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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 NUMBERS 2014: No. 025; 2010: No. 013; 2018: No. 004

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date:

Before:

SIR CHRISTOPHER CLARKE, PRESIDENT
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL ANTHONY SMELLIE

- -

Between:

LEVECK ROBERTS

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

QUINCY BRANGMAN

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

KHYRI SMITH-WILLIAMS

Applicant

- v -

HER MAJESTY THE QUEEN

Respondent

Ms. Victoria Greening of Resolution Chambers for Appellant Roberts

Mr. Mark Pettingill of Chancery Legal Ltd. for Appellant Brangman

Mr. Jerome Lynch, QC and Ms. Sara-Ann Tucker of Trott & Duncan Ltd. for Appellant Smith-Williams

Mr. Carrington Mahoney and Ms. Karen King-Deane, Office of the Director for Public Prosecutions for the Respondent

Hearing date(s): 9, 10, 17, 18 & 19 March 2021

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APPROVED JUDGMENT

CLARKE, P:

1. On 24 August 2020, in the case of *Jahmico Trott v DPP and AG of Bermuda* [2020] SC (Bda) 35 Civ, in which counsel for the DPP had stood down 10 jurors, all of whom appeared to be of Afro-Caribbean descent and 9 of whom were male (Trott was an Afro-Caribbean male) the Chief Justice determined that section 519 (2) of the Criminal Code Act 1907 ("the Code"), as it then stood, was inconsistent with the fundamental right to a fair trial laid down in the Bermuda Constitution ("the Constitution"). That section gave markedly greater rights to the Crown to stand by potential jurors than it gave to the accused(s) to make a peremptory challenge.

2. In the final paragraphs of his judgment in *Trott* the Chief Justice said this:

> "*Conclusion*
>
> *59. Having regard to the reasons set out above, I am satisfied that the disparity between the accused person's and the Crown's right to challenge jurors gives rise to a real possibility that the jury may be biased in favour of the Crown. Such a state of affairs offends the appearance of impartiality on the part of the jury which is an essential element of the fundamental right to a fair hearing by an independent and impartial tribunal guaranteed by section 6 (1) of the Bermuda Constitution. It follows that the provisions of section 519 (2) of the Code are inconsistent with the fundamental right to a fair trial established by section 6 (1).*
>
> *60. I am also satisfied that the extreme disparity created in the jury selection process also results in the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown, and results in a breach of the right to a fair trial under article 6 of ECHR and the right to a fair trial established by section 6 (1) of the Constitution.*

> *61. It was for these reasons that following the hearing on 17 July 2020, the Court declared that section 519 (2) of the Criminal Code is inoperative to the extent that it allows for a disparity between the amount of standbys afforded to the Crown, and challenges without cause afforded to the accused person.*"

The declaration was suspended pending the passing of legislation.

3. In the course of his judgment the Chief Justice said this:

> *"35 `In previous cases it has been argued that even if there is an appearance of bias on part of the court, it does not necessarily follow that the accused person did not receive a fair trial. In* ***Tyson,*** *the Crown suggested that (a) it was necessary for the accused person to demonstrate that there was actual bias on the part of the jury, and (b) that when the trial was looked at as a whole, in relation to overall fairness, the appellant suffered no injustice. I agree with the decision and reasoning of Gonsalves JA (Ag), that the appearance of bias on the part of the jury (and therefore the court) is in itself sufficient to demonstrate a breach of an accused person's fundamental right to a fair hearing by an impartial court, and constitutes a breach of section 6 (1) of the Constitution".*
>
> *...*
>
> *39 In conclusion, it is my view that section 519 (2) of the Code is so heavily weighted in favour of the Crown, that a fair-minded and informed observer would conclude that there was a real possibility that a jury, selected by the exercise of the Crown's right to stand-by, was biased in favour of the Crown. It follows that this conclusion necessarily means that the accused person is denied a hearing by an independent and impartial court and is sufficient to establish a breach of section 6 (1) of the Constitution. It also follows that the provisions of section 519 (2) of the Code can no longer be operative as they are inconsistent with the fundamental right established by section 6 (1) of the Bermuda Constitution."*

4. In *Tyson* [2018] 5 LRC 270 the Appellant had been convicted of murder and sentenced to a term of life imprisonment without possibility of parole. At the trial the Crown had stood by 21 potential jurors when the defendant's right to challenge without cause was limited to 3. The accused appealed (within time) and included in ground 1 of his appeal the contention, not advanced at the trial, that the trial was unfair because of the disparity between the standbys allowed to the Crown compared with those allowed to the defence.

5. The Eastern Caribbean Supreme Court allowed the appeal, set the conviction aside and remitted it for retrial. Gonsalves JA, giving the judgment of the Court said [93]:

> *"I do believe that a fair-minded observer, knowledgeable of the pertinent aspects of the criminal trial system and particularly the operations of the jury selection process, would perceive a real possibility of bias in favour of the Crown in the potential application of section 27(b).*

I am of the opinion that section 27(b) is unconstitutional. Due to the extreme disparity it creates in the jury selection process, it permits the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown. Further, apart from simply infringing the principle of equality of arms as a fair trial component, I am also of the opinion that section 27(b) infringes the substantive fundamental right to a fair trial by an impartial court. I do believe that the perception of bias in the jury selection process would contaminate and lead to a real perception of bias in relation to the trial itself. The two would be inextricably linked.

Having found that section 27(b) is unconstitutional because of the disparity that it provides for, it is still necessary to consider how that provision was utilized by the Crown in relation to the Appellant's case. In this case, the Crown stood by 21 potential jurors without ascribing any cause. I am of the opinion that a fair minded and informed observer would conclude that there was a real possibility of bias in the actual jury selection process of this trial and consequently in the performance of the jury and the trial itself. I do believe that a fair minded and informed observer would ask what possible reason could there be for standing by 21 potential jurors, no cause being assigned, other than the Crown seeking, on whatever grounds, to empanel a jury sympathetic to its case. This must not be interpreted as suggesting that this is in fact what happened - we are here concerned with perception. In this case, the accused's constitutional right to a fair trial by an impartial court was infringed."

The original section 519 provisions

6. The original section 519 provisions were as follows:

"Challenge of jurors

519 (1) An accused person arraigned on an indictment for any indictable offence may effectively challenge without cause-

(a) if he is charged with an offence punishable with death, not more than five persons; or

(b) in any other case, not more than three persons, drawn to serve as jurors in connection with his trial.

(2) The Crown may apply that a person drawn to serve as a juror shall stand by until such time as his name is called a second time, and in such case the court shall order the juror concerned to stand by and shall order the proper officer of the Supreme Court to draw from and call upon the remaining names of the jurors in the panel.

(3) Where the panel of jurors available to serve at the trial is exhausted before a jury can be empanelled and sworn the names of the jurors who have been ordered to stand by upon the application of the Crown shall be called a second time in the order in which they were first drawn, and as each name is called , unless the Crown can effectively challenge a juror for cause in accordance with subsection (4) the juror whose name has been called a second time shall (subject to an effective challenge by the accused person) serve on the jury at the trial.

(4) Without prejudice to subsection (3), the Crown or the accused person may effectively challenge for cause any person drawn to serve as a juror in connection with the trial on the ground-

(a) that the person is not qualified by law to serve as a juror; or

(b) that the juror is not or may not be indifferent as between the Crown and the accused person.

(5) Any challenge to a juror for cause shall be tried by the court before whom the accused person is to be tried."

7. As is apparent from those provisions, an accused person had a right of peremptory challenge of three potential jurors, except in a case where the offence was punishable with death where his right extended to five. Both the Crown and the accused person had a right to challenge any potential juror for cause on the grounds specified in subsection (4). Any such challenge should be tried by the court of trial. In other words, the decision should be that of the trial judge. In addition, the Crown had a right of standing jurors by without specifying any reason. Although that right was said in *Trott* to be limited to 36 jurors it is in fact unlimited. The figure of 36 appears in section 13 of the Jurors Act 1971 ("the Jurors Act") as the number of jurors to be selected by the Registrar to constitute the panel from which jurors are to be selected, with another 36 jurors to comprise stand-by jurors. We were given to understand that in practice the number of jurors listed by the Registrar could be more than 36, although not necessarily as many as 72, and that they would be treated as a single panel, which the Court would go through in sequence in order to create a jury and alternates.

8. If a juror[1] was stood by and, as a result, a jury could not be empanelled by the time all the names in the list were exhausted first time round, the jurors who had been ordered to stand by would be called again, in the order in which they were stood by, and, in the absence of an effective challenge by either the Crown or the accused, or the juror being otherwise excused, the juror in question would serve on the jury.

9. Section 15 of the Jurors Act provides as follows:

"Court may excuse persons

[1] I refer here and hereafter to a potential juror. I have left out "potential" in subsequent references.

> *15 (1) If any person who has been duly summoned for jury service, or who has attended for jury service, or who has been informed that he has been selected and returned for jury service, shows to the Supreme Court, or to a Judge, that there is good reason why he should be excused from attending to perform all or any part of such jury service, it shall be lawful for the Court, or as the case may be, the judge, to excuse that person from so attending."*

10. In addition, there is, as the Chief Justice accepted, a residual discretion in the trial judge to exclude a juror: see *Blackstone's Criminal Practice* 2019 D 13.36-37.

The bundle of rights

11. It is important to distinguish between a number of different rights. There is (a) the right of peremptory challenge by an accused person in respect of three persons; (b) the right of the Crown to stand by a juror; (c) the right of the Crown and the accused to challenge for cause; and (d) the right of the judge to excuse a potential juror from sitting for good reason, or pursuant to his residual discretion. As we shall see, in the present cases it was on occasion not wholly clear whether the Crown was purporting to stand a juror by (particularly when the phrase "stand down" was used – which appears often to have been used by the Crown as synonymous with "stand by") and whether, when those who had been stood by were recalled, the juror was successfully challenged for cause, or excused under the Juries Act, or stood by (and, if so by whom).

12. If the Crown does not stand by more jurors than the accused is entitled peremptorily to challenge there can, as it seems to me, be no basis for claiming that there has been an unfair trial. Further, if the Crown exercises its rights of standby, that is not necessarily the end of the matter for the person stood by. When the list is gone through a second time, he or she may be called upon again, in which case he/she may be empanelled on the jury, or he/she may be successfully challenged for cause, or he/she may be excused. If any of those events takes place he/she will not, in the end, have been stood by. I would not regard the accused as able to say that a juror who in the event fell into one of these categories should count as a Crown standby or that there has been any unfairness because the juror was initially stood by.

13. As is apparent, under the law in force at the time of *Trott***,** there was an acute disparity between the position of the Crown and the accused in that, whilst the accused had a right of peremptory challenge in respect of three persons, the Crown had a far more extensive right to stand jurors by. It was this disparity which caused the Chief Justice to declare section 519 (2), in its then form, inoperative to the extent that he did. There was no appeal from his judgment. The Attorney General had not challenged the proceedings. She asked that the Court's declaration should be suspended, as it was, pending the passing of legislation.

The Criminal Code Amendment (No 2) Act 2020

14. After the judgement, the Legislature amended the section by the Criminal Code Amendment (No 2) Act ("the Amending Act"), which was passed on 24 July 2020 and came into force on 5 August

2020. The Amending Act repealed subsection 1 of section 519 of the Code and replaced it by the following:

> *"(1) An accused person arraigned on an indictment for any indictable offence, and the Crown in relation to each accused person, may each effectively challenge without cause—*
>
> *(a) if an offence is punishable with a mandatory life sentence of imprisonment, not more than five persons; or*
>
> *(b) in any other case, not more than three persons, drawn to serve as jurors in connection with the trial."*

15. The Amending Act also inserted the following subsection:

> *"(1A) Where both the Crown and an accused person agree that a person drawn to serve as a juror should be excused, it shall not be considered an effective challenge and the judge shall discharge such person from serving as a juror in connection with the trial."*

16. In addition, the Amending Act repealed subsections (2) and (3), and in subsection (4) deleted "*Without prejudice to subsection (3), the*" and substituted "*The"*.

17. Most importantly for present purposes section 5 of the Amending Act provided as follows:

> *"Saving*
>
> *5 (1) The method of the challenge of jurors under section 519 of the principal Act before the coming into operation of this Act is not invalidated by reason only of the amendment to section 519 of the principal Act.*
>
> *(2) Accordingly, no conviction shall be quashed solely on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant, or defendants together, were able to challenge without cause.*

18. This provision was not before the Chief Justice when he gave his judgment.

19. The result of the Amending Act was that, for the future, when there was a single accused, the Crown and the accused had a right to challenge 3 jurors without cause. If there was more than one accused, each accused had a right to challenge 3, and the Crown had a right to challenge a total of 3 times the number of accused persons. The right of standby on the part of the Crown was abolished. A juror could be discharged if both the accused and the Crown agreed or, on the application of either the Crown or the accused, could be challenged for cause. The provisions of the Jurors Act were unaffected.

20. In the three cases presently before us the defendants were convicted and appealed to this Court and their appeals were dismissed. Brangman was convicted of attempted murder and using a firearm during the commission of an indictable offence. He was sentenced to 15 years imprisonment for the offence of attempted murder and a consecutive sentence of 10 years imprisonment for the firearms offence. He was ordered to serve one half of his total sentence before he could be eligible for parole. On **17 November 2011** his appeal against conviction was dismissed by this Court. A subsequent appeal to the Privy Council was dismissed on 6 October 2015. On **4 April 2015** Roberts was convicted of premeditated murder and using a firearm to commit an indictable offence; and was sentenced to life imprisonment with 25 years to be served before consideration for parole. He appealed to this Court and his appeal against conviction was dismissed on 12 May 2017. On **16 October 2018** Smith-Williams was convicted of premeditated murder and using a firearm while committing that offence. His appeal against conviction was dismissed by this Court on 25 July 2019.

21. On **20 November 2020** this Court gave leave for the three appeals to be reopened in the light of the judgment in *Trott*. Having regard to the submissions of the parties it seems to me that a number of issues arise, which include the following:

(i) Does the principle of finality apply and does the Court have power to reopen an appeal? If so, what is the test which this Court should apply in deciding whether to re-open these appeals?

(ii) What, on its true construction, is the effect of section 5 of the Amending Act ("the saving provision")? How does it apply, if at all, to a case concluded before it was enacted in which there was a disparity between the number of standbys exercised by the Crown and the number of peremptory challenges afforded to the accused ("the relevant disparity")?

(iii) If, on its true construction, section 5 precludes reliance by the accused on a relevant disparity, is that inconsistent with the accused's constitutional rights?

(iv) Was section 5, if otherwise effective to preclude a challenge on the grounds of the relevant disparity, a breach of the separation of powers because it was a retrospective abrogation of rights directed specifically against defendants in particular criminal proceedings?

Finality

22. The need for finality in criminal (and other) litigation is plain and well established. If the accused has had his appeal determined and has failed to set aside either his conviction or sentence, the effect of setting either of them aside after a later second appeal, may wreak havoc with the administration of criminal justice and cause great injustice to victims and others. There is a strong public interest in not unravelling a series of past cases. Retrying a case years after the event may raise insuperable problems on account of the lapse of time, unavailability of witnesses, loss of exhibits and the like.

23. We have been taken through a number of authorities from different jurisdictions, which deal with the question as to the circumstances in which the Court will allow an appeal out of time, or allow

an earlier appeal to be re-opened, following a change in the law, and, in particular, in the light of a later decision that a law or practice is inconsistent with a Constitution or the European Convention of Human Rights ("HRC"), which applies to Bermuda (by a declaration of the United Kingdom under Article 63 thereof). Some of the cases are of very great length. I intend in the paragraphs that follow to attempt to distil the essence of them.

R v English Newfoundland Court of Appeal

24. In *R v English* 1993 CanLII 3373 (NL CA), the appellant was convicted by a jury in 1991, before the decision in *R v Bain***,** [1992] 1 S.C.R. 91, in which the Supreme Court of Canada, by a majority of 4 -3 held – on 23 January 1992 – that the Crown's practice of standing down potential jurors was contrary to the Canadian Charter of Rights and Freedoms. *R v Bain* was applied in the Eastern Caribbean Supreme Court in *Tyson*, and the latter case was relied on in *Trott***.** One of the grounds of appeal raised in *English* was that the jury selection process was unfair as the Crown was entitled to four peremptory challenges and 48 standbys while the defence was limited to 12 peremptory challenges.

25. In relation to this ground, Goodridge C.J.N, delivering the decision of the Newfoundland Court of Appeal, said at page 19:

> *"R. v. Bain*
>
> *Section 634(1) and (2) provides that, during the jury selection process, the Crown may stand up to 48 prospective jurors aside until all have been called.*
>
> *Defence counsel contended that this process is unfair. It pointed out that the Crown was entitled to four peremptory challenges and 48 stand-bys while the defence was limited to 12 peremptory challenges.*
>
> *Crown counsel in response to this argument, raised for the first time on appeal, referred to the decision of the Supreme Court of Canada in R. v. Perka (1984), 1984 CanLJl 23 (SCC), 14 CCC (3d) 385, 13 D.L.R.(4th) 1, [1984] 2 S.C.R. 232 (S.C.CJ. The court said, at p. 391, that a party cannot raise an entirely new argument which has not been raised below and in relation to which it might have been necessary to adduce evidence at trial.*
>
> *That may or may not be a valid answer to the argument by defence counsel because the Crown has not indicated what evidence, if any, it might have offered if the point had been raised at trial.*
>
> *However, the method of forming juries by the use of peremptory challenges, challenges for cause and Crown stand-bys has been in effect for many years.*
> *In Bain, supra, defence counsel at trial had objected to this procedure and successfully moved that each party be limited to four peremptory challenges and that the Crown be denied the power to stand by jurors.*

The Supreme Court of Canada held that the process of jury selection established in the Criminal Code was inconsistent with s. 11(d) of the Charter which provides that any person charged with an offence has the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. It declared, by a majority, that s. 634(1 and (2) was invalid but suspended the declaration for six months.

The jury selection process was not challenged by defence counsel at trial. The Bain decision was rendered after the trial took place. At the time of trial, the jury selection procedure had not been declared invalid and, in as much as four judges on a panel of seven of the Supreme Court of Canada in Bain suspended the declaration of invalidity for six months, the Bain decision cannot be applied retroactively in this case to upset the decision at trial.

Bain effectively removes as of the date of the decision the right of the Crown to 48 stand-bys. The decision is inapplicable to this case. "

R v English 1993 CanLII 3373 (NL CA) at page 19.

26. It is debatable whether *English* is in fact consistent with *Bain***.** In *Bain* the majority suspended the operation of its decision for six months but also said that its decision would apply to any case in which the provision had been challenged and proceedings relating thereto were still on foot. This seems to me to have been the position in *English***,** albeit that the relevant challenge was only made on appeal. That was also the position in *Wigman* [1987] 1 SCR 246, when the accused/appellant applied to raise a new issue in his extant appeal, following a decision of the Supreme Court which had modified the *mens rea* for attempted murder. He was held to be still in the system and not precluded from raising the point for the first time on appeal.

R v Sarson – Supreme Court of Canada

27. In *R v Sarson* [1996] 2 RCS 22, the Canadian Supreme Court had to consider the position where the accused had been convicted of the offence of constructive murder under section 213(d) of the Criminal Code, had pleaded to the lesser offence of second degree murder and eleven months later the Supreme Court had ruled the section 213(d) offence to be unconstitutional. The accused had sought *habeas corpus* relief to secure his release. In dismissing the appeal, the Supreme Court noted the importance of finality in criminal proceedings and relied on the principle of *res judicata*. The accused having exhausted his appeal rights was refused leave to appeal out of time. The appeal had come before the Supreme Court following an unsuccessful application for *habeas corpus*, the dismissal of which had been upheld by the Court of Appeal.

28. The Court stated the position in Canada to be that *'unless the accused is still "in the judicial system", an accused is unable to reopen his or her case and rely on subsequently decided judicial authorities, even where the provision under which the accused was convicted is subsequently declared constitutionally invalid*.' The Court applied the cases of *Wigman* and *R v Thomas* [1990] 1SCR 713. In the latter case the applicant was convicted of second degree murder in 1984. His

appeal was dismissed on the 27th January, 1987. On the 3rd December, 1987, the provision of the Criminal Code under which he was convicted was declared invalid in the case of *Vaillancourt*. His application for extension of time to appeal his conviction was refused as he was "*not in the judicial system".*

29. The Court then considered an alternative argument that, in the circumstances, the accused's incarceration without eligibility for parole for 15 years under a constitutionally infirm provision was a breach of the tenets of fundamental justice under section 7 of the Charter and that he was entitled to *habeas corpus* relief on that ground (as opposed to *habeas corpus* relief under the common law, to which he was not entitled). In rejecting this argument, the court relied on the 'overwhelming' evidence of the appellant's involvement in the death, which could have supported a conviction under a number of other provisions; that he pleaded guilty to the offence of second degree murder; and that his counsel agreed to the sentence of life imprisonment without parole for 15 years, which was higher than the minimum. The Court noted that, had the appellant not entered a plea, the prosecution may have called evidence to support a conviction under a different provision and on conviction the appellant would have received a greater sentence.

30. The position summarised in the previous paragraph is, it is submitted, clearly distinguishable from the present cases where the provision which offends the Constitution is not the offence, in circumstances where other offences may have been committed. It is a provision which goes to the selection of the tribunal, which goes to the heart of the right to a fair trial before an impartial tribunal.

R v Bestel – Court of Appeal of England & Wales

31. In the English case of *R v Bestel et al* [2014] 1WLR 457 the Court considered a number of earlier English authorities on granting an extension of time to appeal and on reopening appeals following a change of the law. In the course of his judgment Pitchford LJ referred to the decision of the English Court of Appeal in *Hawkins* [1997] I Cr App R 243 in the following terms:

> "13 *In Hawkins the court was considering the consequences upon other previously completed cases of a change in the interpretation of section 15 Theft Act 1968 by the House of Lords in Preddy [1996] 2 Cr App R 524. The applicant was seeking an extension of time of some 7 months in order to take advantage of the change in the law. The court refused the extension of time, concluding that on the facts there had been "no substantial injury to the applicant" because his admitted dishonesty would have permitted other charges under the 1968 Act and the Theft Act 1978. The court accepted the submissions made on behalf of the respondent, described by Lord Bingham at page 239 as follows:*
>
> > *"Counsel goes on to submit that a change in the law since the date of conviction or plea of guilty has not usually been regarded in the past as good reason for granting an extension of time in which to appeal. In support of that submission he has drawn our attention to Lesser [1940] 27 Cr App*

R 69, Ramsden [1972] Crim L R 547, Re Berkeley [1945] Ch 1 and Mitchell [1977] 65 Cr App R 185."

At page 240 Lord Bingham observed:

"That practice may on its face seem harsh. On the other hand, the consequences of any other rule are equally unattractive. It would mean that a defendant who had roundly and on advice accepted that he had acted dishonestly and fraudulently and pleaded guilty, or who had been found guilty and chosen not to appeal, could after the event seek to re-open the convictions. If such convictions were to be readily opened ***it would be difficult to know where to draw the line or how far to go back.***

Counsel on behalf of the applicant suggests that there is a readily available line of demarcation which would distinguish those serving sentences from those who had completed their sentences. That, however, would not in our judgment be an altogether satisfactory line of demarcation in the case of those who were serving sentences for other offences as well as for offences against (in this case) section 15(1).

It is plain, as we read the authorities, that there is ***no inflexible rule on this subject, but the general practice is plainly one which sets its face against the re-opening of convictions recorded in such circumstances. Counsel submits, and in our judgment submits correctly – that the practice of the court has in the past, in this and comparable situations, been to eschew undue technicality and ask whether any substantial injustice has been done.*** *In suggesting that that is and has been the practice reference has been made to McHugh [1977] 64 Cr App R 92, R v Ayres [1984] 78 Cr App R 232, [1984] AC 447, Pickford [1995] 1 Cr App R 420 and Molyneux & Farnborough [1981] 72 Cr App R 111."*

(Bold added in this and other citations)

32. Pitchford LJ then made reference to the statement of Hughes, LJ, as he then was, in *R v R* [2006] EWCA Crim 1974 in the following terms:

"At paragraph 30 [Hughes LJ] said:

"30. It is the very well established practice of this court, in a case where the conviction was entirely proper under the law as it stood at the time of trial, ***to grant leave to appeal against conviction out of time only where substantial injustice would otherwise be done to the defendant.*** *R v Lesser [1939] 27 Cr App R 69 is an early example of emphasis that absent special reasons an application out of time will not be allowed. ..." [emphasis added]*

At paragraph 35, Hughes LJ noted that in Kansal No 2 [2001] UKHL 62, [2002] 1 Cr App R 36 the House of Lords had recognised the practice of the Court of Appeal:

> *"...but, the particular construction of the Human Rights Act apart, it is clear from both the speeches that this court's practice to grant leave out of time only* ***where substantial injustice would otherwise be done*** *is recognised, and indeed endorsed."*

At paragraph 37 he concluded:

> *"37. We have no doubt that the practice is very fully established, endorsed by successive Lords Chief Justice, binding upon us and soundly based in justice."*

33. Pitchford LJ then said the following

> *"15. Hughes LJ's statement was approved by Sir Igor Judge P in Cottrell and Fletcher [2007] EWCA Crim 2016, [2007] 1 WLR 3262. At paragraph 46 the President said:*
>
> > *"In short, the principle is that the defendant seeking leave to appeal out of time is generally expected to point to something more than the mere fact that the criminal law has changed, or been corrected, or developed. If the appeal is effectively based on a change of law, and nothing else, but the conviction was properly returned at the time, after a fair trial, it is unlikely that a substantial injustice occurred".*
>
> *The tension created by individual and public interests was described by the President commencing at paragraph 42 as follows:*
>
> > *"42. These cases present issues of great sensitivity and latent tension. Those convicted on the basis of the old law assert that their convictions were based on an erroneous understanding of the criminal law and that they have therefore suffered an injustice. At the same time there is a continuing public imperative that so far as possible there should be finality and certainty in the administration of criminal justice. In reality, society can only operate on the basis that the courts administering the criminal justice system apply the law as it is. The law as it may later be declared or perceived to be is irrelevant. Change of law appeals create quite different problems to those which arise in the normal case where an individual is wrongly convicted on the basis of the law which applied at the date of conviction. These tensions are not confined to England and Wales.*
>
> > *43. The issue presented itself to the Supreme Court of Ireland in A v Governor of Arbour Hill Prison [2006] IESC 45. The facts were simple. In June 2004 A pleaded guilty and was convicted of unlawful carnal*

knowledge contrary to section 141 of the Criminal Law Act 1935. In May 2006, in CC v Ireland & Others the Supreme Court declared that section 1(1) was inconsistent with provisions of the Constitution of Ireland[2]*. A appealed against his conviction. The argument was simple. His conviction was null. It depended on a law which, because it was inconsistent with the Constitution, did not exist. The High Court agreed. The prosecution appealed. Murray CJ and the remaining members of the court conducted a comprehensive analysis of both common law and civil justice systems, which demonstrated the effective universality of the problem. He observed:*

> *"85...Absolute retroactivity based solely on the notion of an Act being void ab initio so as to render any previous final judicial decision null would lead the constitution to have dysfunctional effects in the administration of justice ... The application of such a principle ... in the field of criminal law would render null and of no effect final verdicts or decisions effected by an act which at the time had been presumed or acknowledged to be constitutional and otherwise had been fairly tried. Such unqualified retroactivity would be a denial of justice to the victims of crime and offend against fundamental and just interests of society".*
>
> *86 In addition to causing injustice it would undermine one of the fundamental objectives of the administration of justice, namely finality and certainty in judicial disputes ...*
>
> *87 In my view when an Act is declared unconstitutional a distinction must be made between the making of such a declaration and its retroactive effect on cases which have already been determined by the courts. This is necessary in the interests of legal certainty, the avoidance of injustice and the overriding interest of the common good in an ordered society".*[3]

Addressing the general principle, he observed:

> *"125. In a criminal prosecution where the state relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any ground which may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any*

[2] The section was declared unconstitutional because it precluded the defence being raised by a person charged under the relevant section to the effect that he had reasonable grounds for believing that the girl in question was over the age of consent to sexual intercourse. (The accused did not suggest that he had that belief). The relevant Act had been in force since before the Constitution and was, in effect, deemed void *ab initio* by reference to Article 50 of the Constitution by the declaration of the Court in *CC v Ireland*.

[3] I have added paragraphs 86 and 87 which are not cited by Pitchford LJ in the judgment.

subsequent ruling that the statute, or a provision, is unconstitutional. That is the general principle.

126.. I do not exclude … some extreme feature of an individual case, which might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice that the verdict be not allowed to stand…"

16. *The principle derived by the President from the reasoning in A v Governor of Arbour Hill Prison was endorsed by the Supreme Court in the Scottish appeal of Cadder v HM Advocate [2010] UKSC 43, [2010] 1 WLR 2601 at paragraphs 60 – 62 and 99 – 103. The Supreme Court applied to Scottish cases the decision of the ECtHR in Salduz v Turkey [2008] 49 EHRR 421 that denial of access to legal assistance in police custody amounted to a breach of the fair trial requirement under Article 6(1) in conjunction with Article 6(3)(c) ECHR. The Court considered the impact which its decision would have upon 'closed' cases. Lord Rodger cited with approval the statement of principle by Murray CJ in A v Governor of Arbour Hill Prison and continued:*

"102. Murray CJ's description of the effect of a decision which alters the law as previously understood can be applied to Scots law. For instance, in Smith v Lees 1997 JC 73 the Court of Five Judges overruled Stobo v HM Advocate 1994 JC 28 and thereby laid down a more restrictive test for corroboration in cases of sexual assault. The new test applied to the appellant's case and to other cases that were still live. But it could never have been suggested that the decision meant that convictions in completed cases, which had been obtained on the basis of the law as laid down in Stobo, were ipso facto undermined or invalidated. Similarly, in Thompson v Crowe 2000 JC 173, the Full Bench overruled Balloch v HM Advocate 1977 JC 23 and re-established the need to use the procedure of a trial within a trial when the admissibility of statements by the accused is in issue. But, again, this had no effect on the countless completed cases where convictions had been obtained on the basis of evidence of such statements by the accused which judges had admitted in evidence without going through that procedure. So, here, the Court's decision as to the implications of article 6(1) and (3)(c) of the Convention for the use of evidence of answers to police questioning has no direct effect on convictions in proceedings that have been completed. To hold otherwise would be to create uncertainty and, as Murray CJ rightly observes, cause widespread injustices. And the Strasbourg court has pointed out that the principle of legal certainty is necessarily inherent in the law of the European Convention: Marckx v Belgium (1979) 2 EHRR 330, 353, para 58. In the Irish case Geoghegan J said, [2006] 4 IR 88, 200, para 286, that he was "satisfied … that it would be wholly against good order if convictions and sentences which were deemed to be lawful at the time they were decided had to be reopened." I emphatically agree. And that policy is, of course, embodied in section 124

> *of the 1995 Act which makes interlocutors and sentences pronounced by the appeal court "final and conclusive and not subject to review by any court whatsoever", except in proceedings on a reference by the Scottish Criminal Cases Review Commission."*

Cadder – The Supreme Court of the United Kingdom

34. Other relevant paragraphs in the Supreme Court's judgment in *Cadder v HM Advocate* [2010] 1 WLR 2601 include the following from the judgment of Lord Hope:

> "*58. There are now a considerable number of dicta to the effect that the court has a general inherent power to limit the retrospective effect of its decisions: see, for example, In re Spectrum Plus Ltd [2005] UKHL 41, [2005] 2 AC 680; Ahmed v HM Treasury (no 2) [2010] UKSC 5, [2010] 2 WLR 378, para 17. The principle of legal certainty, which the Strasbourg court in Marckx v Belgium (1979) 2 EHRR 330, para 58, said was inherent in the Convention as in Community law, suggests that there would be no objection to this on Convention grounds. In that case the court dispensed the Belgian state from re-opening legal acts or situations that antedated the delivery of its judgment. It followed the same approach in Walden v Liechtenstein, application no 33916/96, 16 March 2000. The court said that it had also been accepted that, in view of the principle of legal certainty, a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period. Section 102 of the Scotland Act gives effect to that principle.*
>
> *59. Had it been open to us to do so I would have wished to exercise the inherent power in this case. But I have come to the conclusion that the statutory regime that applies to this case precludes our doing so. Furthermore, it would not be right to deny the appellant, and other appellants like him who have taken the point timeously, an appropriate remedy for breach of the Convention right. I would have felt less inhibited if the Grand Chamber had made it clear in Salduz that it was departing from its previous case law and that it was laying down a new principle. But, as I have already observed, there is no indication anywhere in its judgment that it was its intention to do so. Far from making a ruling that was not applicable to acts or situations that pre-dated its judgment, it ruled that the applicant's Convention rights were violated in 2001 when the relevant events took place.*
>
> *60. That is not to say that the principle of legal certainty has no application. On the contrary, I think that there are strong grounds for ruling today, on the basis of this principle and bearing in mind the fact that the Salduz objection could have been raised at any time after the right of challenge on Convention grounds became available, that the decision in this case does not permit the re-opening of closed cases. Cases which have not yet gone to trial, cases where the trial is still in progress and appeals that have been brought timeously (see section 100(3B) of the Scotland Act 1998, as amended by the Convention Rights Proceedings (Amendment) (Scotland) Act 2009 to which Lord Rodger refers in paras 105 and*

> *106) but have not yet been concluded will have to be dealt with on the basis that a person who is detained must have had access to an enrolled solicitor before being questioned by the police, unless in the particular circumstances of the case there were compelling reasons for restricting this right. As for the rest, I would apply Murray CJ's dictum that the retrospective effect of a judicial decision is excluded from cases that have been finally determined: A v The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88, para 36,*

Then, at paragraph 61, Lord Hope quoted paragraphs 125 and 126 of *Arbour Hill* (see [33] above) and added:

> *In para 127 [the Chief Justice] observed that the applicant, like all persons in his position, could have sought to prohibit prosecution on several grounds including that the section was inconsistent with the Constitution and that, not having done so, they were tried and either convicted or acquitted under due process of law. Once finality is reached in these circumstances, he said, the general principle should apply*
>
> *62 The same approach was recently adopted by the Court of Appeal in England in a case where the statute under which the appellants were convicted had not been notified as required by EU law: R v Budimir [2010] EWCA Crim 1486. Reference was made in that case to Marckx v Belgium and Walden v Liechtenstein, as well as to Murray CJ's observations in A v Governor of Arbour Hill Prison. In the light of these authorities I would hold that convictions that have become final because they were not appealed timeously, and appeals that have been finally disposed of by the High Court of Justiciary, must be treated as incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have access to a solicitor while he was detained prior to the police interview. The Scottish Criminal Cases Review Commission must make up its own mind, if it is asked to do so, as to whether it would be in the public interest for those cases to be referred to the High Court. It will be for the appeal court to decide what course it ought to take if a reference were to be made to it on those grounds by the Commission.*

35. Ms Greening contends that *Cadder* is not determinative. It preceded *Ruddock/Jogee* and *Johnson* (see [44] below); it applied the law of Scotland (where a CCRC existed); and Bermuda has a Constitution the effect of which is that the common law must be read down so as to accord with fundamental rights.

Arbour Hill – Supreme Court of Ireland

36. The Chief Justice of Ireland's judgment in the *Arbour Hill* case, referred to above, also contained the following paragraphs:

> *"36 Judicial decisions which set a precedent in law do have retrospective effect. First of all, the case which decides the point applies it retrospectively in the*

case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law, such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of judicial decision is excluded from cases already finally determined. This is the common law position.

37. Only a narrow approach based on absolute and abstract formalism could suggest that all previous cases should be capable of being reopened or relitigated (even if subject to a statute of limitations). If that absolute formalism was applied to the criminal law it would in principle suggest that every final verdict of a trial or decision of a court of appeal should be set aside or, where possible, retried in the light of subsequent decisions where such subsequent decision could be claimed to provide a potential advantage to a party in such a retrial. In principle both acquittals and convictions could be open to retrial. But one has only to pose the question to see the answer. No one has ever suggested that every time there is a judicial adjudication clarifying or interpreting the law in a particular manner which could have had some bearing on previous and finally decided cases, civil or criminal, that such cases be reopened or the decisions set aside.

38. It has not been suggested because no legal system comprehends such an absolute or complete retroactive effect of judicial decisions. To do so would render a legal system uncertain, incoherent and dysfunctional. Such consequences would cause widespread injustices."

….

"*122 In the light of the considerations outlined above, the judgements and dicta of this court to which I have referred, I am satisfied that the Constitution permits, if not requires, a distinction to be made between the declaration of invalidity of an act and the retrospective effects of such a declaration on previous and finally decided cases.*

123 There are transcendent constitutional reasons why a declaration of constitutional invalidity as regards a statute should not in principle have retrospective effect so as necessarily to render void cases previously and finally decided and determined by the courts, which reasons include the interests of the common good in an ordered society, legal certainty and the need to avoid the incoherence and injustice which would be brought to the system of justice envisaged by the Constitution if the approach argued for was adopted .

> *125 I am reinforced in that view by the fact that such a principled approach is consonant with the general principles of constitutional adjudication and interpretation in other legal systems generally but particularly in those where a judicial declaration of invalidity of a law also applies ab initio."*

R v Canto – Court of Appeal of Alberta

37. In *R v Canto* [2015] ABCA 306, Slatter J, in delivering the decision of the Court of Appeal of Alberta, refusing an extension of time for appealing, when the appellant said that he should have had "enhanced credit" for time spent in custody, following a later decision in *R v Summers*, said at paragraphs 22 to 24:

> "*22. The general rule is that once a judgment is entered, and the appeal period has expired, the decision is final. The doctrine of res judicata prevents the parties from re-litigating or collaterally attacking any of the issues that have been resolved: R. v. Sarson, /1996/ 2 S.C.R. 223 (S .C. C.) at paras. 34-5. The litigants are only allowed to challenge the judgment while they are "in the system", which means that an appeal has been launched, or the appeal period has not yet expired: R. v. Wigman, /1987/ 1 S.C.R. 246 (S.C.C.), at pp. 257-8; R. v. Thomas, /1990/ 1 S.C.R. 713 (S.C. C.) at. 716.*
>
> *23 An applicant who perceives he has missed a development in the law will rely on the sense of injustice that he feels because he might have received a lower sentence if he had chosen to appeal. In a system dedicated to the delivery of justice this is a tempting argument, but the need for finality is equally compelling. The law must balance the advantages of finality with the need to respond to clear miscarriages of justice. The Court always has a discretion to permit a late appeal, but should do so only when the principles reflected in cases like Cairns are respected. Permitting a late appeal whenever there might be some possible benefit to the appellant would undermine the competing principle of finality, and would reflect too open ended a test. The legal presumption is that after the expiry of the appeal period, the accused has no right of appeal. Exceptions to that presumption must be based on something beyond an open ended preference for "liberty" or 'fair process' which is a "wholly impractical dream": Wigman at para. 21. That approach amounts to a reversal of the presumption of finality, not a principled exception to it.*
>
> *24 The doctrine of finality is of equal importance to the Crown and the accused. An accused who has been acquitted cannot be tried again. After expiry of the appeal period, the Crown cannot seek to reopen an acquittal (or conviction on a lesser and included offence) based on a later change in evidentiary or substantive law. Nor could the Crown seek a harsher sentence based on later changes in sentencing law ....*

38. As is apparent from [26] in that case, if the test for whether a case can be reopened is whether the appellant is still within the system, these appellants left the system after their original appeals were dismissed. The Court there held that it was not possible to say that you were still in the system because you were in prison; and that someone who was seeking to appeal out of time was actually seeking leave to enter back into the system. It concluded:

> "*34 In summary, the principle of finality dictates that once the appeal period has expired the principle of res judicata limits reopening the decision based on changes in the law. At that stage, if no appeal is launched, the litigants are taken to have accepted the result. A litigant is not allowed to reopen the decision at a later date on the basis that "if only I had known", or "if only I had launched an appeal", that litigant would have been able to take advantage of different legal presumptions and interpretations. The court retains a residual discretion to allow late appeals, but an applicant who did not appeal during the original appeal period faces a heavy burden.*

R v Grant – Court of Appeal of Jamaica

39. The Crown submits that the public interest in maintaining the finality of litigation necessarily means that the Court of Appeal's power to reopen concluded litigation to enable a rehearing must be exercised with great caution and only in extremely rare circumstances. It relies on the following passage from paragraph [60] of the judgment of the Court of Appeal of Jamaica in *Steven Grant v R* [2018] JMCA 13, which passage followed a review of a number of English and other authorities. The Court set out a number of general principles, gleaned from the cases, relating to the power to relist or reopen an appeal and concluded:

> "[60] *The general principle, subject to the limited exceptional circumstances, is that an appellate court has no authority to review its own decision pronounced after a hearing inter-partes where the decision has passed into a judgment which is formally drawn up. This principle is one that is strictly enforced and is deviated from in limited exceptional circumstances only. The applicant must not only place himself in one of the limited exceptional* ***circumstances but the injustice which would be meted out to him, if his appeal is not reopened, must be so substantial as to far outweigh the public interest in the finality of litigation***".

A change in the law or fresh evidence was said not to be one of the exceptional circumstances sufficient for the appellate court to reopen the case [59]. The test laid down was not satisfied. The appellant had sought, in the event unsuccessfully, to re-open an appeal six years after his first appeal against the sentence that had been imposed on him because, as he claimed, the sentencing court had not given full credit for time spent in custody, as subsequent decisions of the Courts had held to be necessary, as well as other grounds.

40. In the course of its judgment the Court considered a number of cases (not all of which speak with the same voice) in which it had been held by courts in different jurisdictions that there was a power to rehear a case. One was a case such as *Yasain* [2015] 2 Cr.App R 393 [44] – see paragraph 62

and 63 below, where the English Court of Appeal had, on the basis of an erroneous transcript originally allowed set aside a conviction and sentence for kidnapping on the basis that the jury had never reached a verdict on that count, and set aside that decision when it was apparent that the jury had in fact returned a verdict of guilty on that count; or if the case had been determined on a false understanding as to some matters [46] – *R v Burrell*; or where the case had been decided against the appellant on a point on which he had, without personal fault, not been heard [53]; or if the interests of justice required the court's intervention [56]. It then set out [59] a series of general principles and set out a number of exceptional circumstances namely where (i) the appeal was decided on a point on which the applicant was not heard; (ii) grounds of appeal were argued but not determined by the court; (iii) the appeal was a procedural nullity. Although this was not said to be an exclusive list it was held that neither a change in the law nor fresh evidence would themselves be sufficient for the appellate court to re-open the case. The Court then summarised the general principle in the terms set out in the previous paragraph.

R v Ruddock and Jogee – Court of Appeal of England & Wales

41. At paragraph [101] of his judgment in *Grant***,** Edwards J, after reviewing the authorities on re-opening of concluded appeals, stated:

> *"The question of retrospection was marginally considered by the Privy Council in Ruddock v The Queen [2016) UKPC 7.* [Ruddock is sometimes more familiarly known as Jogee, the name of the first appellant]. *There, in its decision to overrule the case of Chan Wing-Sui v The Queen [1985) AC 168 and to restate the law on foresight and intent with respect to secondary parties, the Board considered the impact this change in the law might have on past convictions. It said that the effect of putting the law right was not to render invalid all convictions which were arrived at over many years by faithfully applying the law, as it was laid down in Chan Wing-Sui v The Queen. It also held that where convictions had been arrived at by faithfully applying the law as it stood at the time, it could only be set aside by seeking 'exceptional' leave to appeal to the Court of Appeal out of time. The Board at paragraph 100 observed further that:*
>
> *"100. The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in Chan Wing-Siu and in Powell and English. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction. [4]Moreover, where a conviction has been arrived at by faithfully applying the law as it stood the time, it can be set aside only by seeking exceptional leave to appeal to the Court of Appeal out of time. That Court has power to grant such leave,* ***and may do so if substantial injustice be demonstrated****, but it will not do so simply because the law applied has now been declared to have been mistaken. This principle has been consistently applied for many years. Nor is refusal of leave limited to cases where the defendant could, if the true position in law had been*

[4] The first two sentences are not quoted by Edwards J and have been added.

> *appreciated, have been charged with a different offence. An example is Ramsden [1972) Crim LR 54 7, where a defendant who had been convicted of dangerous driving, before Gosney (1971) 55 Cr App R 502 had held that fault was a necessary ingredient of the offence, was refused leave to appeal out of time after the latter decision had been published. The court observed that alarming consequences would flow from permitting the general re-opening of old cases on the ground that a decision of a court of authority had removed a widely held misconception as to the prior state of the law on which the conviction which it was sought to appeal had been based....Likewise in Mitchell (1977) 65 Cr App R 185, 189, Geoffrey Lane LJ re-stated the principle thus:*
>
> *'It should be clearly understood, and this court wants to make it even more abundantly clear, that the fact that there has been an apparent change in the law or, to put it more precisely, that previous misconceptions about the meaning of a statute have been put right, does not afford a proper ground for allowing an extension of time in which to appeal against conviction'."*

42. In *Mitchell* Lane, LJ (as he then was) also said this:

> *"If we were to refuse him the extension of time in which to appeal against conviction, we should be keeping him in prison, so to speak, when we as a Court were convinced that he had not committed an offence. That again is not an attractive proposition, and it is one from which this Court resiles. This seems to us therefore to be the very rare case where the Court should exercise its undoubted discretion to allow the extension of time and grant leave to appeal against conviction. We wish to make it clear, however, that this is not to be taken as an invitation to all and sundry who have been convicted of this type of offence to present applications to this Court for leave to appeal out of time, because they will not be greeted with very much enthusiasm."*

43. In *Jogee* the Supreme Court decided that the conviction of Jogee for murder should be quashed; and invited submissions on whether to order a retrial or substitute a verdict of manslaughter. In the appeal of *Ruddock***,** the Crown accepted that his conviction for murder should be allowed if, as the Board concluded, the *Chan Wing Sui* principle was wrong, and the Board invited submissions as to the advice that it should tender to Her Majesty.

R v Johnson – Court of Appeal of England & Wales

44. In *R v Johnson* (post *Jogee* appeals) [2016] EWCA Crim 1613, the English Court of Appeal observed that in some cases the courts have an inherent power to limit the retrospective nature of its decisions, referring to *Cadder v HM Advocate* [2010] UKSC 43, [2010] 1 WLR 2601 and the cases there cited at [58], [61] and [100] to [103], It observed that , in that case, the decision generally to allow those being questioned access to legal advice was specifically limited when applying the law of Scotland by the principle of legal certainty, such that it was made clear that cases which had been finally determined, without such access having been granted should not be re-opened. But, it added, in *Jogee* the Court did not go that far.

45. The Court of Appeal adopted the principles in *Jogee.* It made clear [13] that the position stated in *Jogee* had been repeated and emphasised in recent decisions, notably *Hawkins, Cottrell and Fletcher* and *R v R.* At [18] it made plain that the mere fact that there had been a change in the law brought about by correcting a wrong turning was insufficient. If a person was properly convicted on the law as it then stood, the court would not grant leave without it being demonstrated that **a substantial injustice** would otherwise be done:

> "*The need to establish substantial injustice results from the wider public interest in legal certainty and the finality of decisions made in accordance with the then clearly established law. The requirement takes into account the requirement in a common law system for a court to be able to alter or correct the law upon which a large number of cases have been determined without the consequence that each of those cases can be re-opened. It also takes into account the interests of the victim (or the victim's family), particularly* in *cases where death has resulted and closure is particularly important."*

46. At [19] it referred to the approval of the Supreme Court in *Jogee* to the approach taken by the Court of Appeal in *Cottrell* whilst adding a reference to paragraph 44 of that decision which said:

> "*This decision of the [Irish] Supreme Court* [in Arbour Hill] *was based on the constitutional arrangements which apply in Ireland. Accordingly, the analogy with change of law cases in this country is not complete. That said the decision provides valuable illumination of the need to emphasize that appeals against conviction in change of law cases involve significant social and public law considerations which go well beyond a narrow focus of an individual conviction."*

47. In *Arbour Hill* Denham J had explained (paragraphs [170] – [180] that over the years the Court had developed constitutional principles and presumptions relevant to the exercise of the power of judicial review contained in the Constitution. No principle of retrospective application of a declaration of unconstitutionality had been developed. Such declarations had been limited to the parties, or identified litigants, and were prospective. The Court rejected the contention that because the relevant offence had been declared unconstitutional, the appellant's conviction and sentence were null and of no effect. I would observe that at [28] of his judgment Murray CJ observed that the appellant did not and could not complain of any inherent constitutional injustice or unfairness in the process by which he was convicted.

48. At [200] in *Johnson* the Court observed that the requirement of a substantial injustice was a high threshold. At [21] it said that;

> *"In determining whether that high threshold has been met, the court will primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference. If crime A is a crime of violence which the jury concluded must have involved the use of a weapon so that the inference of participation with an intention to cause really serious harm is strong, that is likely to be very difficult. At the other end of the spectrum, if crime A is a*

> *different crime, not involving intended violence or use of force, it may well be easier to demonstrate substantial injustice. The court will also have regard to other matters including whether the applicant was guilty of other, though less serious, criminal conduct. It is not, however, in our view, material to consider the length of time that has elapsed. If there was a substantial injustice, it is irrelevant whether that injustice occurred a short time or a long time ago. It is and remains an injustice".*

49. At [23] the Court said:

> *"If exceptional leave is granted, the court will then, and only then, consider the question as to whether in the light of the direction given to the jury the conviction is unsafe. It was submitted by Mr Moloney QC that the observations of Hughes LJ at paragraph 40 of R v R and others [2006] EWCA Crim 1974, [2007] 1 Cr App R 10 in respect of the practice to be followed in applications for leave to appeal after the reinterpretation of a statute by the House of Lords in R v Saik meant that the consideration of substantial injustice should begin with the primary consideration of whether the conviction should now be regarded as unsafe. It is clear from what Hughes LJ said and from the authorities cited, that the task of the court is first to determine whether* ***there may have been a substantial injustice which involves the wider considerations to which we have referred. Having said that, if the threshold required to justify exceptional leave to appeal is reached, it is likely to be difficult to conclude that the conviction remains safe.****"*

50. The criterion of "*substantial injustice*" is not the same as determining whether the conviction is unsafe. It involves additional considerations. That that is so is apparent from the fact that the Court of Appeal in *Johnson* held that if there had been a substantial injustice, it was likely to be difficult to conclude that the conviction was safe and from the decision of the English Court of Appeal in *Ordu* [2017] EWCA Civ 4, where the court said at [26]:

> *"It is obvious that the substantial injustice test…involves considerations additional to the safety of the conviction, in other words it requires the applicant to demonstrate more than that his conviction is unsafe. This is clear from Johnson at [23]."*

51. The appellants submit that we are bound to apply the test laid down in *Ruddock/Jogee***.**

R v Chouan – The Court of Appeal for Ontario and the Canadian Supreme Court

52. In *R v Chouan* [2020] ONCA 40 the Canadian Courts were concerned with whether the abolition of a peremptory right of challenge by the accused in respect of 20 jurors was contrary to the Constitution. The Court of Appeal for Ontario held that the abolition of peremptory challenges was not constitutionally flawed as impairing a right to a fair hearing before an independent and impartial tribunal; since an observer, fully informed of the safeguards in place to secure an impartial jury and the in-trial mechanisms in place to ensure that that remained so would not conclude that, absent peremptory challenges, a jury would not likely decide the case fairly [92].

But it also decided that the abolition only operated prospectively i.e. to cases where the accused's rights to trial by judge and jury vested on and after the date when the amendment came into effect [210]. The Supreme Court has now allowed the appeal and has decided, by a majority, that the change was both constitutional and purely procedural and therefore had retrospective application; and has restored the conviction.

Power to reopen appeals

53. Any consideration as to whether there is some form of exception to the principle of finality assumes that this Court has power to hear a fresh appeal at all.

54. The jurisdiction of this Court is set out in section 17 of the Court of Appeal Act 1964 in the following terms. There is a general right of appeal of an accused:

> "(*a*) *against his conviction in the Supreme Court, or in any other case, against the decision of the Supreme Court, upon any ground of appeal involving a question of law alone; and*
>
> *(b) with the leave of the Court of Appeal or upon the certificate of the Supreme Court that it is a fit case for appeal against conviction, upon any ground of appeal which involves a question of fact alone, or a question of mixed law and fact or on any ground which appears to the Court to be a sufficient ground of appeal*"

55. By section 21 of the 1964 Act the test to be applied by the Court in determining such an appeal is as follows:

> *"Upon the hearing of an appeal under section I 7(1)(a) or (b), the Court of Appeal shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Supreme Court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.*

56. If this were an original appeal brought in time I doubt not but that this Court could and would grant leave to argue that the conviction should be set aside by reason of the alleged unconstitutionality of section 519 and the contention that as a result the accused did not have a fair trial because there was an appearance of bias in the selection of the jury.

57. This is however a case of reopening an appeal. In relation to civil appeals the Rules of the Bermuda Court of Appeal 1965 provide that:

> *'The Court shall not review any judgment once given and delivered by it save and except in accordance with the practice of the Court of Appeal in England.'*

58. The practice of the Civil Division of the Court of Appeal in England was considered in *Taylor v Lawrence* [2002] EWCA Civ 90, where the Court said:

> '*...this court was established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents ' [26]*
>
> *'As an appellate court it has the implicit powers to do that which is necessary to achieve the dual objectives of an appellate court to which we have referred already. [50]*
>
> *'There can, of course be an appeal to the House of Lords from decisions of the Court of Appeal. However, the House of Lords is not in a position to hear more than a minority of the appeals which litigants would wish to bring. The number of Lords of Appeal in Ordinary is limited to twelve, and they are required to sit both in the Appellate Committee of the House of Lords and the Judicial Committee of the Privy Council. It would not be practical nor proportionate or appropriate for the House of Lords to be involved in resolving the type of issue which is raised by Mr and Mrs Lawrence in this case, relying as it does essentially on fresh evidence for re-opening the appeal. [27]*
>
> *If, however, it is arguable that the Court of Appeal is able to re-open a decision where it has been obtained by fraud, this opens the door to argument that there is jurisdiction to re-open an appeal in other exceptional cases. [37]"*

59. The Court ruled that there was jurisdiction to reopen an appeal in the following terms:

> *"If there is no effective right of appeal to the House of Lords and this court is the only court which can provide a remedy then in our judgment there can arise the 'exceptional circumstances' to which Russell LJ referred in Barrell. ' [49]*
>
> *'The residual jurisdiction which we are satisfied is vested in a court of appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables the court to confine the use of that jurisdiction to the cases in which it is appropriate for it to be exercised. There is a tension between a court having a residual jurisdiction of the type to which we are referring and the need to have finality in litigation. The ability to reopen proceedings after the ordinary appeal process has been concluded can also create injustice. There therefore needs to be a procedure which will ensure that proceedings will only be reopened when there is a real requirement for this to happen.' [54]*
>
> *'What will be of the greatest importance is that it should be clearly established that a significant injustice has probably occurred and that there is no alternative effective remedy. The effect of reopening an appeal on others and the extent to*

> *which the complaining party is the author of his own misfortune will also be important considerations. Where the alternative remedy would be an appeal to the House of Lords this court will only give permission to reopen an appeal which it has already determined if it is satisfied that an appeal from this court is one for which the House of Lords would not give leave. [55]"*

60. In that case the Court rejected the appeal, which had been on the basis that there was apparent bias on the part of the first instance judge, holding that no appearance of bias was made out. The Court recommended that the Civil Procedure Rules Committee should consider issuing rules or setting out the procedure for such cases [57].

61. The English Civil Procedure Rules now provide by Rule 52.30 that:

> *(1) The Court of Appeal or the High Court will not reopen a final determination of any appeal unless-*
> *(a) it is necessary to do so in order to avoid real injustice;*
> *(b) the circumstances are exceptional and make it appropriate to reopen the appeal; and*
> *(c) there is no alternative effective remedy.*

62. The English Court of Appeal addressed the question as to whether the same principles applied in its criminal division, in *R v Yasain* [2015] 2 Cr.App.R 393 in the following terms:

> *"We must therefore address the issue as a matter of principle. In Taylor v Lawrence, as we have set out, the court based its decision on the implied or implicit power to do that which is necessary to achieve the objectives of an appellate court, in circumstances where no express power was conferred on the court and its powers were exclusively based on statute. [37]*
>
> *The way in which the Civil Division approached its power to re-open an appeal is grounded in clear principle. We can see no basis for any distinction between the Civil Division and the Criminal Division as to the principles applicable to the jurisdiction under the implicit powers of an appellate court. The appellate jurisdiction of each is statutory. There is no reason why both do not have the same implicit jurisdiction and the same general basis for that jurisdiction (para 38).*
>
> *The fact that both have the same implicit jurisdiction does not mean that the jurisdiction has necessarily to be exercised in the same way by the Criminal Division as it would be by the Civil Division. For example, in a criminal case there will often be three interests that have to be considered - that of the state, that of the defendant and that of the victim or alleged victim of the crime, even though the victim is not a party to the proceedings under the common law approach ... There is the strongest public interest in finality. The jurisdiction is probably confined to procedural errors, particularly as there are alternative remedies for fresh evidence cases through the Criminal Cases Review Commission. [40]*

> *However, although we can decide this appeal in this way and make it clear that this court has an implicit jurisdiction on the same basis as the Civil Division, we consider that it would be appropriate if the Criminal Procedure Rules Committee can formulate a rule similar to that set out in CPR r.52.17 but which delineates the factors and circumstances applicable to the Criminal Division. [42]*

63. In *Yasain* the accused had successfully appealed against his sentence for kidnapping when it appeared from the transcript that the jury had never convicted him of that; and his sentence was quashed. Later inquiries revealed that there was an error in the transcript and that the jury had in fact convicted him of kidnapping. The Court of Appeal re-opened the appeal and dismissed the appeal against conviction and sentence.

64. The practice of the Court of Appeal Criminal Division in England was again considered in *R v Gohil (Bhadresh)* (2018) 1 Cr. App.R 30, which applied *Yasain* and stated the test for reopening an appeal thus:

> "110 *On the footing upon which Yasain was decided, namely that there is no difference between the jurisdiction of the Civil Division and that of the CACD to re-open previous final determinations, it can safely be said that the CACD will not re- open a final determination of any appeal unless:*
>
> *(a) it is necessary to do so in order to avoid real injustice;*
>
> *(b) the circumstances are exceptional and make it appropriate to re-open the appeal; and*
> *(c) there is no alternative effective remedy.*
>
> *111 Though not to be interpreted as a statute, these form, in essence, what may be described as the "necessary conditions" for the exercise of the Yasain jurisdiction-and are, almost invariably, to be cumulatively satisfied if the jurisdiction is to be invoked. Moreover, we caution that Yasain does not hold that satisfying the necessary conditions is sufficient for the exercise of the jurisdiction; on our reading of these authorities, the court retains a residual discretion to decline to reopen concluded decisions even if the necessary conditions are satisfied"*

65. The Court also said the following: under the heading "*Pulling the threads together*" at [129]

> *i) The CACD has jurisdiction to re-open concluded proceedings in two situations. First, in cases of nullity, strictly so-called and distinguished from "mere" irregularities. Secondly, where the principles of Taylor v Lawrence, as adopted in Yasain are applicable, thus where the necessary conditions are satisfied. For ease of reference, though not to be interpreted as a statute, the necessary conditions are: the necessity to avoid real injustice; exceptional circumstances which make it appropriate to re-open the appeal; and the absence of any alternative effective remedy. It is to be*

emphasised that these are almost invariably cumulative requirements - though not necessarily sufficient for the exercise of the jurisdiction, in that the Court retains a residual discretion to decline to re-open concluded proceedings even where the necessary conditions are satisfied.

ii) Though the principles of Taylor v Lawrence apply in both the Court of Appeal (Civil Division) and the CACD, as underlined in Yasain the jurisdiction need not necessarily be exercised in the same way, bearing in mind both the triangulation of interests in criminal proceedings (the State, the defendant and the complainant/victim) and the general availability of the CCRC to remedy the injustice of wrongful convictions.

iii) In exercising the jurisdiction to re-open concluded proceedings, the test applied by the CACD will be the same, regardless of whether the application is made by the Crown or on behalf of the defendant.

iv) *We respectfully agree with the observation of the Court in Yasain that the jurisdiction of the CACD to re-open concluded proceedings is probably best confined to "procedural errors". Indeed, at least generally, we see the Yasain jurisdiction as directed towards exceptional circumstances involving (as submitted by the amicus) the correction of clear and undisputed procedural errors "where it is simpler and more expedient for the court itself to re-open the appeal and correct a manifest injustice without the need for further litigation". Such an approach is healthy as it does not altogether exclude room for pragmatism in practice, while confining its scope to appropriately very limited circumstances, where, even if recourse to the CCRC was otherwise available, it would be a wholly unnecessary exercise. As it seems to us, fashioning the jurisdiction in this manner accords with authority, principle, practicality and policy – not least the great importance of finality in criminal proceedings."*

66. The English Criminal Procedure Rules now provide:

"36.15 Reopening the determination of an appeal

(3) The application must- (a) specify the decision which the applicant wants the court to reopen; and (b) explain-

(i) why it is necessary for the court to reopen that decision in order to avoid real injustice,

(ii) how the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,

> *(iii) why there is no alternative effective remedy among any potentially available, and*
>
> *(iv) any delay in making the application*."

67. Mr Jerome Lynch QC for Smith-Williams contends that this Court should apply the same approach as that contemplated by the Rules in England and that the criteria specified above are satisfied in the case of his client. To allow Brangman to reopen the case is necessary to avoid the real injustice of a potentially biased jury. In his case, the prosecution, it is said, stood by a greater number of jurors than he had power to challenge. That has been held to be contrary to section 6 (1) of the Bermuda Constitution. It would be a real injustice if he could not raise that ground of appeal simply because his appeal was heard prior to the finding of unconstitutionality.

68. Further, the circumstances are exceptional because the ground of appeal that the Applicant sought to put before the Court is based on a ruling, subsequent to his original appeal, that the procedure of jury selection utilised at his trial was contrary to his constitutional right to a fair trial by an independent and impartial tribunal. The issue strikes at the most fundamental rights of a defendant in the criminal justice system, namely his Constitutional right to the protection of law and his right to a fair trial as set out in section 6 (l) of The Constitution as read with section 1. There are no alternative effective remedies especially in circumstances where there is no equivalent to the Criminal Cases Review Commission. An appeal to the Privy Council would be expensive; whether the Council would entertain it is doubtful; and such a step would be inappropriate. The Bermuda Court of Appeal should consider the matter first. It should not require those attempting to reopen an appeal first to make a request to the Governor under section 27 of the Court of Appeal Act to make a reference to the Court.

Conclusions re re-opening

69. As it seems to me, this Court should recognise, as in effect it has already done, that it has an implicit power to re-open an appeal and that it may (but is not obliged to) do so if (i) the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality; (ii) there is no other effective remedy; and (iii) the accused would suffer substantial injustice if it did not do so.

70. However, that conclusion begs the question as to what approach the Court should take in cases such as the present ones. I will revert to this after summarising the submissions of the parties.

71. I would, however, make one observation. The English cases proceed on the basis that the Court will consider whether to grant exceptional leave on the grounds that the accused has or may have suffered a substantial injustice. It then considers whether to allow the appeal on the ground that the conviction is unsafe (the relevant test in England). There are, thus, potentially three matters to be decided (a) whether the matters relied on might cause the Court to think that the accused has suffered a substantial injustice and that the circumstances are exceptional as defined by the Rules; i.e. whether the application to reconsider should be entertained in principle; (b) whether the Court in fact comes to that conclusion; and (c) whether the appeal should be allowed. These items may, of course, all be considered at the same time, but they need to be addressed in sequence. As the

English Court of Appeal said in the civil case of *AIC Ltd V the Federal Airports Authority of Nigeria* [2020] EWCA Civ 1585 [59] before a court embarks on reconsideration it must first consider whether there was a sufficiently compelling reason that may justify reconsideration and outweigh the importance of finality.

72. In the present case this Court has given leave to re-open but has plainly not reached any conclusion as to whether the accused would or might suffer substantial injustice (assuming that to be the test) if the appeals were not allowed. The Court, at its earlier hearing, decided that there was a public interest in the respective arguments being considered by the Court at a full hearing at which *"everything will be at large – all legal arguments and factual issues"*. Accordingly, the leave then given to re-open should not be interpreted as the Court having reached any conclusion on injustice or on whether the matters relied on outweigh any considerations of finality.

73. In future cases where leave is sought to re-open the appeal the Court should, if it deals with matters separately, either refuse leave, if satisfied that there is no adequate basis for thinking that the matters relied on might cause the Court to give leave to reopen the appeal, or indicate that it is prepared to consider whether or not leave should be granted at some future hearing, without actually granting leave at that point. The impression should not be given that a decision on injustice, or exceptionalism, has been made when it has not.

The Crown's submissions on finality

74. The Crown submits that, in cases such as this, the principle of finality should prevail. A change in the law relating to the procedure in respect of jury selection cannot justify the overturning of previous convictions based on the old procedure. When these accused were tried the Crown had, by statute, unlimited rights of standby. When it exercised those rights it was doing nothing unlawful under the law as it stood, and as it was understood, at the time. No one then challenged the procedure. The process of standby was a convenient, practical and appropriate means of empanelling a full jury as swiftly as possible. It enabled jurors in relation to whom there might be some reason why they should not sit (either a challenge for cause or because they might justifiably be excused), or who, themselves, raised concerns, to be held back from immediate empanelment, and enabled the selection of a jury first time round in relation to whose members no such question arose.

75. This was an advantage to all concerned. The exercise of determining whether the juror should be excluded for cause or excused could be time consuming. Often it would be apparent from what the juror said, or from a note that was produced, which would be shown to the judge and counsel, what the potential problem or excuse was. It would not be uncommon for defence counsel to indicate their assent to a juror being excused by silence, a nod of the head, facial expression, or a comment made *sotto voce* which was not recorded on the audio recording system. It was also not uncommon for defence counsel to indicate to the Crown, by a note or a whisper, a certain connection with or prior knowledge of a prospective juror that would prompt the Crown to stand him by without stating a reason at the time. Or the potential difficulty might already be known to the Crown. We were told that, on occasion, the defence would align itself with the Crown in a standby so as not to have to use its limited right of peremptory challenge. Finally, it was simply wrong to think that a prospective juror was stood down because he might be favourable to the defence. If the cause

was, for instance, his familiarity with a prosecution witness or the victim, or employment by the police, the precise opposite would be the case.

76. By this process potential jurors in relation to whom no question arose could be empanelled; and, if that did not produce enough, the list would be gone through again when the question of exclusion for cause or excusal could be considered. Looked at as a whole this process did not significantly undermine the principle of randomness of selection.

77. Convictions should not be at risk of being set aside only because of a change in the law as to the number of permissible standbys and a relevant disparity in numbers. In order for there to be an appearance of bias or a substantial injustice something more is required than the mere fact that the Crown stood by more than 3. An appeal on that basis is, in reality, a technical appeal. In considering whether there has been a substantial injustice on the grounds of possible partiality it is necessary to look at matters in the round and not to look only at what happened in court. There is a presumption of juror impartiality and there are important safeguards in the form of (a) the qualifications and disqualifications for jury service under section 3 of the Jurors Act and the duties of the Revising Tribunal under section 8: see [11] – [12] of the Chief Justice's judgment; (b) the right to challenge for cause; (c) the right to excuse; (d) the residual discretion of the judge to remove a juror (see Blackstone 's Criminal Practice 2019 D 13.36-37[5]; and (e) the directions of the trial judge to the jury as to how they are to fulfil their functions and approach the evidence.: see the approach of the Ontario Court of Appeal in *Chouan* at [61] – [74]. Further it is wrong to think that the fair minded and informed observer ("FIO"), looking at the jury selection process at the relevant time, would think that a standby for which no reason was given, was on account of some bias in favour of the prosecution. On the contrary the presumption is that the Crown would only exercise its right of standby for good reason.

78. If the finality principle is not applied, there would be a real prospect of a large string of cases, in which second appeals against conviction would be brought, stretching back indefinitely. We were told by Mr Pettingill that there was something like 40 or 50 cases where there was a prospect of a second appeal, and that the actual number of appeals might be substantial. These might paralyse the appeal system. If standing by more than 3 is fatal it could apply to very many cases. If it were now necessary to revisit old cases in which the Crown had exercised its rights, going back for an indefinite period, there could be great difficulties in determining, many years after the event, what exactly had transpired when the jury was selected. Notes that were handed up might not be available. Transcripts (which do not in any event fully reflect the dynamics of what was going on) might be ambiguous (e.g. as to whether there was agreement between counsel that a potential juror should be stood by, rejected for cause or excused); or whether the Crown or the judge was making the relevant decision. In old cases there may be no recording available. Communications between counsel might not be apparent from the transcript. Those involved might no longer be around and their recollections would in any event have dimmed. If the Crown is required years later to explain why it stood by a juror (if that is not apparent), something that it was not required to do at the time,

[5] The text makes plain that the cases show that this discretion may be exercised where an individual juror is obviously incompetent to act, being mentally or physically infirm, insane, drunk or preoccupied with the dangerous illness of a relative, but neither the Crown nor the defence stands by or makes any challenge. It may be exercised when the judge notices that a witness has difficulty in reading or hearing or would find a long trial unusually burdensome. But it should not be exercised in such a way as to undermine the random nature of jury selection.

it may well be impossible to do so and would, itself be unfair. The hearing of any appeal would become a memory game. If the case is to be retried, witnesses might not be available, recollections would have faded, material might have been lost, and other obstacles to the prosecution (and the defence) would arise.

79. It is notable, the Crown submits, that no English case and no Privy Council judgment suggests that a case can be reopened on account of a change in the law in relation to jury selection or a decision that some previous law or practice was unconstitutional.

80. That the principle of finality should govern is apparent from the saving provision in section 5, which, it is submitted, states the common law. Section 5 (1) makes plain that the method of challenge of jurors in existence before the 2020 Act is not invalidated by reason only of the amendment (which changed the law); and section 5 (2) makes it clear that a conviction shall not be quashed solely on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant or defendants together were able to challenge without cause. I consider this section further below.

The Appellants' submissions

81. The Appellants submit that the position is quite different. As the Chief Justice has held, the disparity between the accused person's and the Crown's right to challenge jurors gives rise to a real possibility that the jury may be biased in favour of the Crown. (The Chief Justice was referring to the disparity between the Crown's right of standby and the accused's right of peremptory challenge. Both the accused and the Crown have a right to challenge for cause).

82. Such a state of affairs, he held, (a) offends the appearance of impartiality on the part of the jury which is an essential element of the fundamental right to a fair hearing by an independent and impartial tribunal guaranteed by section 6 (1) of the Bermuda Constitution and (b) the principle of equality of arms, which is also part of the right to a fair trial As is apparent, the Chief Justice applied the test for bias set out in the decision of the House of Lords in *Porter v Magill* [2002] 2 AC 357, namely "*whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased*". As he observed:

> *"It is further established that there is now no difference between the common law test of bias and the requirements under Article 6 of ECHR of an independent and impartial tribunal. This is made clear in the opinion of the Appellate Committee in House Lawal v Northern Spirit Limited* [2003] UKHL 35 at [14]:"

83. In the course of his judgment the Chief Justice rejected the contention that it was necessary to show actual bias and referred to a similar argument advanced before the Privy Council in *Millar v Procurator Fiscal* [2001] UKPC D4, by which case it is submitted that we are bound. He did so in the following terms:

"*36 Before the Privy Council the Solicitor General accepted that a temporary sheriff [6] was not an independent and impartial tribunal for the purposes of Article 6 (1) of ECHR, that notwithstanding, the defendants had received fair trials. The Solicitor General argued that the rights under Article 6, save for the right to a fair trial, were not absolute; it was proper to consider the right allegedly infringed in the context of all the facts and circumstances of the case as a whole, and to weigh the alleged infringement against the general interest of the public. The ultimate issue, he argued, was one of overall fairness, viewing the proceedings as a whole. It is clear from the judgments of Lord Bingham and Lord Hope that the submission of the Solicitor General was rejected and in rejecting this submission Lord Bingham referred to the decision of the Court of Appeal in Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451 at pages 471-472, paragraphs 2-3:*

> *"2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.*
>
> *3. Any judge (for convenience, we shall in this judgment use the term 'judge' to embrace every judicial decision-maker, whether judge, lay justice or juror) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case law, is called 'actual bias' are very rare, partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists."*

[6] Temporary sheriffs were appointed for one year only and were subject to recall during that period at the instance of the Lord Advocate. They were in existence from 20 May to 11 November 1999. The High Court had decided that there was a real risk that a well-informed observer would think that a temporary sheriff might be influenced by hopes and fears as to his prospective advancement, and was not therefore an independent and impartial tribunal within the meaning of Art 6 (1).

37. Lord Hope explained his rejection of the argument by the Solicitor General in the following terms at [63]:

> *"In my opinion this argument overlooks the fundamental importance of the Convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done; it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality: McGonnell v United Kingdom at p 306, paragraph 48 quoting Findlay v United Kingdom (1997) 24 EHRR 221, 245, paragraph 73. As Lord Clarke said in Rimmer v HM Advocate, 23 May 2001 (unreported), the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings."*

38. Lord Hope expressed his conclusion at [65] as follows:

> *"The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice: see Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759; R v Gough [1993] AC 646, 661 per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand. The Solicitor General's submission that the matter, if raised after the event, should be considered in the light of all the facts bearing on the question whether there was a fair trial is contradicted by this line of authority."*

84. In his opinion Lord Clyde said:

> "*It should not need to be said that these cases cast no reflection at all on the character or conduct of the temporary sheriffs engaged on them, nor indeed on any other of the temporary sheriffs. Their personal integrity and independence of mind are not in doubt and it is not suggested that there was any conscious or unconscious*

> *bias or any subjective partiality felt or displayed in their work. But it is as important that the appearance of justice be safeguarded as well as the actual doing of justice and it is on that account that I am driven to the conclusion that the convictions in these four cases cannot be held to be fair. Now that it has been held that temporary sheriffs lack independence, a decision which has not been questioned in these appeals, and in the absence of an effective plea of waiver, I see no alternative to a finding that the acts of the prosecutors in each of these four cases were unlawful for the same reasons as those which applied in Starrs. The principle of independence and impartiality of the tribunal "particularly in criminal cases" is too precious to be put at any risk. I should be sorry if in a case like the present we were to allow any derogation from that principle, even if the consequences of holding to it involve the invalidation of convictions which from every other angle were safe and unimpeachable"*

Millar was not a case of re-opening an appeal. It was an appeal to the Privy Council, with leave, pursuant to the relevant provisions of the *Scotland Act 1998*.

85. In short, the appellants say, if there has not been a fair trial because of an appearance of bias or a want of equality of arms, the accused has suffered a fundamental injustice and an infringement of his constitutional rights, than which it is difficult to find a clearer example of an injustice properly to be regarded as substantial. The trial has been unfair; the accused has suffered a substantial injustice; there has been a miscarriage of justice and the miscarriage is a substantial one. Canadian and Irish cases which indicate that in principle there is no retrospective application of decisions on unconstitutionality (albeit subject to limited exceptions) should not be followed insofar as they depart from the approach recognised by the Supreme Court/Privy Council in *Jogee* and in *Millar* and the English Court of Appeal authorities. Further the principle of finality is not to be found in the Constitution.

86. The appellants contend that the appearance of partiality in selection of the jury is not simply a matter of numbers. What happened in the present cases (and many others) is broadly speaking as follows. The jurors were called. Sometimes the Crown would stand by a juror for no apparent reason. In some of those cases the Crown in fact had what it regarded as a good reason (e.g. in one case that the juror worked in the DPP's office) but nothing was said at the time. All that the FIO (and the accused, and the judge) would see was that the Crown had stood the juror by. In other cases, something was said by the juror (or contained in a note) which might (the optative is important) have justified exclusion for cause or excuse. But the effect of the Crown's use of its right of standby meant that, at that first stage, the question whether the juror should be excluded or excused was not determined. And the effect of the standby was in some cases that the juror was never called again. As a result, the jurors stood by who were not called a second time round never had the question of whether they should be excluded for cause or excused determined.

87. In some of the cases there was no apparent reason for the standby; the juror appeared simply to have been removed from consideration by the Crown's unilateral decision. In cases where something was said or noted, when the jurors were originally stood by, the validity of any possible objection or excuse was never assessed. Further, counsel for the accused had no right to object to a Crown standby and were powerless to prevent it (unless the Crown or the Court agreed) or to

require the Court to give a ruling on exclusion or excuse before the juror was stood by. Thus, jurors whom the defence might have wanted to be on the jury were excluded as candidates. All of this gave the appearance of bias and of the Crown fashioning the jury to suit its own ends or for tactical advantage. In circumstances where there was a right of challenge for cause and a juror could be excused for good reason, as to either of which it was for the judge to decide, these two routes should not have been sidestepped by the Crown's use of an unlimited right of standby, the effect of which was either to deny anybody else any understanding of why the Crown was standing by, or to preclude any challenge to the exercise of the right, or both. Further, save in a case where it was beyond doubt that the juror could not have sat, where it might be right to apply the proviso, this Court cannot, or at any rate should not, do now that which the judge was never asked to do at the time, namely make a decision on whether the juror would successfully have been challenged for cause or rightly excused.

Consequences

88. In response to the points on finality made by Mr Mahoney, Mr Lynch in his oral submissions submitted that the potential consequences of re-opening and allowing the appeals in these cases were not as alarming as the Crown suggested. If an appeal was to be re-opened, leave would be required and that would require evidence of what had transpired on jury selection. Although standing by more than 3 (in a case involving one defendant) was objectionable, if there were, say, 4 standbys it might be possible to conclude that there was no substantial miscarriage of justice and apply the proviso although there would need to be evidence as to why one more was stood by. Similarly, if the case against the accused was overwhelming it might be right to apply the proviso. He also submitted that it was wrong to separate each potential juror and separately analyse the standbys. It was necessary to look at the overall impression that the FIO would have in any given case. In his client's case the Crown stood by six potential jurors without cause, on its own case (one was stood by when alternates were being selected). This by itself would be half of the potential jurors who could have sat on the jury and double the number of challenges without cause now permitted, in circumstances where the jury convicted by the narrowest of margins: 9 – 3.

89. In this connection it is necessary to have regard to paragraph 9 of the judgment in *Trott* where the Chief Justice said:

> *"At the hearing of this matter both Counsel agreed that the Court should approach this matter as a matter of principle and not based upon the allegations in relation to the motivations behind the selection of particular jurors. Accordingly, the result in this Judgment is dictated by the terms of section 519 (2) of the Code, and not by any consideration that the exercise of the right to stand-by was in any way abused in this case."*

90. That paragraph makes plain that the judgment was based on principle rather than any consideration of any actual abuse of a right to stand by. But, if the principle is that any more than 3 standbys gives rise to an appearance of bias, and, if that is to mean that, when that happens prima facie any first appeal is to be allowed and any appeal determined before the ruling must be re-opened, the circumstances in which there may be any exception to that principle are opaque. Mr Lynch, as I understood him, suggested that the Crown might be able to produce evidence that the juror was in

fact stood by for good cause and, once you knew what the cause was, it was self-evident that he could not sit on the jury. That might mean that there was no miscarriage. But any reliance on particular circumstances as showing that, in a particular case, even if there was an appearance of bias, there was no substantial miscarriage of justice would need evidence in support. The starting point is that 3 is the maximum. If it is to be said that jurors were *bound* to be stood by or excused that would need evidence. And the fact that the juror *might* arguably be successfully challenged for cause or excused would not be enough.

91. I am far from convinced that these points significantly reduce the problems inherent in re-opening appeals. I note, also, that in his written submissions, Mr Lynch said that, "*whilst it must be accepted that it is possible the FIO would not think, say, 4 challenges/stand-bys fell below the "real possibility" standard necessary the question has to be asked where else does one draw the line? If not 4 then is it 5, or 6, or what number? We submit that such an exercise is fraught with danger".*

How should this Court approach the question in the present appeals?

92. As is apparent from paragraphs [24] ff above different courts have approached the question of finality in different ways and with differently formulated exceptions, particularly when considering the effect of a later decision that a statute or a provision thereof was unconstitutional.

Previous cases

93. In *English* the Court held that the appeal, which was not out of time nor an attempt to re-open a former appeal, could not be allowed on the ground that the law in force at the time of trial (relating to jury selection) had subsequently been held to be unconstitutional. Regard was had to the fact that the decision which changed the law had itself been suspended. That appears to have been an acceptance that, as the Supreme Court of Canada had suspended the operation of its decision for six months, it cannot be taken to have contemplated that it would apply to the case which it was considering which, obviously concerned events in the past. The decision was, in effect, held to be prospective only and not to apply even to appeals brought within time and even though the jury selection procedure was constitutionally unfair. As I have said it is debatable whether that was, in fact, consistent with *Bain* where, in the appeal before it, the Supreme Court reversed the decision of the Court of Appeal, which had allowed the Crown's appeal on the ground that the Crown was entitled to more peremptory challenges than those allowed to the defence and, in addition 48 standbys, and ordered a new trial, and restored the accused's acquittal. It also said that, notwithstanding the suspension of its decision, it applied to any case in which the provision had been challenged and proceedings relating there were still on foot.

94. In *Sarson* and other earlier Canadian cases it was held that an accused had to be "*still in the judicial system"* in order to rely on a subsequent decision that the provision under which he was convicted was constitutionally invalid.

95. In *Bestel, Jogee,* and *Johnson*, and other English authorities referred to in those cases, the courts held that a case could be re-opened out of time if the accused had suffered substantial injustice, and would continue to do so if the leave to appeal out of time was not allowed. None of these cases was concerned with a later decision that an Act or a provision was unconstitutional.

96. In *A v Governor of Arbour Hill Prison* a decision that a statute, which was thought at the time to be unconstitutional, was, in fact, inconsistent with the Constitution, was held not to have retrospective effect when the statute had been relied on by the State in good faith and the accused had not sought to impugn it at the time. The later decision could not affect a case which had reached finality on appeal or otherwise. The Court recognised that there might be a "*wholly exceptional case which might require for wholly exceptional reasons relating to some fundamental unfairness amounting to a denial of justice that the verdict be not allowed to stand"*. Other passages in the judgment refer to a possible exception to the general principle in "*wholly exceptional circumstances*" [179] [264-5]; or "*on the clear demands of justice*" [191]; or in an exceptional case of manifest injustice or oppression [282].

97. In *Cadder* a decision that denial of access to legal assistance in police custody amounted to a breach of the fair trial requirement under Article 6 of the ECHR was held by the Supreme Court of the United Kingdom not to affect prior cases. Although this case did not concern the provisions of any constitution, it did concern the application of the HRC. Under the UK Human Rights Act 1998 section 3 (1) legislation had to be read and given effect to in a way which was compatible with the Convention rights, the terms of which, in relation to fair trials, are reflected in the Bermuda Constitution.

98. The Supreme Court dealt with the question of prospective overruling in paragraphs [56] ff, describing it as "*perhaps, the most difficult and anxious of all the issues that the court faces in this case*". It made two very significant decisions. First it said (see [34] above) that a number of dicta in Supreme Court cases suggested that the Court had a general inherent power to limit the retrospective effect of its decisions, to which it suggested that there could be no objection on Convention grounds because the principle of legal certainty was inherent in the Convention. The Court declined to make use of its inherent power in that case because the relevant statutory regime precluded it from doing so[7]. It also felt that it would be wrong to deny relief to an accused who had brought a timeous appeal.[8] This is to be compared with the approach of the Court in *English* which denied relief to the appellant before it.

99. The second decision was as to the application of the principle of legal certainty. This enabled the Court, bearing in mind that an objection to the constitutionality of the proceedings could have been brought at any time after the right of challenge on Convention grounds became available, to rule, as it did, that its decision did not permit the re-opening of closed cases. (*Cadder* itself was not a closed case). Cases which had not yet gone to trial, or where the trial was still in progress, or appeals had been brought timeously could rely on the contention that the accused must have had access to a solicitor before being questioned by the police, in the absence of compelling reasons for restricting this right. But closed cases must be treated as "*incapable of being brought under review on the ground that there was a miscarriage of justice because the accused did not have*

[7] The *Scotland Act 1968* gave the court certain powers to remove or limit any retrospective effect of certain decisions: but the decision of the Lord Advocate in that case was not one of them.

[8] The Court does not seem to have considered the possibility of deciding, under the retrospectivity heading, that it would allow its decision to be retrospective in relation to the appellant, or the appellant and any other timeous appeals currently in the system, but that it would otherwise apply only prospectively. The first of those approaches was a route contemplated in *Arbour Hill*.: see [151]; [165] [179]; both were said to be applicable in *Bain*.

access to a solicitor whilst he was detained prior to the police interview". The Court cited the passage in the judgment of Murray CJ in *Arbour Hill* which referred to a possible exception, but did not hold that the contemplated exception applied.

100. In *Grant*, the Court held that the applicant must not only place himself in one of the limited exceptional circumstances (of which a change in the law was not one) but that the injustice which would be meted out to him, if his appeal was not reopened, must be "*so substantial as to far outweigh the public interest in the finality of litigation".*

What did the Chief Justice decide?

101. In the present case the Chief Justice plainly did not intend his decision to have only prospective effect. It was to affect the Trott trial. But he did order the declaration to be suspended for a brief period. I take the intention to have been that, once the suspension was over, it should apply to the Trott trial; but what exactly was to be the position in relation to any case where the jury was empanelled during the period of suspension, or before that at a trial from which a timeous appeal was pending, is unclear[9]. (In *HM Treasury v Ahmed*, [2010] UKSC 5 where the Treasury sought (unsuccessfully) a suspension of the Court's order it accepted that, if the suspension was granted, the decision would operate retrospectively from the date when the suspension ended, and that the suspension would have no effect on the remedies available for what happened in the period of suspension). The Chief Justice made no decision, in terms, that his declaration should not be taken to apply to past cases; and did not address the question as to whether his decision should apply to appeals in closed cases, which question was neither before him nor for him. It is, however, incumbent on us to address that question.

102. In my judgment we should adopt the approach taken in *Arbour Hill* and *Cadder*. The decision that the disparity between the Crown's statutory right of standby and the accused's right of peremptory challenge gave rise to the real possibility of bias and an inequality of arms and, therefore, an unfair trial, and that, to the extent that section 519 (2) allowed for such a disparity it was unconstitutional ought, ordinarily, to be held not to permit an appeal in closed cases. I have reached that conclusion for a number of reasons.

103. First, whether or not an appeal should be re-opened and, if re-opened, allowed, is a matter for the discretion and practice of this Court. As Lord Bingham indicated in *Hawkins,* we are concerned with the general practice of the Court (which, itself, may be departed from) and not with any inflexible rule. No statute lays down any test for the exercise of what has been described as a residual jurisdiction: *Taylor v Lawrence*. Even if the conditions specified in the Criminal Procedure Rules in England, which are not replicated in Bermuda, are satisfied there is still a residual discretion to decline to re-open concluded proceedings.

[9] The possible permutations involved are not without complication. They include (a) closed cases, where either no timely appeal has been brought or an appeal has been dismissed; (b) cases where a timely appeal is still pending in which the constitutional disparity point is one of the existing grounds of appeal; (c) cases where a timely appeal is still pending which does not include the disparity point as one of its grounds but where there is an application to amend to include it. In J*ohnson* the Court of Appeal held [25] that in case (c) the Court would generally apply the same principle (i.e. only to grant leave, exceptionally, if it was demonstrated that without it a substantial injustice would be done) to any application to put forward new grounds based on the decision in *Jogee*. It may well be that there are no cases in categories (b) and (c) in Bermuda.

104. Any discretion must, of course, be exercised on proper grounds. As the Supreme Court recognised in *Cadder*, if the right decision is to allow all or any of these appeals, we should not decline to do so simply because the result may be to burden the Court with many others. At the same time, in considering the exercise of our discretion, it is important to bear in mind that we must take into account three different sets of interests: (a) the interests of the accused; (b) the public interest in good order, finality, certainty and closure; and (c) the interests of the victim's family and others, who will be understandably disturbed, if not appalled, at the prospect of everything going back, years later, to square one. Those courts which have considered the problem have realised that any solution may appear harsh on someone; but those courts that have dealt with constitutional challenges, or the equivalent (i.e. reliance on the HRC), have decided that the right approach is that their decisions should not, subject to rare exceptions, affect closed cases, even if the change in the law concerns the method of jury selection, the unconstitutionality of a statute, or a breach of the HRC.

105. I would accept that, as the Court held in *Arbour Hill*, there is no principle of constitutional law that cases which have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and of no effect. That was, of course, a conclusion in relation to the Irish Constitution; but I see no reason why a different approach should be adopted in relation to the Constitution of Bermuda. Further, whilst the Bermuda Constitution (like the Irish one) does not in terms address the question of finality, it operates in respect of a legal system which recognises that principle, and it embodies concepts which derive from the HRC, which applies to Bermuda. The ECHR in exercising its jurisdiction to protect fundamental rights under the Convention has itself held that the principle of legal certainty is necessarily inherent in the Convention: *Marckx v Belgium* [1979] 2 EHRR 330[10].

106. I note, also, that in *Arbour Hill* the Court referred to and relied on the fact that when its decision in *Burca v Attorney General* [1976] 1R 38 struck down as unconstitutional a statute governing the selection of juries in criminal cases[11] it did not mean that" *the tens of thousands of jury decisions previously decided by juries that were selected under a law that was unconstitutional should be set aside".* It also held that, save in exceptional circumstances, any approach other than the one that it adopted "*would render the Constitution dysfunctional and ignore that it contemplates a set of rules and principles designed to ensure 'an ordered society under the rule of law'* ".

107. I am inclined to accept that the Bermuda Supreme Court has an inherent power to limit the retrospective effect of its decisions and declarations, and, in particular, either to make them wholly prospective, or only partly retrospective, or to suspend their application. In *Cadder* the Supreme Court effectively recognised that it had such a power, which, but for the considerations to which it referred, it was minded to exercise. In *Ahmed v HM Treasury* Lord Hope in the Supreme Court of the United Kingdom recorded that the House of Lords in *In re Spectrum Plus Ltd* [2005] UKHL 41 had held that it had jurisdiction to make such an order (although it is plain from the latter decision that the House was wary as to whether such a power should be used, albeit, in a later article, Lord Rodger of Earlsferry acknowledged that prospective overruling might be particularly

[10] That case condemned a Belgian law which wrongly deprived children born out of wedlock of inheritance rights.

[11] The statute provided for all male juries except for women who applied to be on the jury list. The two female defendants objected to this. It also provided that jurors had to be rated occupiers.

useful in cases involving the application of Convention rights). This discretion arises as an aspect of the Court's general jurisdiction so to exercise its powers as to do what it thinks is right having regard to the different interests and considerations involved. I am not disposed to regard this as some special principle of Scots law (especially when *Ahmed* and *In re Spectrum*, which were cited at paragraph 58 of *Cadder,* were Supreme Court decisions on appeal from English courts), or as only applicable, in the United Kingdom, to the Supreme Court.

108. I have considered, therefore, two different possibilities. The first is whether we should proceed on the basis that, since the Chief Justice suspended his declaration for a short time, he must be taken to have decided that it would not have any retrospective effect, save in relation to *Trott*. I do not regard that as an appropriate approach, because it is not at all clear to what extent the question of retrospectivity was addressed at the hearing, or decided on by the Chief Justice.

109. The second is that, in deciding whether to allow these appeals, we should decide what the Chief Justice should have decided as to the application of his decision to all previous cases, if he had been asked to address the question. But that seems to me an unnecessarily convoluted and inapposite approach. He was not asked to make such a decision and, had he decided that his decision was not applicable to closed cases, (i.e. cases where there has already been an appeal or the time for appealing has expired), it might have been necessary for us to decide whether to make a decision that was so applicable. Nor did he decide that his decision did not mean that there could be an appeal in closed cases. Had he done so, that could, itself, be regarded as a usurpation of a decision which it was for this Court to make.

110. However, and this is my second reason, it seems to me that the decisions in *Arbour Hill* and *Cadder*, on the application of the principle of legal certainty, are highly persuasive. The decision in the former case, which itself considers authorities from many other jurisdictions, confirms the unwisdom, potential injustice, and detriment to the public interest to which the opening of closed cases may give rise, including cases where a decision has subsequently been reached that a statute or provision is unconstitutional. The fundamental basis of the case is that there should be no retroactivity in relation to the Court's decisions on the unconstitutionality of a statute (subject to a very limited exception). One of the several reasons for its decision [75] was that the courts could only address interpretive issues of the Constitution as they arose in cases coming before them, so that unconstitutionality might be found, as here, for the first time decades after the relevant enactment, although *"actors in society may have presumed or assumed that the Act was lawful and effective and acted accordingly, including those disadvantaged by its operation"*. The Canadian cases take a similar approach. Very similar considerations apply to the question as to whether an appeal should be re-opened and allowed, as appears from the fact that the Court decided that its decision could not affect a case which had reached finality on appeal or otherwise.

111. In the case of *Cadder***,** where the practice complained of was held to be contrary to the HRC, the Supreme Court ruled that its decision did not apply to closed cases. That decision, too, does not seem to me to be dependent on any special provision of Scots law, nor to be limited to decisions of the Supreme Court. It was based on the application of the principle of finality, which is a general common law principle, and inherent in the HRC. Further a decision from this Court, applying that principle, that the decision of the Chief Justice should not apply so as to enable an accused

successfully to appeal in closed cases, is, in substance, a decision as to how we should exercise (or not exercise) our power to allow an appeal on reopening. That is plainly within our jurisdiction.

112. Third, I have not forgotten the approach and principles laid down in the cases referred to above ending with *Johnson*. But the circumstances of those cases are different. In *Jogee* the summing up reflected the law at the time, which the highest court in the UK subsequently held to be wrong, effectively reversing a decades old decision of the Privy Council on appeal from Hong Kong[12] and the decision of the House of Lords in *R v Powell, R v English*. The accused could not at his trial have done anything about the state of the law as it then was. But a submission that section 519 was unconstitutional was available to be made by any of the appellants before us, just as it was made on the part of Trott in his case. This could have been done at the trial or, as in *Trott*, by proceedings parallel to the trial and in such a manner as to affect the method of selection of the jury at the time. This was a feature which was regarded, in my view rightly, as of importance both in *Arbour Hill* and *Cadder.*

113. The point could also have been taken at the first appeal. This was considered relevant in *Canto***,** where the accused could have appealed on the point, subsequently decided, on which he relied in seeking an extension of time to appeal, in circumstances where the uncertainty of the law was well known at the time that he was sentenced, and there was no binding authority on it. He and all other sentenced persons had the option of challenging the interpretation that the sentencing court was said to have placed on the relevant provision (viz that the court could grant 1.5 days off for every day in custody prior to conviction "*if the circumstances justify it*"). When he did not do so the legal system was held to presume that he was satisfied that the sentence he had received was lawful, and he was to be taken to have accepted the result, although the court had a residual discretion to allow late appeals, the hurdle for which was a high one, which, the Court held, the would-be appellant had not overcome.

114. I note also that in *Johnson* the English Court of Appeal emphasised [19] that the Supreme Court in *Ruddock/Jogee* approved the approach taken by the English Court of Appeal in *Cottrell***,** and referred to paragraphs 43 and 44 of the latter case, which, in turn, referred to the judgment of Murray CJ in *Arbour Hill*. The Court of Appeal also referred to the fact that passages from the judgment of Murray CJ were cited by Lord Hope in *Cadder* at [60] – [62] and by Lord Rodger at [100] – [102]. I have referred to these passages above,

115. Fourth, there are, usually, exceptions to every rule, as the Courts recognised in *Arbour Hill*, that exception being referred to at paragraph [61] of *Cadder***.** I would accept that there may be wholly exceptional circumstances in which a subsequent decision as to the unconstitutionality of a statute or provision should be applied to a closed case. But it seems to me that such a case would have to be wholly exceptional; and that the fact that the decision went to the constitutionality of a statute or provision, including one relating to jury selection, would not, of itself, make the circumstances wholly exceptional (as is apparent from the fact that courts which have decided that statutes are not in accordance with the constitution have, nevertheless decided that they do not apply to closed cases) To quote *Arbour Hill "the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that*

[12] The Court of Final Appeal in Hong Kong has declined to reach the same view.

verdicts in particular cases or a particular class of cases be not allowed to stand.". The use of the phrase "*wholly exceptional*" was intended to convey that the hurdle was very high; and it should not, in my view, be watered down in application. That exception ("the Arbour Hill exception") was not, in *Arbour Hill,* held to be applicable, even though the statute under which the accused was convicted was held to be unconstitutional. Nor was any exception applied in *Burca***,** which concerned an unconstitutional composition of the jury, or in *English* which concerned the disparity of standbys in the jury selection procedure, or in *Cadder*, which held that an accused was entitled to access to a solicitor before being questioned by the police.[13]

116. The present cases do not seem to me to be wholly exceptional, or to involve some fundamental unfairness amounting to a denial of justice or to come close to meeting that standard for a number of reasons. Firstly, the disparity is said to give rise to the possibility of bias in the jury selection or, to put it another way, a legitimate doubt as to whether the jury was biased. But, it is not said that the individual members of the jury who sat on the jury were themselves biased; nor does it seem to me that those jurors can, individually, be regarded as having the appearance of bias. The complaint is in relation to the use of standbys. In substance it is said that people were stood by who should not have been stood by and who, in consequence did not sit on the jury. It is said that it was the removal of individuals from the selection process by the Crown that had the appearance of bias with the result that the overall composition of the jury might have been unfairly weighted in favour of the Crown.

117. I have not forgotten (a) that the Chief Justice has held that it was not necessary to show actual bias in order to establish the potential unconstitutionality of section 519; and (b) the fundamental importance of the fairness of a trial, which has been regarded as requiring that there should not even be an appearance of bias – a relatively low level test. But the question now before us is a different one, namely whether there should be an exception to the principle of finality, (which, if it applies may preclude an appeal in closed cases of the type mentioned in [115] above) and, if so, what criterion to apply. In determining that question we have to take into account the three different interests involved and not just the interests of the accused. As I have said it seems to me that the appropriate way of balancing those three interests, in the present type of case, is to adopt the *Arbour Hill/Cadder* approach and its very limited exception.

118. Whether the exception should be held to apply is, then a matter for us to decide in the light of all the material that we now have. We are not solely concerned with what the FIO might have thought was possible when the jury was selected.

119. In a case where the accused has been found guilty of murder and not manslaughter because the summing up was based on the "old" law, and the Court decides to reopen the appeal it will be on the basis that a plain error of law will have been established, and that the accused has probably suffered an injustice. If the summing up had followed the (later established) law then, but for the established error, he would, or could well have been, convicted of manslaughter only.

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[13] In *Cadder* the Court said that "*Countless cases have gone through the courts, and decades have passed, without any challenge having been made to that assumption* (that admissions made by a detainee without access to legal advice during his detention are admissible). *Many more cases are ongoing or awaiting trial - figures were provided to the court which indicate there are about 76,000 such cases - or are being held in the system pending the hearing of an appeal although not all of them may be affected by the decision in this case.*

120. In the present cases what is said, is that the FIO would have thought that there was a real possibility of bias in the mode of selection which may have appeared to favour the Crown; and, if there had not been a relevant disparity, different people might have been on the jury and the result might have been different. In other words, there was a combination of possibilities (i) that the composition of the jury was biased; and (ii) that, if it had not been, the result might have been different. But in the cases before us these were no more than possibilities, each of which would have had to be actual for the accused actually to have suffered a substantial injustice. These do not seem to me to be cases in which it is "*clearly established that a significant injustice has probably occurred*", to use the phraseology of *Taylor v Lawrence*; nor does the case that, if the Crown had not exercised its rights of standby in the way that it did in these cases, the result would in fact have been different seem to me a strong one, to use the phraseology of *Johnson***.**

121. It can, of course, always be said that if the composition of the jury had been different, the result might have been different. But I cannot regard the fact that there has been a relevant disparity as necessarily or generally amounting to "*a wholly exceptional case, where for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, the verdicts cannot be allowed to stand*". And, if anything above, or much above, three Crown standbys is said to entitle the accused to a new trial, the cases in which this entitlement arose would be more likely to constitute the usual rather than the wholly exceptional.

122. Further, with one exception, no error was revealed in the summings up. (The exception was that the judge in Roberts' case failed on a number of occasions to give the directions necessary for a case of premeditated murder as opposed to murder. This was not held to affect the safety of the conviction). All the points that the accused sought to put forward on appeal have been dismissed. If there was no actual bias in the selection or if, even if there was, it made no difference, the convictions were not unsafe. The unconstitutionality of the jury selection process was never challenged at trial, as it could have been. In those circumstances, there does not seem to me any adequate basis for saying that there should be an exception to the finality principle.

123. The conclusions which I have reached are bolstered by considering the number of standbys and the circumstances thereof, with which I deal in paras [145] ff below, in which I consider further whether the case of the appellants falls within the exception.

124. I bear in mind, also two further considerations. The first is that, even on the substantial injustice approach the hurdle is a high one. Allowing an appeal to be opened on the basis that, say, the Crown stood by six potential jurors, does not seem to me much of a hurdle at all. I am not persuaded that, in the present cases, the appellants have surmounted the high hurdle of showing two of the cumulative factors necessary, i.e. (i) that they have suffered a substantial injustice, or (ii) that the circumstances are so exceptional as to make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality, particularly when a challenge to the constitutionality of the jury selection procedure could have been made at the time. The second factor is an adoption, which I think appropriate, of the approach of the English Criminal Procedure Rules, and seems to me inherent in the *Arbour Hill* exception. I will refer hereafter to the combination of factors (i) and (ii) as "the English test".

125. The second is that potential unfairness works in two directions. Re-opening of closed cases on the ground, that the Crown, acting in accordance with the statute law then it effect, as it understandably regarded itself as entitled so to do[14], should not have had so many standbys, may well be grossly unfair to the prosecution, and to the public, for the reasons summarised by the Crown, as set out at [74] ff above, and addressed at length in *Arbour Hill.*

126. Lastly, I realise that to adopt this approach, means that the Court will apply a different test in relation to timeous appeals to the one which it will apply to closed cases. As the cases recognise, that results from the need to give effect to the principle of finality.

The effect of the section 5 of the Amending Act,

127. Let us assume that there is a case where there is a relevant disparity. The single accused issues a peremptory challenge in relation to 2 jurors. The Crown stands by 8, and enough jurors are empanelled to avoid the need to call any of the 8 a second time. That is the type of disparity which the Chief Justice held to be unconstitutional.

128. The Crown submits that the saving provision in section 5 of the Act has not changed the law or any constitutional right of a defendant previously available: see paragraph 3 of its submissions of 29 January 2021. The saving provision has merely stated the common law in respect of the effect of a change or development in the law on the outcome of criminal prosecutions arrived at by faithfully applying the law as it was in force at the time. The presumption is that statutes are not to apply retrospectively. What the saving provision does is to make clear that the change affected by the Act takes effect for the future and, accordingly, no previous conviction is to be quashed solely on the ground that there was a relevant disparity.

129. There is a fundamental problem with this analysis which is twofold. First, the presumption is, indeed, that statutes do not, unless they say so, operate retrospectively. But in the present cases the Constitution was in force at the time of trial and, if the jury selection procedure then was unconstitutional, it was not because of the amending statute, but because the procedure was inconsistent with the requirements of the Constitution. Second, there are exceptions to the principle of finality. The Court may reopen an appeal and set aside a conviction in some circumstances, whether they are those contemplated in the *Arbour Hill* and *Cadder* decisions or the decisions ending in *Johnson*, and by the Criminal Procedure Rules.

130. Under Section 5 the method of challenge in past cases is not invalidated **only** because of the amendment to section 519 and, accordingly, no past conviction shall be quashed **solely** on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant was able to challenge without cause. One possible interpretation, which I do not favour, is that the subsection is simply saying that the fact that the initial number of standbys was more than three is not determinative, because in the end there may only be three or less.

[14] In *Arbour Hill* Geoghegan J regarded the DPP as having acted lawfully when he launched the prosecution. He rejected the proposition that the DPP merely *bona fide* believed that he was acting lawfully, and held that he was *in fact* acting lawfully: [280] – [281].

131. Another, which I do favour, is that the section recognises and endorses the finality principle of the common law, but leaves open the ability of the Court of Appeal to quash a conviction if satisfied that the accused will have suffered such an injustice, and the circumstances are sufficiently exceptional, to make it appropriate, in the Court's view, to reopen and allow the appeal. But an excess number of standbys is not, by itself, enough. On this basis the saving provision is to be treated as confirming that the Court needs to find something more[15] than a disparity of standbys to re-open and allow an appeal. This is consistent with the principle of finality and the exception to it (whichever formulation of the exception is adopted).

132. If, however, the section is sought to be relied on as providing that an excess standby for the Crown can never form the basis of a quashing of a past conviction, there are a number of difficulties.

133. First, the potential unlawfulness of the excess standby lies in the fact that it offends the accused's constitutional rights, which he enjoyed at the time of the trial, even if no one had yet addressed the point on the basis of which the Chief Justice found that they were potentially infringed. An application to set aside a conviction on the ground that the method of challenge of jurors involved a breach of constitutional rights would not invalidate the method of challenge "*by reason **only** of the amendment to section 519*". It would be invalidated because the method of challenge involved, in the circumstances of the particular case, a breach of the accused's constitutional rights. The amendments to section 519 in sections 3-4, which do not purport to have retrospective effect, would cure the defect for the future but the amendments would not themselves invalidate anything.

134. Further, if sub section (2) is to be interpreted as meaning that an appellant can never claim that a past conviction should be set aside on the basis that the Crown stood by more potential jurors than the defence, that would itself be an invalid attempt to preclude the accused from relying on his constitutional rights, particularly where an appeal was brought in time. I would, also, accept, by analogy with *R v Robinson* [2009] CA (Bda) 8 Crim, that it is not for the Legislature to preclude the Court of Appeal from fulfilling its judicial function of deciding whether an appeal should be entertained.

135. I would also observe that the fact that Parliament included the saving provision would appear, itself, to be a recognition of the fact that the past method of challenge might itself breach constitutional rights, and justify the reopening of an appeal and allowing it. If there was no prospect of that happening the provision was unnecessary.

136. In those circumstances it seems to me that we should proceed on the basis that Parliament did not intend section 5 to have the effect that an appeal can **never** be reopened or a conviction set aside if there has been a relevant disparity. But what it did do was to provide a strong steer in what seems to me to be the right direction, namely that the mere fact of some disparity is not a sufficient ground for allowing an appeal.

[15] Which might, for instance, be the case if the Crown, in a case against a black defendant, stood by, without the Crown or the putative juror giving any reasons whatever either at the time or later, 21 potential jurors (the number stood by in *Trott*), all of whom were black, resulting in a jury which only had one black person on it,

Separation of Powers/Interference by the State with the accused's rights of fair trial.

137. Ms Greening submits that, if the saving provision has the effect of disabling an accused from relying on the infringement of his constitutional rights, it was a legislative intrusion on the judicial function, and was targeted against a specific group, and therefore constituted an interference by the State with the accused's rights to a fair trial and was contrary to the rule of law. In the light of the conclusions I have reached on section 5 I can deal with this shortly.

138. Ms Greening draws attention to the line of authority of which the latest example is *Ferguson et al v AG* [2018] UKPC. The nature of the issue in that case appears from paragraph 1 of the judgment:

> "*1 This appeal arises out of an ill-fated attempt to introduce a statutory limitation period for criminal prosecutions in Trinidad and Tobago. The relevant statutory provision was in force for only two weeks before it was retrospectively repealed by a fresh Act of Parliament. These proceedings have been brought by a number of persons who would have been entitled to the benefit of limitation but for the repeal. Their case, in summary, is that the repeal was unconstitutional because it was a retrospective abrogation of vested rights, a legislative intrusion on the judicial function and directed specifically against the defendants in particular criminal proceedings. They also say that in the light of the prosecutor's involvement in promoting the repeal, the continuance of the prosecution would be an abuse of process."*

139. The Amending Act, by section 5, repealed the relevant statutory provision and deemed it not to have come into effect. Section 6 provided that all proceedings under the repealed section 34 which were pending before any court immediately before the date of assent of the Act should, on coming into force of the Act, be void. The appeal to the Privy Council was dismissed.

140. At paragraphs 30 and 31 Lord Sumption said this:

> *"30. The first question is whether the repeal directly interfered with current criminal proceedings against the appellants in a manner inconsistent with the separation of powers. In the Board's opinion it did not. Section 5 simply altered the general law, by restoring it to what it had been before 31 August 2012. Section 6 on the face of it comes closer to being a direct interference with judicial proceedings, because it legislatively annulled valid applications by which the appellants had invoked the statutory jurisdiction of the High Court during the brief interval when section 34 was in force. But section 6 must be viewed in the context of the whole Act. Section 5 on its own would have been enough to achieve the legislator's purpose of ensuring that no one would be able to take advantage of the ten-year limitation period, since it deems section 34 never to have come into effect. Section 6 adds emphasis but nothing more. It is in reality a consequential procedural provision designed to ensure that effect was given to section 5 across the board, irrespective of the stage which those affected had reached in their attempts to take advantage of the repealed provision. Far from indicating the special character of the Amending Act, it underlines its generality. Parliament, having resolved upon a comprehensive repeal,*

> *could not sensibly have contemplated an arbitrary distinction between those who had been quick enough to make their applications during the brief period of a fortnight when section 34 was in force and those who had not, two categories whose position was for all practical purposes the same.*
>
> *31. It follows that the challenge to the Amending Act on this ground can succeed only if it is shown that the terms, although framed generally, would in practice apply only to a limited category of people including the appellants against whom it can be said to have been targeted. But this is manifestly not the case. The Amending Act not only looks like general legislation. It is general legislation. It affects all cases to which section 34 would otherwise apply, past, present or future. This includes a very large number of persons and cases against which it cannot have been targeted. It is right to add that if the concern had been only or mainly with the appellants, the logical course would have been to amend Schedule 6 so as to add the offences with which they were charged to the list of those excluded from section 34. That was one of the options proposed by the DPP but it was not the one adopted.*

141. Ms Greening submits that the appellants are not in a general class; that section 5 affects a targeted group; and that, if it has the effect relied on, it is incompatible with the accused's fundamental rights. That does not seem to me to be the correct analysis. The provision is framed generally; it applies to all previous cases; it cannot be said to have been targeted at any specific individuals.

Was there, having regard to the number of standbys made by the Crown, a relevant disparity in any of the three cases

142. The important question is to what extent the Crown, in each of the three cases, exercised its rights of standby, and whether the times which it did so exceeded the number of times that an accused or accuseds might make a peremptory challenge. If, in a case with only one accused, the Crown only stood by three jurors the fact that it could have stood by more is irrelevant. As I have said, I am also of the view that if a juror is stood by first time round and, second time round, the judge decides that he or she is rightly challenged for cause, or should be excused, that does not count, for present purposes, as a Crown standby. In such circumstances, in the end, the juror concerned has not been stood by. In addition, if a standby is agreed by Counsel, I would not regard that as a standby which should count for present purposes. The accused cannot contend that he has suffered any injustice by reason of a standby which was agreed.

143. But a standby which occurs without any apparent reason should, the appellants submit, *prima facie* count (even if there was a reason known to the Crown which might justify a challenge for cause). What is at issue is the appearance of events to the FIO. The fact that the Crown might, years after the event, be able to adduce a reason for the standby is no answer. It would, itself, require evidence. It would not affect the fact that what happened denied the defence of any opportunity to be heard on the question of challenge for cause or excuse, and meant that the Court never made any decision on that. Many factors might have contributed to the judge's decision and we will never know what it would have been. Most important of all the fact that a reason might later be put forward does nothing to dispel the appearance of bias to a FIO at the time.

144. As I have said, I do not accept that, in deciding whether there is an exception to the rule of finality, we are confined to considering the view that the FIO would have taken at the time when the jury was selected.

How many standbys were there?

145. In order to assess what were the number of standbys that count, it is necessary to go through (as we have done) the transcripts of the jury empanelment proceedings to examine what happened. The material which we have gone though is sizeable and, in places, obscure. (The difficulty in dealing with it and the time necessary to attempt to do so affords some powerful support for the application of the finality principle). I shall attempt to deal with the question as concisely as is possible.

146. In each case the Crown has told us which jurors they accept were stood by (without being successfully challenged or excused second time round) and what they say in relation to those that they claim were not stood by. The defence for their part have stated their contentions on the same questions. In all three cases the Crown has prepared a schedule which sets out the jurors who were at some stage stood by, and contains references to the transcript of the jury selection exercise on the first day of the trial which evidences (to the extent that it does) what occurred.

Brangman

147. In the case of Brangman the judge said at the beginning of the selection process the following:

> *"When your names are called, it is advised that you consider the following question, and that is: Is there anything known to you that a reasonable person with knowledge of that information would say, you, by reason of probable bias or favour, may be incapable of rendering a fair verdict in this case? If your answer to that question is "Yes", you should indicate, and you may be excused. In aid to that question, you should consider the following: One, do you know any –- do you know the accused person? Or any of the witnesses, or their relatives, and/or associates, in such a manner or to such a degree that you may not honestly, that is without bias or favour to any side, deliberate in this matter, on the basis of the law you shall hear and the evidence you shall hear in this trial only.*
>
> *Or are you likely to suffer from the pressure of pain or circumstance due to associations, or illness, work or travel arrangements, and/or other commitments, that you may not honestly and properly address your mind to your duty in this trial? Your duty is to hear the evidence and return a fair verdict.*
>
> *Three: And do you hold any views that are so strong that they may affect your judgment in this case? In short, can you put away some of the prejudices and other strong views that you may have and deal with the case on the evidence you hear only, and on the law you hear only, period? If your answer to any of these questions is "Yes", you ought to indicate so that you may be excused.*

> *Now, this is not an exhaustive list. There may have been other considerations that I have not mentioned. On the other hand, it is not an opportunity for avoidance of service. We do know how to separate and reject the genuine from the not-so genuine."*

The significance of expressions of concern by jurors needs to be considered in the light of that ruling by the judge.

148. The Crown's schedule is at **Appendix 1**. As is apparent therefrom the Crown accepts that it stood by the following jurors with no reason being given for why they had been stood by:

Juror Number	**Name**	**Transcript Pages**
26	Muhammad	7
38	Simons	8
4	Crisson	15

149. Mr Pettingill submits that the Crown also stood by the following

13	Glasford	16-17
49	Webb	18-19
14	Seaman	18

150. There was another juror, number 11 **Eve**, who said that she knew the defendant's father, auntie and the defendant and "*Debora Wellman and ....*" Mr Richardson, Brangman's counsel, indicated that he had no issue with her knowledge of the defendant and his relations but, as Mr Pettingill was disposed to accept, it appears that it was the Court which decided that she should be stood down. I do not think that this should be treated as a standby by the Crown, a proposition with which Mr Pettingill agreed, whilst observing that the sequence of communications did not help with the overall appearance of fairness because the Crown and the judge appeared to be working together when there should be a clear demarcation between standbys, decided on by the Crown, and challenges for cause which were to be determined by the judge.

151. In relation to juror 13, **Glasford**, the record shows the following exchange:

> *"COURT ASSOCIATE: Number 13, Glasford.*
> *THE COURT: All right. Back at the front row. Any concerns?*
> *Yes, madam?*
> *MS. GLASFORD: I know [indiscernible]. Linda Wilson, Cathy Williams, Kirk Saunders and, um, Hassle, Vance Hassle.*
> *MS. KEILLOR: Stand down, my Lord."*

152. As is apparent Ms Glasford said that she knew four witnesses and was stood down (sic) by Ms Keilor for the Crown. Mr Pettingill submits that that must count as a Crown standby. It was the Crown which in fact caused her to stand by and Counsel indicated her decision to the Judge. The use by Counsel, in this and other cases, of the phrase "stand down" may have indicated (as I think

that it probably did) that she regarded this as a case where the witness could be challenged for cause. But, if that was to be done it had, Mr Pettingill submits, to be done properly with a decision made by the Judge who, alone, could rule on it. For Counsel to standby the juror, even under the term "*stand down*", gave, it is submitted, the appearance that the Crown was fashioning the jury.

153. In relation to juror 49 **Webb** the transcript reveals the following exchange:

> *"Court Associate: Number 49, Webb.*
> *THE COURT: Any concerns, Mr. Webb?*
> *MR. WEBB: Know the family of Mr. Darrell.*
> *THE COURT: Hmm?*
> *MR. WEBB: Nathan Darrell.*
> *MS. KEILLOR: Stand down, my Lord."*

Nathan Darrell was the victim of the attempted murder.

154. In relation to **Webb** Mr Pettingill makes the same submissions, He was stood by by the Crown (sub nomine "*stood down*".) The Crown made the decision. No assessment took place of the extent of his knowledge of the family of the victim and whether that disqualified him, no challenge for cause was addressed; and no decision was made by the judge.

155. In relation to juror 14**, Seaman,** the transcript reveals the following exchange:

> *"COURT ASSOCIATE: Number 35, Seaman.*
> *THE COURT: Any concerns, Ms. Seaman?*
> *MS. SEAMAN: Yes, I know Vance Hassle [indiscernible] and Linda Wilson.*
> *MS. KEILLOR: Sorry, my Lord, I didn't hear the second witness's name that she, she mentioned?*
> *THE COURT: Repeat.*
> *MS. SEAMAN: Vance Hassle and Linda Wilson.*
> *MS. KEILLOR: Stand down."*

156. In relation to this juror, who said that she knew witnesses, Mr Pettingill makes the same submissions as before.

157. In short, he says that the Crown stood by at least six potential jurors when Brangman could only challenge three. That gave an appearance of bias in the selection of the jury, because the prosecution appeared to be making (and, indeed, was making) the decisions about who should come off which gave rise to the real possibility or risk that the jury would not be impartial. The process also offended the principle of equality of arms

158. Mr Mahoney invites us to take a practical view. The Crown was trying to be helpful. Where a potential juror indicated a basis upon which he or she could be removed from the case, the prosecution stood him down. Only three were stood by for no reason given. The others gave reasons which would justify excluding them; they should not be treated as standbys because they could not serve on the panel anyway. The standbys should be counted as three.

159. I would accept that there were in fact six Crown standbys. But, as I have indicated, that does not seem to me to bring the case within either the *Arbour Hill* or the *Johnson* exception. In particular, it is apparent from what was said by counsel for the Crown why she was standing the jurors down (sic), which was that they said that they knew the witnesses or the victim. It does not seem to me that the FIO would at the time think it possible, or that we should now regard it as either possible or likely, that the Crown was activated by bias against the defendant; but rather that it was seeking to exclude from the jury someone who might well be antagonistic to him. Nor does it seem to me at all likely that if any of the three jurors referred to in paragraph [149] had sat on the jury that a different result would probably have occurred. Further, the case against Brangman was a strong one. He was positively identified by the victim, who said he knew him well; and he did not give evidence. He was, of course, perfectly entitled to stay silent, but his silence meant that there was no evidence from him to contradict the inferences that the Crown invited the jury to draw.

Smith-Williams

160. In Smith-Williams the Crown stood by 22 jurors (initially). Smith-Williams challenged 1, the list of those stood by and the reasons given, where a reason was given, is at **Appendix 2.** Of those the Crown accepts that 5 were stood by and not reconsidered. They are the following:

Juror Number	**Name**	**Standby Number**
8	Curtis	1
34	Simons	8
32	Simmons	11
19	Hypolite	17
16	Latham	21

All of these five were stood-by by the Crown with no reason given or apparent. The last two were potential alternates.

161. Mr Lynch for Smith-Williams submits that the following 7 jurors should also count as stand by, so as to make 12 standbys in all:

Juror Number	**Name**	**Standby Number**
7	Cupidore	1
29	Rewan	9
3	Bridges	10

35	Simons	12	
20	Lewis	15	
10	Darrell	16	
18	Hurdle	18	(Proposed Alternate)

162. Juror number 7**, Cupidore,** was stood by without any reason being given. She was, however, as Mr Mahoney told us, known to the Crown at the time as an HR representative for the DPP's office. (I see no good reason why we should not proceed on the basis that what Mr Mahoney has told us is true). She, it is submitted, should be treated as a Crown standby because on the face of it she was stood by for no apparent reason; a reason should have been stated; the defence might have wanted her on the jury and whether she should not sit was never determined by the judge; nor can we determine that now. It is far from evident, Mr Lynch submits, that, if the matter had been ruled upon she would have been successfully challenged for cause, particularly because this was not a case where there was any attack on the police or the prosecution.

163. Mr Mahoney told us that this potential juror worked closely with members of the DPP including himself, and that cause would have been established if she had been called a second time, although he said that he would concede to this one as a Crown standby "*for now".*

164. Juror 8, **Curtis,** (whom the Crown accepted to be a standby) was the next person to be stood by.

165. After another juror **(Matthews)** was called a preliminary jury of 12 had been found; and the judge then proceeded to go through the 12 to ask them if they had any concerns. It was at this stage that more standbys occurred and, once that had happened a new prospective juror was called forward, some of whom were then, themselves, stood by.

166. **Simons** - Juror no 34 – is accepted by the Crown as a standby.

167. **Rewan** was also stood by with no reason being given. But she was known to be a former accounts clerk at the Supreme Court (in 2007/8, Mr Lynch told us) and then employed by MDM. In relation to her the same considerations arise as they do for Cupidore. There was no reason, Mr Lynch submits, why she should not have sat on the jury because of those characteristics, and it was certainly not self-evident.

168. Mr Mahoney told us that this juror's office had been close to that of Greaves J, who was the judge, and that she had a close professional relationship with him, and that there was, therefore, good reason why she should not stand on the jury at the time.

169. **Bridges** said that he had job commitments from October 10th to 15th and then travel dates from October 22nd to 24th. The Judge said "*Yes, Prosecutor*" and Mr Mahoney said "*Stand by*". Mr Lynch submits that this, too, must be counted as a standby. Most of us have job commitments, but that does not automatically mean that one should be excused. Further the travel dates were no obstacle. The judge had told the jury (See ROA 372) that they hoped to be finished by Monday

22nd but that if they were not there would be a break for the rest of that week and they would complete the trial the following week. In any event it would be necessary before excusing a juror to examine the nature of his "*travel dates"*, in particular as to whether they were pre-booked commitments, and whether they were changeable.

170. Mr Mahoney observed that this juror was a latecomer as a potential standby, not being mentioned in Trott & Duncan's letter to the Court of 26 February 2021 or its response of 16 March 2021 to the Court's questions. What happened in essence was that he and Mr Lynch looked at each other and in the light of his reaction the standby took place. The putative FIO would not, he submitted, be concerned about this, nor should we.

171. Juror 35, **Simons** is then another prospective juror whom the Crown accepts was stood by without any reason being given.

172. In relation to **Simons** the transcript reveals the following:

> *"THE COURT Yes, blue dress.*
> *PROSPECTIVE JUROR: I've been seconded to Legal Aid Officer, --*
> *THE COURT: Yes, Prosecutor?*
> *PROSPECTIVE JUROR: -- and I'm sure that --*
> *MR. MAHONEY: Stand-by.*
> *PROSPECTIVE JUROR: Thank you.*
> *THE COURT: We were trying to hold on to you.*
> *PROSPECTIVE JUROR: I know you were.*
> *MR. LYNCH: So was I.*
> *THE COURT: Yes."*

173. We were told that juror number Simons was an Office Manager in the AG's Chambers, seconded to the Legal Aid Office. Mr Lynch submits that she, too, should be counted as a Crown standby for the same reasons as apply to Cupidore and Rewan, particularly when the Judge and Mr Lynch said that they were trying to hold on to her (although the Crown says that this was no more than a jollity after she was stood by). She was not self-evidently someone who could successfully be challenged for cause, especially when the AG was not prosecuting, and Smith-Williams was not on Legal Aid.

174. Mr Mahoney told us that this juror had assisted the DPP in her capacity as Office Manager. Her office was on the fourth floor when the DPP's office was on the second. The Legal Aid department would have contact with clients and the Crown did not know that Smith-Williams was not legally aided. She would, if necessary, have been challenged for cause.

175. Juror **Lewis** said that she suffered from "*anxiety and depression and I am absolutely panicked that I'll end up having a panic attack here*". Mr Mahoney then said standby, having regard to the reason given. Again Mr Lynch submits that this must count as a Crown standby. That is what the Crown did. The judge did not excuse the juror or make any determination at all. Further an expression of concern on the part of a juror is no necessary bar to him or her sitting. Mr Mahoney submits that a perfectly good reason was given by the juror why she should be excused.

176. **Ms Darrell** was asked by the Judge if she had "*any concerns*". She replied "*Yes*" whereupon Mr Mahoney said "*Stand by, sir* (sic)". We are told that on the recording there is a gap at 42.37 after the judge says "*Any concerns, Ms Darrell*"; at 42.54 there is the sound of paper rustling and at 43.09-17 there is a further sound of paper. It is at 43.27 that Mr Mahoney says "*Stand by, sir*". The judge says "*Yes?*" but that appears to be an indication to the Associate that they should proceed to the next juror.

177. Mr Mahoney told us that there was a note which had been passed to him and by him to Mr Lynch (Mr Lynch confirmed that if a note had been passed to Mr Mahoney he would have seen it because he would have required it); that they looked at each other and based on their communication with each other (Mr Lynch accepts that he may have shrugged his shoulders), he stood the juror by. It is accepted that the sound of paper rustling can be heard. But we cannot now tell what the note, which I accept must have been produced, may have said and no one seems to have any recollection of its contents.

178. Mr Lynch submits, as before, that this too must count as a Crown standby.

Alternates

179. By this stage a 12-person jury had been selected and the names which the jury might hear in the course of the case were read out. These included **Mr Muhammad**. The Court then proceeded to try to select five alternates, on the footing that, if they could potentially select five, two of those presently envisaged as being on the jury could be replaced. The judge indicated that the two whom he had in mind were **de Sousa**, who he identified as "*the lady who says she works for herself doing maid duties*" and **Matthews**, whom he described as "*the psychologist who wants to do her programmes*". In the event, no alternates had to sit on the jury.

180. **Ms Hypolite**, juror 19, was called first and immediately stood down, with no reason given. She is accepted to be a Crown standby.

181. Three alternates (**Scott, Alexander** and **Hall**) were then selected. **Cashin** was then called, to whom the defence a little later objected, whereupon he was removed as an alternate. Next was juror **Hurdle**. The Crown stood her by without giving reasons. However, we were told that the reason was that she worked in the AG's Chambers and was an administrative assistant to the Deputy Solicitor General; Further the DPP and the AG are in the same building and personnel from each department encounter each other in the building and at social functions. At 54.14 of the Courtsmart recording there is a discussion amongst counsel regarding this juror. The content cannot be heard. There was no objection. Mr Lynch submits that she falls into the same category as Linda Simons. Mr Mahoney submits that she was someone whom it was proper not to have on the jury,

182. There was then a replacement of the two jurors already on the panel in relation to whom the judge had expressed some sympathy. **de Sousa**, a self-employed housekeeper, who had replaced a juror who was stood by after the initial 12 had been selected and who, when the judge asked her if there were any concerns (ROA 385) said that she did not get paid if she did not get work, but who had

not then been stood by, was replaced by juror **Scott**. **Matthews**, who was on the original 12 but who does not appear to have been stood by, but who had expressed concerns because she was a school psychologist in the middle of casework, was replaced by juror **Alexander**. **Messick** was called next and excused because of travel commitments, with Mr Lynch's agreement. He is not relied on as a standby. Next juror **Hayward** was called without objection. **Cashin** was then objected to by the defence and stood down.,

183. Next was **Latham** whom the Crown stood by without giving any reasons and who is accepted to be a Crown standby.

184. Last was **Davis** in relation to whom the transcript reveals this:

> *"COURT ASSOCIATE: Number 9, Danielle Daniels.*
> *THE COURT: You have any concerns, Ms. Daniels?*
> *MS. DANIELS: I do have a question. If somebody in my immediate family has been convicted of [[indiscernible], would they have a conflict, and as well as knowing one of the witnesses or people that --*
> *MR. MAHONEY: Stand down."*

The person with a conviction to whom she was referring may have been the lady's son. In any event, Mr Mahoney submits, she was obviously not someone who should sit on the jury. The FIO would be concerned if she had done so as a supposedly impartial juror.

185. The Court then ran out of potential alternate jurors so that the number of alternates was, in the end, two namely **Hall** and **Hayward**.

186. As I have said the Crown accepts that **Hypolite** was a standby and the defence asserts that **Hurdle** and **Latham** were as well. Mr Lynch submits that the significance of the selection of alternates is that the FIO might think that the jury was being fashioned such that, even if one of the jurors had to come off it, the Crown would still have one of their desired people on the jury, Since, however, no alternates in the end sat on the jury it could be said that the method of their selection is irrelevant. None of them had to decide the case. In principle I would accept that to be so; or, at the least, that an accused could not complain that he had suffered a substantial injustice by reason of the selection of alternates who never judged him.

187. There is, however, an added complication. If Juror 19 – **Hypolite** – had not been stood by it would have been he who replaced **de Sousa,** and **Scott** would have replaced juror **Matthews**. So he is, in my view, to be regarded as a relevant standby. But we can ignore, for present purposes:

(a) **Hurdle**, whom the defence submits should not have been stood by simply because she worked in the AG's Chambers.

(b) **Latham**, who was stood by without any reason being given, and

(c) **Daniels**, in relation to whom no examination took place as to whether she should be challenged for cause.

188. There are thus, on the Crown's case, 4 relevant standbys: **Curtis, Charlene Simons, Crystal Simmons** and **Hypolite**; and, if the Defence are right, a further 6 (i.e. those in paragraph 161, excluding Dorianne Hurdle). I would accept that there were 10 relevant Crown standbys namely **(i) Curtis** (8); (**ii**) **Simons** (34), **(iii) Simmons** (32); **(iv) Hypolit**e (19); **(v) Cupidore** (7); (vi) **Rewan** (29); (vii) **Bridges** (3); (viii) **Simons** (35); **(ix**) **Lewis** (20); and (**x) Darell** (10)

189. It does not however appear to me that this is so exceptional a case that the appeal should be allowed; or that it meets the *Arbour Hill* exception or the English test. The contention that the Crown was in fact standing by jurors to fashion a jury in its favour, or that the result would probably have been different if those stood by had not been stood by, does not seem to me a strong one. There were of course 4 relevant Crown standbys where we do not now know the reason why they were stood by and where no reason seems to have been mentioned at the time. But in relation to the rest, **Cupidore** was stood by because she was an HR representative in the DPP's office and, as Mr Mahoney told us worked closely with members of the DPP including himself. I accept that the FIO, observing the jury selection process at the time would have no idea why she was stood by; but, as I have said, for the purposes of deciding whether or not the case is one where, exceptionally, it should be reopened and the appeal allowed, the Court is entitled to look at any information which indicates why a decision was taken. Further, whether or not a case is sufficiently exceptional is not a matter for the FIO but for this Court. In the light of what we now know, any case that the Crown was standing this juror by because it was thought that she might be antagonistic to the Crown is not convincing; nor is the idea that the result would probably have been different if she had remained.

190. The same applies in relation to **Rewan**, who, we were told, had a close professional relationship with Greaves J; and to **Bridges**, who was stood by on account of job commitments and travel dates. I accept that the justification for excusing him deserved further and better consideration. But again, any case that he was stood by to bolster the Crown is wholly unconvincing. The same applies in the case of **Simons**, who was an Office Manager in the AG's Chambers, who had assisted the DPP, and who had expressed her own concern. **Lewis** was stood by because he feared having a panic attack and similar considerations apply to him. In relation to **Darell** some form of concern must have been put on paper but we do not know what it was. It is pretty clear that it was that concern that caused him to be stood by (counsel having seen the note and either indicated no objection or, at any rate, voiced none).

191. In short, looking at the matter as a whole I cannot regard this case as coming within the wholly exceptional category, however precisely it is formulated. I recognise that we do not know why the Crown stood by four of those that it did. But, in deciding whether the case is exceptional, it is legitimate to take in to account whether, in relation to those where reasons were apparent, or are now known, the proposition that the Crown was fixing the jury in its favour and that, if it had not, the result would probably have been different, carries any and, if so what degree of conviction. In my view it does not carry any real conviction and certainly not one amounting to a strong case.

192. The defence also contends that there is a yet further standby, although, as Mr Lynch put it, he would not wish his case to turn on it. Juror 17 – **Hollis –** was stood by. The passage in the transcript which is believed to relate to her reveals the following:

"THE COURT: You might be recalled.
Point number 1, might be gone by Monday. Right?
PROSPECTIVE JUROR: Right.
THE COURT: Point number one may be gone by Monday. I have that little issue, too, and mine is going, so that might be gone by Monday.
Point number two is more difficult. You have my sympathies as far as that is concerned, I wish the best for you, but it might not excuse you entirely.
So you just take a seat now.
[Indiscernible.]"

193. The above passage is extremely obscure and it is not clear whether the first sentence relates to this juror or a previous one. There was plainly some note provided but we do not know what it said. As it seems to me this matter should not count as a standby by the Crown but a decision by the judge.

194. There is an additional complication. Smith-Williams was convicted of pre-meditated murder. Under the amended section 510 he would have the right to challenge without cause 5 persons because that offence is punishable with a mandatory life sentence. That was not, however the position at the time of the trial, which took place before the amendment.

195. But in the Supreme Court trial of *R v Cleveland Rogers and Burgess* Justice Simmons decided – on 9 July 2019 – that Burgess, who was charged with pre-meditated murder, was entitled, as was Rogers, to five peremptory challenges, notwithstanding that the Criminal Code in its then form provided that the right to challenge, without cause, five persons applied if the accused was charged with an offence punishable by death. She did so on the basis that although the Legislature had by the Abolition of Capital and Corporal Punishment Act 1999 abolished the death penalty, and, the Criminal Code Amendment Act 2014 had effectively removed the offence of pre-meditated murder for offences committed after the 2014 Act came into force, the Legislature had left section 519 (a) intact, The right to five challenges had, she held, survived the repeal of the death penalty and the amendment abolishing pre-meditated murder as a charge in respect of murders occurring post the amendment (but not those occurring on a date prior to the coming into force of the 2014 Act amendment - as was the case with Rogers and Burgess). Reliance was placed on section 16 (1) (c) of the Interpretation Act to submit that the right to challenge five jurors on account of the offence being only punishable with death had survived the abolition of the death penalty by the 1999 Act.

196. I entertain some doubt as to the correctness of that decision which appeared to rest on the proposition that the right to five peremptory challenges was acquired because the death penalty was the only sentence then for a charge of premeditated murder and that that right survived the repeal of the death penalty. It would seem to me that the only relevant enactment which the 1999 Act repealed was the provision in 286 A (2) of the Criminal Code providing for the death penalty for premeditated murder and that the only right which is said to be potentially affected by the repeal was the right of someone charged with an offence punishable with death to challenge more

than 5 persons. But that right has not in any way been affected. Nor has Smith-Williams been charged with such an offence.

197. Another possible analysis is that the reference to "*punishable with death*" should, after the 1999 Act be construed as a reference to an offence which was once punishable with death.

198. But whatever the merits of this argument, at the time of the Smith-Williams trial the right of challenge which he effectively had was 3 (of which he used 1).

Roberts

199. In this case, where Roberts' co-defendant was Duerr, the Crown stood by (initially) 33 jurors. The details are in **Appendix 3**. However, second time round, 28 of those were either stood down by the judge or excused by him; or it was agreed that they be released. 3 were in fact empanelled (standbys 9, 18, and 24). In those circumstances the eventual standbys numbered 2. Ms Greening for Roberts did not dispute these figures. Roberts challenged 3.

200. Ms Greening submits that the appearance of bias was not removed by the fact that in the end there were, at best, only 2 effective Crown standbys, namely **Greaves** (15) and **Mello (**17). According to the references given by the Crown in Appendix 3 **Greaves** was initially stood-by by the Crown when she said that she was due to travel between the 4th and 11th of April; Record of Appeal page 266; page 18, lines 3-16. Second time round she was stood-by by the judge, after he had asked whether "*we can all agree*" on her standing by "*for the time being*", in response to which Mr Mahoney and Mr Mussenden said "*Yes*". Somewhat, puzzlingly this was on the basis that she would be away from 28th March to 1st April (Record of Appeal 320; pages 72-73).

201. **Clare Mello** asked, first time round, to be excused for a medical reason, and provided a letter (causing the judge to say "*We expect to be finished by that date*") and was stood-by by the Crown. Second time round the judge again said "*we can agree that she can stand by for the time being,* to which Mr Mahoney replied "*Yes sir*". This was on the basis that she was travelling from 24 March to 31 March (Record of Appeal, page 321, page 73.). I would not regard either of those as Crown standbys. In effect the judge made the decision.

202. Ms Greening observes that what anyone watching this process would have observed was a continuous run of 33 standbys, with the prosecution making unilateral decisions. In at least 13 of those cases the initial standby was made without any reason then being given or appearing. These were the following jurors using their standby numbers: **Dawson** (1); **Gardner** (2); **Smith** (3); **Wellman** (5); **Durham** (7); **Wilson** (9); **Richardson** (23); **Dean** (24); **Roberts** (25); **Bento** (26)**; Rawlins** (29); **Hassell** (30) and **Laws** (31). In the case of the remainder at least some information as to why the juror was being stood down was apparent.

203. The transcript reveals that there was another potential juror - Juror number 37 **Jovetic**. He was called and the judge asked him if he had any concerns to which he obviously said something which the transcriber found indecipherable (ROA 27) and Mr Mahoney said "Stand down": in the end he was selected to sit on the jury but was challenged by Roberts.

204. Ms Greening submits that any fair minded observer seeing this number of names called out, and stood by, without any explanation at all, would think that there was a real possibility, and an appearance, of bias in the selection process as used by the Crown and a want of equality of arms. This meant that the accused was not to have a fair trial and that there has been a miscarriage of justice. The concerns of the FIO would not be alleviated by seeing that in other cases, although some information as to the reason, or potential reason, for a standby was given, there was no examination by the judge of whether the juror should be stood by, and no engagement of the defence in relation to that question. In truth the whole process was contaminated with the appearance of bias.

205. I do not accept that we should look at the number of those who were initially stood by and decide that there was an appearance of bias from that number alone. The FIO is to be assumed to have sat through the whole of the jury selection process from start to finish. If it turned out that, in the end, only two of the original Crown standbys remained stood by, it does not seem to me that he would think that, because originally there had been many more, that there was an appearance of bias in the process which had in fact led to the selection of the jury. More importantly, there is no good reason for us to think that the accused has suffered a substantial injustice, let alone that there has been a wholly exceptional set of circumstances which have involved a fundamental denial of justice,

Roberts' evidence

206. There was a further aspect of the procedure which, Ms Greening submits, gave every appearance of bias. In an affidavit sworn on 16 November 2020 Roberts said that "*throughout the jury selection process the prosecutor was communicating with police officers in the back of the courtroom who were indicating to him with a nod of the head or otherwise whether to stand potential jurors by*" and that it was "*abundantly clear [to him] that the prosecution was manipulating the jury selection process to secure an unfair advantage to [his] detriment through racial profiling and other unknown methods"*. In a later affidavit of 3 December 2020 he added that the police officers of whom he spoke were also prosecution witnesses in the case against him and that he recalled that one of them was Nicholas Pedro; but that there were, also, other officers present at the jury selection process who were communicating with the prosecutor and who testified for the Crown.

207. We have heard oral evidence from the appellant, Mr Roberts, and Ms Smith, who was the junior for the Crown. I shall endeavour to summarise the gist of it.

208. The jury selection process took place in Court No 3 at the courthouse on Front Street. That is a very small Court. A photograph of it is at **Appendix 4**. As can be seen, if you were to place yourself where the judge sits you would have in front of you in the following order (a) the clerk, sitting at a desk; (b) two rows for counsel, leading and junior; (c) the dock in which the accused sits with the base of his chair above ground level, and which is, on its top, surrounded by glass; and (d) behind the dock, and barriers to the side of it, the seating area for the public. On the judge's right (to the left of the photograph, as you look at it), is the jury box. In counsel's rows Crown counsel are closest to the jury with defence counsel to Crown counsel's right. The photograph shows two

doors on the side opposite the jury. There is another door, not on the photograph which is on the same side but behind the seating area behind the dock. That is the public entrance into the Court.

209. When a jury is to be empanelled the potential jurors will assemble in the area behind the dock. When they are called they will go into the jury box; but in the process of selection jurors may be stood by in which case they may, at some stage, leave the jury box and be replaced by others. As is apparent, when there is present in court a pool of persons from which the jury is to be selected there is not much spare room behind the dock or close to it.

210. Roberts was sitting in the front row of the dock with his co-defendant, Duerr, facing the judge and looking down on the lawyers. A correction officer was behind them. In the front row of counsel were Mr Mahoney, Mr Richardson and Mr Mussenden in that order. Behind them were Ms Smith, Mr Attridge and Mr Williams.

211. Roberts accepted, in his oral evidence, that there was a goodly number of potential jurors in the Court room (it appears to have been 60 or so) and that they remained in the courtroom whilst the empanelling went on. He did not accept that there was no way that the Crown counsel could see someone standing at the back of the court near the public entrance door. It seems to us, however, that it would not be at all easy, for Crown Counsel, Mr Mahoney in the front row in particular, to make sign contact with a police officer at the back, or vice versa. Roberts accepted that his lawyer, Mr Attridge, made no objection and expressed no concern about anything to do with the process of empanelment of the jury at the trial, nor was any raised on the first appeal. He maintained that Mr Pedro was one of the police present on the first day and that the police were standing near the entrance door. He said that Mr Mahoney was looking back at where they were standing; he did not accept that the dock obscured his view.

212. We heard evidence from Ms Nicole Smith, Mr Mahoney's junior, a criminal lawyer of some 16 years' experience. She had sworn an affidavit in which she said that neither she, nor Mr Mahoney, deferred to or sought the assistance of any police officers who may have been present in the courtroom during the empanelling of the jury and that the physical logistics of Court No 3 made it impossible for those standing at the rear of a jammed court room to communicate with prosecuting counsel seated at the front. There was no attempt to manipulate the composition of the jury. Potential jurors were stood by for reasons such as that they knew the defendants, were friends with the deceased or his family, or were excused for medical and travel commitments. She said that she did not recall Mr Mahoney standing a lot of jurors by (although he plainly did, at least first time round), but recalled that the judge did so (as he did, second time round).

213. In her oral evidence Ms. Smith told us that, when matters began, they had a list of those whom the ballot had selected as potential jurors, which was provided in order for counsel to see if they recognised any of the names and whether they were, for instance, neighbours, cousins, relatives. She confirmed the existence of the three doors on the left hand side of the judge (as he looked at the dock); and that the one furthest from him was the entry and exit point for public and jurors. She said that when the clerk put his hand into the bowl and pulled out a name and a number, it was not her practice to look round and see who was coming up: because of the size of the court room you could not really do that and she would wait until the potential juror took his/her seat. A lot of jurors were excused by the judge who said that he was getting so many letters that he felt like a

postman (he is recorded in the transcript as saying that). There were 50 or 60 potential jurors. If the police had been present they would not mix or mingle with the jurors and she did not recall any police being present. She denied that in this case the prosecution liaised with the police or that it did so in order to eliminate particular jurors. She herself had no communication with police.

214. We also have before us an affidavit from Mr Pedro, whom Ms Greening did not seek to cross examine. In it he confirms, by reference to his electronic calendar, that on 4 and 5 March 2015 he was engaged in a number of activities elsewhere and that he was not present at Court No 3.

215. I am wholly unpersuaded, and do not accept, that there was any communication between Crown Counsel and police officers when the jury was empanelled by which officers gave some indication to counsel as to whether a juror should be stood down. The geography of the courtroom and the quantity of people in it would have made such communication as is said to have taken place very difficult, at best, and quite probably impossible. If it had occurred, it must have been apparent to experienced defence counsel; but nothing was said (nor do we have any evidence from them). I see no reason not to accept Ms Smith's evidence as to the absence of such communication, which, if it had occurred, she must surely have seen. The allegation, itself, is made many years after the event, and it is apparent that the one police officer whom Roberts identifies plainly was not there on the relevant day. This does not give us confidence in Roberts' evidence.

216. In those circumstances it is not necessary to consider the extent to which communication between police and prosecutor about jury selection is legitimate. I should not be understood to be saying that that it is never so. One obvious circumstance where it would be appropriate for the police to inform Crown counsel is if a prospective juror has a previous conviction or criminal associates. There are no doubt others.

217. I would add that the suggestion that there was some racial bias in the selection of the jury appears to me to be entirely unfounded. An accused is not entitled to have a jury of any particular racial composition. As it happened, the jury was composed of 8 black and 4 white jurors, who returned unanimous verdicts.

218. Mr Mahoney submits that it is necessary to look at the end result of the selection exercise. The fact that there were 33 initial Crown standbys was not surprising in a case with two defendants and when one of the victims was a well-known local singer. In the event 28 of those could not have sat anyway because they were excluded for cause or excused by the judge. Of those who did not fall into this category 3 in the end sat on the panel. The FIO, having sat through the whole process and having seen that most of those who were stood by first time round were successfully challenged for cause, excused or sat on the jury, would not think that there was any appearance of bias. Further the number in the end stood down was at best 2, and the defence between them had a right of peremptory challenge of 6.

219. As I have said, it seems to me that, in the end, the two standbys relied on as remaining Crown standbys, were jurors who were stood-by by the judge. In those circumstances there was no relevant disparity and, *a fortiori*, the case does not come within the exception.

220. I would also accept that there would be no breach of the accused's constitutional rights if the Crown had stood by six. Ms Greening submits that that cannot be right because, so far as each individual accused is concerned, he would only be entitled to 3 peremptory challenges and the Crown, in a case where there were two defendants to 6. It seems to me however that it is not unfair for the Crown to have (as the amending Statute provides) the same right of standby as the defence, as a whole, has of peremptory challenge. This seems to me especially so given that there is no exact equivalence between standby and peremptory challenge. If a juror is peremptorily challenged, he or she comes off the panel. If the juror is stood by, he may, in practice, come off the panel. But if he is called second time round, whether he does so depend on the decision of the judge.

221. Lastly, this does not seem to me to be a case where the FIO would think it possible, or that we should think it possible, or likely, that the Crown was activated by bias against the defendant; but rather that it was seeking to exclude from the jury someone who might well be antagonistic to him. Nor does it seem to me at all likely that if either of **Greaves** or **Mello** had sat on the jury that a different result would probably have occurred. The case against Roberts was a strong one and he, himself, gave no evidence to contradict it.

Fresh evidence in Smith-Williams

222. In this case the appellant invites us to admit what is said to be fresh evidence in the form of affidavits from Ryan Furbert and Rasheed Muhammad. Ryan Furbert left Bermuda very shortly before the trial. That he had departed was discovered by the police on **2 October 2018** and the selection of the jury began on **4 October 2018**,

223. At trial, the case for the Crown was as follows. On **4 February 2011** Colford Ferguson was shot by Rasheed Muhammad, who had been taken to and away from the scene on a black motorcycle ridden by the appellant. (Muhammad has never been charged with the murder). The scene was East Shore Road, at a house on which Ferguson and Furbert were working. Some 20 minutes before the murder the motorcycle had been ridden to the scene, driven by Muhammad. He returned later as a passenger, with the appellant as rider. The principal evidence relied on was what was a confession that the appellant was said to have made to Troy Harris, an associate of his. This was said to have happened first when they were both at Westgate Correctional Facility, and, subsequently, when they were both out of prison in conversations at their houses (the evidence was that they lived opposite each other). The latter conversations were recorded on an electronic listening device. That evidence was admissible against the appellant but not against Muhammad. It was the lynchpin of the Crown's case. The Crown had some complementary evidence and the defence said that no confession was made and that other elements of Harris' story was untrue.

224. As was recorded in the judgment of this Court on the first appeal, at first it was thought that Furbert might have been the intended victim, as a result of an altercation that had taken place two months earlier when his gold chain had been snatched from his neck by Trey Simons, and Furbert, having previously tried to get it back, had been taken to Trey Simons' house by his brother, where he had damaged Simons' motorcycle in retaliation. But at the trial, and in the light of Harris' evidence, the case of the Crown was that the murder was one of mistaken identity in the context of MOB/Parkside territorial conflicts. The judgment of this court records that it was not suggested

that either Furbert or Ferguson were Parksiders, and we have seen no evidence to that effect, although Mr Lynch told us that Furbert might have had some association with Parkside. In any event, both of them were working in MOB territory, where Parksiders, or persons believed to be Parksiders, would be at risk.

Furbert's evidence

4 February 2011 interview

225. Furbert did not give evidence at the trial. But a precis of some of what he had said to the police was prepared and read to the jury. Furbert's first recorded interview was on **4 February 2011**. In it, we are told (we have no transcript) he says the rider stared at him and turned on the brakes. He went into hiding. He got out of the building and went into a neighbour's yard. Police asked, "*where could you see the guy riding up and down to*?" Furbert explains, "*You could look onto the roadside both Somerset Road and East Shore Road… I only saw it once while I was still in the open*". He explained the problems with people he knew in Somerset none of which included the appellant or Muhammad.

6 February 2011 interview

226. On **6 February 2011** Furbert made a witness statement which referred to the gold chain incident, and its sequel.

7 February 2011 interview

227. On **7 February 2011** there was a second recorded interview. In summary, Furbert said that he was working at the house with Colford Ferguson. The work appears to have started sometime after 1100. At lunch time they took a long break. There came a time when Ferguson went over and talked to someone and the appellant continued working on his own. He saw the bike coming up the hill fast and the rider kept looking back on him. (There was only one person on the bike: page 8). The rider then slammed on his brakes, started skidding and turned round; the rider looked him in the eyes (but he had his silver mirrored visor on), shook/nodded his head and pointed at him, and then sped off towards the police station (page 3). He thought the helmet was black (page 10). At this stage Furbert was standing outside the door of the house (page 7). He called Ferguson, said that he felt something was going to happen and that he was going to leave. Ferguson told him to calm down and just get in to the house. Ferguson said he was going to get a burger and would be right back.

228. Furbert left the house and followed some tracks to a higher level and went into someone's yard that had a white fence; it was a red house, where you could look down on the road. After calling another friend, he called Ferguson. Ferguson said that this guy keeps riding up and down the hill trying to look at the house, to which Furbert said "*yeah, yeah, yeah I think he's looking for you*". (In his interview on 20 August 2012, he said, at page 3, that Ferguson had said "(*inaudible) guys keep riding up and down. They are looking in the house. I don't know whether they are looking for me or for you*" and at page 14 that Ferguson had said "*yeah, they are riding up and down (inaudible). I think they are looking for you. I am not sure if they are looking for me or not"*).

229. Ferguson told him to hide; he followed some path, looking for somewhere to hide, and went in to someone's yard. (This seems a reversal of his original description of the order of events). He thought of hiding in a tent which was there but decided that that was too obvious. He went down some steps to a storage room or something like that (on 20 August 2012 he described it as a shed: page 15). He hid there for a little while. He heard three shots; at this time, he had no cell service on his phone. He was about to leave, when he saw a black male wearing a black visor helmet and black jacket, who looked as if he was looking where to go or looking for someone. He ducked behind the door before the man saw him. After that he heard sirens and called Ferguson who did not answer his phone.

230. It is apparent that this was a somewhat compressed account of events which involved (see below) one rider arriving and leaving and a rider and passenger arriving 20 minutes later, when the shooting happened.

231. The police asked (page 9) if the first rider was skinny or fat. Ryan Furbert responded "*I don't know, bigger than me*". Furbert was asked if he saw any facial features and he said that he only saw his chin. The police asked him how he would describe himself and he described himself as skinny. The appellant is also skinny – lanky. Furbert said that he did not see the complexion of the person (page 11). When asked how he could tell that the first rider had a mirrored visor he said that the man was looking right at him and said "*I couldn't see him really, but he could see me*". He could not remember if the rider was wearing gloves. The police then reverted to asking about the original persons of interest to them which did not include the Appellant or Muhammad.

232. The recording of this interview appears to have ended abruptly before it had finished.

20 August 2012 interview

233. On **20 August 2012**, (i.e. over 18 months later), there was a third interview. Furbert recalled the same facts in terms of the arrival of the first rider, who stared at him and nodded his head. At page 3 he said that Ferguson had suggested getting into the house; Furbert said that he had to leave and Ferguson said he was going to the shop and coming right back, and that Furbert should go upstairs. He then said "*I was like, 'Yeah' so I went in the house and then I left, went up the hill really quick in the trail. Yeah, saw the bike come back, he called me real quick. (Inaudible) guys keep riding up and down. They are looking in the house. I don't know if they are looking for me or you.*" He said that a couple of minutes later he heard footsteps. "*They must have heard where I ran because they had a dog. They must have like saw me or whatever and they were barking at me. So they came in the yard*", A couple of minutes after they left he heard maybe three shots. He called Ferguson but got no answer.

234. The police put to him that he had told a police officer that he thought the rider of the motorcycle on the hill was Deonte Darrell one of the original suspects (it appears from his interview that he had indeed said that to an officer at some stage: see pages 9- 10). He said *"(inaudible), in my last interview I didn't say that. . . I said that it was a mirror visor, and when I looked at the mirror visor I could see myself reflecting. So I couldn't see who it was*". He said that it was a **dark person** that he saw [4] and that although it could have been Darrell he did not think that it was him and

that he would have recognised him more if it was him [5]. He also said that the bike came about 20 minutes before the shooting and the man had his jacket on. He was also asked whether the shooter was Trey Simons (said by Troy Harris to be a member of MOB) or Blaine Simmons. He said that it was definitely not either of them. He also said that the rider was someone who he had previously seen but whom he did not know personally. [7]. He said that he was trying to say that they (sic) knew him but he did not know them. He could not say whether he had ever been in contact with him.

235. At page [8] the officer said to him that the last time he was seen "*you gave a bit more of a description about the rider of the scooter. Do you remember what that was*?" to which Furbert replied "*Yellow skin*" and "*maybe he is a bit skinny*". The reference to yellow skin does not appear in the record of the previous interview; and does not seem to fit with his description of a dark person (see above). In his interview on 7 February 2011 he had described Fulford's cousin, who Fulford had gone to talk to at some stage before everything, as yellow skinned: page 6.

236. At page 9 there was this exchange:

> "Q. *Ryan I can hear the word that you are saying. I personally think that you know the identity of that person sitting on the bike. I hear all the things that you are saying.*
> *A. I ain't going to just say names to me, and then you just arrest them, and then it's like…*
> *Q. It doesn't work like that.*
> *A It does work like that.*
> *Q. It doesn't. that is certainly not what I intend to do.*
> *A. No what I'm trying to say is like… (inaudible), like see how you threw out them names in the other interview and it is like wrong? It is the same thing. It is like, yeah I had problems with them, but that don't mean they did it, but somebody that is probably connected to them probably did it, but it's like…it's too much stuff. I am hearing too much stuff. I don't know. I aint' believing nothing, (inaudible)"*

237. At page 10 of this interview he said that all he saw was a chin, and that you could not see the face on a mirror visor. That was why he did not recognise the person on the bike. He said that he had felt threatened and went to Ferguson, who was talking with his uncle, and had a one to one conversation (this seems to have been a departure from what he had previously said, which did not refer to a one to one conversation at this stage) and that after that he had a telephone conversation in which he said that he had to go, and Ferguson said that he should go upstairs. Furbert confirmed (page 12) that after his conversation with Ferguson he went up the trail and stayed up on a bank at a "*nice house "with a nice little view and I just stayed there watching. That is when I came down. There were two guys on a bike and then Colford called me saying, 'Yeah they keep riding up and down, going through here like that, going up and down, looking into the house…".* The two guys had black helmets with jackets. Then he went into somebody's yard "*in the back of here*". Then he heard shooting and later sirens.

238. Furbert was asked what he saw of the two men on the bike, to which he said [12] "*Just looking, They were looking all around the area like. And then they went"*.

239. There was then the following exchange [13] :

> *"Q Do you think that was the same bike that was there the first time?*
>
> *(no audible response)*
>
> *Q You do? And do you think one of the people on the bike..when they came back the second time was the same person that was there the first time, is that fair?*
>
> *A Possibility.*
>
> *Q No I am asking from what you saw and what you heard.*
>
> *A* ***Can't really see nobody when they are on a bike that far, like their colour and all of that, with the visor and all of that***
>
> *Q Yeah but there are some things that you would see that may ....*
>
> *A If I am running for my life right now, think about what I have done. I am seeing a guy go that way and I have run up here. You think I am going to wait and watch him come back down this way and see what he is doing?"*

240. The police sought some clarification of what he was saying and were later told this (which is not entirely easy to follow, particularly without a photograph, which the police had, of the scene):

> *"And I stayed up top of the hill. (inaudible) come back. Crawford* [sic]called me, "Yeah they are riding up and down (inaudible). I think they are lo*oking for you. I am not sure if they are looking for me or not." When he: said that, I. said, "I've got to get out of here." So I went. Then I heard the bike just keep going up and down and I was like, I can't basically run onto this road." I wanted to get on this side, you know? But I didn't want to get on the lane. I was like, if I get on the main road I will go by the bus and all that, (inaudible) see me. So I just went to the house and I stayed there for a while. Luckily the door was open. After I heard the shots and all that I kept calling his phone".*

241. He then referred to the episode of the man walking in the yard, who was dark skinned (page 13) and had a black visor, and the barking dog. He said (page 16) that after the shots, which he heard about 2-3 minutes after that, he called his mother and then made two calls to Ferguson with no reply (pages 17-18).

242. Furbert did not in any of these interviews say that the rider was the same on both occasions.

1 February 2019: The first affidavit

243. In his original affidavit of **1 February 2019** Furbert had given the following account. On the day in question he had two instances to observe the rider of a black or charcoal grey, unmistakable dark, motorcycle. On the first occasion the rider, who was wearing a mirrored visor, came from the direction of the Somerset Police Station towards Mangrove Bay. The rider crossed him, slammed on the brakes as if he recognised him, turned around, came back towards him, nodded his head and pointed at him and then sped off in the same direction as that from which he had come. He could not be sure what his face looked like because he was wearing a mirrored visor. There was nothing, either by way of mannerism or physical presence, which led him to believe that the appellant, whom he knew, was the rider. He believed that the rider was shorter and stockier than the appellant who, he said, was at that time "*quite lanky and incredibly skinny*". The rider also did not manoeuvre in the same way as the appellant. After the shooting, there was a person who he believed to be the shooter who appeared to be looking for him around the area. In his view this person was not the appellant either. He was dark skinned and did not have the same stature as the appellant. He also said that he knew Muhammad, whom he considered as an acquaintance and had no reason to believe that he would be responsible for this attack.

244. In his affidavit he said that:

> "*I left prior to the trial because I did not want to be involved. I was deeply frightened by thought of retaliation of some form if I did speak on any aspect of the case and I purposefully left the jurisdiction as a result as I physically and mentally could not be present to face it. This happened despite me being summonsed by the Crown to appear as it is very difficult to know who to trust. There are two families impacted here and families can have far reaching and often ill willed affiliates and I did not want to expose either myself or my family to potential violence or retribution in some other form. Apart from the fear I had of participating I believed that I could add nothing to the case because I was not able to positively identify a person or persons on the day of the incident"*

245. The evidence in this affidavit was in truth of limited relevance. It was not the case for the Crown that the appellant had been the rider on the first, or the shooter on the second, occasion, and evidence that he had no reason to believe that Muhammed had reason to shoot the victim was of very limited value, if any,

25 July 2019: The first appeal

246. In the course of his judgment on appeal Kay, JA said:

> "*At trial, the case for the Crown was that the murder was gang-related. The Appellant and Muhammad were members of, or connected with, the MOB gang. Their territory is in and around Somerset. Ferguson, probably as a result of mistaken identity, was believed to be a member of the Parkside gang whose territory is in the City of Hamilton. At the time of the murder, he was working on a house situated in MOB territory.* [This was 2 East Shore Road]. *He was with Ryan Furbert. Furbert did not actually see the murder but he was close by at the time.*

On 7 February 2011, he was interviewed by the police and gave an account of the events of that day. He did not give evidence at the trial because he had left Bermuda. However, an agreed version of what he had told the police in February 2011 was put before the jury. Since the trial, he has sworn an affidavit in England on 1 February 2019, adding to the account he had given to the police in February 2011. Also, Rasheed Muhammad was interviewed under caution in April 2018 and denied involvement in the murder.

Furbert' s affidavit sworn in relation to this appeal is long on opinion and belief, but in relation to admissible content, adds little to his evidence as it was presented to the jury. Mr. Lynch realistically accepts that it contains only one brief passage which might be admissible. It simply states that Furbert knows Muhammad "and would consider him an acquaintance". Mr. Lynch seeks to combine that with the formal admission that Furbert had said that he did not think that the rider of the motorcycle 20 minutes before the murder (said by the Crown to be Muhammad at that stage) was somebody he knew personally. At that time, the rider was wearing a helmet with a mirrored visor. As evidence that the rider was not Muhammad that seems to me to be of very low value indeed. It is equivocal. I do not consider that it would have had the potential to change a jury's mind about the credibility of the evidence of Harris. I should add that, in his police interviews, Muhammad said that he did not know Furbert."

12 January 2021: The amended affidavit

247. For the purposes of these proceedings Furbert swore an amended affidavit, on **12 January 2021**. In it he said that, although he had referred to having two instances to observe the rider he had failed to provide information relating to the second one. What he said in his amended affidavit was this:

"(*j) The second chance I had to view the rider of the cycle involved with the killing of Mr. Colford Ferguson occurred when I decided that remaining at #2 East Shore Road, could be potentially dangerous. This happened after I witnessed the nodding and the pointing and I said to Mr. Ferguson that I had no desire to stay at the property and that he should leave too. I regret not being adamant in my telling him to leave. As I left I initially took refuge at a neighbouring property, upward along the East Shore Hill. At that time the motorcycle returned with a rider and appeared to be manoeuvring up and down the hill as if were looking for someone, which I now presume to be me. I decide [sic] to take better cover as I figured that if I could see them then they could certainly spot me. I took refuge deeper into the hill in a neighbour's yard* ***but I can certainly say that the rider of the vehicle on the return trip which I had observed when initially seeking cover had been the same rider which I observed on the first occasion, this time returning with a dark skinned pillion passenger.***

(k) I also know Mr. Abdur Rasheed-Muhammad and would consider him to be an acquaintance. We are not close friends but we have always been cordial and I have no reasons to believe that he would be responsible for this attack. ***He is also***

> ***not the dark skinned person I witnessed looking for me during the events in question as I know him to be my complexion which I class as caramel tone. The person I observed had a dark skinned complexion as mentioned above and in my recorded statements and I class that complexion as chocolate tone."***

248. The significance of this amended account, it is said, is that it contradicts the Crown's case that Mohammad had been the rider of the bike on the first occasion and that, having seen Furbert, he recruited the appellant to convey him back to the scene (the appellant being the rider) where he would then go on to shoot and kill Colford Ferguson. If the rider on the return trip was the same as the rider on the first trip (who was said not to be the appellant) that contradicted the case of the Crown (a) that there had been a change of rider; and (b) that the rider on the return trip was the appellant. If the person who was looking for him after the shooting was the shooter, then on that evidence, if accepted, it was not Muhammad.

The power to admit new evidence

249. The statutory foundation of this Court's power to admit fresh evidence is to be found in section 8(2) of the Court of Appeal Act 1964, read in conjunction with section 16(2) of the Criminal Appeal Act 1952. In *Barnett v R* [2015] Bda LR 103, paragraph 7, this Court restated the conditions upon which it will receive fresh evidence in the following terms:

(i) The evidence sought to be called must be evidence not available at the time of the trial;

(ii) The evidence must be relevant to the issues;

(iii) It must be credible, that is well capable of belief; and

(iv) If the evidence is admitted, the Court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury with regard to the guilt of the Appellant if that evidence had been given, together with the other evidence in the case.

250. In *Pitman* [2008] UKPC 16, referring to the equivalent position in Trinidad and Tobago, Lord Carswell also referred (at paragraph 30) to the overriding statutory power to admit fresh evidence if it is in the interest of justice, but in the context of the "*long-accepted requirements of the law that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial*."

251. There are, therefore, at least four questions for consideration viz (a) whether the evidence now sought to be adduced was available at the time of trial; (b) whether it is well capable of belief; (c) whether it might have given rise to a reasonable doubt in the minds of the jury if it had been before them at the trial; and (d) whether there is a reasonable explanation for the failure to adduce it at trial. In addition, it is common ground that, if the application to admit fresh evidence is to succeed, it must satisfy the test for re-opening of an appeal. As to the latter it seems to me necessary, *inter alia*, for the appellant to establish that the new evidence sought to be relied on was not available

at the time of the first appeal and that there was a reasonable explanation for the failure to adduce it for that appeal.

252. So far as the matters in the previous paragraph are concerned, it does not seem to me that a witness' evidence is to be regarded as "*available*" simply because he is alive and well and capable of giving evidence. The question is whether it is possible for the accused by the use of any reasonable means, to adduce his evidence. There is, however, a further question as to the approach that the Court should take if the witness is not available at the trial, but his evidence is available for the first appeal but omits something which is sought to be added for a second appeal. I consider this question further below.

The Crown's submissions

253. The Crown submits that this attempt to have a second attempt to rely on new evidence does not fall within any exception to the principle of finality The whole issue of fresh evidence was argued at the first appeal; it is *res judicata* and cannot be gone through again.

254. The "new" evidence of Furbert was available at the first appeal. He was prepared to produce evidence and what he said in his second affidavit in 2021 he could easily have said in his first affidavit in 2019.

255. Further, the evidence is not well capable of belief. Firstly, there was no reason why it should not have been adduced before and the fact that it was not casts doubt on its credibility. Secondly, reliance is placed on two matters. The first is the passage in his evidence to the police on 20 August 2012 - see [239] above – where he first says, when asked if anyone on the bike second time round was on the bike first time round "*Possibility*"; followed by "Q *No I am asking from what you saw and what you heard*" A *Can't really see nobody when they are on a bike that far, like their colour and all that, with the visor and all of that"*.

256. The second is the appellant's evidence at the trial, which was that he did not know Furbert at all at the time, and had never come across him: see pages 33 ff of the transcript for 12 October 2018 and page 101 of the transcript for 15 October 2018. Furbert's evidence in his original and amended affidavit was that he had known the appellant for 14 years [10(a)]; that they had always been cordial with each other [10(d)]; that he had been in his presence on several occasions [10(e)]; that he had often seen him ride motorcycles of different makes [10 (f)]; and that there was nothing that led him to believe that the appellant was the person who rode the bike on the day [10(f)]. The suggestion that because of his long association with the appellant Furbert recognised that the first rider was not the appellant, and was certain that the second rider was the same, simply does not fit with the appellant's evidence that they had never met.

257. Mr Lynch submits that the evidence which he now seeks to adduce was not available either at the trial or at the first appeal. As to the trial, Furbert was to have been the Crown's witness, due to be called on the first day. As it happened he never turned up and, although he was believed to be in the UK, the Crown said that it was not clear where exactly he was, and that they had had no reason to believe that this would happen. His amended affidavit was not available, either at the trial or the first appeal, because he had failed to provide, as he should have done, the important additional

information that it contains. It is also well capable of belief. The Crown, itself, intended to call him, as a witness capable of belief. He was there at the scene (unlike Harris). He had no axe to grind. His evidence that he saw the same rider on each occasion and that it was not the appellant, is clear and unambiguous and, if it had been available at trial, would have significantly undermined Harris' account and credibility and the Crown's case.

258. I am not persuaded that this new evidence was not available at the first appeal; or that it is well capable of belief or that, if it had been available at trial, the jury might have reached a different result; or that there has been a reasonable explanation for its non-production at the first appeal.

259. As to these considerations, in his original statements to the police Furbert had said that he did not see the complexion of the first rider, who had a mirrored visor, and that he could not see him really [231]; that all he saw of him was his chin [231] which is why he did not recognise him [237]; and that he could not really see anyone when they are on a bike that far away with a visor, including noticing their colour [239]. In those circumstances the suggestion, in the new evidence, that Furbert was certain that the riders were the same on the first and second occasion lacks all credibility. So also does the suggestion that the passenger that he saw on the second occasion was chocolate and not caramel, especially when this "new" evidence did not emerge until January of this year. Further, if the riders were the same on each occasion the rider would, presumably, have had a mirror visor, to which no reference was made in relation to the rider on the second occasion. The credibility of this certainty of recollection is further impaired by the incongruence between what Furbert says about his knowledge of the appellant and what the appellant said in his evidence about that.

260. I appreciate that, if the question is what impact the evidence might have had on the jury at trial, then, on a first appeal, the question is what might the effect on the jury might have been if the evidence in question had been before them at the original trial. But we are presently concerned with both the evidence that was relied on at the first appeal and the new evidence which is relied on in this one. In that context it does not seem to me that we should look at the question as to how the, or a, jury would have regarded the new evidence without taking into account (a) what the person providing the new evidence (Furbert) had said before the trial; (b) what the appellant himself had said at the trial; (c) what Furbert said in his first affidavit; and (d) what he says in his second one.

261. When these matters are considered as a whole the picture has a number of features. At the trial what Furbert had to say was relied on by the Crown in support of its case against the appellant. Nothing that Furbert had by then said suggested that the rider on the first and second occasion was (a) the same and (b) someone other than the appellant. Since he was due to give evidence at the trial of the appellant Furbert could not have been unaware of the significance of evidence to that effect. At his trial the appellant gave evidence that he did not have any acquaintance with Furbert. No doubt he relied on that to rebut any suggestion that he had any animosity towards him which might explain why he was the rider on the second occasion with someone else as the shooter.

262. For the purposes of the present appeal the position is reversed. The appellant says that he and Furbert were well acquainted and he relies on Furbert's new evidence that the appellant was not

the rider on either the first or the second occasion, and that he was in a position to know that because of his acquaintance with the appellant.

263. In my judgment, a jury presented with the totality of the evidence referred to in the previous paragraphs would not regard it as assisting them to determine the critical question as to whether the appellant's alleged confession to Harris had actually been made.

264. Matters go somewhat further than that. If the jury had had before it evidence that the appellant had, in his sworn evidence said that he did not know Furbert, and had then sought to rely on an affidavit in which he said that he knew him very well, that would itself have driven a very large hole in his credibility.

265. Next I do not accept that any satisfactory explanation has been given as to why the new evidence in the second affidavit was not contained in the first. In this context it does not seem to me that we are solely concerned with whether the appellant's attorneys have a reasonable explanation as to why the first affidavit did not contain the information in the second (which explanation was, so far as they were concerned, that they had not been given it). It is also material, in a case such as this, to consider why Furbert did not provide it. As I have said, he must have been aware at the time of trial of the significance of this "new" evidence. *A fortiori* he must have known that at the time of his first affidavit, given that his first affidavit was sworn in support of the appellant's appeal. We have no real explanation from Furbert as to why he omitted from his first what he now inserts in his second affidavit.

266. Lastly, it seems to me that the Court should set its face against allowing additions by the same witness to previous evidence which has not secured a successful first appeal, in order to promote a second appeal, on the basis of new(er) evidence, save in very exceptional circumstances, which I do not regard the present ones to be. To quote the words of the English Criminal Procedure Rules the case does not seem to me sufficiently exceptional to make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality,

Muhammad

18 April 2018: First Interview

267. Muhammad was interviewed by the police on **18 April 2018**, following his arrest. He told them (pages 3-4) that he recalled hearing about the Ferguson murder; that he could not remember where he was at the time, but that he used to work seven days a week from seven in the morning until eight in the evening, every day of the week, at KS Watersports. When asked what he was doing for them he said: "*Just the tour guy, during the winter I would take hotel guests where it's Dockyard (inaudible), find their way out there, and I would take them out on the water*". He identified the man he worked for. He said that the appellant was a close childhood friend he grew up with (page 7).

268. He was asked if he knew Ryan Furgo (sic), by which the police meant Furbert, and he said that he did not. He was later asked if any of the names that he had been asked about (said to be MOB linked) had a beef with Ryan Furbert and he said he did not know who Ryan Furbert was. As is

apparent from the affidavit to which he later swore (see [277] below) Muhammad knew him as Saggus. Muhammad denied that he was then a member of MOB or any other gang, whilst admitting that since the age of 15 he had had an MOB tattoo on his chest, although at 17 he was "*completely out of the streets".*

19 April 2018: Second Interview

269. In his second interview the next day (he was held in custody overnight) he confirmed his address in Sandys. The officers referred to a witness (obviously Harris) who had come forward and said that the murder was committed by Muhammad and the appellant to which he replied "*no comment*". He asked whether he was being arrested and had lost his job because of hearsay. When he was told that the witness was saying that Ferguson was mistaken for Jakai Morris (a gang member, but not of MOB, in whose territory the murder took place) he said that he had no idea what the police were talking about, adding *"If you're gonna just sit there and accuse me of something I did not have any part in, I'm gonna say "no comment" throughout this whole interview*". Harris had said that the appellant told him that the murder was a case of mistaken identification of the victim as Jakai Morris. Thereafter he said no comment to a number of questions, including whether the murder was committed by him and the appellant and whether he was still a member of MOB, on a number of occasions. He accepted that he grew up with the appellant. He made plain his denial of involvement and wanted to know why he was being held without any evidence.

Muhammad's "evidence" for the first appeal

270. The (unsworn) affidavit which was the new evidence relied on in the first appeal, contained the following passages which were quoted in the judgment of this Court:

> *5 ... Prior to the trial and during the course of proceedings I was contacted on numerous occasions by members of the Appellant's immediate family to present myself to his attorneys in attestation of his defence. It was my desire to contact Counsel for the Appellant to discuss the information I had which might have assisted the Appellant during the course of his trial but my fear of doing so was greater than my will. I knew once I gave my side I would be asked to participate and I was not mentally in a position to cope with the thought of my involvement or what that could bring about. I did not involve myself and trusted very few people at that time. I refused further contact from those involved and absented myself from making contact with either the Appellant or counsel and I deliberately did so because of fear and not believing the police could or would protect me.*
>
> *6 ...due to the uncorroborated evidence of a sole witness in the t r i a l ... I was concerned about my own public participation during the course of the murder trial. I did not want to appear to incriminate myself in the eyes of others or render myself a target the consequences of which could be fatal; they still are and I will have to think about my future and*

where it will be. But, I have since taken stock and realised that I should have made myself personally available for the accused at his trial and that my evidence may have had an impact on his defence and the outcome of the trial….

8 … I provided my alibi to the police for the day of the murder…I make this Affidavit so as to affirm my alibi and I can confirm that at the time of the murder…I was on shift and carrying out my daily work functions with KS Watersports. At that time, I worked every day and I would not have been available to commit this horrible act…

10 … I unequivocally deny being involved in the murder of Mr Ferguson. I did not know Mr Ferguson at the time of his death… I do not know why the informant…Troy Harris is making these allegations against me. I am aware that he has active dislike of me which was made very clear during the course of the trial. I believe he called me a "dirty stinking rat" or words to that effect on a number of occasions during the proceedings. It is my view that he dislikes [me] due to his primary dislike of my brother Anwar Muhammad.

I do know Troy Harris but not to any significant degree. This includes through my associations with the western end of the Island. I have no reasons to harbor the hatred he appears to have for me as I have no real association or connection to him. I do know Ryan Furbert but again I do not know him to have any grievance with him and I would not have known him to any significant degree in 2011 save for through mutual acquaintances. I did not know Mr. Culford Ferguson and would not have committed the acts I am alleged to have done.

11 I did not believe that hearsay evidence from a single informant could result in my arrest and detention or the conviction of [the Appellant]. *If given the opportunity, I would like to offer my evidence with respect to my alibi for the day of the murder as I believe it will have strong bearing on the facts which the jury ought to properly consider with respect to the truth of the statements made by the informant. I am prepared to make my statements despite the implications it may have as it is my view that they are material, they are relevant and they are important to both the victim and the Appellant in this matter…"*

The first appeal

271. In paragraph 39 of his judgment Kay JA quoted extensively from the affidavit of Ms Tucker, of Trott & Duncan, as to Muhammad's position in these proceedings:

"During the trial I had indirect contact with Muhammad indicating that we wished him to give evidence and to make himself available. He did not. We were unclear

as to whether he was even in the jurisdiction but we had no evidence that he was either scared, in fear or otherwise being restrained from giving evidence.

I have been in contact with Rasheed since he visited [our] offices on the 19th October 2018, following the conviction of the Appellant, emphasizing his dismay at the conviction and his desire to assist the Appellant. In particular, we discussed why he did not come forward for the Appellant's trial. It was only at this time that he explained his fear of reprisal in coming forward not only for himself but for his family during the trial but because of his history with the Bermuda Police Service.

Following this meeting we engaged in further communications by email and WhatsApp, as we sought to detail what would otherwise have been his evidence during the trial into an Affidavit for the purposes of the appeal. It became clear that he was no longer in the jurisdiction and was now residing in the UK – we still do not know where.

On his instructions I drafted the Affidavit in its original Form and sent it to him on 5th February 2019 for his approval. There was some toing and froing between us and I sent him the final draft on 23rd February 2019 when he confirmed he was happy with the content and he would print and sign it with a solicitor the following day…He did not. I have maintained contact with him but he has vacillated between signing the document and not. He had promised many times that he would do so. He never did….

Whenever I sought to follow up with Rasheed on his swearing of the document he has said he continues to be challenged by forces close to him which are keeping him away from these proceedings for his own safety and that of his family still present in Bermuda.

I last contacted him on Saturday, 8 June 2019, via WhatsApp…where he expressed his wish to help the Appellant but his unwillingness to come forward due to family pressure keeping him away and their continued desire to preserve his and their safety.

I am satisfied that despite my efforts over the past six months, Rasheed although wanting to participate is either not willing to out of fear or is unable to because he is kept from doing so by others."

272. As Kay JA observed, the statement about Muhammad's elusiveness was not wholly accurate. In the course of the appeal hearing the Court was told, and it was agreed, that Muhammad had in fact been in the court building on the second day of the trial and a police officer had made Mr Lynch aware of this. The indirect contact referred to by Ms Tucker was limited to contact with the appellant's family. There was no direct contact between the appellant's legal team and Muhammad before or during the trial. He had not provided any statement or proof of evidence to them.

273. This court declined to admit this "evidence", such as it was, because, as it decided, the fact was that his evidence was not shown to have been unavailable at the time of the trial. Muhammad had not manifested fear to the appellant's legal team at the time of the trial. He was in the court building for part of the trial - but no attempt had been made to secure his attendance as a witness by any legal process. (The court building is located in the area of MOB's arch rivals the Parkside gang - no concern in that respect seems to have precluded him from attending). The court also doubted whether the evidence was capable of belief since he had been unwilling to attend to give evidence; had not been willing to swear the affidavit before an English solicitor, and, thus, the only account which could formally be attributed to him was the one in his police interview in which, when asked where he was at the time of the murder, his first words were "*I can't recall*". Further, even if the account of the 13 hour working day was broadly accurate, it would not exclude the possibility of occasional absence, particularly out of season.

274. In those circumstances the court felt that there were insurmountable problems in the way of admitting the so-called fresh evidence. The notion that a conviction for premeditated murder should be set aside on the basis of an unsworn affidavit attributed to the alleged principal offender where the only other material attributable him was his denial in interview, when under arrest and caution seven years after the event, was unattractive in the extreme. As it was the application did not satisfy the prescribed tests.

The sworn affidavit: 3 February 2020

275. Muhammad has now produced an affidavit sworn by him on **3 February 2020** before a Manchester solicitor. In it he says [4] that at the trial he was very reluctant to be involved due to the nature of the charges that the appellant faced, and the gravity of the circumstances and repercussions which could have befallen him should he have entered the trial arena. It was, he says, his desire to be involved, but his will would not allow it as he was in deep fear and concern for himself and his loved ones should he have given a statement for the defence or be used as a witness in live examination. After the appellant was convicted, [5] something which astounded him, there was, he said, nothing he wanted more than to help the appellant who was his friend. So [6] he presented himself to the offices of Trott & Duncan, being desperate to assist, given the implication of the appellant being found guilty, namely that he would be guilty by default.

276. He then sets out most of the affidavit that was prepared at the time of the original appeal. As incorporated into his 2020 affidavit the first affidavit, is sworn to, apparently on 3 February 2019. But in the paragraph which follows [8] he says that the statement above is an unsworn statement, unsworn because he was again overcome by feelings compelling him not to get involved. He was prepared to sign the document when it was drafted but, as the appeal approached, and counsel expressed how important his signature would be, he withdrew out of fear. In the rest of his affidavit he confirms the truth of the first statement. We suspect that he fixed his signature to the first affidavit, now contained in the second affidavit of 3 February 2020, and that the date of 3 February was added to the quoted first affidavit (without 2019, the typescript date, being changed to 2020).

277. He describes [10] Harris as a well-known thief and liar, with whom he had no real association or connection. He says that he had [11] no grievance with Furbert and did not know him to any significant degree, save through mutual acquaintances. During his interviews with the police he

did not link the name Ryan Furbert to who he actually was, because he knew him under the alias "*little Sagguss*". He did not know Colford Ferguson and had no reason or motive to want or wish him dead. He says [12] that, if given the opportunity, he would like to offer evidence with respect to his alibi for the day of the murder.

278. He also says [13] that he knows why Troy Harris had a strong dislike for him. It arose because of a physical altercation in December 2012, before he left Bermuda, when Harris was strongly suspected of breaking and entering into the Somerset Cricket Club youth locker room and stealing a load of mobile phones. When Muhammad attended Harris' home and demanded the return of the phones, fighting ensued between him and Harris in which he was victorious. He then embarrassed and humiliated Harris by stripping him naked and beating him with a belt. Harris returned the phones. Harris hated him as a result. Harris is apparently now in Birmingham.

279. At [16] he says that he felt that Harris had been offered a deal to make up outrageous lies against him and the appellant "*due to our past unsavoury affiliations*". He says [18] that if given the opportunity he would be prepared to take the stand and provide a full account of his evidence.

The Appellant's submissions

280. Mr Lynch submits (a) that the new evidence of Muhammad was not available at the trial nor at the time of the first appeal; and (b) that it is well capable of belief.

281. As to (a) Muhammad had not been prepared to contact the appellant's attorneys or attend and give evidence at the original trial; and had refused to sign an affidavit for the appeal. At the time of the trial all that was known was that he had told the police at interview that he was not the shooter and that at the time he was at work 7 days a week at the Watersports facility. But, as Mr Lynch accepted, what he had said at interview (that he was not the killer) was all the evidence that they needed to adduce.

282. Mr Lynch's team had made it plain by messages to the appellant's family, who were in contact with Muhammad, that they wanted him as a witness. But his team was not aware where he was, so as to be able to serve anything on him. Nor were they aware at the time of trial that he was in fear and that that was holding him back from appearing; they learnt that later. Mr Lynch told us that he was told that Muhammad had been at the Court but not that he was then at court.

283. As to (b) Muhammad's account has been consistent throughout. He had nothing to do with the killing. That is what he said to the police, in the absence of any lawyer (he did not seek to have one); and he was forthright in his non-acceptance of matters put to him. Further the only evidence upon which the appellant could realistically have been convicted was that of Troy Harris, who said that the appellant had made a confession to him. There is no evidence of Muhammad's involvement which is admissible against him, and, leaving that legal question aside, the evidence of the man who the appellant, in a disputed confession, is said to have been identified as the killer, is plainly highly material and would, if accepted, fundamentally undermine the Crown's case. Muhammad, who is now living in the UK, unassociated with gang culture, has nothing to gain from giving the evidence that he says that he is willing to give.

284. Muhammad's evidence is particularly significant, when taken with the fact that Furbert, (even now when he, too, lives outside the jurisdiction and away from any gang associations) does not identify either Muhammad or the appellant. The Court now has evidence from the intended victim (albeit under a mistake) who was to have been a key witness for the Crown, and the alleged shooter, which if laid before the jury in combination would, or at the least might, create a reasonable doubt in the mind of the jury as to the appellant's guilt. The original jury had convicted by the slenderest of majorities: 9 – 3. Whilst the Court cannot be expected to entertain a limitless sequence of applications to adduce new evidence from the same people, and the hurdle may be higher second time round, the circumstances here are exceptional, and it is particularly important that the Court should admit this evidence since there is no CCRC in Bermuda. If the new evidence gives rise to a sense that the jury, if it heard the material, might come to a different conclusion, the hurdle is not so high that the appellant cannot overcome it.

The Crown's submissions

285. Mr Mahoney submits that Muhammad's evidence was in truth available, at trial. He resided in Somerset (in his interview of 18 August 2018 he gave an address – 8 Seawall Drive); he was seen in the court on the second day of the trial. His mother was at the trial every day. He could have been subpoenaed. In paragraph 40 of the judgment the court recorded that *"in the course of the hearing we were told, and it is now agreed that Muhammad was in fact in the court building on the second day of the trial and a police officer had made Mr Lynch aware of this at the time*". There is a potential ambiguity in the use of the phrase "*at the time*" – in particular as to whether Mr Lynch was told that Muhammad was at court when Muhammad was still there. As I have said, Mr Lynch told us that he was made aware, maybe on the second day, that he had been in court. Muhammad was never pointed out to him.

286. In any event, Mohammad had been told that he was wanted to give evidence, although his name had not been given by Mr Lynch's team as a possible witness. (Mr Lynch accepted before us that Muhammad was not named at the outset of the trial because they did not know the extent to which he would be required. If Harris was sufficiently undermined in cross examination it would not be necessary to call him). Not calling him appeared to be a tactical decision. According to Ms Tucker's evidence they had no evidence that he was either scared, in fear, or otherwise being restrained from giving evidence; and it was implausible to think that he had any fear. He was, despite his MOB affiliations, content to come to the court which is in a Parkside area. No Parkside member had in fact been killed and Parksiders would have no reason to harm him or seek some form of revenge. Further, three days after the conviction he came to see the appellant's attorneys (in a Parkside area) with a view to introducing his evidence as fresh evidence.

287. If Muhammad had had any genuine fears use could be made of sections 5 (1) & (3) of the *Police and Criminal Evidence Act*, to adduce his evidence to the police. Those sections provide:

> *"First-hand hearsay*
>
> *Subject to subsection (4), a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if—*

the requirements of one of the paragraphs of subsection (2) are satisfied; or the requirements of subsection (3) are satisfied.

(3) The requirements mentioned in subsection 1 (b) are -

(a) that the statement was made to a police officer to some other person charged with the duty of investigating offence or charging offender; and

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

Evidence, it is suggested, could have been obtained from the family about his fears; and if there was no response to a witness summons, or he could not be found that would strengthen the case for section 75 to apply.

288. In relation to section 75 Mr Lynch submits that this is irrelevant. At the time of the trial they were proceeding on the basis that Muhammad was not too scared to come, because they had no indication that he was not prepared to give evidence through fear (or of any reason for such fear) – a matter that would have to be established, at least to the civil standard. *R v Shabir* [2012] EWCA Crim 2564 at [64] shows that the Crown would have to establish it to the criminal standard. It was only afterwards that they learned of his fear. The highest that matters could be put at the time of trial was that he had concerns. They were trying to secure his attendance, made inquiries to try and find him but had no direct contact with him, did not know where he lived; and had no evidence of fear. Ms Tucker understood that at the time of the trial he was not residing in Bermuda; he had come back for the trial.

289. Further, Mr Mahoney submits, his new evidence is not well capable of belief. The name Furbert was put to him by the police in his first interview and in his unsigned affidavit he said that he knew Ryan Furbert. He did not in that affidavit say that he did not know that Furbert was the same as Saggus or that he did not know him as Furbert at the time. It is only in his second sworn affidavit (at para 11) that he says that. In his second affidavit he says [16] that he had never known the appellant to have any communal ties with Harris, when the evidence at trial was that they lived opposite each other. He had not been willing to produce any evidence at or for the trial; or to sign his affidavit for the appeal. His sworn affidavit adds nothing to his unsworn affidavit and it would not have added anything helpful to what was before the jury who, in essence, had to decide the credibility of Harris as opposed to that of the appellant. And Mohammad, if he gave evidence, would have to be advised of the privilege against self-incrimination. When he was asked where he was on the day of the murder he could not recall and the sequence of events leading up to his eventual swearing of an affidavit was nothing more than an exercise of dodging the ball.

290. Not without some hesitation I have come to the conclusion that we should admit the evidence of Muhammad. It seems to me (a) that it was not available at the time of the trial or the first appeal; (b) that it is capable of belief; and (c) that, if placed before the jury it might well have produced a different verdict. I would also order a new trial. I appreciate that, despite the fact that I would not

have admitted the evidence of Furbert as new evidence and allowed the appeal on that basis, the effect of allowing the appeal on a different basis will be that his evidence will, if available, be able to be put before the jury in any new trial.

291. Accordingly, I would dismiss the appeals in Brangman and Robarts. In the case of Smith-Williams, I would allow the appeal and order that there should be a retrial. Subject to any submissions that may be made in writing within the next 21 days, I would order that Smith-Williams should remain in custody pending his retrial.

BELL, J.A.

292. I agree.

SMELLIE, J.A.

293. I also agree.

APPENDIX 1

SCHEDULE OF JURORS CHALLENGED – R V QUINCY BRANGMAN

Juror Number	Name	Standby Number	Record Page No. & Line	Reason Given
26	[redacted] Muhammad	1	7, L24-25	Crown said standby
38	[redacted] Simons	2	8, L6-8	Crown said standby
4	[redacted] Crisson	3	15, L9-11	Crown said standby

APPENDIX 2

SCHEDULE OF JURORS CHALLENGED – R V KHYRI SMITH WILLIAMS

Juror Number	Name	Standby Number	Record Page No. & Line	Reason Given
7	[redacted] Cupidore	1	7, L12	Crown said standby – no reason was given but she was known to Crown-HR representative for DPP's office
8	[redacted] Curtis	2	8, L11	Crown said stand down
2	[redacted] Anthony	3	Pg.9, L 12 – pg. 10 L2	Stand down. Cousin of Counsel V Greening who represented Dfdt T. Saltus in previous case.
24	[redacted] Ming	4	Pg. 10, L10- pg. 11 L3	Wrote note. Judge said stand down; Crown said excused, No Defence objection
12	[redacted] DeSouza		17, L17-20; Pg. 30 L 22- Pg. 31 l 1	Self-employed housekeeper who does not get paid if she does not work. Stood down by Court after jury was selected and there were sufficient numbers left to replace her
11	[redacted] DeGrilla	5	Pg. 11, L12 – pg. 13 L5	Sole caregiver to ill mother. Counsel J. Lynch suggested he be stood down; Crown did not object
39	[redacted] Trott	6	Pg. 13 L20 – Pg. 14 L5	Note from doctor-health issues. Crown said stand down
22	[redacted] Matthews		Pg.14 L 14 – Pg. 16 L8 ; Pg. 31 L 3 -9	School psychologist in the midst of casework. Stood down by Court after

SCHEDULE OF JURORS CHALLENGED – R V KHYRI SMITH WILLIAMS

				jury was selected and there were sufficient numbers left to replace her
6	[redacted] Cooke	7	Pg.16 L16 – Pg. 17 L2	Permission to travel 20-28 October. Judge stood down
34	[redacted] Simons	8	17 L4-6	Crown stand by
29	[redacted] Rewan	9	17 L7-9	Crown standby- no reason given but she was former Accounts clerk at Supreme Court; now employed at MDM
3	[redacted] Bridges	10	Pg. 17 L25 – Pg. 18 L4	Crown standby- job commitments 10-15 October followed by travel 22 – 24 October
32	[redacted] Simmons	11	18 L 5-7	Crown standby
35	[redacted] Simons	12	Pg. 18 L25 – Pg. 19 L 5	AG's Chambers Office Manager who was presently seconded to Legal Aid Office as Office Manager
21	[redacted] Lopes	13	Pg. 19 L19- Pg. 20L 10	Wife diagnosed with cancer. Due to travel abroad with her for medical treatment within next few weeks
17	[redacted] Hollis	14	Pg.20 L22- Pg. 21 L6	Note written. Crown said standby; Court advised that they might be recalled
20	[redacted] Lewis	15	21 L 22- 25	Suffers from anxiety/depression. Was absolutely panicked that she was about to have a panic attack. Crown said standby
10	[redacted] Darrell	16	22, L 2-8	Wrote note. Crown said stand by

SCHEDULE OF JURORS CHALLENGED – R V KHYRI SMITH WILLIAMS

19	[redacted] Hypolite **	17	26, L 23-25	Crown said stand down
18	[redacted] Hurdle**	18	Pg. 28 L 24 –Pg. 29 L 3	Crown standby- works in AG's chambers; At 54: 14 of Court smart recording there is discussion amongst Counsel regarding this juror.
23	[redacted] Messick**	19	29, L7 - 18	Travel 24 -29 October. Defence Counsel J. Lynch says "wrong side of risky". Court stands down
5	[redacted] Cashin**	20	31, L17-19	Defence exercised challenge
16	[redacted] Headlam-Latham**	21	32, L3-11	Crown said standby
9	[redacted] Daniels**	22	32, L13-21	Had family member convicted of offence and knew witnesses; Crown said stand down

**** Alternate Selections**

APPENDIX 3

AMENDED SCHEDULE OF JURORS CHALLENGED – R V ROBERTS & DUERR

Juror Number	Name	Standby Number	Record Page No. & Line	Reason Given
14	[redacted] Dawson	1	12, L2; pg. 49 L7- pg. 50 L1	Excused by Judge due to work commitments
24	[redacted] Gardner	2	12, L13; pg. 50, L3- pg. 51 L 20	Challenge for cause. Stood down by Judge
55	[redacted] Smith	3	13, L22-23; pg.51, L22 – pg. 52 L14	Excused by Judge – grieving sudden death of brother
13	[redacted] Scott Darrell	4	14, L13-25; pg. 56 L18- pg. 57 L 18	Knew families of the deceased parties; Counsel Attridge agreed he be released.
60	[redacted] Wellman	5	15, L3-5; pg. 57 L20 – Pg. 58 L17	Excused – had civil case with Defence Counsel and knows one of the accused's family well. Stood down by Judge
	[redacted] McMahon	6	15, L18-25; pg. 58 L21 – pg. 60 L 5	Request to be excused as she is School Principal at TN Tatem Middle School and familiar with the Accused. Cause established. Judge stood down
29	[redacted] Durham	7	16, L6-10; 60 L 6-14	Stood down – knew deceased ●uterbridge and his family. Cause established. Judge stood down
	[redacted] Simons	8	16, L14-23; 60 L15-19	Excused- Deceased Outerbridge was

AMENDED SCHEDULE OF JURORS CHALLENGED – R V ROBERTS & DUERR

				her friend and co-worker; Cause Established. Judge stood down. All Counsel agreed
48	[redacted] Sanchez-Wilson #	9	17, L1-3; pg. 60 L20 – pg. 63 L19	Wanted to be excused for medical reasons. Cause not established
	[redacted] Dyer	10	Pg.66 L19 – pg. 67 L7	Note Sent: Excused – All agreed
	[redacted] Jensen	11	Pg. 67 L 8; pg. 89 L 1-2	Travelling on the 4th. Cause established
	[redacted] Crockwell	12	69 L1-22	New Job. Excused- All Counsel Agreed he be excused
	[redacted] Williams	13	Pg. 69 L23-pg. 71 L23; pg. 89 L7 – 21; pg. 91 L10-pg. 92 L 3	Excused by judge for the time being, but told she would standby in the event that she was needed
	[redacted] Kennedy	14	72 L2	Excused by Chief Justice
28	[redacted] Greaves	15	18, L3-16; 72 L3-12	Travel 4-11 April; stand by for the time-being
	[redacted] Simons	16	21, L7-10; 73 L 13-15	Knows one of the accused's family very well; Excused
42	[redacted] Mello	17	19, L7-16; 73 L 16-24	Medical Certificate Shown to Court and Counsel; standby for the time-being
	[redacted] Basden #	18	Pg. 23, L4 – Pg. 24, L20	Wishes to be excused due to work scheduling at BELCO. Cause not established.

AMENDED SCHEDULE OF JURORS CHALLENGED – R V ROBERTS & DUERR

15	[redacted]DeMello	19	20, L17-25;	Travelling end of month to hospital. Cause established. Stood down by Judge
	[redacted]Holder	20	26, L8-12; 75 L7-10	Friends with deceased Outerbridge's mother; Cause established.
	[redacted]Harnett	21	26, L20-25; 75 L14-19	Knows Dfdt Duerr's mother – Cause established. Excused
	[redacted]Furbert	22	75 L20-25	Relative of the deceased. Cause established
44	[redacted]Richards	23	27, L12-14; 76 L 7-16	Knows Deceased Outerbridge and his family – Cause established. Stood down by Judge
16	[redacted]Dean #	24	27, L20-21; pg. 76 L 17-pg. 77 L 17	Sent note to Judge- stand-by for now
46	[redacted]Roberts	25	27, L23-25; pg. 77 L8 – pg. 78 L12	Note shared with Court. Cause established. Stood down by Judge
6	[redacted]Bento	26	28, L4-6; pg. 78 L13 – pg. 80 L10	Notes shown to Court. Cause established. Stood down by Judge
	[redacted] Garland	27	28, L11-14; Pg. 80 L5-8	Deceased Outerbridge was a school friend. Cause established. Stood down by Judge.
	[redacted]Campbell	28	Pg. 29, L22- Pg. 30, L3; 80 L 12-16	Defence Counsel Attridge is her lawyer. Cause

AMENDED SCHEDULE OF JURORS CHALLENGED – R V ROBERTS & DUERR

				established. Stood down by Judge.
	[redacted] Rawlins	29	Pg. 80 L23- pg. 83 L15	Sent Note to Court. Cause established.
	[redacted] Iassell	30	84, L 8-14	Knows Deceased Outerbridge and a few of the witnesses. Cause established
	[redacted] Laws	31	84, L15-18	Knows the family of one of the deceased. Cause established
20	[redacted] Ebbin	32	20, L7-15; pg. 86 L 1 – pg. 88 L3	Knew one of Accused; Expressed concerns in a note. Cause established
	[redacted] Botelho	33	85, L11-20	Deceased Furbert was her fiancé's nephew. Cause established

 # Empaneled

APPENDIX 4