Neutral Citation Number: [2020] CA (Bda) Crim 7

Case No: Crim/2019/6

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR JUSTICE GREAVES
CASE NUMBER 2018: No. 22

Sessions House
Hamilton, Bermuda HM 12

Date: 09/06/2020

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL KAY
and
JUSTICE OF APPEAL BELL

- -

Between:

KIARI TUCKER

Appellant

- and -

THE QUEEN

Respondent

Ms. Susan Mulligan (Christopher's Barristers & Attorneys) for the Appellant

Mr. Carrington Mahoney, Ms. Karen King Deane and Ms. Kentisha Tweed (Office of the Director for Public Prosecutions) for the Respondent

Hearing dates: 13th, 16th –18th March 2020

- -

APPROVED JUDGMENT

CLARKE P:

INTRODUCTION

1. On **13th June 2019** Kiari Tucker ("the appellant") was convicted by the unanimous verdicts of the jury on two counts: (i) Murder of Morlan Steede contrary to section 287 of the Criminal Code; and (ii) Using a firearm to commit an indictable offence contrary to section 26A of the Firearms Act 1973.

2. On **16th** and **19th July 2019** the appellant was sentenced to life imprisonment on count 1 with a recommendation that he must serve 25 years before being eligible for consideration for parole and 10 years' imprisonment on count 2, to run consecutive to the tariff imposed for Count 1, with time in custody to be taken into account.

3. The appellant now appeals against both conviction and sentence. This is our judgment on the appeal against conviction.

4. The case presented by the Crown (as summarised in its submissions to us and the record made of the CCTV viewing)[1] appears from paragraphs 5 – 23 below.

THE MURDER

5. On **Friday the 3rd November 2017** at around **21:40**, the deceased Morlan Steede was at a residence located on One-Way Deepdale (i.e. Deepdale Road East) in Pembroke Parish. It is shown as the Building of Interest on a plan produced by the Crown: page 18 of the Record. He was there socialising and playing cards with a group of men. Later in the evening when the group of men had finished socialising and had decided to go their separate ways, a figure in dark clothing and black helmet emerged from the shadows. Mr. Steede then took off running down the hill of One-Way Deepdale with the man in dark clothing chasing closely behind him. The unknown male had a firearm in his hand and extended his arm as he ran after the deceased; three to four flashes were seen coming from the assailant's outstretched arm. The chase continued from One-Way Deepdale on to Two-Way Deepdale (i.e. Deepdale Road West) and it appeared from CCTV footage, which captured the incident, that the deceased had been shot during the chase as the white tee shirt which he was wearing had a visible stain on the back. The chase continued on to Parson's Road where the deceased collapsed in the road outside a shop called One Stop Variety. He eventually succumbed to his injuries. He had been shot 4 times; 3 times in the back and once in the arm.

EVENTS BEFORE THE MURDER

The Appellant Arrives at Court Street

[1] The details of what appear on the CCTV cameras, as summarised in BPS records and the movement of numerous people, is extremely full. What we have set out in these paragraphs is a bare outline. The jury looked at the relevant material several times and we have seen some of it. It was, of course, for them to determine whether what the Crown said about the footage was well founded.

6. CCTV footage retrieved from the Court Street area showed the appellant arriving at Court Street earlier that evening at **17:42** riding on a bike with another man (Justin Cameron) as a passenger, who rode the bike back southerly on Court Street after they had stopped near the Spinning Wheel nightclub. After alighting from the bike, he is seen socialising with a group of men on the sidewalk outside the Spinning Wheel night club and appears to walk into the club. He was wearing a dark coloured hooded sweater with a white zipper down the middle and what appeared to be white tassels hanging down the front. He had what appeared to be a white undervest or tee-shirt, dark coloured Adidas track pants with white stripes down either side of the outer leg, and in the calf, and dark/greyish sneakers with white soles. I call this "the Adidas kit". As he walked along the sidewalk, he had, the Crown said, a distinctive gait. The appellant remained in various locations in the Court Street area.

The appellant is driven to One-Way Deepdale and then back to Court Street

7. Lequan Outerbridge, son of the owner of the One Stop Variety shop on Parson's Road, and a cousin and close friend of the appellant, eventually arrived in a car which then drove away. He walked across Court Street to the eastern sidewalk and stood near the appellant and appeared to be in conversation with him. Shortly after this conversation the appellant put on a black helmet and left as a passenger on a bike driven by Judah Roberts, who had arrived on it shortly before, at about **19:54:56**. The bike travelled at average speed and arrived at One-Way Deepdale at **19:56:38** in the area where the murder eventually occurred later that night. The appellant and Judah Roberts remained in the area for about thirteen minutes before they departed the area on the bike at **20:09:28** and returned to Court Street at **20:10:49**. The prosecution case was that they had gone to scout out the position for the planned murder and to see that the victim was there. The appellant accepted that he went to Deepdale but said that he did so in order to get weed. These times are significant since it is apparent from them that it was possible to get from Court Street to One-Way Deepdale – on a bike – in something like 1.42 minutes.

The appellant leaves Court Street

8. The appellant appeared to be waiting on Court Street in the vicinity of the Spinning Wheel night club when at about **20:14** he walked into the road towards a car travelling north and about to park on the opposite side of the road facing in the Till's Hill direction. The appellant appeared to be in conversation with the driver of the car while it was being parked. Once the car was parked the driver, Lequan Outerbridge, exited the car. The appellant and he went inside the doorway of a close by building adjacent to the parked car and appeared to continue their conversation. (The prosecution suggested that he was reporting to Outerbridge what he had observed in Deepdale). Outerbridge and the appellant then crossed the street over to the other side where Judah Roberts was sitting on the bike eating from a container.

9. Outerbridge then crossed the street back to his car and returned with a striped sweater in hand which he eventually put on, the hood of which covered his dreadlocks hair style. He also picked up a helmet from the road beside Judah which he eventually placed on his head. Outerbridge got on the bike and drove it on to Elliott Street in a westerly direction, out of camera view. But at **20:23:29** he is seen riding in an easterly direction on Angle Street across Court Street. (The Crown's suggestion was that Outerbridge was in league with the appellant in relation to the events

which were about to happen, that he covered up his dreadlocks in order not to be recognised and that, having circled the block he rode off in the Deepdale direction.)

10. The appellant meanwhile entered the Elliott Street carpark heading east towards Union Street at about **20:21:49**.

11. The appellant's cell phone was then picked up in the Eve's Hill cell tower area at **20:23:56** on Parson's Road in the vicinity of a peach/orange house which can be accessed from both Parson's Road and One-Way Deepdale.

12. Between **21:11:46** and **21:12:32** the Two-Way Deepdale CCTV camera recorded the shadowy movements of a person dressed in dark clothing walking back and forth in the yard of the same peach/orange house on the north side of One-Way Deepdale. The person eventually walked to the western side of the peach house into the darkness. The Crown's case was that this man ("Man X") was making an assessment of the area for the purpose of the murder that was to take place; and that Man X was the appellant.

13. At **21:14:04** the same person emerged from a path between the rear of the One Stop Variety shop and a green house on Two-Way Deepdale. The person had on a black helmet, dark top or jacket with white lines going down the front similar to what the appellant was last seen wearing; he appeared to be wearing a white shirt underneath, dark pants, dark footwear and was of similar build to the appellant. The person walked with a similar gait to the appellant's along Two-Way Deepdale where he turned into the yard of the green house and passed by a wall where he seemed to be lurking in the shadows of the rear of a premises from which one could access the southern side of One-Way Deepdale. The person appeared then to disappear in the darkness in the direction of One-Way Deepdale. Between **21:14 and 21:16** the person in question is picked up in various locations near the junction of One-Way and Two-Way Deepdale.

14. Twenty-five minutes later at about **21:40:31**, a motorcycle was seen on CCTV camera speeding down the hill on the northern side of One-Way Deepdale towards Two-Way Deepdale followed by two persons running rapidly. One of the persons was the deceased, Morlan Steede, who was being pursued by the appellant (see paragraph 5 above)

EVENTS AFTER THE MURDER

The call after the murder

15. After the murder, the appellant made an 83 seconds call at **21:51:08** which registered on the Prospect cell tower mast that provides coverage for the area where the murder occurred. At about **21:51**, cameras on Court Street captured a group of men who appeared to be socialising outside the Spinning Wheel night club. One of the men had a mobile phone which appeared to receive a call, at the same time as the appellant made the call from his cellular phone, because the screen of the phone lit up and he placed it to the side of his face. After the telephone call, the man with the phone, was seen speaking to the others. Another man from the group was then seen on CCTV cameras to mimic the movements of someone firing a gun; he was seen to do this four times. (The deceased had received four shots). Some men in the group then looked towards the Court and

Angle Streets intersection. The case for the Crown was that the appellant was telephoning with news of the killing and one of the men in the group was mimicking the shooting which had just happened.

The appellant returns to Court Street

16. At about **21:53**, CCTV cameras captured the appellant walking very briskly west on Angle Street and turning left in a southerly direction on to Court Street. He was no longer wearing a dark coloured top. At this time, he had on a white tee shirt, dark coloured Adidas track bottoms with white stripes down either leg and dark/greyish sneakers with white soles, i.e. the Adidas kit but without the jacket. He kept walking briskly and appeared to turn and glance over his shoulder toward the Till's Hill/Parson's Road direction. He appeared to be perspiring profusely and lifted the front of his white tee shirt to wipe his face more than once. The Crown's case was that he was in this condition as a result of his recent pursuit of the deceased and because he wanted to get away from the area of the shooting as soon as possible. The appellant's account was that he had taken off the black jacket in a gambling establishment because he was too warm and had forgotten to take it away with him.

17. Once the Appellant reached the men outside the Spinning Wheel night club, the appellant was seen on CCTV footage bumping fists with several of the men in the group including Judah Roberts and Ronniko Burchall. The Crown's case was that this was a celebration of the killing. He spoke with them for a few moments before one of the men, Ronniko Burchall, left the scene in a car and was seen shortly thereafter by a police officer in the vicinity of where the deceased had collapsed on Parson's Road.

18. The appellant was then seen pacing up and down the sidewalk of Spinning Wheel night club, glancing over his shoulder frequently upon the approach of vehicles coming from the direction of Parson's Road/Till's Hill i.e. the direction from which any emergency vehicles might come from the scene of the murder. At about this time, he crossed over to the opposite side of the street where he was captured darting into the shadows as the emergency vehicle lights of the ambulance can be seen approaching from the Parson's Road/Till's Hill direction. As soon as the ambulance passed, he emerged out of the shadows where he continued to pace up and down seemingly aimlessly while glancing over his shoulder.

19. On the **4th November 2017**, at about **15:30**, in pursuance of a Firearms Warrant, armed officers attached to the Emergency Response Team ("ERT") attended the appellant's address at #1 Tribe Road Warwick, a multi apartment dwelling. Officers entered the North Apartment, the residence of the appellant's god-mother. After calling out their presence everyone in the apartment came out except the appellant. The appellant was found in a back room hiding under a stack of clothes, crouched down on his buttocks on the ground with his hands over his head. The appellant was pulled by his forearms from the closet and arrested. His cellular phone was also seized.

20. In the South Apartment, where the appellant resided with his mother and grandmother, several items of male clothing (which included a pair of blue slip-on-slip-off jeans pants and a red and black handkerchief), were seized from a bed in a bedroom that the appellant's grandmother directed the police to.

21. Those items, along with the pair of black sneakers the appellant was wearing when arrested and swabs of the appellant's hands, were forensically examined. The appellant's hands were found to have 3 full GSR particles and 5 two component particles. The blue jeans pants had 6 full GSR particles and 11 two component particles. The black sneakers, left foot, had 2 full GSR particles and 1 two component particle. The red and white handkerchief had 1 full GSR particle and the appellant's DNA.

22. The forensic gait analysis expert, after examining CCTV footage sent to him for analysis, identified seven similar features between the appellant and Man X. The footage of the appellant was of him walking on Court Street at **18:27**, moving south, and on his return to Court Street from Angel Street at **21:53,** and of the suspect who was seen walking on Two-Way Deepdale at **21:14:04** on the night of the murder. The features are set out at page 81 of the Record (Exhibit 15).

23. As appears from the above, two important parts of the Crown's evidence were (i) the claim that the person seen at **21:14** was the appellant, as was said to be apparent from their similar gait; and (ii) the evidence that it was the appellant who made the call at **21:51** to a man outside the Spinning Wheel night club (this was not in dispute), who then spoke to others, one of whom mimicked the firing of a gun.

24. The appellant's evidence, in short, was that after his first arrival on Court Street he spent some time selling crack cocaine. Later in the evening he was taken on Judah Roberts' motorbike to buy weed in Deepdale, where he used to go every day. The person to whom he went for weed was Nasir Maynard. There were guys in the area smoking and drinking, including Morlan Steede, later to be the victim. After about ten minutes he and Judah Roberts went back to Court Street, and at some point he left on foot and went into the Elliott Street parking lot and made his way to a spot on Curving Avenue where he kept his stash of cocaine, and scales and stuff, in order to be able to sell it at what was a good time (Friday evening) to make money. (In the course of cross-examination, he indicated that drug selling on a Friday night could take place between 5 and 6 all the way up to 2 or 3 in the morning, depending on demand. 87) In the course of his evidence he **i**ndicated where the stash was, namely, at a place within a red circle which he marked on the photograph at page 21 of the Record.

25. On his way to pick up the stash he passed a gambling spot in the basement of a house (which he circled in blue on the same page). When he had got his drugs ready for sale (in cross-examination he said that he had enough to last for the night:138) and was on the way back he decided to stop at the gambling spot (although he said he did not really gamble). He stayed there for between 30 minutes and an hour. When leaving the gambling house, he called his friend Troy Hewey ("Chadda") and when he got off the phone – this is the call at **21:51** – he was basically coming back on Angle Street to Court Street, walking at a good pace because he had drugs on him. When he returned to Court Street, he no longer had the jacket which he had forgotten about and left at the gambling place. He had taken it off because it was humid there; he retrieved it some days later.

26. When he saw Chadda at the Spinning Wheel, Chadda said that he wanted a haircut, and the two of them walked to a barber shop. (The footage apparently showed that that was not the case). Then he left and went back towards Spinning Wheel and made a few drug sales. He became aware of

the Deepdale shooting when Ronniko Burchall came back and told the guys there about the shooting. When he learnt of this, he did not want to stay on Court Street because when there is a shooting the Police come to Court Street and sales of drugs slow up. At about **22:20** he left on a bike belonging to his cousin Marcus Tucker, who had to get a helmet for him from Marcus Tucker's house before they set off. He, the appellant, rode the bike. He described the route he took home (via Corkscrew Hill, up Trimingham Hill and then along South Shore Road and Ord Road to his home where his granny was in Warwick) and said that it took about five minutes. He stayed there.

27. On the occasion of his arrest the next day he had hidden in the closet underneath some clothes. The police, in masks, came calling out his name and banging on his godmother's door. He was scared (a) of the police in general and (b) of going back to jail from which he had only been released on **September 15th**. The police pulled him out of the closet; he was put on his stomach and handcuffed. All the clothing in the bed in the South Apartment was his and he could give no explanation as to why there were at least 6 full GSR particles on the jeans and 1 on the bandana. Man X was not him, nor did he chase, shoot and kill the victim.

28. The appellant raises several grounds of appeal which we address below.

GROUND 1: DENIAL OF REASONABLE REQUESTS FOR AN ADJOURNMENT

29. The first ground is that the trial judge denied reasonable requests for an adjournment and in this respect exercised his jurisdiction unfairly. As to that, the appellant's case is as follows. The appellant was first brought before the Magistrates' Court on **10th May 2018**. His original counsel was Mr Craig Attridge who met with the appellant in custody and prepared the case for trial. The trial was set to begin on **25th March 2019**, having been set some time in advance. Mr Attridge sought and received various legal aid approvals including for the instruction of a second counsel.

30. However, in **November 2018** Mr Attridge was appointed to the Magistrates' bench. It was arranged that the appellant would continue with Mr Charles Richardson and proceed on the scheduled trial date. But in **January 2019** Mr Richardson, having begun to prepare for trial, determined that he had an unresolvable conflict of interest and could not continue to represent the appellant. In **late January**, the appellant contacted Ms Mulligan who explained that she could not properly represent him if the trial proceeded on **25th March 2019**, but was willing to represent him for the purpose of seeking an adjournment.

31. Ms Mulligan raised the difficulties in retaining the then current trial date at the arraignment session in **February 2019** (the appellant was not then being arraigned) and made requests to adjourn on a number of occasions thereafter. The appellant put on record his desire to adjourn the trial until a date in July. The judge refused to adjourn until then but eventually did adjourn the matter to **20th May 2019** over counsel's objections. Counsel represented that, given her other trial commitments, of which the judge was aware, she would not have sufficient time to prepare for a very serious and complex trial.

32. In the event Ms Mulligan's calendar was, as she put it, kept stacked up by the judge with the following trials:

- Vlcek (Importation and possession of heroin with intent to supply)
  4th March – 14th March 2019

- Albuoy (same offence)
  25th March – 3rd April 2019

- Wolffe (wounding with intent, attempted robbery, intimidation x 2)
  9th April – 15th May 2019

- **Tucker**
  20th May 2019 – 13th June 2019

- Rogers and Burgess (Murder)
  24th June 2019.

33. This was plainly a very heavy workload. Ms Mulligan was taking on Tucker when already having to prepare for three trials that would precede it. By **15th May 2019** when the Wolffe trial ended, Ms Mulligan had only met the appellant briefly on some three occasions at the Westgate Correctional Facility and, as she told us, had not had sufficient time to prepare and take instructions on a matter as serious as this. It is apparent from the transcript of **20th March 2019** that those meetings had occurred on **February 11th and 21st** (when she was only allowed 30 minutes with him) and **March 15th**.

34. On **16th May** the Legal Aid Committee approved a second counsel – Ms Elizabeth Christopher. On **20th May** Ms Mulligan again requested an adjournment or at least that after a jury was selected, she be permitted the afternoon at the Courthouse with her client to review CCTV footage together and for her to take proper instructions so that she could finalise a defence statement. She had viewed a portion of the CCTV footage on one of the three occasions when she had met the appellant in custody. That was, she told us, about 25 minutes' worth and was some of the Court Street and Deepdale footage. But much of the Court Street footage and the Till's Hill footage was not seen by her or the appellant until trial. Matters had been made more difficult by reason of the fact that the Correctional Facility had been on lockdown and the guards had been maintaining a work to rule in the weeks leading up to the trial. Both applications were rejected, and the matter proceeded to trial.

35. The submission on the part of the appellant is that this was simply unfair.

36. The Crown's response to this is as follows. When the matter was mentioned on the **12th September, 2018** to Mrs Justice Simmons, Mr. Attridge requested a trial date of either the **19th** or **26th November, 2018**. However, due to the unavailability of an important Crown witness during that period, the trial date was set for the **8th January, 2019**. On the **1st October, 2018**, when the matter was mentioned, Mr. Attridge repeated his request for an earlier trial date in November and undertook to file the defence statement within 28 days. The trial date for the **8th January, 2019**, was confirmed.

37. On the **3rd December, 2018**, when the matter was mentioned, Mr Richardson, who now appeared on the record for the appellant, indicated that he could not be ready for the trial date in January and, accordingly, the trial date was changed to the **25th March, 2019**. Mr. Richardson also undertook to file the defence statement by the **8th January, 2019**, none having yet been filed on behalf of the appellant.

38. In **mid-January, 2019**, it was confirmed that Mr. Richardson would no longer appear in the matter due to a conflict of interest. On the **1st February, 2019**, at the arraignment session, while trial dates for other unrelated matters were being discussed, Ms. Mulligan gave an indication that she was likely to appear for the appellant although his matter was not before the court. But for the fact that the trial of *R v Edward Albuoy*, Ms. Mulligan's other matter, was also set to commence on the same date; no indication was given that the trial of the appellant's matter could not proceed as scheduled on the **25th March, 2019**.

39. On the **18th March, 2019**, the Crown sought clarification from the Supreme Court in respect of which of Ms. Mulligan's two matters would commence on the **25th March**. In a reply email in the late evening of that same date Ms. Mulligan indicated that she was prepared to proceed with the *Albuoy* matter but was unable to proceed with the appellant's matter. She said that she was prepared to act for the appellant, but only if there was an adjournment and she had sufficient time for proper consultation with experts. On the **19th March**, the Crown requested that the matter be mentioned as soon as possible.

40. On **20th March, 2019**, the matter was mentioned before Mr. Justice Greaves. Ms. Mulligan requested that the matter not proceed on the 25th March as she was awaiting a final expert report in relation to the GSR evidence (she had a preliminary one). She indicated that the final report from the defence GSR expert was expected by the next week; and that she did not expect to need to call a gait expert (she said that she had a preliminary opinion from one such expert and a more solid opinion from another) as she should be able to form the basis of her cross-examination of the Crown's expert after seeking advice. The trial date of the **25th March** was vacated and the matter was to be mentioned on the **29th March**, to set a trial date, with both parties encouraged to seriously consider the **6th May, 2019**, as the new trial date.

41. On the **29th March 2019**, the matter was mentioned and Ms. Mulligan indicated that Ms. Elizabeth Christopher would be joining her as co-counsel in the matter. Ms. Mulligan stated that the **6th May** was not a convenient trial date as she was due to travel to see her mother in Canada whom she has not seen in over three years, and Ms. Christopher was due to travel in either the first or latter two weeks of May. The matter was set for trial on the **20th May, 2019**. This was confirmed on **4th April 2019**.

42. On the **20th May, 2019**, both counsel for the appellant were present and the jury was empanelled. On this occasion Ms Mulligan made the applications referred to at [34] above. On that occasion she told the court that she had received the CCTV footage in March.

43. The Crown submits that counsel as experienced as Ms Mulligan and Ms Christopher had ample, and certainly sufficient, time to prepare and the judge was entitled as a matter of discretion to refuse an adjournment.

44. We are not persuaded that the decision of the judge not to grant a third adjournment was one that he could not fairly reach; or that the appellant has suffered any injustice thereby. The judge was entitled and plainly must have taken into account the fact that the case involved an indictment dated **18th May 2018**; that the date originally set was for **8th January 2019**; and that it had been set down on **29th March** for hearing on **20th May 2019**. In addition, the appellant had the benefit of two counsel. We recognise that Ms Mulligan was under significant pressure and are not without sympathy for her position. But it is not apparent to us that the quality of the appellant's representation was in any way diminished by the timing ordered by the judge, or that the appellant's trial was rendered unfair on account of the pressures on his counsel.

GROUND 2: FAILURE TO GRANT A MISTRIAL FOR LATE DISCLOSURE OF DNA LAB FILE AND WORKING NOTES.

45. The appellant contends that the judge should have granted his application for a mistrial. His application had two parts: the first related to late disclosure of DNA related material and the second to material in Notice of Additional Evidence No 9. The Crown submits that the trial judge did not err in overruling, as he did on **28th May 2019**, the Appellant's application for a mistrial ruling on either basis.

46. As to the DNA material, the Crown says that DNA working notes were served on the appellant (via Mr. Attridge) by the police on the **29th June** and **11th July, 2018** respectively. It is not, however, entirely clear whether Mr Attridge received all the notes and all four of the relevant reports. The Crown accepted that he did not get one of them.

47. Ms Llewellyn, the Crown's DNA expert, stated in her evidence in chief and cross-examination that swabs were taken of the blue jeans' pants. These swabs were of (a) the left pocket area (18.1.18), which had a low-level mixed DNA profile which did not contain enough information to make a comparison or any form of conclusion; (b) the crotch and waist areas (4.2.18); and (c) the inner ankle and knee area (27.6.18). The dates in brackets are the dates of the relevant reports. Shortly before lunch on **27th May 2019** Ms Mulligan stopped in her cross-examination to record that there were four reports of which she only had two; and she said that she was missing the bulk of the DNA case file. There were, apparently, four working files but she only had one. Over the adjournment Ms Mulligan was given the two reports which she said that she did not have and the four DNA working files of which she had only one.

48. In the course of the resumed cross-examination, Ms Llewellyn confirmed that the swabs from the crotch and waist area of the jeans had at least three contributors and there could be more; that it was more than likely that the sample was degraded or that "*there were just different amounts of people there which I couldn't pull out"*. Similarly, on the swabs of the ankle and knee area she found a low level partial human DNA profile which appeared to be a mixture of at least three people. There was not enough information for any comparison.

49. There seem to us to be two aspects of this ground. The effect of the reports which were lately disclosed to Ms Mulligan was that there was insufficient DNA to link the jeans to the appellant.

Such information was of assistance to the defence. It was essentially on that basis that the judge dismissed the application under this heading. We do not regard him as in error in doing so.

50. Further, the judge appears to have treated this aspect of the application as involving the contention, which he must have understood was being made, that the evidence of DNA belonging to someone other than the defendant being on the jeans would support the inference that they belonged to someone else and that the defendant had no connection with the jeans. If that was the contention that was being made it would be inconsistent with the fact that, as the appellant came to accept in evidence, the jeans were his. Relying on DNA evidence to suggest the contrary would seem to us to come so close to making a positive case which was known to be untrue that it would not be right to say that a mistrial should have been granted on this basis. At one point in her submissions to us Ms Mulligan said that she saw that there was material in the notes which might, if an expert was instructed, reveal that the clothes were not those of the appellant, which appears to tally with what the judge understood the submission to him to be.

51. The second aspect is that, so Ms Mulligan told us, she suspected from such perusal of the reports as she had been able to have that an expert might have been able to say that the jeans had been worn most recently by someone other than the appellant. Because the material was only produced late (on the day when Ms Llewellyn gave evidence) she was not able to take the matter forward. Ms Llewellyn was asked to remain available in case Ms Mulligan wished to ask further questions: but this did not solve the problem.

52. As to that, we regard the suggestion that an expert might be able to opine that the fact that there was the DNA of three or more individuals on some of the swabs of the jeans meant, or might mean, that one of them was the last wearer, as too tenuous a prospect to have required the judge to order a mistrial. We do not know that any expert would say that (it was not suggested to Ms Llewellyn) and it is not apparent to us how the fact that the DNA of at least three people was on the jeans would support the conclusion that the last wearer was one of those whose DNA was there – a proposition difficult to match with the fact that the clothes were the clothes of the appellant and on a bed in his bedroom. Further, Ms Llewellyn was unable to use the swabs to make any useful comparison; from which it would seem to be the position that it was not possible to exclude the appellant as a contributor of some of the DNA. Lastly, this point does not surface in the judge's ruling, which leaves us in some doubt as to the clarity (or lack of it) with which it was made to him.

53. The second limb of the application for a mistrial concerned the following contents of NOAE 9: (a) photographs taken from a download of the appellant's phone and (b) photographs taken by Detective Inspector Redfern.

54. The Crown says that the purpose of adducing the evidence in (a) was (i) to rebut the inference raised in cross-examination by the appellant to suggest that the blue jeans were "women clothes" and did not belong to the appellant, as the appellant appeared to favour that particular style of pants; and (ii) to show the appellant's habit of wearing one garment over another which would explain the absence of his DNA on the blue jeans, being the outer garment; and (iii) to show his fascination or state of mind in regards to guns. The photographs in categories (i) and (ii) included photographs showing the appellant wearing baggy pants or pants on top of some undergarment

(which the appellant said was underpants). The photographs in category (iii) showed him making gestures with the fingers of his right hand as if firing a gun. One of the photographs on his phone showed an album cover in the centre of which there are seven upright bullets. We address the considerations relevant to category (iii) under ground 6 below.

55. The judge rejected the application so far as it related to NOAE 9. He accepted that the photographs in category (a) could explain why you might not find DNA on the appellant's trousers and rebutted the suggestion that the appellant would not wear trousers over trousers. The prosecution was also entitled to adduce these photographs to deal with the then defence challenge that the clothes found in the bedroom may not have been those of the appellant because they were too "girlie". In addition, one of the photographs showed the appellant with a red kerchief round his neck which, the judge found, the prosecution was entitled to produce to show the similarity with the kerchief with the appellant's DNA on it found in the bedroom.

56. The photographs of DI Redfern (which showed the path that could be taken from the peach/orange house to the rear of One Stop Variety shop on Two-Way Deepdale Road) were adduced to rebut the inference raised by the appellant during the cross-examination of DC Sabean when defence photographs were admitted into evidence to suggest that it was impossible for the man seen on CCTV lurking in the premises of the pink/orange house to be the same person who appeared from the rear of the One Stop Variety on Two-Way Deepdale before the shooting. The judge held that the prosecution was entitled to use the photographs for that purpose.

57. In our view the judge was entitled to take the stance that he did. He was not obliged to declare a mistrial on account of the production of this material; or to exclude it from evidence; nor was the trial unfair or the verdict unsafe because he did not do so. We would observe that in his ruling on **28th May 2019** the judge ruled that the photographic evidence should be admitted. His ruling is not expressed in terms a ruling on an application for a mistrial under this heading but, if there was such an application (as the Crown's submissions accept (see paragraph 18)), it was justifiably denied.

58. The appellant also complains of the late disclosure of various items under various Notices of Additional Evidence. No application was made for a mistrial on account of the production of this material; and there can be no sound basis for seeking, now, a determination that the trial miscarried on account of its production. Appendix 1 to this judgment sets out the content of those NOAEs and includes the Crown's response to the complaint of late disclosure. We are satisfied from a consideration of that material that the complaint under this heading affords no basis for allowing an appeal.

GROUND 3: LOST EVIDENCE

59. Ms Mulligan contends that the judge should have required the Crown to recall DC Lawrence to the witness stand after the Crime Scene Log Book (Deepdale and Parson's Road area scene) was disclosed during trial, and it was learned that the ERT Incident Log Book (arrest of the appellant and search of two residences) could not be located. These two revelations occurred after DC Lawrence's departure from the witness stand.

60. Once the Crime Scene Log Book was disclosed mid-trial, it became apparent, it is said, that not only had the Firearms Officer who arrested the Appellant (PC Che Young) been at the scene of the shooting the night before his arrest, but also that one of the search officers (DC Lawrence) who located clothing later said to have gunshot residue particles on it, was also at the scene where the shooting had taken place the night before.

61. Whilst DC Lawrence's original statement indicated she had been at the scene the night before, it gave no indication that she may have gone beyond the perimeter of the scene, as she was not a forensic officer and was not detailed to guard the scene. Upon receipt of the Crime Scene Log Book mid-trial it became clear, Ms Mulligan says, that she had actually entered the cordoned off area of the crime scene (in Parson's Road) because her name was recorded in the book by the officer who was tasked with noting everyone who came and went into the cordoned off area.

62. Further, when the Crime Scene Log Book / Arresting officer – PC Young – eventually returned to the stand to be asked about his presence at the crime scene where shots were fired the night before he arrested the appellant, the defence learned for the first time that there would also have been an Emergency Response Team Incident Log Book relating to their attendance at residences connected to the appellant the following day to effect his arrest.

63. Requests for the latter Log Book detailing who was present, where they went, what they did and what firearms they had in their possession went unanswered until the defence were told that the Bermuda Police Service were unable to locate this record. This record was, it is submitted, clearly relevant and significant in terms of potential GSR transfer to the appellant and the two apartments that were searched.

64. The Crown submits that there was no miscarriage of justice due to the late disclosure of the Crime Scene Logbook. Evidence that DC Lawrence was at the crime scene prior to attending the appellant's residence was disclosed in her first statement of **12th April 2018** and she was not cross-examined about her presence there or where she had gone. The logbook related to where the victim collapsed on Parson's Road, not the area where the shots were discharged, namely One- and Two-Way Deepdale Road. As her evidence revealed, by the time DC Lawrence arrived on Parson's Road (**00:55**) the deceased had been removed to hospital by ambulance. She played no role in the apprehension of the appellant in the North Apartment and was the note taker when DC Blair searched, seized, packaged and labelled items from the South apartment. After the items were packaged and labelled, they were passed to DC Lawrence who had no direct contact with the seized exhibits.

65. The Crown accepts that it is regrettable that the Emergency Response Team Incident Log Book could not be located. But the fact that material has become unavailable does not mean that the trial was unfair.

66. We do not think that, in those circumstances the judge was in error in declining to order the recall of DC Lawrence, or that his failure to do so has rendered the trial unfair or the verdict unsafe. There is no rule that, if material becomes unavailable the trial is unfair, because, for instance, a relevant line of inquiry can no longer be pursued with the benefit of the missing documents. It all depends on the circumstances and, in particular the extent of the prejudice to the defendant: see

PR v R [2019] EWCA Crim 1225, and the cases there cited, which show that the burden is on the defence to show that, in the absence of the missing material, the trial cannot be fair; the grant of a stay (it is not clear to us whether one was sought) being exceptional and a measure of last resort. Indeed, the absence of documents is sometimes more beneficial to the defence than the prosecution. It does not seem to us that there is any sound basis for saying that the judge should have taken the view that the unavailability of the ERT Incident Log Book was of such a seriousness that the trial was unfair, or that we should do so either.

67. Ms Mulligan objected to some of the cross-examination of Ms Shaw, the appellant's GSR expert witness as a result of which she accepted that she may have been misinformed when she thought that armed officers had entered the South Apartment. That objection was based on the possibility that armed members of the ERT may in fact have done so. This prospect seems to us unrealistically remote. Evidence was given by DC Blair and DC Lawrence of their activity in the South Apartment. There is no suggestion in that evidence that any other officer was there. The evidence of PC Young was that no firearms officer entered any apartment other than the North one.

GROUND 4: COMMENTS TO COUNSEL IN THE PRESENCE OF THE JURY

68. Not pursued.

GROUND 5: HEARSAY/IMPLIED ASSERTIONS

69. Ms Mulligan originally contended, based on her recollection of events at the trial, that the judge had erred in allowing the Crown's police witnesses to say indirectly what they could not say directly i.e. to give hearsay evidence that the bedroom and the clothing on the bed searched on **4th November 2017** was the bedroom of the appellant and belonged to him. This, it was submitted, had had the effect that the appellant had to go into the witness box when, in the absence of such inadmissible evidence, he might not have done so.

70. In the course of argument, it became apparent that this contention was not well founded, as Ms Mulligan accepted. There was no issue but that the last known address of the appellant was Tribe Road Number 1, Warwick and that before DC Blair entered the South Apartment (the appellant having been arrested in the North Apartment) the appellant's mother and grandmother identified themselves as such to him. The grandmother directed him to a bedroom located on the right after entering the apartment. The grandmother made a statement to DC Blair. (That is literally what he said; he was not allowed to say what she told him).

71. Upon entering the bedroom DC Blair observed two beds. The one on the left had male clothing on it. He also observed a pair of sneakers in the room. DC Blair, who had put on a brand new pair of gloves (he had previously been at the North Apartment as a search officer, where he had seized the appellant's phone), eventually seized everything on the bed, about 14 items, all of which the appellant accepted were his, including a red and white handkerchief (found to have the appellant's DNA and one full GSR particle) as well as the blue drawstring jeans pants (found to have 6 full GSR particles and 11 two component GSR particles) and the black sneakers (found to have on the left foot 2 full GSR particles and 1 two component particle).

72. None of this constituted a breach of the rule against hearsay. The hearsay rule does not apply where the statement is relevant because it provides a reason why a person, in this instance DC Blair, took a relevant course of action. Even if it had been hearsay the appellant has suffered no injustice from the jury being told that the police officer had entered a room (which was in fact the appellant's room in which there were what were in fact his clothes) as a result of a statement of unspecified content.

GROUND 6: RAP SONGS

73. The appellant submits that the judge erred in allowing the Crown, over the objection of the appellant, to put before the jury evidence of songs and photographs stored on a media card some 2-3 years before the murder.

74. On **4th November 2017** the appellant's cellphone was seized and various photographs were found on it. A Crown witness – Loryn Bell – also downloaded from the cellphone some 71 audio files which included five files of rap songs with titles. The photographs included photographs - items 96-99 of the Record - of the appellant as a teenager posing for the camera and making gun finger gestures. Two of the photographs (items 100 -101 of the Record) were of an album cover, one of which showed 7 bullets pointing upwards. The songs were gangster rap songs about shooting people. It appeared from the expert evidence called by the Crown (Mr Richardson) that the photographs were on a media card and were created in about 2014/5. Mr Richardson could not tell whether they were accessed thereafter. The titles of four of the songs went before the jury and the title of a fifth song and some of the lines were put before them as well. That song was entitled "*By Myself*" and had the words "*I can manage by myself. I don't need nobody else. Slide up, shoot a nigger by myself".*

75. In his summing up [58] the judge told the jury that they must be careful with the evidence of the photographs of the appellant making gun signs and the rap songs. That evidence was not there to say to them that the defendant was a killer, a person with a propensity for killing; but for the "*very, very narrow*" purpose of determining his state of mind at the time of the killing. It supported the prosecution case that the defendant had conditioned his mind to shoot, had a "*fascination with this shooting thing, that's why he had these signs and sings this rap*". He told the jury that they could reject the photographs and the music and still arrive at a verdict, one way or the other, without them; and that he, the judge, did not see the photographs and the music as a major factor but in fact a pretty minor one.

76. Ms Mulligan submits that this evidence of gun signs and rap songs had no probative value, and was far more prejudicial than probative. The judge ruled that these items could be presented to the jury. He referred to the case of *Spalding* v R [2012] CA (Bda) 6 Crim where the prosecutor had successfully argued that the evidence was admissible because the typed versions of "original" reggae songs found in the Appellant's bedroom "*captured the circumstances of the murder*." There is however, she submits, a substantial difference between (i) original song lyrics allegedly written by the appellant Spalding and located inside his bedroom around the time of the offence with which he was charged; and (ii) commercially available, popular music stored on a media card some two years prior to the murder and perhaps never accessed by the appellant. To suggest that a random song stored on a media card in his phone reflected his state of mind on the night of the

murder and "*captured the circumstances of the murder*" because the song contained a line about shooting someone alone, invited the jury to draw an illogical and prejudicial inference against the Appellant.

77. The judge also referred to the case of *Washington v R* [2016] Bda LR 57 in which one (of the several) reasons why photographs of the appellant making gun signs with his fingers were held to have been rightly admitted was that they related to his state of mind shortly before the shooting in relation to firearms and their potential use. We accept that the other reasons relied on in that case were not applicable to this one. We do not derive much assistance from the case of *R v Mullings* [2010] EWCA Crim 2820 which involved markedly different circumstances.

78. The Crown submits that the images were, indeed, relevant and admissible as they assisted in establishing the appellant's state of mind shortly before the shooting in relation to firearms and their potential use. The three song titles and a portion of the lyrics of a fourth song were properly admitted into evidence for that purpose.

79. We do not regard the judge as having been in error in admitting this evidence. Its probative value was limited; it was potentially prejudicial to the appellant (depending on what view the jury took of it) but it was relevant material for the jury to consider in determining whether he could have been the shooter on the night in question. Its prejudicial value did not so outweigh its probative value that it should not have been before the jury at all. The judge's direction to the jury as to how to approach it was measured and made clear that the material was of pretty minor significance. In the light of that direction it does not seem to us that there was a prospect of the jury treating this material as simply generally prejudicial.

GROUNDS 7-9 FORENSIC GAIT EVIDENCE

80. The judge is said to have been in error in admitting the evidence of Mr Francis, a Forensic Gait Expert, who gave evidence of the similarity between the gait of Man X and the appellant. It was the contention of the appellant that this so-called science was not generally accepted by the forensic science community as valid. There were no published reports on error rates. Cognitive bias was built into such evidence, and there was no way for the jury to determine the reliability or accuracy of this entirely subjective evidence of the "expert."

The request for a *voir dire*

81. The judge denied the defence the opportunity to test the expertise of the witness in this area on a *voir dire* as it related to the distinctive features of gait of people in Bermuda.

82. This, Ms Mulligan submits, was fundamentally wrong. For his evidence to have any relevance Mr Francis would need to know and be able to speak about the prevalence or rarity of the features that he noticed on the footage in the rest of the Bermudian population. The more common a particular feature in Bermuda the less likely it would be that the person said to be the appellant was indeed him. In the absence of evidence as to prevalence there was a danger that the jury would place far more weight on the evidence than was appropriate.

83. The judge in his ruling of **22nd May 2019** disagreed with the defence. He observed that gait comparison evidence had been accepted by previous courts, as demonstrated in the English Court of Appeal decisions of *R v Otway* [2011] EWCA Crim 3; and *R v Ferdinand* [2014] EWCA Crim 1243. Mr Francis, a consultant podiatric surgeon for over 25 years, had given evidence in the latter case. [The admissibility of his evidence was not then challenged]. The judge referred, inter alia, to paragraph 77 of the latter case where the Court had recognised that the science was in its infancy but did not find that on that account, and on account of the fact that it was still developing, that it should be disallowed. After a careful review of what the Court of Appeal had said in each case, the judge said that he did not think that a *voir dire* was going to assist him to establish whether Mr Francis was qualified or whether the science was acceptable or not. The Court of Appeal in England had held him to be qualified, and the science to be acceptable.

84. Mr Francis had, the judge observed, set out in his statement the similarities between the questioned individual and the known individual, and the videos he used were, in his opinion, clear. The judge found Mr Francis' evidence to be admissible and him to be qualified. But he added:

> "*I will, however, limit his evidence to the comparison of the similarities and exclude the opinion that the evidence is moderate to strong evidence that the suspect and the Defendant are the same. I think that that opinion is an opinion for the Jury. I think that it would be a prosecutor's fallacy at this time to think that such evidence would be admissible. Whether the suspect and the Defendant are one and the same, in my opinion, is a conclusion for the Jury and the Jury alone. That, therefore, is my ruling."*

85. This, it is said, missed the point being made, which was that Mr Francis was not qualified, and should not be permitted, to give evidence suggesting that Man X was the same person as the appellant, since he had no experience practicing podiatry in Bermuda and could not offer an opinion based on the prevalence of particular gait characteristics in the Bermudian population.

The directions on gait evidence

86. Further, it is said, although the judge told the jury to make sure that they could see what the expert said he saw before relying on the expert's evidence, they were not clearly instructed not to use the footage to make their own comparisons and come to their own conclusions about gait.

87. The appellant submits that the summing up was flawed. In it the judge indicated that Mr. Francis' evidence could not assist the jury to identify Man X as the appellant in the way that DNA or fingerprints would, but rather gait analysis could only be classified as class identification. But he then failed to explain to the jury how they might go about assigning weight to this evidence if they accepted the opinion of Mr. Francis. Similarities (as identified by Mr Francis: see Record 61) between Man X and the appellant could not, Ms Mulligan submits, assist the jury to determine whether Man X was him without knowing the prevalence of the feature in question among the Bermudian population.

88. In *R v Otway* the English Court of Appeal referred to the authority of *T* [2010] EWCA Crim 2419 where Thomas LJ (as he then was) referred to cases where the expert was unable to evaluate his

findings by reference to a database of random selection, but was nevertheless able to give evidence of evaluation based on the expert's personal experience. The Court in *Otway* concluded that the "*proposition that evidence of a comparison cannot be admitted if its evaluation is expressed in terms of subjective experience is simply wrong in law."*

89. The judgment went on to explain [22] why the Court found that the trial judge had correctly admitted the evidence and limited the extent of the opinion the expert could give in that matter in these terms:

> "*We have read a transcript of Mr Blake's evidence and we have viewed the recorded material from which he demonstrated the foundation for his opinion. We entertain no doubt that the jury was in a position to follow and assess the value of his evidence. There is no danger here that the jury was being invited simply to take Mr Blake's comparison on trust. We agree with Maddison J, however, that Mr Blake's ability safely to express his ultimate conclusion in terms of probability of a match, even probability based on Mr Blake's clinical experience, was insufficiently established. It is important that juries are not misled to an over-valuation of comparison evidence.*
>
> *Mr FitzGibbon made it clear that he had no criticisms to make of the way in which HH Judge Gee QC directed the jury as to Mr Blake's evidence.* ***No attempt was made to identify the man at the filling station and the jury was specifically warned that they must not make the attempt.*** *The exercise in which the jury was engaged was a consideration of the effect of the circumstantial case as a whole. They were entitled to take into account, together with the circumstances listed at paragraphs 4 – 7 above, the similarities in walking gait identified by Mr Blake when considering whether there was any sensible prospect that the man at the filling station was someone other than the appellant. In those circumstances we see no basis upon which this aspect of the trial can be successfully challenged and leave is refused.* ***We do not wish it to be thought that we are endorsing the use of podiatric evidence in general. Upon the evidence before him and the argument addressed to this court, we conclude that Maddison J was right to rule the evidence admissible. However, each such application must be considered on its own merits. It may well be, as in the present case, that the trial judge will need to be astute when such evidence is admitted that it is strictly confined within the expertise established and that the proper limits of evaluation are identified from the outset.*** *We endorse, with respect, the views of the court in T (pars 97-99) as to the necessity for the parties to have issues of disclosure and admissibility well in mind during preparation for the case management hearing so that, when the appropriate time comes, the trial judge is presented with all the material needed to make an assessment of admissibility, and the permissible scope of the evidence if admitted."* (Emphasis added in this and other quotations)

90. The present case may, the appellant submits, be contrasted with *R v Ferdinand* in which Mr Francis was the Crown's expert. In that case Mr Francis identified five features of gait of which one (the inward turn of the left foot) was, in his estimation from his clinical practice in the United Kingdom,

found in less than 5% of that population, and the other (knee knock) found in less than 10%. That, Ms Mulligan submits, made his evidence arguably relevant.

91. But, in the present case (as in *Ferdinand*) Mr Francis was not permitted to offer any opinion as to the likelihood of the suspect and the appellant being the same person and was unable to offer any opinion about the prevalence of the features of the gait features he observed in the Bermuda population. In those circumstances, she submits, his evidence was not relevant for any purpose. The fact that two subjects showed some similarity in the way they walked left the jury to guess how much weight to attach to the evidence.

92. The problem with gait analysis were identified in an article by Ivan Birch, a forensic scientist, whom Mr Francis testified that he respected, in the following terms:

> *"The features of gait that can be identified are class level features, that is to say features that occur in a proportion of the population, and therefore demonstrate compatibility rather than uniqueness.* ***A fundamental skill of a forensic gait analyst is therefore an understanding of the prevalence of the features of gait identified in the population.*** *To date this judgment has been based on past experience gained from sources such as past casework, clinical practice, text books, and published case studies and research papers [11–13]. Information gained from clinical practice requires careful consideration and use. If the practitioner is a specialist in musculoskeletal conditions, it may be expected that the majority of patients that seek their services have a musculoskeletal disorder or injury.* ***As a result the prevalence of some features of gait, based on such a sample of individuals, could be over-estimated****. The data gained from these sources has in the past often been supplemented by unpublished ad-hoc surveys carried out by the forensic gait analyst.* ***While such surveys can provide useful information they are particularly prone to skew in terms of demography caused by the location at which they occur.*** *For example, if the data is collected at a location close to numerous healthcare facilities, it is possible that the individuals sampled will have a higher than usual prevalence of health-related conditions.*[2]

93. In *Ferdinand***,** although the Court concluded that the evidence was properly admitted the Court made clear that the admission of this type of evidence in any given case had to be carefully considered:

> "[77] *Comparison evidence founded upon the science and expertise of podiatry is, we recognize, a technique still in its infancy. The articles to which Mr Birnbaum has helpfully drawn our attention show that research conducted with a view to establishing nationally accepted standards continues to take place.* ***It remains, in our view, a technique that requires careful scrutiny before expert evidence is admitted*** *and, if admitted, rigorous examination of the quality of the images and the opinion expressed by the expert*."

[2] L. Birch et al., Aiding the interpretation of forensic gait analysis: Development of a features of gait database; Sci. Justice (2016), page 1

94. That, Ms Mulligan submits, is what should have happened here. The appellant ought to have been allowed to challenge the expertise of the expert and the relevance of his evidence to this case and, in the light of the expert's inability to give any evidence as to the prevalence of the features he identified, his evidence ought to have been excluded.

95. The weakness and hazards of such evidence have been highlighted, the appellant observes, in a primer for Judges in the United Kingdom which was completed in 2017 and published by the Royal Society of Edinburgh. The Primer was produced by His Honour Judge Mark Wall QC and Professor Dame Sue Black DBE FRSE (one of the world's leading forensic anthropologists) along with other distinguished members of the Royal Society and the Primer Steering Group.

96. In the opening summary, the learned authors of the Primer foreshadow the serious concerns that have come to light with respect to this type of expert evidence:

> "*Forensic gait analysis, the direct visual comparison of two or more video recordings to establish whether they are of the same individual or different individuals based on the gait pattern alone, is a relatively new form of evidence in the UK criminal courts. Its underpinning science is sparse and largely translated from the more developed fields of clinical gait analysis and biomechanics, with more recent insights from biometrics. Care is required, however, in assuming that techniques developed in one field can be applied in another with quite different objectives.* ***The scientific evidence supporting forensic gait analysis, as currently practised, is thus extremely limited****.*
>
> *When forensic gait analysis is used as an aid to positive identification of a suspect, the following matters should be borne in mind:*
>
> *• There is no evidence to support the assertion that gait is unique within current or foreseeable limitations of measurements used in forensic gait analysis.*
>
> *• There is no credible database currently that permits assessment of the frequency of either normal or abnormal gait characteristics.*
>
> *• There are no published and verified error rates associated with the current methodology.*
>
> *• There are no published black-box studies of analyst reliability and repeatability.*
>
> *• There is no standardised methodology for analysis, comparison and reporting of gait characteristics.*
>
> *Excluding a suspect on the basis that their gait is different from that of the individual recorded on video should be less demanding than making a positive identification. However, there is even less evidence to support the use of video in this context. There are several factors that may cause individuals to walk differently*

> *on different occasions and these require accounting for before a suspect could be reasonably excluded, and such research is sparse.*
>
> *A wide range of professionals may present as a Gait Analyst, which is not a legally protected title. There are no academic qualifications in forensic gait analysis per se, and so professionals involved in the field may hold qualifications in a wide range of related areas. The professional or academic background, qualifications or professional registration of an individual are thus unlikely to give unambiguous confirmation of their competence to act as an expert witness in relation to forensic gait analysis evidence…"*[3]

97. In those circumstances to deny the appellant the authority to challenge the expertise of the witness and the reliability/relevance of his evidence in a *voir dire* amounted, Ms Mulligan submits, to an error of law. Instead the judge ruled as follows:

> *"The Defence has urged, in the circumstances, the Court should hold a voir dire. I am unable to agree with the Defence in these circumstances for the holding of a voir dire. Mr. Francis has been tested much in the past by previous courts, as demonstrated in the two Court of Appeal decisions that have been put before me and he has been extended – sorry, he has been accepted.*
>
> *I have perused these cases pretty extensively and I see, therefore, no benefit whatsoever at this point in the holding of a voir dire. I do not see that it is going to assist me to establish whether or not he is qualified. He has been held to be qualified by high courts of appeal. I do not see that it is going to assist me in establishing whether the science is acceptable or not. The Court of Appeal in the UK have held the science acceptable in both decisions. …*
>
> *The continuation of similarities, the identification of the similarities, have been testified to before by him and have been accepted both by the trial courts and the Court of Appeal. He has laid out in his statement what the similarities are between the questioned individual and the known individual in this case,*
>
> *[Comments about the Court's opinion of the quality of the CCTV footage omitted.]*
>
> *So I do not see how a voir dire is going to assist one way or the other, in that matter, other than to use up precious court time. So, I am going to refuse to hold a voir dire. I am satisfied that the decision can be made based on the submissions and the statements I have before me.*
>
> *As far as the admissibility of the evidence is concerned, I find, one: having regard to all that I have referenced before, that the evidence is admissible, that is the evidence of the comparisons made by Dr. Harris – Dr. Francis. Sorry. Between*

[3] Forensic Gait Analysis: A Primer for Courts, supra, at pages 6 – 8

> *the suspect and the known video. Two: I find that he's qualified and experienced to give that evidence."*

98. The Crown submits that the trial judge did not err in admitting the evidence of the forensic gait expert. He was entitled not to have a *voir dire* which was a matter for his discretion and to decide the issue, as to whether Mr. Francis should give expert evidence, on the basis of the written material before him.

99. Reliance is placed on the passage in *Archbold 2019* at paragraph 10-50 which reads:

> "*A judge has a discretion to direct a voir dire for the purpose of deciding whether a purported expert should be allowed to give evidence as an expert witness; but the discretion should be exercised sparingly, as the judge should be astute to avoid unnecessary satellite litigation; in the vast majority of cases, the judge would be able to decide the issue on the basis of the written material before him: R v G. [2004] EWCA Crim 1240…".*

Voir dire

100. It does not seem to us that the judge was bound to hold a *voir dire* before allowing Mr Francis to give evidence or that his decision not to do so was not one which, as a matter of discretion, he was entitled to make. Mr Francis had been accepted by courts as an expert witness in this field on a number of occasions - in some five previous criminal cases, either for the prosecution or the defence, before *Ferdinand* [54]. Further, even though Mr Francis gave no evidence as to the prevalence of particular gaits in the Bermudian population, it seems to us that his evidence of the similarities between the gait of Man X and the appellant was relevant and admissible. We do not regard evidence of prevalence as some form of precondition for the giving of expert evidence. Further the availability of satisfactory evidence of prevalence is unclear.

101. Mr Francis' evidence might have been more powerful if he had been able to identify similar gait characteristics between Man X and the appellant which were unusual in the Bermudian population. But it would have been wrong, in our view, to deny the jury any evidence as to the existence of similarities in gait between the two men. The jury were entitled to consider whether, in the light of the evidence of Mr Francis, they were satisfied that there were similarities in gait between Man X and the appellant, as part of their overall assessment of the prosecution case. As it was put in *Otway*:

> *"They were entitled to take into account together with the circumstances listed at paragraphs 4 – 7 above, the similarities in walking gait identified by [the expert] when considering whether there was any sensible prospect that [Man X] was someone other than the appellant"*

The circumstances listed at paragraphs 4-7 were the circumstantial case against the defendant in that case. We do not accept that, in the absence of evidence of prevalence of gait characteristics, the evidence of Mr Francis was of such marginal relevance that either it did not constitute

admissible evidence at all; or that its admission was so much more prejudicial than probative that it should have been excluded.

102. To have held a *voir dire* would, indeed, have run the risk of satellite litigation. We do not regard a decision to proceed without one as unfair to the appellant. There was ample material before the judge for him to decide that Mr Francis could properly give evidence. It was then entirely open to the appellant's counsel to cross examine Mr Francis as to the asserted deficiencies of his evidence, as she did, including cross-examining him on the basis that he had never practised in Bermuda as opposed to London (which he described as "a very cosmopolitan city" – he also said that he did not know that people's walk necessarily differed depending on their nationality or ethnic origins although there was certainly a difference in levels of flexibility, non-Anglo Saxons tending to be less stiff). We find it difficult to see how holding a *voir dire* would have produced anything which was not produced on cross examination or which would have indicated that Mr Francis should never have been called at all.

Summing up

103. As to the summing up, the judge gave a careful summing up of Mr Francis' evidence and its limitations. This included the fact that gait analysis was, at this time. class identification only (151); that Mr Francis was careful not to go outside the area of his expertise (152); and that in respect of prevalence of features there were, he said, no or very few databases (153). The judge referred to the fact that in the present case there was no evidence of prevalence (154). He went through the evidence of the features that Mr Francis had observed (and which the jury had viewed along with him) in respect of Man X as he walked on Two-Way Deepdale at 21:14; and in respect of the appellant as he came along Angle Street, turned left and walked into Court Street at 21:53 – 21:55, and in earlier Court Street footage at 18:27 in some detail. He went through the features identified by Mr Francis of the gait of Man X and the appellant, making it clear that the jury would need to look at what he was referring to and see if they saw it as well. He made it clear that it was for the jury to consider the table of 7 similarities (165) and all the evidence they had heard seen, or watched; and that the prosecution case was that this expert evidence, **together with the other strings of evidence**, compelled them to the sure conclusion that the defendant and Man X and the person who shot and killed Mr Steede were one and the same. Whether that was so only the jury could decide. The jury was entitled to accept or reject Mr Francis' evidence and the extent to which they did so was entirely up to them.

104. He pointed out that the defence case was that this sort of evidence was unreliable and not good science (167), and not properly tested by peers. He directed the jury that they could see the video evidence again to see if the features referred to were there consistently and to make their determination having regard to all the evidence that they had seen and heard (168). If they did not see the similarity, they were entitled to reject the evidence. If they did, they could reject or accept it. **If they accepted the gait analysis evidence, then that would be a string that they could attach to other strings** and see if it bound the defendant to the crime (168).

105. The judge summarised at some length the cross-examination of Mr Francis in the course of which he referred to the fact that Mr Francis agreed that FGA analysis was a young discipline; and that he would not disagree with the suggestion that cognitive bias was particularly difficult to counter

in this field (170-1). He pointed out that the defence relied on that cross-examination to say that his evidence was unreliable; the science young and untested; with no real default ratios known (by which we understand him to have meant evidence of distribution of gait characteristics among populations). He ended [182] by reminding the jury that they **could only use the expert evidence to convict** the defendant if having looked at that video **they were confirmed in their minds that it demonstrated features so similar in the two, i.e. Man X and the defendant, that they felt sure that they were one and the same.** If they were not sure they must reject the expert evidence. Even then they must consider all the other evidence and accept or reject what they wished before arriving at their verdict of guilty or not.

106. We do not regard the directions in the summing up, in respect of which the appellant raised no issues at trial, as a misdirection. The tenor of the summing up was that the prosecution case was that the gait evidence was a string which taken with the other strings should cause the jury to be satisfied of the appellant's guilt, and that if they accepted it, that would be a string they could attach to other strings to bind the defendant to the crime i.e. that they could use the gait evidence together with other evidence to convict the defendant. The judge repeated his string metaphor at the conclusion of his summing up where he identified thirteen strings which, when woven together, made a compellingly strong rope which bound the appellant to the crime, the GSR evidence being string 8. The jury was not being invited to treat string 8 as a rope.

107. The appellant submits that the ending of the summing up wrongly permitted the jury to convict the defendant on the gait evidence alone. In our view the summing up must be read as a whole. What the judge was saying was that the jury could use the gait evidence together with all the other evidence to convict the defendant. He then said that they could only use the gait evidence to convict the defendant if they were sure that the features were so similar that the two were the same. The use to which he must have been referring was as part of evidence on the totality of which the jury could convict the appellant.

108. That approach was not without benefit to the appellant. Gait evidence is often put forward on the basis that it shows that there is a real possibility or likelihood that two persons are the same, which is evidence that can be taken into account with other evidence to reach a conclusion that they are. If such evidence can only be used if the jury is satisfied from the gait evidence alone that they are the same that would remove a string from the prosecution's rope, if they could not be so satisfied. Further, if the jury were so satisfied, they were entitled to use the evidence to convict the appellant, as was the case with the appellant Hashi in *Ferdinand*, who was convicted predominantly on the basis of Mr Francis' evidence of the similarities of gait between him and the person referred to as Suspect 2. The only other evidence in *Ferdinand* was that Suspect 2 was of similar build, skin colour and height and wore a combination of clothing similar to that worn by Hashi. The evidence additional to the gait evidence in the present case was considerably more extensive and stronger. It seems to us unrealistic to suppose that, in the light of the judge's summing up, taken as a whole, the jury would reach its conclusion on the basis of the gait evidence alone.

GROUNDS 10-12 NEW EVIDENCE IMPROPERLY ADMITTED IN CROWN'S CLOSING SPEECH

109. During the closing speech for the prosecution there was produced to the jury side-by-side gait comparison footage of Man X and the appellant, containing some portions of two original CCTV videos of the appellant and Man X played at the same time. This footage, Ms Mulligan observes, was created by an unknown person, using an unknown editing programme, and slowed to half speed when presented to the jury. She and the appellant had never seen it. She had no opportunity to challenge the admissibility of this material. The jury was plainly being invited to make their own gait comparison. The prosecutor is said to have repeatedly told the jury to "look at the walk" while the footage was played and then played again in slow motion.

110. Mr Francis had given evidence of the risk of unconscious cognitive bias i.e. the risk that when one is given footage of the alleged perpetrator to compare with other footage one may tend to see similarities in gait that are not similarities at all. His evidence was that this was something that it was particularly difficult to guard against. He said that he would review the relevant footage sequentially - first the footage of the alleged perpetrator and then the footage of the appellant: pages 22-24. The Crown directs our attention to a passage in his evidence where he said that he reviewed the Man X footage on one day and the known footage later; but, also said that at the time of the enhancement he reviewed them together. Page 125.

111. The judge, in turn, referred in his summing up [50] to Mr Francis' evidence that if he has the CCTV footage, he would first of all look at that of the unknown person, identify the features and flow and, when that was complete, he would look at the known footage to see whether there was any comparison.

112. But what in fact happened, complains Ms Mulligan, was that the prosecutor caused the CCTV footage to be edited in such a way as to place the appellant and Man X side by side on the same piece of footage and then compare the way the man on the right walked with the way the man on the left walked – one being Man X (on the right) and the other being the appellant.

113. The unacceptability of this, Ms Mulligan submits, is supported by the authors of ***Forensic Gait Analysis: A Primer for Courts,*** published by the Royal Society and the Royal Society of Edinburgh, who noted that the current best practice for comparison required that the questioned footage and the known footage be viewed independently and sequentially, not side by side:

> "…This requires an analysis of both sample and reference, and then a comparison of those analyses. ***Best practice in forensic matching generally is achieved when the analysis is performed on the sample and reference independently and then a comparison is undertaken. In an ideal world, both the analyses would be undertaken by independent observers and the comparison undertaken by a third observer.*** However, in the real world of forensic gait analysis, true independence is generally not possible and a single person is often responsible for all three processes. In this case, a few simple steps can be taken to ensure that the three processes are as independent as possible***. The most obvious is to perform them sequentially, leaving a reasonable time gap between the three parts of the process.***

> ***The sample data should always be analysed first to ensure that the analyst is not either consciously or subconsciously looking for specific features that are known from the reference data to characterize the individual. Documenting the date and time at which the three processes commenced and were completed will provide evidence of the attempted independence.****"*

114. In a scholarly article, ***Gait analysis in forensic medicine,*** the learned authors who had been involved in several cases where they presented gait analysis, along with photogrammetry, comment on the issues that arise from showing two photos or video clips at the same time to a jury:

> ***"When a person is shown two pictures of other people, he or she will unconsciously try to compare them and build a relationship between the two pictures****. It follows that if many images of a perpetrator and a suspect are shown side-by-side in court, this may potentially, even perhaps just unconsciously, lead the jury members to decide that there is a definite relationship between the perpetrator and suspect."*[4]

115. In the present case the jury was, it is submitted, being shown what was not in evidence nor made an exhibit at the trial; and invited to rely on extraneous non evidential material. This was a material irregularity which means that the verdict cannot stand.

116. Reliance is placed by the appellant on *R. v Stewart and Sappleton, [1989] No 88/5719/Z4 & No 88/5720/Z4 (CA).* In that drug importation case, the prosecution had relied on the obvious change in weight of luggage when the drugs were added as one basis upon which the jury might reject the contention by the defendants that they were not aware of any drugs in their luggage. After the jury had retired and had been given a majority direction, they returned to ask if they could be given scales or weighing equipment to help clarify how much difference the weight of the cannabis would make. Both appellants objected to the jury being provided scales at this late stage but the Prosecution argued that the scales should be provided. The Judge provided scales for the jury and they returned, within the hour, unanimous verdicts of guilty against both Defendants.

117. The Court held that the jury should not have been provided the scales, that it constituted a material irregularity and that it was not appropriate to apply the proviso because they were not confident that no miscarriage of justice had taken place. On appeal, the prosecution accepted that there could be no new evidence or material provided to the jury but submitted that the scales were equivalent to providing a ruler to a jury who wanted to apply a scale to a map already in evidence or a magnifying glass to enable easier reading of a document exhibited during trial. The Court held that it was impossible to know what use the jurors made of the scales. If the jury conducted experiments in the absence of the appellants, who would have had no opportunity to address them regarding a crucial issue in the case, the verdicts would not be safe. (In the present case, Ms Mulligan submits, the prosecution in effect conducted the experiment itself). The Court endorsed the words of Watkins L.J. in *R. v. Thomas*:

[4] Larson et al., *Gait Analysis in Forensic Medicine*, International Society for Optics and Photonics Videometrics IX (2007), at page 6

> *"It can never be right for a jury to be provided with something which has not been part of the evidence in the trial."*

118. It is right to observe that in that case it was entirely unclear what use the jury intended to put the scales to. They did not have the cannabis with them in the room. They did have the holdalls in which the cannabis had been imported. The fear was that they had performed some experiment putting items available in the jury room up to the weight of the cannabis into the holdall.

Objections to the jury seeing the parallel footage

119. In the present case Ms Mulligan raised objection to the jury being shown this side by side footage; asked that the disc with the footage be made an item for the purpose of any appeal (which the Court is said to have forcefully refused, shouting "trust the prosecutor"). The appellant, it is submitted, ought at the very least to have been able to review the footage himself, with his counsel, to determine if anything had been altered; if any portion of the original footage had been removed; if footage had been smoothed; if the frame rate speed changed and became uniform when the two clips were transformed into one clip; if the size of images and other alterations that can occur either purposely or by error during film editing had in fact occurred. If the footage had been produced as evidence the appellant would have been able to ask questions relating to this issue and possibly call an expert himself. Ms Mulligan also drew attention, before the judge, to the fact that Mr Francis described the two footages as running at 15 frames per second in the case of Man X and 15-20 frames per second in the case of the Appellant and questioned whether if you put the two together (at what she had been advised would be a uniform frame rate), it might make the respective gaits appear more similar.

120. The appellant made a formal application for a mistrial relying, inter alia, on the showing of this material. This was refused. – page 31 – on the basis that the juxtaposition of the two videos together amounted to no more than argument and that the prosecution was entitled to do that in circumstances where both of the images were admitted into evidence and both were referred to by both the gait expert and the defendant himself.

How the side-by-side footage was dealt with in the summing up

121. In the course of his summing up the judge said [261]:

> "*Remember in the address of the Prosecution -- by the Prosecution when they played two videos together, played the Man X and the, um, and the court Street, the video, together with him walking towards the camera, and they put the two videos on the same screen, side-by-side, as part of his argument. He didn't do that in the cross- examination."*

122. What it is said that the judge should have done is to have told the jury in the strongest possible terms that they could not use any of the video evidence or the evidence of the expert to conclude that Man X and the Appellant were the same person.

123. Ms Mulligan submits that the judge erred in never returning to the issue of the edited footage shown to them during the Crown's closing speech in his summation. We have already summarized the judge's summing up in respect of the evidence of Mr Francis but, for ease of exposition, we set out below the passages to which Ms Mulligan directed our attention in the summing up: [159]

> *"Now, you must note that he [Mr. Francis] made no reference to the man's height. I think you must also note that he made no reference at any time in his evidence to facial matters either.*
>
> *You may think, and you should think, that that is significant because they play no role in assisting an FGA to make determinations about how a man is walking. You don't need a man's face to see how his feet is working. Right. That won't be* ***identifying,*** *or the man by walking, that would be by faces.*
>
> *Anyhow, he said he is interested in the feet and legs, not his face, for example.* ***Identification*** *by face is a different matter. And that is correct, I think. A matter for you. …*
>
> *[166] The Prosecution is relying upon this expert evidence as another string in its rope which it says binds the Defendant to the charges, the crimes charges.*
>
> *They say this evidence, together with the other strings of evidence is of a nature, quality and kind that compels you to the sure conclusion that this Defendant and that Man X and the person who shot and killed Mr. Steede are one and the same.*
>
> *You may have noticed that in analysing the FGA evidence the expert never purported to say Man X and the Defendant are the same. He only pointed out to you the similarities in the walk of the two. Only you, as the Jury and finders of fact, can find that this Defendant and Man X is the same and that he is the man who shot and killed Mr. Steede."*

Thereafter after a lengthy review of Mr Francis' evidence the judge went on to direct the jury as follows [182]:

> "*I must remind you again that you can only use the expert evidence to convict the Defendant if you feel sure, having heard it, and having looked at it, that – looked at that video, you have confirmed in your minds that it demonstrates features so similar to the two, Man X and the Defendant, that you feel sure that the two are one and the same…*"

124. It is submitted that this decision was wrong in law: and supported the improper approach taken by the prosecution. The jury should have been warned not to use the expert evidence along with the video with the side-by-side footage to identify Man X and the appellant as the same. It is not wholly clear to us what the judge meant by "*that video*". In an earlier passage in his summing up he had referred [168] to the jury's entitlement to "*have the video replayed and any aspect of it*"

where he appears to be referring to the video evidence as a whole, and Ms Mulligan was disposed to accept that he was referring to the video material shown when Mr Francis gave evidence.

125. We do not accept that the judge should have told the jury not to use any of the CCTV footage or the evidence of the expert to conclude that Man X and the appellant were the same. But that leaves for consideration whether they should have been shown or allowed to consider or take into account the side-by-side footage.

Request by the jury to see side-by-side footage again

126. During the course of their deliberations the jury asked to see this side-by-side footage, amongst 6 other items of footage [342]. The judge's decision on that was in this form [page 359]:

> *"THE COURT: Okay. So let's – let me see what you want to do. I will do number 3 before we do number 2. Is that alright with you?*
> *FOREPERSON: Yes.*
> *THE COURT: All right. Well, this is what – how we're going to do approach number 3 [the side-by-side footage].*
> *Now, when the Prosecution was addressing you, he placed the two videos that the expert used, he put them together, beside each other and showed you. And he did* ***that for argument purposes****. All right.*
> ***The manner in which the evidence was presented to you by the expert is that he showed you them individually, and that is how I proposed to show you. All right?***
> *So what I am going to do, therefore, is show you … You've seen, you've just seen, on 1,* ***Man X walking****. [The jury had already been shown the footage of Man X walking up Two-Way Deepdale] So observe – observe Man X. If you want to go back to it, I can let you go back to that. But now I'm going to Man X – sorry, not Man X, I'm going to go to* ***Tucker on Court Street.*** *Right?*
> *THE FOREPERSON: Yes. Yes.*
> *THE COURT: The one that he showed you. That would be the one that was near to Elliot Street, not the one when he returned.*
> *THE FOREPERSON: Yes.*
> *THE COURT: Right? Okay. So show them that one."*

The judge also showed them the footage showing the appellant's return to Court Street from Angle Street at 21:51

127. This approach, Ms Mulligan submits, neither corrected the problem created by the jury having seen the edited footage nor fulfilled the request which they made. It left them to consider the edited footage as part of the Crown's argument to determine whether or not Man X was the appellant. This, she submits, was improper. They should have been told to put it out of their minds because it might be unhelpful at best and misleading at worst; the appellant had had no opportunity to cross-examine Mr Francis about it and there was no evidence as to how it was created. The Court could well have gone further and told the jury that the footage might lead them into seeing similarities of walking that the expert had not identified.

The Crown's response

128. The Crown accepts that as a part of its closing arguments relevant portions of the CCTV exhibits, which were analysed by, and in respect of which, Mr. Francis gave evidence in chief and in cross-examination, were individually played at regular and half speed before they were played side-by-side on one screen at both regular and half speed. The footages were not altered, although, Mr Mahoney told us, the footage of Man X was a bit zoomed. The same result could have been achieved by the longer procedure of using two laptops and two separate screens positioned side-by-side. Other items of evidence were also placed side-by-side, such as photographs and maps, during the closing address for the Crown. No new evidence or exhibit was thereby presented to the jury during the course of its closing submissions. What Mr Mahoney said to the jury was that they needed to see whether they could see the similarities that Mr Francis had identified.

129. In the course of the hearing before us Ms Mulligan received a copy of the file from which the footage was derived. She told us that the properties of the file showed that the footage was at 30 frames per second, when the original Tucker footage was at 15 frames per second and that of Man X at 15-20 frames per second. That, she suggested, may have had the effect of making the two look more uniform and similar. Mr Mahoney told us that if you put a 15 or 20 frames per second footage into a 30 frames per second editor, it plays the footage you put in at the existing frames per second.

130. This was not, the Crown submits, a case, of further evidence or extraneous material being introduced into the jury deliberation after retirement, as occurred in *R v Stewart and Sappleton* and *R v Thompson* [2010] EWCA Crim 1623 respectively. Nor was any new evidence placed before the jury during the Crown's closing address. The evidence which was before the jury during the course of the prosecution and the defence case, was the same CCTV footage transposed side-by-side as a part of the Crown's closing arguments. Nothing new, nothing different was given to the jury after they retired.

131. Reliance is placed on *R v Asgodom* [2012] EWCA Crim 2054 where a different DVD viewing machine was introduced which allowed for a clearer image of the CCTV footage transposed to a DVD which had been before the jury. The Court of Appeal held that the jury was entitled to be provided with a machine which would allow them to examine with greater clarity that which was already before them. The position was no different to the provision of a magnifying glass.

132. The trial judge was not, the Crown submits, at fault in not acceding to the appellant's mistrial application or requiring the Crown to tender a part of its closing argument as an exhibit, namely the showing of the exhibits side by side. The production of the side by side footage was rightly regarded as part of the prosecution's closing argument.

133. The side-by-side footage in this case constitutes, in our view, the juxtaposition of existing evidence, rather than the introduction of new. But it should not have been put forward without any prior reference to the defence. It is often the case in criminal trials that, when it comes to final submissions, the parties produce material which forms the basis of their submission based on, or incorporating, the evidence that has been given and the analysis that they seek to make of it, and

which involves assembling the evidence in a particular manner. But good practice requires that material of this nature is not sprung on the defence by the prosecution, particularly when it derives exclusively from material – the CCTV footage – in the possession of the prosecution. In a case such as this, if there is an issue as to whether the jury should be allowed to see it, the matter needs to be raised with the judge who can consider any question as to whether the "argument of the prosecution" may incorporate some hidden flaw or require some specific warning. If that had been done in the present case, we have little no doubt but that the judge would have allowed the prosecution to use the footage.

134. We do not accept that the jury was not entitled to look at the footage side-by-side. Mr Francis in assessing similarity between Man X and the appellant had initially looked at the footages independently. That is how he had dealt with them in his evidence. But he had also reviewed them together, albeit not before the jury. We cannot regard it as illegitimate, nor did Mr Francis' evidence so suggest, for the jury, who had ultimately to decide whether Man X and the appellant were the same, ever to look at the footages side-by-side.

135. It would have been appropriate to warn the jury to take care when considering the side-by-side footage which the prosecution had put forward by way of argument since (a) this exercise had not been done before; (b) Mr Francis had not been asked about it; (c) there was a danger of cognitive bias in the jury in that, seeing two moving images side by side, the jury might unconsciously be inclined to see a similarity that was not truly there; and (d) to make reference to whatever the defence had said in its final submission on the topic.

GROUND 13: IRREGULAR JURY DELIBERATIONS

136. The jury had asked if it was possible to view the footage they wanted to see in a more private setting. The relevant passage from the transcript is as follows:

> *"THE COURT: I understand you have another note, before I move on to this one.*
>
> *--- at 3:34 p.m. - second note handed up.*
>
> *THE COURT: I told you all about that before, you know. I told you it's not going to go anywhere. You're going to have to view it right there.*
>
> *"Is it possible to view the footage in a more private setting? We were of the impression that we could collaborate, make comments while viewing the footage which may not be appropriate for the entire court to hear."*
>
> *Oh, man, I know this problem is going to come up one of these days, because of this thing. It should be possible that you should be able to go and look at it in truth. This is an issue that was dealt with in one of our decisions that went to the Court of Appeal. You remember that one? Washington case?*
>
> *MS. MULLIGAN: Washington.*

> *THE COURT: Yeah. And it seems from that that this is where you will have to do it because of the risks, I told you earlier, that you might go in the computer and discover other things, even though we might try to give you a clean computer.*
>
> *Now, that computer I don't think is clean. It has all kind of stuff, some of which you haven't seen.*
>
> *But this is what I'm going to do for you. You can gather round this TV. You don't have to sit down there in your seats like that, while you're viewing it. We will be looking at the stuff, right, from there we just show you the part and it's for you to do. So, we are not listening to what you say, you know, or anything like that. And so on. And I've seen jurors come and do it, they've come up to this screen here, close, and they look up there, and do vizie-vizie, can't hear a thing they're saying. Jurors can wizie-wizie all right. All right? So if we can -- if you can adjust this here a little closer to you, so that they can't see what you're trying to sort out, you want to turn in that corner there in there. Right. You can do that. No problem.*
>
> *--- at 3:36 p.m. - further instructions for viewing"*

137. The reference to Washington is to the case of *Washington v The Queen* [2016] Bda LR 57(CA) where the jury had been provided with a laptop for one purpose and might have used it for another and thereby gained access to an unedited form of a video clip containing audio that had not been played for them. In the event the court was satisfied that at no stage did the jury have the opportunity to view the video clip, muted or unmuted.

138. The judge is said to have erred in not permitting the jurors to have the CCTV footage they sought in some private location where they could view it without being overheard. Instead they had to gather around a television monitor in the Courtroom with Crown counsel, defence counsel, the appellant, Court staff, a police officer who had given evidence at trial, the trial judge and other unknown persons / police officers in the body of the Court while they viewed and discussed the footage during their deliberations.

139. The judge is said to have made matters worse by making comments to them during their deliberations regarding the CCTV footage in open court. He reminded them of a feature of one of the clips that he clearly thought was significant – the clip which showed the flashes from the firearm. As it happened the jury rejected the offer to view it, but it is said, it was inappropriate to take part in their deliberations beyond simply fulfilling their requests or, after discussing it with counsel, giving further and better instructions to the jury on an issue.

140. The Crown submits that where the jury ask to see again an exhibited video surveillance film, the best practice, and the practice of the courts in this jurisdiction, is for the film to be shown in open court. This is particularly so, when the surveillance footage involved several recordings covering hours of which only select portions were shown to the jury and a police officer who was a part of the investigating team and a witness in the case, DC Sabean, had to be relied on during the trial to operate the viewing of the various CCTV footage, and, in particular to slow it down if required.

141. The Crown further submits that a fair-minded independent observer would not conclude that there was a real danger, or a real possibility, of the jury's decision being compromised by the comments of the learned judge when they returned to view the CCTV exhibit in court.

142. All other things being equal it would be desirable for the jury to have private access to all footage. But with footage of this kind whose display has to be effected by others that is usually impractical. There was some 100 hours of footage. The display had taken place at the trial with DC Sabean operating the system. The several clips covered an extended period of time and only portions were relevant. It would not have been realistic to entrust the jury with the disc which we were told existed with all the footage on it (but on which you could not change speed or zoom in and which contained a lot of unused material); nor is it apparent to us how speedily the seven sections which they sought to view could have been loaded on a computer (with nothing else on it) for them to use in private. In any event, the judge had a discretion as to how he handled this request: R v E [2006] EWCA Crim 1216 at [29] from which it is apparent that frequently that discretion should be exercised by requiring the replaying of the relevant exhibit in open court.

143. What the judge did was well within the ambit of that discretion. We have considered the passages of the transcript which have been drawn to our attention in which the judge determined the order in which the footage was shown, in one instance referred to the fact that the footage (Tucker near to Elliot Street) was one that the expert used to show at least one of the stills from, and in another asked how they wanted the clips with the gun flashes shown to them. We do not regard what the judge did or said as in any way improper, let alone constituting some involvement or butting in on his part in the jury's decision making or deliberations. The judge engaged with the jury (and vice versa) as to what they wanted to see. There is no good reason to believe that the appellant suffered any injustice from the course that the judge took or that his conviction was in some way unsafe on account of it.

GROUNDS: 14-15 CELL SITE EVIDENCE

144. The cell phone records produced by the Crown showed that a call was placed at **21:51** (about 11 minutes after the murder) on 3 November 2017 from the appellant's phone and that call was completed using the **Prospect Mast** with the **Cell ID: 22063** and the **Broadcast Control Channel 532.** That did not, however, necessarily mean that the phone was located in the area of Parsons Road and Deepdale Road (the murder scene) at that time.

145. The prosecution's cell site expert was Mr McWeeney. The appellant submits that the judge erred by permitting him to testify about specific locations of the appellant based on the cell site masts that his phone accessed during the course of the evening, which evidence went beyond what was in his statements and report. We disagree. It was legitimate for him to explain the significance of what was in that material.

146. Mr McWeeney testified that the most detailed information, for present purposes, could be found on page 11 of his report (78 of the Record), which information was generated by conducting drive tests in the area, using sophisticated equipment. That page indicates the probable serving masts in Deepdale Road at its junction with Parson's Road (the murder scene). His conclusion was that the probable serving mast was the Prospect mast with Cell ID 22063 and BCC 532.

147. Mr McWeeeny's evidence was that tests were carried out, using sophisticated equipment, to indicate which towers it may be possible to receive a signal from on the specific roads that were driven round for the purposes of collecting data. The data does not enable one precisely to locate a particular cell phone which connects with a particular tower; but only to say with more accuracy the areas that a cell site tower would service based on the ability of the equipment to connect with that tower during a drive test. No doubt for that reason the relevant pages are headed "Probable Serving Masts in... [the area concerned]".

148. His evidence included the following elements:

a. As to whether or not the phone used by the appellant at **9:51 pm** had to have been in or near the murder scene at the relevant time, he testified that a call made at that time on Mr. Tucker's cell phone was picked up by the Prospect Cell 22063 site, as was not in dispute, "*meaning the user has to have been in the location served by 22063 mast, which **includes** the area of interest at the junction between Deepdale Road and Parsons Road*." [51]. Immediately after he said this the judge said "*Had to be in the area which is Parson/Deepdale Road. Yes?* No reply was recorded. It is this passage and the absence of any reply which, no doubt, led the judge to sum up in the way that we record at [151] below.

b. He agreed that the phone could be anywhere within the coverage area of the Prospect mast, and not just in the area of the murder scene. As he put it "*Anywhere which had 532 on the map"* and not just the murder scene [66],

c. When asked if he could give precise locations for cell phone users based on the information he had in this case, Mr. McWeeney responded that he could not do that, but rather that the information is more generic. "*It is an area – it is not a pinpointed location."* [68]

d. By contrast Mr. McWeeney acknowledged that if someone was using their phone and the call was being picked up by a mast in the City of Hamilton, he would be able to say for sure that the caller was not located at the Airport in Bermuda. [68]

149. Mr. McWeeney's evidence was, thus, that the user of the appellant's phone had to have been in an area served by the Prospect mast and that the area around the murder scene, specifically the junction of Parsons Road and Deepdale Road was served by that Mast. However, that was not the only area served by that mast, which used Broadcast Control Channel 532 to transmit radio signals. Mr. McWeeney agreed that the same mast could serve any of the areas indicated by the number 532 on page 11 of his report.

150. The appellant's evidence [14/151] was that at the time that he made the **21:51** call he had left the gambling haunt in Middle Town Road which he had identified with a blue circle on the photograph at page 21 of the Record. This would appear to fall within an area bounded by roads to the north, east and south where 532 appears. The figure 532 also appears at the east end of Elliott Street where it joins with King Street. However, no drive test was carried out down Middle Town Road

– no doubt because it was not apparent, when the evidence was gathered, that the appellant was going to say that he was there at the time of the call. No defence statement had by then be filed.

151. In the course of his summing up [page 186] the judge said this of Mr McWeeney:

> *"In conclusion, he concluded that at 21:58:08, that is 9:51:08 [sic], the user of cell phone in question in this case, that is admitted to be the Defendant's, was used. That cell phone connected with the Prospect site, 28003,* ***and had to be in the area of Parsons Road, Deepdale Road. Okay?***
>
> *He explained the colour-codes on the exhibit and their relevance. I think for these purposes I shall not delve into them unless you request me to.*
>
> *The Prosecution relies upon this cell site evidence as another string in it's rope which it says, in all the circumstances, assists to bind the Defendant to this murder as the perpetrator.*
>
> *You know that the deceased was pursued, shot and killed about 9:40 p.m., and they say this evidence supports that it must have been the Defendant who killed him. You know that the Defendant returned to Court Street at about, I think it was 9:53?*
>
> *MR. MAHONEY: Yes.*
>
> *THE COURT: Yeah. That is about 13 minutes after the killing. And he says the call was made from that phone, from the Prospect tower, 9:51:08,* ***which put the Defendant, the user of that phone*** *which the Defendant -- there's no evidence in this case that that phone was used by anybody else* ***in the Parsons/Deepdale area, road area.***
>
> *So those are matters for you. The Prosecution, as I said, relies upon this cell site evidence as another string in its rope which it says in all the circumstances assists to bind the Defendant to this murder as the perpetrator. You know that the deceased was pursued, shot and killed about 9:40 p.m., as I said before, and they say this evidence supports that it must have been the Defendant who killed him…"*

152. That summary was, the appellant submits, far too strong. The evidence did not indicate that the appellant **had to be** in the area of Parsons Road/ Deepdale Road. The most it could show was that the appellant **may have m**ade the call from the area around the murder scene or any other area served by the Prospect mast which included, it is suggested, the area around Middletown, specifically Middle Town Road, where the appellant says he was when he made the call.

153. There are, further references in the summing up to the cell site evidence showing that when he made the call the appellant was in the Parsons Road/Deepdale Road area. At page 228 the judge said that the appellant was saying that he was at one place when he made the **21:51** call and that the prosecution was saying that the telephone, computer evidence showed that he was someplace

else. At page 313 the judge said that string eleven of the prosecution case was that the *"cell site analysis evidence certainly [placed] him in the area at the time of the shooting….That second call* [i.e. the one at 21:51*] was made off the Prospect Tower, somewhere Deepdale/Parsons Area, after the killing, likely to report his success"*.

154. The Defence objected to the Court's summation of Mr. McWeeney's evidence and submitted (a) that it did not accurately reflect and warn the jury regarding the limitations on this type of evidence; and (b) that the Court incorrectly summarized the evidence, indicating that the witness had testified that the Appellant had to be exactly in the area of the junction of Deepdale Road and Parsons Road when his cell phone made a call at 21:51 on the night of the murder. In addition, the Defence objected to the summation on the basis that the Court had misunderstood and was misinterpreting the report prepared by Mr. McWeeney in such a manner as to misstate what conclusions could fairly be drawn from the data in the report as it was explained to the jury by Mr. McWeeney.

155. The judge agreed to revisit this evidence and reinstruct the jury regarding it, but the appellant submits, this only reinforced the errors made in the original summation.

New directions on cell site evidence

156. The directions which the judge gave to the jury when he called them back included the following (page 346):

> *"In respect of that 9:51 call made by the Defendant to Chadda, which the Prosecution is saying, was made, according to these exhibits, off the Prospect Tower, right, which the Prosecution is saying, as I understand it, their argument, must have put the Defendant in the area of Parsons/Deepdale at the time, likely heading back towards Court Street, I am told, the Defence suggests, that the word "must be" that I said, "must be" that the Defendant must have been, put it that way, in Parsons/Deepdale at that time, was too strong and not supported by the evidence. It is suggested that the word should be "may be".*
>
> *Now, I put…used the word "must be" as argument for the Prosecution. What they are saying their case is, he must have been there. All right?*
>
> *The Defence is saying, he may not have been there, in fact he is saying that he wasn't even there, near Prospect or Deepdale, that the call he made really was made from somewhere near Middle Town, towards Angle Street. You remember he said he was near Court Street, so that's Middle Town, Union, somewhere around there, coming down there I think is, so on, I don't know that back-of-Town road so good. But somewhere heading there towards the thing. An we know that about two minutes after, about 2:53 he turned up."*

157. A little later at page 349 the judge said he understood the prosecution case to be that the call must have been made as he was heading back on Parson's Road and not from any Middle Town Area; and at 351:

"The Defence -- now you go back to 16. That might be your 17 [page 83 of the Record which dealt with signal levels from Prospect Cell 22063, BCCH 532]. And again, you'll see the Prospect cell ID 22063. This is dealing with Probable serving area of mast with Cell ID 22063 - Part 1, and there again you'll see how it is illustrated. All right? Now, and they also have a round thing there showing you the murder scene. See that round, that round circle there in blue? Where they show you where the murder scene was like. And you can see then how the signal from the Prospect thing runs down that road there where you see the numbers 63.7, 88.4 and 90 and all of that. I can't see what is the road underneath that. Right? But if you look under that num -- that 90, 93 and 9.9, you see Ewing Street and Elliot Street and Union Street and Court Street, and all of that. And there's a piece of green running off for the -- looks like the Court Street, heading down that side. All right. Goodie.

So, the Defence now is saying that, why they want to say the word "may", ***despite all the expert evidence****.* ***Remember this chart, the telephone expert said is accurate. Right? And despite all of that, so he keeps attributing the signal to be the Prospect Mast****, they are saying, however, that the direction should be that he may have been in Deepdale -- the call may have been made with the person making it in the Deepdale/Parsons area, because there is a possibility that the signal might have been picked up in the area the Middle, Middle -- Middle Town on area, towards Court Street, as he said****.*

And one of the reasons is that they point to -- they point to what I would call Page 11, [page 78 of the Record] which deals with the Probable Serving Masts in Deepdale Road, junction with Parsons Road. This one here. See that one? And you see it among the places it got there marked is Prospect (Cell ID: 22063, BCCH: 532). And (22062, BCCH: 512). So, let's deal with that 532. And they are saying that when you look at this map here, right, that you will see the 532 numbers somewhere all down there around Princess Town and -- what is that? Union Street. Round there. Sorry. Right in that area around King Street and so on.

……

They're saying that it is possible, despite the record saying Prospect Mast, or even if it says the Prospect Mast, that the Prospect mast was sending out signal in this area down here where the Defendant said he was*, and therefore -- therefore there's nothing inconsistent with what he's saying about where he made the call from.*

But remember this also, the expert says that the signal, the phone picks up the signal from the strongest signal, and remember he said that you will see features of the -- a mast, spread out in areas, but doesn't mean that you can pick up from the area, because it attaches to the strongest signal. Doesn't use 2 and 3 one time. It picks the strongest one.

Good. So that is that. I think that should be covered. Now, so it's for you to decide. Is it particularly a major point? Is it important or is it not? And so on."

158. In short, the appellant submits, the evidence was that the appellant's phone picked up the signal from the Prospect mast (as was never in dispute); but the fact that it did so did not show that the appellant must have been at or near the murder scene when he made the call. There was no evidence that the area of Middle Town where the defendant testified that he was when he made the call would have been served by some other mast whose signal strength would have been higher. The way in which the judge summarised the defence case denigrated it by saying that the defence case was put forward despite the evidence of the expert that it was the Prospect Mast that was sending out the signal, when it was that fact that the defence said indicated, or could indicate, that that the call came from the area where the appellant said that he was.

159. As to that, the position seems to us as follows. The evidence of Mr McWeeney was that the phone could have been anywhere with 532 on the map at page 78 of the Record. (The judge referred to this in his summing up at 188-9 when observing that Ms Christopher had asked Mr McWeeney about the significance of the 532s, although he did so in somewhat cryptic terms ["He accepted that 532 could be anywhere 532 is shown on the map"]). That map showed 532 at various streets along which the relevant vehicle had travelled. These did not include Middle Town Road which was the road were the appellant had placed the blue ring (towards the east end) indicating the gaming club which he said he had left when he made the call. But that spot lay within what was a rectangle of roads where 532 appeared to the north, east, and south. There was thus no direct evidence that if the appellant was where he said he was his phone would have connected with channel 532. Nor was Mr McWeeny asked in terms about whether channel 532 would be the channel that responded if the appellant was in the Middle Town Area, But, in view of the proximity of Middle Town Road to roads were 532 did appear on page 78 the jury might well think that that would be so. In the light of Mr McWeeny's evidence it would seem that it was equally possible that the appellant was either at Parson's Road/Deepdale or where he said he was when he made the call.

160. The revised directions were grudging. The defence case was initially expressed to be "*despite all the expert evidence*"; and then to be "*despite the record saying Prospect Mast*", although that was corrected to "*or even if it says the Prospect Mast***".** But this was then followed by a reference to the fact that the phone will pick up the strongest signal, which was opaque, and potentially misleading, in the absence of any evidence that the place where the appellant said that he was served by another mast whose signal strength was higher, and where the evidence of Mr McWeeney was that, in respect of the areas where they drove round they were trying to give, as they did on 78 of the Record ,"*a generic picture of the strongest server*" [83]. In re-examination he appeared to be saying that was certainly the case where 532 appeared.

161. The place where the appellant was when he made the call at **21:51** was not, in fact, determinative of guilt or innocence. The murder was at around **21:40**. If the appellant committed it, he could still have been where he said he was 10 minutes later. However, if he was at or in the vicinity of the murder scene when he made the call at **21:51**, which call lasted 83 seconds, it is very difficult to see how he could have got to Angle Street by **21:53** even if he was driven.

GROUNDS: 16 – 17 GUN SHOT RESIDUE EVIDENCE

162. The appellant contends that the judge inaccurately recited the evidence of the Defence Gunshot Residue expert (Angela Shaw) and unfairly criticised her evidence during his summation. She gave evidence about the possibility of transfer of GSR or its components to the appellant's hands from PC Young who was at the murder scene on **3rd November** and who arrested the appellant the next day with PC Minton Gilbert in the North Apartment. PC Young's evidence was that he was wearing gloves and pulled the appellant out from under the clothing by his forearms and put him face down and then put his hands in handcuffs behind his back. PC Gilbert said that he placed his hand on the back of the appellant's head.

163. In her questioning of the witness Ms Mulligan summarised the officer's evidence (that he went home on **3rd November**, took off his clothes and had a bath, and returned to work the next day in civilian clothes and put on ERT uniform and later that afternoon was at the scene where he arrested the appellant), and asked about the likelihood that he would be carrying GSR from the scene back to his home. The witness said that if the officer had come into direct contact at the scene with anything that had been exposed to the discharge of shots his person or his shoes could become contaminated with GSR which he could transfer to his vehicle and onward when he arrived home, depending on the amount of residue that was there to begin with. If he went back to work the next day the chance of contamination of the fresh clothing would depend on how much he was contaminated with and how much was there to pass on. She said that if he was walking through a scene where shots had been fired his boots could pick up gunshot residue, if he came into direct contact with where the residue had been deposited, or he could touch something and his hands become contaminated, and he could then transfer particles if he touched his clothing or surfaces in the vehicle. She said that similar considerations would apply to DC Lawrence who had been at the scene and was present in the apartment when the jeans and handkerchief were seized, depending on what she did at the scene and where she walks.

164. She also spoke of the possibility of contamination of officers' kit as a result of firing in the firing range (where she understood that officers fired hundreds of rounds of ammunition – which in cross-examination she accepted was based on procedures in the UK and was speculation [130]) and contamination from police vehicles with subsequent contamination of the officer's home and potentially his own vehicle. She referred to a recent study of the Cayman Island Police Force which found gunshot residue on officers in the Police Station and on the outside of cells. She expressed the view that the likelihood was high that PC Young had transferred GSR to Mr Tucker's hands when he took him by his by his elbows or upper arms and then handcuffed him. She said that any physical contact between the officers and the suspect could result in a transfer of gunshot residue. The handcuffs themselves might be contaminated as well. GSR might be transferred to the appellant's sneakers if officers Gilbert and Young who attended the North apartment had their footwear contaminated when they entered and there was contact between the appellant's feet and the officers. They could have transferred residue to the floor area and if someone else walked back through that same area it could be transferred to them. She also expressed the view that DC Blair, who seized the clothing but did not exchange his gloves between each item, could perhaps transfer particles from one piece of clothing to another.

165. The witness accepted in cross-examination that if the evidence was that no armed officers entered the South Apartment (Ms Mulligan objecting that the relevant log book was missing) they could not have transferred GSR. Her report had assumed that armed officers had searched every room at the address. She was referred to the evidence of PC Young that he last discharged his firearm in **July 2017**, that his firearm was then cleaned; that the clothing he trains in is washed separately, and that the vehicles used by firearms officers are regularly washed. His evidence was also to the effect that he did not go to the incline where the shots were fired, and that he never leaned on anything or touched anything. She accepted that if he did not walk through where the shots were fired and had no contact with the victim she would not have expected him to pick up residue at the scene. In the course of her evidence she indicated that if clothing is worn continuously GSR could remain for up to 24 hours and if the clothing was put down undisturbed it could be there indefinitely {110). GSR could remain on the hands for up to 4 hours [106] but it was possible to re-contaminate the hands. [The judge referred in his summing-up to the evidence of the Crown expert that GSR could remain on the hands for four to six hours but could stay longer depending on the level of activity of the person concerned: 136ff]. It was put to her that there was no evidence of physical contact between the officers and the sneakers [112] and she accepted that, in the absence of such evidence she would be speculating in suggesting transfer [114]. She was also cross examined about the unlikelihood, on the Crown's case, of contamination of the appellant's hands from PC Young.

166. At the end of her cross-examination she accepted that ultimately there was a population of gunshot residue on the appellant's hands, jeans, handkerchiefs and sneakers which could have got there through transfer, or the fact that the wearer had discharged a firearm or was in the vicinity of someone who had done so and that you could not deem one of those situations more likely than the other with the exception, she said of the hands unless, in relation to the latter he was re-contaminated in the hand from contact with the clothing and the GSR particles thereon and the recontamination occurred within the four hour time period during which, she said, GSR would stay on the hands.

167. Her evidence, both in chief and cross-examination was summarised at some length in the summing up, during the course of which the judge explained how the Defence sought to rely upon it, as well as the Crown's response, in a manner which does not appear to us to be at all unfair.

168. The Crown suggested to Ms Shaw (page 95 of her evidence) that a passage in the Scientific Working Group for Gunshot Residue's Guide for Gunshot Residue Analysis ("the Guide"), of which group Ms Shaw was an affiliate member, contained a reference to a study indicating that police officers were very unlikely to be the source of gunshot residue contamination. The passage included the statement that *"…the research of others in this field shows that contamination from police officers' hands is unlikely, in fact, most officers when tested were found to have no particles on their hands. With the exception of a police officer who has recently fired his weapon, the few officers that do have particles on their hands are unlikely to transfer more than one or two particles to a subject that they have touched. One reason may be that they wash their hands more often than they touch their firearms""* Ms Shaw's immediate response was that the reference was to one study but she would need to see which study was referred to.

169. Later on in the course of her evidence, Mr Mahoney had secured a further copy of the Guide and showed it to the witness. She observed that the passage referred to was part of an example of an answer to be given by experts when giving testimony to the question "*How likely is it that law enforcement officers could be a source of contamination of GSR?"* and said that it was an opinion given at the time, not an actual study and that there had been studies since which demonstrated that armed police officers can be a source of residue. 117/8

170. Ms Mulligan addressed the question in re-examination when the witness said again that she thought that the passage shown to her was not the result of a study but sounded like an opinion given at the time and that since then further studies had been done (147).

171. The portion of the document put to Ms Shaw was contained in an appendix to the guide and was entitled "*Typical questions and example answers used in the examination of an expert witness in gunshot residue."*

172. In his summing up the judge said this [285]:

> *"Challenged with a GSR guideline of the Scientific Workshop Group, document page 77, penultimate paragraph, in which the study is referred to, stating yet an arresting officer's hand was hardly found and in a case one or two particles was, or were found,* ***she, you may think, didn't accept its finding and later asserted, in re-examination, it was based on questions asked and didn't name the conduct of the study.***
>
> *So, there she sounds a little bit like how the gait analyst sounded when he was challenged about studies. He said that was a student study. She said this one here is a question study."*

173. This passage was, Ms Mulligan submits, misleading. The passage relied on was not a study and the witness said that there had been later studies to a different effect.

174. The Crown submits that this point is bad. The Guide was put together by the leading experts in the field of gunshot residue analysis. The question put to the witness, of which complaint is now made, was based on the sample answers to possible questions which experts in the field may be asked in providing testimony in court. The sample answer is at page 77 of the Guide. No specific study was identified in the sample answer, but the passage quoted referred to "*the research of others in this field*" and an example of such a study, is listed in the bibliography at reference 89, page 97 of the Guide. An abstract of the study, to which we were referred, concludes with the observation that "*Although the potential for secondary transfer contamination from an arresting officer to a suspect exists, the low empirical numbers of GSR particles found on these non-shooting officers suggest that the potential for this occurrence is relatively low"*. The evidence was that PC Young had not used his weapon since July and PC Gilbert had last discharged a firearm at training on **27 October 2017**.

175. In any event the summing up by the judge, to which no objection in this respect was taken at the time, does not seem to us unfavourable to the defence. The passage quoted must have been

referring to some form of study ("*the research of others in this field*") and we have seen a reference in the Guide to one such study. We note also from the Preface that the document is said to have been the product of input from subcommittees within the group and that "*its intended use was as a comprehensive guide to the forensic laboratory practitioner, the legal community and academia*".

176. What the judge was effectively saying was that Ms Shaw initially disagreed with the finding contained in the passage put to her and then in re-examination said that what was being said was a response to question with no study identified. It would have been better if he had referred to her evidence that other studies had reached a different conclusion. But we cannot regard his failure to do so as imperilling the safety of the conviction, particularly when, as it seems to us, the critical question was what was the source of the GSR found on the clothing in the South Apartment, into which no armed officer entered.

177. Complaint is also made that the judge wrongly provided his own interpretation and explanation of the Gunshot Residue evidence – suggesting to the jury that perhaps only a small number of three component particles characteristic of gunshot residue (barium, lead and antimony) would be created when a firearm was discharged and that that that might explain the small number of such particles found on the appellant and his clothing when in fact no such evidence was ever given by either the Crown's expert or the Defence expert.

> *"I think this is an important factor, because you have heard in the address it's suggested that when a firearm is discharged you get thousands of particles come from it. So, you might think from that they were saying that thousands of GSR, three component particles come from the firearm when it does that. There's no evidence to say that. There's no evidence to say that. Thousands of particles come from the firearm it may be, but there's no evidence that says that thousands have been fused together to form that three-component particle. So, you might think there's something about that three-component particle that makes it special.*
>
> *In other words, the way I understand the evidence is, not at all times do all these particles fuse. The particles fuse as they hit the atmosphere, having come from the heat, and get in the cold, the cold cools them down, and if they're close enough, when flying about, some of them will fuse. Some don't. That's why you get three-component particles, you get two-component particles and you may even get one-component particles. Right? You may also get some particles that don't have any of them elements at all. All right? So that's a factor that you will take into account. And since they are moving around and so easy to dissipate and different kinds like that, that might assist to explain to you why, in some cases like this, you might only six or twelve or so of those particular particles that they're looking for, those three-components or two-components."*[5]

178. This, the appellant contends, amounted to expert testimony from the judge since neither expert had spoken to the reasons why there may not be very many 3 component particles located. This was,

[5] Summation, Transcript pages 134 – 135

it is submitted, a grave error as they jury would have thought the Judge was summing up the evidence at this trial but in fact was giving them his own explanation for a weakness in the Crown's GSR evidence.

179. We do not agree. There was in fact, as the judge said, no evidence that thousands of 3-component particles come from a firearm when it is fired. Ms Helsel explained how gas will exit the firearm during discharge in the form of a gaseous cloud and then different elements will start to cool down and condense together and produce thousands of particles, including three, two and one component particles. But she did not say, nor was it suggested to her, that thousands of three component particles would be formed.

UNFAIR AND UNBALANCED SUMMATION/INVITATION TO SPECULATE

180. Ms Mulligan contends that the effect of the summation was that the jury were being invited to speculate in an unacceptable way. The first way in which that was done was in relation to the Crown's case that Mr Outerbridge took the appellant to the Deepdale /Parson's Road area, and the eventual scene of the murder on a bike so as to arrive there at **20:23:56**. The CCTV footage and the phone data revealed the following sequence of times (which may not be accurate to the last second):

20:21:49	The appellant walks into the Elliot Street parking lot
20.23.02	Outerbridge gets on a motorbike and drives on to Elliot Street in a westerly direction
20.23.29	Outerbridge rides the bike in an easterly direction on Angle Street across Court Street
20.23.56	Appellant phones in a call which is picked up by the Eve's Hill Mast Cell ID 22331

181. Mr McWeeney explained that page 69 of the Record of Appeal shows the expected coverage area for the cells from four masts (Eve's Hill, Cumberland, Seon Place and Prospect) [35]. The colour pink shows the areas where a telephone will pick up a signal from Eve's Hill mast Cell ID 22331. There is a very small area to the east of the scene of the murder and in or near the area of the peach house ("the pink area"). His evidence was that the area shown in pink to the east of Eve's Hill "*with a couple of small dots across the map*" is showing the locations where Eve's Hill is the strongest server, and that that server was "*the one that your phone will connect to after it pings"*. The small dots include the pink area. In that pink area you would, he said, actually get served by the Eve's Hill mast: pages 56-62. It is in the pink area that the prosecution say that the appellant was when he made the phone call at **20:23:56**. (The appellant said that he was in the Curving Avenue area) The same map shows areas where three other masts will give the strongest signal.

182. It appears that, because of a lack of synchronisation between CCTV and telephone times, it is necessary to add at least 13 seconds to the police CCTV time in order to synchronise it with the telephone time. If you add 13 seconds to **20:21:49** you get **20:22:02**. That would mean that it took the appellant about **1 minute 54 seconds** to get to the pink area, which was possible on a bike. The suggestion initially made at trial was that the appellant was driven there by Mr Outerbridge. That this was the prosecution case was stated by the judge on more than one occasion in the summing up: pages [99], [115], [117] [250] [296][311]. In the passage at [115] he said that the prosecution

case was that *"the whole enterprise was an arrangement between Outerbridge and the Defendan*t". At [250] the judge said that the prosecution was saying that Outerbridge had been travelling at speed and that that it did not take long to get to Deepdale on a bike. At [296] he said that it appeared to him that Outerbridge "flashed across the road" but that it was for the jury to make their own assessment of that. In fact, it could not have been Outerbridge, who does not cross Court Street going east until **20:23:29**. He could not have taken the appellant to the area where the **20:23:56** phone call was made in the 27 seconds available (assuming that you do not add the 13 seconds to the **20:23:29**): a point the appellant made when he was being cross-examined [220]

183. However, it could have been someone else who drove the appellant there. As both Mr Mahoney and Ms Mulligan informed us, the Crown came to accept that it could not have been Outerbridge who took him and what Mr Mahoney submitted to the jury was that, if it was not Outerbridge, it was someone else. This was not put in terms to the appellant. What had been suggested to him was that Outerbridge picked him up in front to a shop called Fish N' Tings in Angle Street [170] or by Union Street [217]. More importantly the judge on several occasions characterised the prosecution case as being that the appellant was driven to the Deepdale/Parson's Road scene by Outerbridge on his bike.

184. In his evidence the appellant said that earlier in the day he had been to Deepdale from Court Street on a bike, and he believed it took just about two minutes [168]; and it is apparent from the timing referred to at paragraph 7 above, that it could be done in less than two minutes. The appellant's case was that he made the **20:23:56** call from the place in Curving Avenue when he went to pick up his stash. The judge set out the rival contentions as to where the call was made from at page 297 of the summing up and included, as one of his "strings" at page 311, that it was the prosecution case that Outerbridge picked the appellant up and the two of them travelled to where they knew the victim was i.e. the Parson's Road/Deepdale area. He did not refer to the possibility that it was someone else who picked him up.

New directions in relation to Outerbridge

185. In an addition to his summing up, made as a result of counsel's concerns, at 330-1 the judge included specific details of the times, which the defence relied on as showing that the appellant cannot have travelled with Outerbridge, although, initially, he took a time of **20:23:49**, not **20:23:29**. This reduced the time from when Outerbridge rode across Angle Street until the time of the **23:56** telephone call to 7 seconds (as the judge pointed out). However, when setting out the prosecution response to the point, namely that you have to add 13 seconds, he added the 13 seconds to the **20:23:56**, i.e. the time of the telephone call, when it should be added to the CCTV time, and subtracted 20:23:29 (sic) from that, making, he said, 28 + 13 = **41 seconds**. If you add the 13 seconds to the CCTV time, that would make the difference between the time when Outerbridge rode off east, and the time when the call was made **14 seconds** (**20:23:56** – **20:23:42** [**20.23.29** + 0.13]), which would plainly be insufficient to enable Outerbridge to get to the pink area by **20:23:56**.

186. The jury thus had before them the defence contention that Outerbridge could not have taken the appellant to Deepdale/Parsons Road , and figures (albeit inaccurately stated) that showed that that was, it would seem to us, in reality, impossible in the 41 seconds, which was what the judge said

applied, according to the prosecution. The judge had at an earlier stage invited the jury to use their experience and knowledge to determine how close Deepdale was [99]. On the correct figures it was plainly impossible. But the judge left it to the jury to find that Outerbridge drove the appellant to Parson's Road/Deepdale, which would seem to be what the prosecution was suggesting that they could find, by putting forward the addition of the 13 seconds.

187. In view of the evidence of Mr McWeeney the jury would have been entitled to find that, by whatever means of locomotion, the appellant was, when he made the phone call, in the pink area and not at what was said to be his stash house in Curving Avenue. The phone call connected to the Eve's Hill Mast. On the assumption, to which the expert evidence attests, that the phone will pick up the strongest signal, the pink area appears to be the only realistic candidate for where he was in order to respond to a call from that mast; and the evidence does not suggest that he would have picked up an Eve's Hill Mast signal when at Curving Avenue. Page 78 of the Record indicates that the probable serving mast in that area was the Prospect Mast, the very point that was relied on by the defence in support of the contention that the **21:53** call was made from near the gambling establishment in Middle Town Road. That the appellant had access to bikes was apparent. He arrived at Court Street at **17:41** as a driver on a bike with Justin Cameron as a passenger. He left later on a bike ridden by Judah Roberts and he went home that night on a bike ridden by Martin Tucker. But it is apparent that Outerbridge was not the person who drove the appellant to the scene.

188. A further example of what is said to be a wholly speculative suggestion is the prosecution case that the appellant made an 83 seconds all at **21:51.08** from somewhere close to the murder site and was then seen crossing from Angle Street to Court Street at about **21:53**, which, it is suggested, was an implausibly short period of time. The prosecution say that he could have made part of the journey on a bike and only ran at the end of his journey to Court Street. Moreover there was evidence from Nasim Maynard of seeing at about **21:15:20** two very suspicious looking people dressed all in black with black full face helmets riding slowly on Happy Valley approaching the One-Way Deepdale junction, where it looked like they stopped and looked down One-Way Deepdale (he said that you can see all the way down to the building where Marion Steed and others were); and then pulled right off and rode towards Montpellier on Happy Valley Road. This, the Crown submits, showed that the appellant may have had back up support. That evidence does not establish that the people whom Maynard saw were assisting the appellant: but it was plainly possible that they or someone else was doing so.

189. It is unfortunate that the judge, until he made the observations set out in paragraph 156 above, seemed to regard it as established by the scientific evidence that when the call was made the appellant must have been close to the murder scene, a proposition which might, itself, seem somewhat unlikely. In fact, the evidence showed, and what was put to the appellant in cross-examination, was that he was, after the shooting, in the "vicinity to the extent that the Prospect Mast could pick you up". The area where the Prospect Mast could pick him up was an area which extended significantly to the west. The judge said [346] that he understood the prosecution case to be that the appellant was "*in the area of Parson's/Deepdale at that time, likely heading back towards Court Street".* There is, however, a distinction between being in the area served by the Prospect Mast and being in the area of Parson's/Deepdale. It would have been possible to get from the murder scene to the crossing between Angle Street and Court Street in less than 2 minutes on a bike (although that does not appear to have been specifically suggested to the appellant),

although, as we have said, doubtful that that could or would be done if the appellant was making an 83 second telephone call, and a fortiori from somewhere further to the west. .

190. The most significant element of speculation was, it is said, in relation to the appellant's clothing. When the appellant arrived at Court Street, he was wearing the distinctive Adidas kit. When he returned, he had that kit, sans the jacket. But Man X does not appear to have any white striped Adidas pants nor the distinctive white stripe along the base of the shoes. The Crown's position was that at some stage the appellant got from somewhere the blue jeans that were found at his home and put them on over the Adidas pants; and changed into the shoes that he was wearing when arrested. He must also have got a helmet at some stage since Man X had one). But, it is said, there was no evidence that the appellant was carrying, or had access to, a change of clothing or that he had access to, or wore, the blue jeans with the elastic band which were found in his bedroom and had GSR particles on them. In addition, if the case against him was well founded, he would have to have taken off the blue jeans, got rid of the jacket and changed his shoes. He would also have to have retrieved from wherever they had been left the blue jeans and the shoes – the incriminating articles - and taken them or get them home.

191. The appellant was, indeed, cross-examined to that effect (14/230-233). It was, as we have said, suggested to him that after the shooting at **21:40** he was "*in the vicinity to the extent that the Prospect mast could pick [him] up"* for up to 10 minutes, during which time he could take off the slip off jeans, change his sneakers, get rid of the jacket and discard the helmet. In the course of that cross examination the appellant said that his Adidas pants were in fact in his hamper. It was, therefore, suggested that the police did not find them because they just removed what was on the bed. PC Blair's evidence was that he did not conduct any extensive search in drawers. He knew what he was looking for was male clothing and simply seized all the clothing that was obvious to him.

192. All this was, Ms Mulligan submits, speculation upon speculation. The danger of such speculation and of gaps being filled by inferences which were not obvious was the basis of the decision in *R v Saltus* [2019] Bda LR 20. None of the clothing which the appellant clearly wore that night could be identified as being worn by Man X/the shooter. There was no evidence that the appellant had access on the night to the blue jeans or the black sneakers which he is said to have used for the shooting; or that he had some form of bag; there was no evidence that he effected any change of clothing or shoes; or of the retrieval by him or somebody else of the blue jeans and the shoes so that the shoes were on him and the jeans were in the South apartment when the police came the next day. GSR particles or components were found on his clothing, and the appellant could not say how they got there, but such evidence, at best, signifies, she submits, either that the person in question has fired a gun, or was near to someone who did so, or picked it up somewhere, which could be expected from someone who was a drug dealer.

193. No firearm was ever found which was connected to the appellant. The red scarf in his room with his DNA on it was not seen on him, or being worn by the shooter on any of the CCTV images and no witness testified to seeing a red scarf. None of the Adidas kit worn by the appellant could be identified as worn by Man X. Enough could be seen of the footage of Man X to conclude that none of the clothing he was wearing was the same as the clothing worn by the appellant. He did not appear to be wearing jeans that were blue (although they were dark).

194. The appellant submits that, rather than disabuse the jury's minds of these speculative theories and point to the facts in evidence, the judge adopted them and made attempts to explain away the obvious difficulties for the Crown, even suggesting his own theories and speculations that had not been offered up by the Prosecution, such as the Appellant wearing his jacket or pants inside out to explain away the discrepancies in the appearance of Man X and the appearance of the Appellant only minutes after the **21:51** call in a different location:

> "*Next think the Police stop there, you got the coat, and it full of something. Because you may consider, given these types of clothes, whether the coat was indeed the coat that the -- Man X had on, might be the coat -- if it had -- the Defendant, that the Defendant was wearing anyhow, all the time, maybe turned inside-out. It's the dark or black coat, white stripes on front. In your experience you know people to make these kind of things with the pattern outside and inside? Or the inside might be different, maybe lined, have a lining. These are all matters you might consider.*
>
> *And what about the pants? They could turn inside-outside? You can put something up, or down? I don't know. These are all matters which the Defence would say, if you were considering that, you may be speculating, or being asked to be drawn into speculation. And which the Prosecution would be entitled to say, No, those are reasonable inferences you could draw. Turn them in, turn them out. Get rid of. Get rid of. Get rid of the coat, that's closer to the firearm, so it might have the particles on it, when the pants is all the way down there, that might not have any.*
>
> *So the Prosecution is entitled to say he made a mistake, because, as the Prosecution said to you, there are no perfect crimes. These are all matters that you may consider. These are not my opinions. You don't have to be bound by anything that I say. I'm just putting to you the issues so that you might consider them properly, both for the Crown and for the Defence. That is my duty.*
>
> *So the Prosecution is saying, this Defendant had to get rid of that coat, the gun, shoes, change, and all of that, in order to assist to cover up his enterprise. And the Defence disagrees."*[6]

195. The judge went on to suggest to the jury that there may be something significant about the fact that the police did not locate the pants or white bottomed sneakers that the appellant wore on **3rd November 2017**, despite the fact, Ms Mulligan observes, that the officer who seized the clothing from the bed indicated he did not know what he was looking for and he just seized these items. He did not search for the pants or sneakers because he was unaware of them. The trial judge did call the jury back to address this fact, but failed to point to that evidence and tell the jury they should draw nothing from that fact.

196. In his summation the trial judge said this to the jury:

[6] Summation, Transcript, pages 253 to 254

> *Do you find it significant why the pants with those distinctive white marks and/or those white-bottom sneakers were not found, or produced, and is why -- and, if why... And is your answer to that as significant as your answer to the disappeared jacket?"* [7]

197. When he called the jury back to deal with the objection by the Appellant's counsel, he told them:

> *Now, two last ones. The Adidas clothing. I told you that the Prosecution is saying, in this case, or entitled to say, that there is something significant about the disappearance -- is the word I might have used, but let me use a different word -- the absence of the Adidas after this event. No Adidas jacket, no Adidas pants. No Adidas sneakers, but sneakers with the white thing round it, round the sole. So the Prosecution's case is, having got the jacket away first, because that was closer to the gun, so you would expect particles to be on it, so he got rid of that, and that was very identifiable, got rid of that. [Indiscernible] smart by walking back in the pants only, with the white Adidas pants, but then you never saw that again later, and the sneakers were out missing somewhere. And they are saying that that helps to point to his guilt. So once he got home, or wherever, I think the inference the Prosecutor is asking is that he got rid of that too, the pants, the other pants, all right? The Adidas. And that sense to assist to point to cover on his part from being identified as the assailant in this case.*
>
> *The Defence is saying, Hey, not so quick. The Adidas pants. We know the jacket went early, that I know. But the Adidas pants, for example, might have been right there, in that room with the rest of the things, at South -- at South Apartment. The Police didn't search, and it could have been there, and they didn't pick it up. '**Cause it might be that they didn't even know what they were looking for. So they just took up what they found on the bed, but they had other stuff round there that they could have looked**, and if they'd done a proper search, rather than a sloppy search, they might have found the other stuff, which might have assisted in excluding the Defendant as a suspect in this case, or as a perpetrator in this case. So those are all matters that you can take into account. Are they major enough, or are they just minor? Do they assist you one way or the other? All of those things."* [8]

198. Ms Mulligan submits that this approach was misplaced. It was not the defence saying that the police might not have known what they were looking for and might have just taken the clothing off the bed without doing a proper search. That was the evidence of PC Blair who conducted the search and the jury should have been told in the circumstances that to draw any conclusion from the fact that the clothing worn on **3rd November 2018** was not found or produced would be wrong. It is not quite accurate to say that DC Blair said that he did not know what he was looking for: all he knew was that he was looking for male clothing; and he did not carry out any search of substance other than to pick up the material on the bed. The essential point which at this juncture the defence was making, was that all that the police did was take up what they found on the bed, rather than

[7] Summation, Transcript, pages 262 - 263
[8] Summation, Transcript, pages 335 – 336

make any greater search so that it could well be that the Adidas pants were there to be found; and that point was put by the judge before the jury.

199. We do not accept that the judge was inviting or allowing the jury to speculate in an unacceptable manner. His suggestion that the appellant may have changed his Adidas kit inside out was, we would accept, a suggestion of his own, not put to the appellant, although it was one that the jury might wish to consider, and the suggestion that he turned the pants round did not fit with the prosecution case that the appellant pulled the jeans over his trousers.

200. But there was a body of evidence from which the jury was entitled, if they accepted it, and the Crown's suggestions as to what the footage showed, to be satisfied that it was the appellant who shot the victim. This included:

(a) the journey of the appellant at around **20:22** to the Parsons Road/Deepdale junction close to the house where the victim was, which the jury could conclude, was for the purpose of scouting out the position in preparation for the murder. and the return later in that direction;

(b) the fact that after he left Court Street a second time he was not seen again until after the killing;

(c) the activities of Man X at Deepdale;

(d) the similarity of gait between Man X and the appellant as described by Mr Francis;

(e) the unlikelihood of the appellant, having collected his drugs, spending time at a gambling club (when he said he did not even gamble) rather than going to Court Street to sell them;

(f) the appellant's return to Court Street in Adidas pants but without the jacket on what he described as a *"nippy*" night in November; using his tee shirt to wipe his face and sweating; which the prosecution said was the result of the chase that he gave to the victim and his escape back to Court Street; and the implausibility of the appellant's statement that it never occurred to him to go back and get his jacket

(g) what the jury might think was the implausibility of his having left his Adidas jacket in a gambling establishment on a cool evening in November;

(h) the telephone call of the appellant at **21:51** (wherever exactly he was when he made it) and the four firing gestures made by someone in a group with a chequered shirt (the appellant is shown on the footage talking to a man in a chequered shirt at **18:21**) close to the recipient of the call, four being the number of the shots that appear to have been fired;

(i) the fact that members of the group on Court Street were looking, or looked towards, Angle Street when the appellant appeared from it;

(j) the fist bumping on the appellant's return to Court Street with a group which included Judah Roberts and Ronniko Burchall;

(k) the fact that when he returned the appellant engaged in looking over his shoulder and back towards Parson's Road when walking south down Court Street; together with other movements on Court Street such as turning from north to south on the approach of a vehicle with flashing lights which the prosecution suggested reflected his anxiety;

(l) the unlikelihood that the appellant, who said he did not really worry about the CCTV cameras, having just got fresh supplies of crack, would abandon selling at a prime time and place i.e. Friday evening on Court Street and go home at around **22:00**, if he had nothing to do with the murder – the prosecution suggestion being that he had gone home to escape and probably to clean up some more;

(m) the departure of Ronniko Burchall from Court Street at **21:54** in car driven by Judah Roberts and the fact that he was seen by Jason Trott, a police officer at the murder scene sometime after **21:50**, which, the prosecution suggested, indicated that the appellant reported the shooting to Ronniko who went off to the murder scene;

(n) the circuitous route which the appellant said that he took to get home via Corkscrew Hill and then over Trimingham Hill , South Shore and Ord Road (instead of going straight down Court Street or King Street,), an illogical route involving a steep hill and a hairpin bend and which must have taken more than the five minutes he said it took; the jury could have concluded that this was connected with the retrieval of what he was wearing at the time of the shooting;

(o) the falsity of the appellant's evidence that after he returned to Court Street, he went home, taken by Marcus Tucker, and got there at about 22:30 and stayed there [183], when the cell site evidence (see page 94 of the Record) showed that he made a number of calls after 21:51 and up to 00:26 which were picked up by a number of different masts;

(p) the fact that the appellant hid from the police, covering himself up under a pile of unfolded laundry, in the room where he was arrested;

(q) the sizeable quantity of full GSR particles found on his hands, jeans, sneakers and handkerchief seized on **4th November 2017** for which the appellant had no explanation. Of particular significance were the full GSR particles found on the jeans and sneakers in the South Apartment, to which, the evidence was, armed officers did not enter. Further it was well open to the jury to accept that PC Young was unlikely to have picked up GSR which contaminated the appellant's hands.

201. The time scale of events was such that the appellant could have committed the murder at **21:40** and got back to Court Street at **21:53**. If he was not on a bike at this stage and if he was at the Deepdale/ Parson Road junction at **21:51**, when he made an 83 seconds call, he could not have done so but (a) he was not necessarily at that junction at **21:51** and (b) he may well have had access to a bike. He had been on other people's bikes that evening. But, even if he was on a bike it seems unlikely that he would get to Court Street at **21:53** if he started an 83 second call at **21:51**,

202. The Crown's case was that he put the blue jeans on top of his Adidas pants and that he left the blue jeans somewhere before he returned to Court Street and that somehow they got back to the South Apartment; and that after he left Court Street he changed shoes so that he was wearing the black sneakers, which he had had on when he was arrested at the North apartment, when the murder took place; and then changed back into the Adidas shoes before his return to Court Street. All this was put to him. It was put to him that after the shooting he was in the vicinity *"to the extent that the Prospect Mast could pick you up"* for up to 10 minutes, which, it was suggested, was more than sufficient time to change his clothing and his sneakers and discard a helmet .

203. The appellant's evidence, if accepted, or if the jury thought it might be true would mean that a conclusion of guilt was not justified. There were potential answers to the points made against him. Ms Mulligan put some of them before us. The appellant may have had a sweaty appearance but, in one clip Troy Huey who is seen walking behind him had a glow on his forehead also. The suggestion that Troy Huey, whom the appellant rang at **21:51** conveyed something to the man in a check shirt who made the four imitation firings was, she suggested, not apparent. Further it was possible that it was Ronniko Burchall who gave the information to the man in the check shirt. Fist bumping is no more than a common means of greeting. Whilst the appellant could not explain the presence of GSR particles on the items found at his flat, he could hardly be expected to do so.

204. As we say, we do not regard the judge's summing up as encouraging or permitting speculation. At pages 309 he summed up the strings of the prosecution case, including several of the matters set out in paragraph [199] above.

205. String 6 was the suggestion that the only inference to draw, according to the prosecution, was that Outerbridge picked up the appellant and the two travelled to where he knew that Morlan Steede was. String 11 was that the cell site analysis evidence certainly placed the appellant in the area **at the time of the shooting** (sic) and that the jury should reject his assertion that the call was made from Curving Avenue after he left the gaming house.

206. It was no doubt the content of string 6 and string 11 which led to the requests to the judge to correct his summing up to which we refer above.

207. He then summarised the defence case that the prosecution case was "*a rope of speculation*". In particular it was speculation that the appellant left on a bike with Outerbridge; there was no evidence of what his conversations with Outerbridge may have been; his evidence was that the contentious call was made from Curving Avenue near his stash and the cell site analysis supported it. The appellant had said things about himself (his dealing in crack and jail history) that he did not have to, and should have credit for that. The gait evidence was unreliable; did not exclude others who had a similar walk; was based on questionable science; was not tested by "error evidence" and was subject to manipulation and cognitive bias. The night was not so cold that he could not have forgotten his coat in the gambling house; he was walking briskly from a hot gambling house so it was no wonder that he was sweating. He had simply forgotten his conversations with Outerbridge and readily accepted that he had them when they were illustrated by the video. He hid in the North apartment because he had been recently released from prison and did not want to go back again. The GSR could have got there by police contamination. No gun was found. No test was made of the victim to see if there was GSR for comparison. In effect the judge put fairly and

squarely before the jury the defence case that it was the prosecution who were engaging in speculation. He had given them a direction not to speculate at the beginning of his summing up [66] and had, on a number of occasions during it, observed that the defence said that the prosecution was inviting them to speculate.

UNREASONABLE AND UNSAFE VERDICT

208. The appellant submits that the verdict was simply unsafe. This was a case where no motive was alleged; there were no eyewitnesses to it; the whereabouts of the appellant at the time of the murder were unknown. Even the cell evidence suggested at most that he could have been at the area of the murder scene 10 minutes after it happened or he could have been where he said he was. The gunshot residue evidence, given the admitted lifestyle of the appellant as a drug dealer and potential contamination by officers who attended both the murder scene the night before and the residence where he was arrested added little other than to say that he could have fired a weapon, been close to someone who did or that the GSR particles could have been introduced to the environment by the officer. In order to convict the appellant, the jury would have to have engaged in a series of guesses and speculative leaps. The verdicts are accordingly unsafe.

209. Although we are satisfied that the judge was not inviting the jury to indulge in unacceptable speculation and that there was undoubtedly evidence upon which it was open to the jury to convict the appellant, we have concerns as to the safety of the conviction on three main bases.

210. First, the evidence of the gait expert was of obvious importance. But he never gave evidence by reference to continuous side-by-side footage. As we have already said it seems to us (a) that this sort of material should not have been sprung on the defence and (b) that it would have been appropriate to give the jury a warning of the nature suggested in [135] above. We do not, however, regard that as affecting the safety of the conviction or amounting to a miscarriage of justice. The jury were well aware that this was not an exercise that Mr Francis had carried out (as the judge said); and Mr Francis had spoken of the dangers of cognitive bias, to which the judge referred. When the jury asked to see the footage again, they were not shown it, and saw the footage of Man X and the appellant separately. Further we do not think that there was any real danger that the jury would convict on the basis of this evidence alone.

211. The second is the manner in which the judge dealt with the suggestion that Outerbridge gave the appellant a lift on his bike to Parson's Road/Deepdale. As we have said, it is apparent that he cannot have done so. But the judge consistently recorded that as the case for the prosecution, and only at a very late stage referred to some figures (inaccurate as it happened) which indicated that that was impossible. He did not spell out the fact that, even on what he took to be the correct figures the prosecution case did not work (and, a fortiori, on the correct ones) and that, if the appellant was taken to Parson's Road/Deepdale it must have been by someone else. On the contrary he left it open to the jury to decide that the appellant was driven by Outerbridge to Parson's Road/Deepdale.

212. This might be thought not to matter too much but for the fact that the prosecution placed some store by the fact that it was Outerbridge who took him, because of the connection of the latter to One Shop Variety and because it was part of the prosecution case that the two of them were in

league for the purposes of the later murder. The judge recorded that the prosecution was (they might think) saying that this was an enterprise probably/perhaps carried out for Outerbridge or that Outerbridge might have been the supplier of the equipment to carry it out [247].

213. The third is the manner in which the judge dealt with the cell phone evidence, which he persisted in saying showed that the appellant was at Parson's Road/Deepdale at **21:51**. Further, in the course of his summing up the judge said that the cell site evidence *"certainly [placed] him in the area **at the time of the shooting***", which it did not. A little later he said that "*The second call was made off the Prospect Tower, somewhere Deepdale/Parson's area, after the killing, likely to report his success*". We presume that the judge said that the cell site evidence placed the appellant in the area at the time of the shooting on the basis that the cell site evidence placed him in the area 10 minutes after the shooting, although the conclusion does not follow from the premise. We assume that the jury realised that there was no cell site evidence that related to the exact time of the shooting but the suggestion that the cell site evidence (in relation to a call at **21:51**) showed that the appellant was at the murder scene at **21:40** was dependent on his having been there or close to there at **21:51**.

214. In the end the judge indicated that it was the defence case that the cell phone evidence was consistent with the appellant having been at or near the gambling club when he made the call. But the manner in which he did so suggested initially that this was contrary to the expert evidence, which it was not, and, even in the judge's final formulation, introduced a qualification about phones responding to the strongest signal, which was inapposite in the absence of any evidence that there was some stronger signal to which a phone would relate if the call was from where the appellant said that he was, and which appeared to be put forward as an indication that the defence contention was ill founded.

215. As we have observed, it can be said that it does not matter how the appellant got to where he did at **20:23:56** or who drove him there. But the Crown had been making the case that he was driven there by Outerbridge, who was said to have a pivotal role in the murder. The Crown, we are told, drew back from that case, but the judge persisted with it. There seems to us to be a real danger that, in the light of his summing up, and the judge's persistent enthusiasm for the Crown's original case, the jury thought that it was open to them to conclude that the appellant had, indeed, been taken to the scene by Outerbridge, his supposed accomplice, or the person behind the murder, and that that was a route, or part of a route, to a guilty verdict.

216. As to the call at **21:51** it was not critical to the prosecution case that it was made from the Parson's Road/Deepdale area i.e. the murder scene; and if it was made from there and lasted for 83 seconds, it is very difficult to see how the appellant could get back to Court Street nearly two minutes later even if on a bike. But that was what the prosecution had been saying. Nor is it easy to see why the appellant should, after a murder at **21:40** want to remain at the murder scene, especially if he had already changed his clothes and hidden the gun. If the appellant was where he said that he was at **21:51** i.e at or near the gambling house, he could have got there, or to the place where he stashed his cocaine, in the ten minutes from the time of the murder at **21:40** and would not need to have done so on a bike. And he could have carried out any change of clothes during the interval.

217. But the place where he was when he made the **21:51** call was not without importance because, if he was in the Parson's Road/Deepdale area, he would not have been where he said that he was;

and the jury might conclude from that that he was simply not telling the truth about what had occurred. It may be that, in the light of the unlikelihood of the appellant getting from Parson's Road/Deepdale between **21:51** and **21:53** that the jury would have proceeded on the basis that the appellant cannot have been there, or near there, at the time of the call. But we cannot be sure that that is so.

CONCLUSION

218. In short, it seems to us that the failure of the judge to point out that Outerbridge could not have conveyed the appellant to the pink area so as to arrive by **20:23:56**; together with his treatment of the cell site evidence compromised the fairness of the trial and amounted to a substantial miscarriage of justice. In effect he left it open to the jury to conclude that he had been taken to the murder scene by the person the Crown said was an instigator or an accomplice; and to conclude that the cell site evidence, at worst, indicated that he was at the scene of the shooting when it happened, and, in any event, that he cannot have been where he said he was when he made the **21:51** call. The form of the summing up had the potential to undermine the central point of the appellant's defence which was, in essence, that the closest he got to the scene of the crime was the place where he stored his drugs/the gambling den; and that it was there that he was when he made the **21:51** call. Although there was a strong case against the appellant, we are not satisfied that if the summing up had not contained these errors the jury would inevitably have convicted.

219. Accordingly, we shall allow the appeal and set aside the conviction; and order that there shall be a new trial.

KAY JA:

220. I have read my Lord President's judgment in draft and I agree that the appeal should be allowed.

BELL JA:

221. I also agree.

APPENDIX 1

LATE DISCLOSURE RELIED ON AND THE CROWN'S RESPONSE

NOAE4 served on 15th May 2019

a. **Statement of PC Lewis dated 18th March,2019-**

Essentially the same as a statement dated 14th March 2019 served on Appellant on 18th March, 2019, and dealt with identification of Appellant on Court Street CCTV which was conceded by Appellant during the evidence of DC Sabean.

b. **Statement of PS Gilbert dated 13th May,2019**

Addressed the last time he, as a member of the Emergency Response Team, discharged his firearm and the steps taken after each use to minimise forensic contamination; relevant because he was one of those who arrested the appellant.

c. **Statement of DC Blair dated 14th May, 2019**,

This indicated that he seized a black jacket, when other items of clothing were seized, which was not mentioned in first statement but mentioned in a search report served on the Appellant from 2018. He was an arresting officer.

d. **Statement of Sean Patterson dated 6th May, 2019**

This exhibited a map of relevant areas provided by Senior Land Surveyor; which map was admitted into evidence by agreement.

e. **Statement of Barry Francis dated 14th May, 2019** –

This was a statement in, essentially, the same terms as Mr Francis' original Report.

f. **Photo album prepared by DC Jewel Hayward**

This came from a disc of photographs and contact sheets served on the Appellant on the 21st June, 2018.

21st May 2019

a. **Statement of Inspector Stableford dated 16th May, 2019.**

This indicated that he created a single video file from the several CCTV files already served on the Appellant on the 21st June and 4th July, 2018, respectively;

b. **Statement of Victoria Holden** and photographs of Court Street and environs.

These were taken on the 17th May, 2019, in the presence and on the instructions of DC Sabean through whom the album was admitted into evidence; the only thing different about the area from the time of the incident was the name and sign of a business in the vicinity;

c. Still photographs placed into an album taken from CCTV that Mr. Francis included in his report and intended to rely on in his evidence; Statement of DC DeSilva dated 20th May, 2019, in respect of his 911 calls made in respect of the murder on the date of the murder retrieved and downloaded onto a disc on the 16th May, 2019.

d. There was no amended report of Mr. Francis included in this NOAE as inaccurately claimed by the Appellant.

NOAE 7 (served on the 22nd May, 2019)

a. Statement of Patricia Simmons dated 21st May, 2019, to establish that a Crown witness in respect of continuity, Michelle Perinchief, was off island;

b. Statement and disc of Loryn Bell, police analyst, incorrectly dated 15th March, 2019, relevant to audio files downloaded from the Appellant's phone on or about May 2019.

23rd May 2019 Notes of Mr. Barry Francis

a. A copy of Mr. Francis' notes was served on the Appellant on the 17th August, 2018. Counsel for the Appellant was in possession of same as she cross-examined Mr. Francis and requested to see the original notes.

27th May 2019

a. The entire working file, lab notes, and computer-generated DNA test results that the Prosecution expert was testifying about in Court that very day. This was part of the application to declare a mistrial which is addressed in the body of the judgment.

b. Statement of cell site expert John McWeeney dated 23rd May, 2019, correcting an error on his statement dated the 11th May, 2018, re Lusher Lane (Cell ID 21421) which had no impact on his conclusions. This correction was not an issue at the trial. This witness gave evidence on the 27th May, 2019

28th May 2019

a. Five photographs retrieved from Kiari Tucker's phone – no statement provided

b. Seven photographs taken by retired Insp Redfern within the past week from the area of the shooting – no statement included from him

c. Copy of the Crime Scene Logbook from the area of the Shooting, showing that the Firearms Officer who arrested Kiari Tucker (PC Young) was at the scene of the shooting i.e. where the body was, and also one of the search officers (DC Lawrence) was present at the scene of the shooting

Items a and b were the subject of the application to declare a mistrial. Item c was the subject of ground 3.