Neutral Citation Number: [2025] CA (Bda) 5 Crim

Criminal Appeal No 11 of 2023

IN THE COURT OF APPEAL
ON APPEAL FROM THE SUPREME COURT OF BERMUDA
BEFORE THE HON JUSTICE CARLISLE GREAVES
CASE NUMBER 2015 No 3

Dame Lois Browne-Evans Building
Court Street
Hamilton HM12
Bermuda

Date: 21/03/2025

Before:

JUSTICE OF APPEAL THE HON IAN KAWALEY
JUSTICE OF APPEAL THE HON NARINDER HARGUN
and
JUSTICE OF APPEAL THE RT HON SIR GARY HICKINBOTTOM

- -

Between:

LEVECK ROBERTS

Applicant

- and -

THE KING

Respondent

Mr Charles Richardson, Compass Law, for the Applicant
Mr Carrington Mahoney, Department of Public Prosecutions, for the Respondent

Hearing date: 12 March 2025
Date of Judgment: 21 March 2025

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Fresh evidence – Principle of finality – Reopening an appeal

JUDGMENT

HICKINBOTTOM JA:

Background

1. On 6 April 2015, the Applicant was convicted of the premeditated murder of Rico Furbert and Haile Outerbridge contrary to section 286A(1) of the Criminal Code Act 1907 ("the Criminal Code"), two counts of using a firearm whilst committing an indictable offence contrary to section 26A of the Firearms Act 1973, and one count of taking a motorcycle without lawful authority. The two murders occurred on the same occasion on 23 January 2013 at Belvin's Variety Store in Happy Valley Road ("the Belvin's murders"); the firearms offences were in relation to the use of a firearm in committing those murders; and the motorcycle was the vehicle used by the perpetrators to get to and from the store. The Applicant was acquitted of a further charge of attempted murder of Zico Majors on a different occasion. He was sentenced to life imprisonment with a 25-year minimum term for each of the premeditated murders, and 10 years for each of the firearms offences, all concurrent.

2. The Applicant appealed on eleven grounds, which appeal was dismissed by this court (Baker P, Bell JA and Clarke JA) on 12 May 2017 ("LeVeck Roberts No 1").

3. Following Jahmico Trott v Director of Public Prosecutions and the Attorney General of Bermuda [2020] Bda LR 47 (in which it was held, by giving the Crown greater rights to stand by jurors than an accused had rights of peremptory challenge, section 519(2) of the Criminal Code as it then stood was inconsistent with the fundamental right to a fair trial guaranteed by the Constitution), the Applicant successfully applied to re-open his appeal, submitting that his trial was unfair because of the "uneven playing field" created by section 519(2). On 11 June 2021, this Court (Clarke P, Bell JA and Smellie JA) dismissed that appeal ("LeVeck Roberts No 2").

4. The Applicant now applies to admit fresh evidence in the form of voice notes and WhatsApp messages from the mobile phone of his co-accused, Gariko Benjamin, that was not available to the Applicant at the time of his trial or his first appeal or his second appeal but is available to him now; and to re-open the appeal on the basis that the fresh evidence undermines the safety of his convictions because it shows that Mr Benjamin

and not the Applicant went into the Belvin's Variety Store and fired the fatal shots.

5. The issues for this Court are, consequently, does this Court have jurisdiction to admit the fresh evidence and re-open the appeal; and, if so, should we do so.

The Facts

6. It was the prosecution case that the Applicant and Benjamin were affiliates of the MOB gang. From November 2012, the Applicant had issues with the Parkside gang. He believed that members of that gang had discharged a firearm at his house on 8 or 9 November 2012.

7. The Applicant made arrangements to obtain a US passport, which was ready by 22 January 2013.

8. On 16 January 2013, the Applicant and Benjamin went to the house of Mr Majors in Curving Street, in the Parkside area, where they shot and injured him and his dog. It was the prosecution case that the shooter on that occasion was the Applicant. However, in his evidence at trial, Mr Majors denied that the Applicant was the shooter; and the case against the Applicant on that charge was not pursued. That was the attempted murder charge to which I have already referred, upon which the Applicant was acquitted.

9. On 23 January 2013, the Applicant, Benjamin and a third person called Romano Mills went to the same area, where they stole a motorbike BP950. A few moments later, three motorbikes arrived outside Belvin's Variety Store, from the direction of Curving Road. They slowed and circled outside the store. Rico Furbert was coming out of the store. He shouted: "They are outside. It's more than one person. They've got guns." He and Haile Outerbridge then ran towards the back of the store. It was the prosecution case that the Applicant went into the store, apparently to follow Mr Furbert. Four shots were fired at the back of the store. Both Mr Furbert and Mr Outerbridge died from gunshot wounds. It was the prosecution case that the Applicant was the shooter. He denied (and, as I understand it, continues to deny) that he was present when this incident occurred.

10. Ahisha Francis, who was working in the store, pressed the panic button and the police were called. Francis described the shooter as taller than her – she is under 5 feet tall – and he wore a dark jacket and a helmet with a full-face visor which was down.

11. The motorbike BP950 was found 300-400m from the Applicant's house, with apparent gunshot residue on it. The Applicant then got a lift on another motorbike to his father's house, where he was seen by Patti Robinson who lives over the road. She heard a motorbike ride through the gate of her property. She was unable to identify the rider, whose face was hidden by a helmet visor. However, the Applicant, whom she had known for many years, was the pillion passenger. He waved to her and shouted: "Hi Auntie!". She was surprised to see him as a pillion passenger, as he was normally the rider. She then noticed that her outside light was off, so that the yard she shared with the Applicant's

father was in darkness. The Applicant had taken out the bulb. She screamed at him to replace it, which he did.

12. Early the following morning, the Applicant took a photo of the report of the murders on the front page of the Royal Gazette, which was later found on his cell phone.

13. On the evening of 25 January 2013, police officers went to the Applicant's home and arrested him. He was wearing a bullet-proof vest. Particles characteristic of gunshot residue were found on both of the Applicant's hands, and on items seized including a jacket similar to the one worn by the Belvin's murders' shooter and two helmets. Several motorbikes were found in the yard, one of which matched the description of the bike used in the shooting of Mr Majors on 16 January.

14. In respect of the Belvin's murders, there was no direct identification of anyone as the shooter. The case against the Applicant depended on circumstantial evidence. That included:

    (i) evidence from an imaging expert who had examined pictures of the gunman at the scene which showed dark tones that possibly – I emphasise it was no more than "possibly" – matched tattoos which the Applicant has on his right hand and upper wrist: Benjamin has no such tattoos;

    (ii) evidence from Akelah Hendrickson, who had a relationship with the Applicant, who said that she recalled one occasion on which she called the Applicant and he promised to call her back, and he did not do so promptly: but, when he eventually did so, he said that he could not call before because he had jumped overboard to remove gunpowder from his clothes: she was unable to recall the date of that conversation;

    (iii) evidence from Ms Hendrickson that, on another occasion, when she visited his residence, he showed her a dark gun which had been wrapped in a towel;

    (iv) evidence that the motorbike BP950 was found 300-400m from the Applicant's residence with apparent gunshot residue on it;

    (v) although the prosecution case was that he had changed motorbikes, the evidence of Ms Robinson that the Applicant was not the rider but a pillion passenger of the motorbike that arrived at his father's house after the shootings;

    (vi) the photograph of the report of the shootings found on the Applicant's cell phone;

    (vii) photographs on his cell phone glorifying the MOB gang and vilifying the Parkside gang;

(viii) the fact that, on arrest (two days after the shootings), the Applicant had apparent gunshot reside on both hands and on items of clothing, and he was wearing a bullet-proof vest; and

(ix) the fact that, after arrest, he had fled the jurisdiction and contested extradition proceedings for his return.

15. Benjamin was arrested on 24 January 2013, and questioned in respect of social media postings regarding the shootings. Particles characteristic of gunshot residue were found on both his hands. He was released on bail, and left Bermuda for Atlanta on 15 March 2013, with a due date of return on 20 March 2013. However, he did not return. He departed New York for Accra, Ghana, on 18 July 2013. Following the Applicant's conviction in April 2015, Benjamin flew back to the US with a view to returning to Bermuda. Upon landing in the US, he was arrested on an Interpol warrant, and he was required to give up his cell phone and its password. The US authorities immediately downloaded all data from that phone. Benjamin was returned to Bermuda on 27 August 2015, when the US authorities also delivered a download of the contents of his phone to the Bermuda police and, subsequently, to the Bermuda prosecuting authorities.

16. At the time of the offences, the Applicant was on probation and therefore unable to travel overseas without permission from the Department of Court Services. However, following his arrest, on 16 August 2013, he travelled to Atlanta on the US Passport he obtained on 22 January 2013. He was eventually extradited, following extradition proceedings which he contested.

17. The Applicant was tried with a Christophe Duerr who, it was alleged, was an accessory. On 6 April 2015, the Applicant was found guilty of the five charges referred to above. It is implicit by those verdicts that, on the evidence before them, the jury were satisfied to the criminal standard that the Applicant was not only present when Mr Furbert and Mr Outerbridge were killed but was the shooter.

18. His first appeal was heard in March 2017, with judgment dismissing the appeal being handed down on 12 May 2017.

19. Benjamin having returned to Bermuda, he was tried with Mills in September 2017. WhatsApp messages and voice notes Benjamin had sent and received when he was in Ghana, downloads of which were sent to the Bermudian authorities by the US authorities as I have described, were disclosed as unused material; but Benjamin's Counsel could not access the material until it was served on two new discs during the trial. His First Counsel (Craig Attridge) reviewed that material, which included further evidence of Benjamin's participation in the Belvin's murders, with the Applicant, Duerr and Mills. Benjamin then pleaded guilty to the two murders on the basis that he was an accessory.

20. The Applicant's second appeal was heard 9-19 March 2021, with judgment dismissing

the appeal being handed down on 11 June 2021.

Premeditated Murder

21. By section 286A(1) of the Criminal Code, at the time of the relevant killings, any person who with premeditation unlawfully killed another person was guilty of the felony of premeditated murder. For these purposes, "premeditation" was defined in section 286B as an intention to cause the death of any person, deliberately formed before the act causing the death was committed or the omission causing the death was made, and existing at the time of the commission of that act or the making of that omission. By section 286A(2), upon conviction for premeditated murder, the sentence was required to be life imprisonment with a minimum term of 25 years. By section 4(e) of the Criminal Code Amendment Act 2014, sections 286A and 286B were repealed as from 19 September 2014.

22. Section 287 of the Criminal Code (which remains unrepealed) provides for the offence of murder, which includes an unlawful killing where the intention is to cause the death of the person killed (section 287(1)(a)) but also where (e.g.) the intention is to cause the person killed some grievous bodily harm (section 287(1)(b) or if the offender causes death by means of an act done or omission made in the prosecution of an unlawful purpose (section 287(1)(c)). By section 288(1), upon conviction for murder, the sentence must be life imprisonment.

Jurisdiction

23. In respect of jurisdiction to admit new evidence, there is no doubt that this Court has full power to admit evidence in support of an appeal that was not before the Court below ("fresh evidence") (section 8(2) of the Court of Appeal Act 1964, read with section 14(5) of the Civil Appeals Act 1971). The test for civil appeals and criminal appeals is the same.

24. Therefore, when an appeal depends on fresh evidence, the question for this Court is not whether the fresh evidence can be admitted but rather whether, in the circumstances of the particular case, leave should be granted to admit it (Intervest v Black and Doble [2010] Bda LR 41 at page 2). Fresh evidence will be admitted "where it would be just to do so. What justice requires will always be materially shaped by the circumstances of the individual case" (Thomson v Thomson and Colonial Insurance Company Limited [2015] SC (Bda) 84 Civ (30 November 2015) at [15] per Kawaley CJ).

25. Whilst always fact specific, the requirement that fresh evidence will only be admitted where it is just to do so, has led this Court to set particular conditions upon which it will receive fresh evidence, as follows (Barnett v R [2015] Bda LR 103 at [7], restated with approval recently by Clarke P in LeVeck Roberts No 2 at [253]-[255]):

(i) the evidence sought to be called must be evidence not available at the time of the trial (or where, as here, it is sought to adduce the evidence in an application to re-open an appeal, not available at the time of the trial or earlier appeal(s));

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

(iii) the evidence must be credible, that is capable of belief; and

(iv) the fresh evidence, together with the other evidence in the case, would have caused a reasonable doubt in the minds of the jury with regard to the guilt of the accused/applicant (see paragraphs 27- 28 below).

26. Turning to this Court's jurisdiction to re-open an appeal, section 17(1) of the Court of Appeal Act 1964 provides that a convicted person has the right of appeal:

> "(a) against his conviction in the Supreme Court, or in any other case, against a decision of the Supreme Court, upon any ground of appeal involving a question of law; and
>
> (b) with the leave of the Court of Appeal or upon 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 law 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."

27. Section 21 sets out the test to be applied in determining any such appeal:

> "Upon the hearing of an appeal under section 17(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 that any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal."

28. It is to be noted that this test is different from the test for appeals against conviction in England & Wales, where the sole criterion is the safety of the conviction. By section 2(11) of the Criminal Appeal Act 1968, in England & Wales, the Court of Appeal is required to allow an appeal against conviction if they think that the conviction is unsafe and is required to dismiss the appeal in any other case. However, in most circumstances these different tests will yield the same result because, unless they think the conviction is unsafe, this Court will not think that the verdict of the jury to convict should be set aside on any of the grounds set out in section 21.

29. Sections 17(1) and 21 of the Court of Appeal Act 1964, on their face, clearly give this

court, as a matter of jurisdiction, the power to entertain more than one appeal from a convicted person in relation to the same conviction.

30. However, finality in criminal proceedings is an important and well-established principle based on public interest. As Clarke P said in LeVeck Roberts No 2 (at [22]):

> "… If the accused has had his appeal determined and has failed to set aside either his conviction or sentence, the effect of setting either aside after a later second appeal, may wreak havoc with the administration of justice and cause great injustice to victims and others…".

31. When a convicted person has had an appeal against conviction refused, and then applies to reopen the appeal, there are consequently two, potentially conflicting strands of the public interest in play, (i) that of ensuring that those who are innocent of charges are not convicted, and (ii) that of finality in criminal proceedings.

32. How the Court should approach such cases was described by Clarke P in his judgment in LeVeck Roberts No 2. Reflecting R v Gohil [2018] EWCA Crim 140; [2018] 1 Cr App R 30 [110]-[111] and [129] (which sets out the position in England & Wales), he said (at [69]):

> "… [The Court of Appeal] 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 re-open the decision notwithstanding the rights and interests of other participants and the importance of finality; (ii) there is no other remedy; and (iii) the accused would suffer substantial injustice if it did not do so."

33. If I might respectfully say so, that is helpful in emphasizing that an appeal will only be reopened in "exceptional" (i.e. rare) circumstances, and an appeal will not be reopened if the convicted person has some other remedy. However, it must be remembered at all times that the star which directs this Court – as with all Courts – is justice, and our overriding objective is always to ensure that justice is done. Consequently, on an application to re-open an appeal, as Mr Richardson submitted (quoting in support the judgment of Lord Bingham LCJ in R v Hawkins [1997] 1 Cr App R 234 at page 240, reflected by Clarke P in the passage quoted above), the question for an appeal court to ask is "whether any substantial injustice has been done". For these purposes, "substantial injustice" and "real injustice" (the phrase used in Gohil at [110(a)]) mean the same thing. Where the proposed re-opened appeal is entirely dependent upon fresh evidence then, in terms of the "quality" of the evidence, the question for this Court is whether substantial injustice will be done if the fresh evidence is not admitted.

34. The criterion of "substantial injustice" is not coterminous with determining whether the conviction is unsafe involving, as it may, additional considerations (LeVeck Roberts No

2 at [50]). However, where an appeal court considers that the conviction is not unsafe, absent abuse of process, it is unlikely that there will be "substantial injustice" in maintaining that conviction and dismissing an appeal against it.

The Fresh Evidence: The Applicant's Case

35. The fresh evidence upon which the Applicant relies comprises 114 pages of messages and the transcripts of voice chats from the data downloaded from Benjamin's phone, which were messages/chats from and to that phone in the period March 2013 to August 2015 when Benjamin was not in Bermuda. I will refer to these as simply "the messages/chats". Some of the messages/chats have an identifiable correspondent (e.g. Benjamin's younger brother), but many do not.

36. Mr Mahoney for the Crown submitted that these messages/voice chats were available to the Applicant from about September 2017, when they were disclosed in accessible form to Benjamin's Counsel in his criminal trial. Mr Richardson was Second Counsel to Mr Attridge for Benjamin at that trial. This was well before the Applicant's second appeal hearing in 2021, when (Mr Mahoney submitted) this ground of appeal should have been made, and this material could and should have been deployed.

37. Mr Richardson said – and I accept – that the material was considered by Mr Attridge on behalf of Benjamin, and he (Mr Richardson) did not in fact see it at that time or before it was sent to the Applicant in 2021. In any event, he submitted that serving Benjamin was not the same as serving the Applicant, and the Applicant was not sent this material until after his second appeal.

38. In my view, for the purposes of this appeal, it is unnecessary to determine any "service" issue. I shall assume, in the Applicant's favour, that he was not in possession of the fresh evidence, nor could he have obtained it by diligent effort, before he in fact obtained it in 2021. In other words, I shall assume it was not available to him at the time of his trial or first appeal or second appeal.

39. That takes us to the "quality" of the fresh evidence. I have carefully considered all the messages/chats, and Mr Richardson for the Applicant went through the messages/chats upon which he particularly relied. As Mr Richardson conceded, nowhere in this corpus of material does Benjamin expressly admit to being the shooter at the Belvin's murders; nor does he expressly say that the Applicant was *not* the shooter. However, Mr Richardson submitted that, looked at as a whole, the messages/chats indicate that Benjamin was involved in gang activities, heavily and at high level; that he had been the shooter in other, earlier incidents; and that he was involved in the Belvin's murders. In particular, they show that he maintained a close interest in the investigation of the Belvin's murders, and in the prosecution of the Applicant for them including the timings involved in that prosecution. There is evidence from the messages/chats that Benjamin took the view that he would not return to Bermuda before the Applicant's trial had run

its course, reflected in the fact he left Africa for the ultimate destination of Bermuda via the US in August 2015 following the end of the Applicant's trial in March 2015.

40. In all the circumstances, Mr Richardson submitted that it could and should be inferred from this material that Benjamin was the shooter in the Belvin's murder. As the prosecution case against the Applicant, accepted by the jury, was put solely on the basis that the Applicant was the shooter, he submitted that, in the light of this fresh evidence, the convictions are at least arguably unsafe; and the interests of justice require us to admit that evidence now, give leave to reopen the appeal, and then proceed to consider whether the convictions are in fact unsafe and they should be overturned to avoid a avoid substantial injustice. In Mr Richardson's submission, as it can be inferred from the fresh evidence that Benjamin and not the Applicant was the shooter, we can be satisfied that the convictions are unsafe and, to avoid substantial injustice, they should be overturned.

Discussion and Conclusion

41. Elegantly as Mr Richardson put the Applicant's case – and it could not have been better put – in my view, the fresh evidence upon which he relies does not bear the weight of his submission. That new evidence does not, even arguably, render the convictions here unsafe. In coming to that conclusion, I have taken into account in particular, the following.

42. In the messages/chats, Benjamin does not expressly admit that he was the shooter, nor does he say that the Applicant was *not* the shooter even when he was aware that the Applicant was being prosecuted as the shooter. These were private communications, often with family members, and it is clear that Benjamin did not consider for a moment that they would be accessed by any relevant authorities or other "outsider", as shown by his reaction after they were accessed in the criminal proceedings against him. In these messages/chats, there was no reason for him to be coy about the part he played in Belvin's shootings. He was not reluctant to refer to his role in other gang activities.

43. Nor can an admission arguably be inferred. I accept that some of the messages/chats suggest that Benjamin regarded himself as a leader of the gang (e.g. Chat ID 68 26 March 2015 5:35:00 PM); and other messages/chats suggest that others shared that view (e.g. Chat ID 112 13 November 2014 2:02:46 PM from an anonymous sender). Indeed, as Mr Richardson submitted, the general gist of several messages/chats from Benjamin when he was in Africa indicated that he wished the violence towards the Parkside gang to continue, which also may suggest that he continued to consider himself a gang leader. As Mr Richardson put it, in the messages/chats, Benjamin also "bragged" of his previous gang activities (e.g. ID Chat 58 8 March 2025 (several chats)); and there are some (although often quite oblique) references to his involvement in earlier shootings (e.g. Chat ID 104 19 January 2015 2:28:55 PM). However, on the prosecution case and the Applicant's defence, Benjamin's involvement in the Belvin's murders was not in doubt; and he eventually pleaded guilty to murder as an accessory. His earlier history – no doubt

known to the Applicant as an associate of the same gang and deployed in his defence that Benjamin was the shooter but, I accept, to an extent confirmed by these messages/chats – and his general involvement in gang activities does not make it more likely that he was the shooter on this occasion, there being no direct correlation between the level of general involvement in a gang and the likelihood of being a shooter in a particular incident. Clearly, both Benjamin and the Applicant had some involvement in the activities of the gang.

44. Similarly, no inference can be drawn from his interest in the Belvin's murders investigation and the prosecution of the Applicant and Duerr, whether looked at alone or together with the evidence of Benjamin's previous gang activities considered above. I accept that it is clear from the messages/chats that Benjamin both had (a) an involvement in the Belvin's murders (e.g. he knew the person who had ended up with the murder weapon and how it had got to him via Duerr (Chat ID 68 13 March 2025 7:04:19 PM), and (b) an interest in the investigation and prosecution of the Applicant, with particular attention being paid to timing: Benjamin took the view, apparently having taken advice (but, certainly, not from Mr Richardson) as to when and how he might return to Bermuda. However, there is no indication from the messages/chats that that return was dependent upon the nature of the verdicts in the Applicant's trial: it was never suggested, for example, that he would only return if the Applicant were found guilty. Indeed, when he heard that Mr Majors had not identified the Applicant as the shooter in the incident in which he was injured, Benjamin expressed himself as being pleased: "That's a blessing" (ID Chat 68 10 March 2015 2:05:16)

45. Furthermore, the messages/chats do not only fail to state that the Applicant was not the shooter, as well as providing evidence of Benjamin's involvement, they provide evidence that is also unhelpful to the Applicant's case. For example, Benjamin indicates to an anonymous correspondent that he left his helmet with the Applicant ("Fredo" or "Veck") which appears to be a reference to after the Belvin's murders; and arguably implicates the Applicant at whose home two helmets were found (Chat ID 296 4 May 2013 3:49:32 PM, 3:52:53 PM and 3:53:01 PM).

46. For those reasons, I do not consider that it could reasonably be inferred from the fresh evidence that Benjamin and not the Applicant was the shooter; and it is consequently not arguable that the convictions are unsafe or that the messages/chats should be admitted in this Court to avoid substantial (or, indeed, any) injustice or miscarriage of justice. I would consequently refuse the Applicant's application to admit the messages/chats as fresh evidence. The application to re-open the appeal is dependent upon that fresh evidence, so that I would also refuse the application to re-open the appeal.

47. As a subsidiary submission, Mr Richardson submitted that the proceedings against the Applicant as a whole were unfair because of the Crown's failure to disclose the messages/chats to him. However, I find no force in that argument.

(i) Mr Richardson was clear that it was not suggested on behalf of the Applicant that there had been a deliberate failure by the Crown to disclose the messages/chats. There is no suggestion of any abuse of process.

(ii) Whilst it is not entirely clear when the prosecuting authorities in Bermuda had access to the messages/chats, it was certainly after 27 August 2015 when Benjamin was extradited to Bermuda from the US. It was therefore after the Applicant's trial.

(iii) Insofar as it was before the Applicant's first/second appeals, whilst the Crown has a continuing disclosure obligation towards an accused even after conviction, the scope of that obligation is not the same as before and during the trial: it is restricted to an obligation to disclose anything which comes into its possession which might afford arguable grounds for contending that the conviction is unsafe (R (Nunn) v Chief Constable of Suffolk Constabulary [2014] UKSC 37 at [35] per Lord Hughes with whom the other UK Supreme Court Justices agreed). Therefore, if the messages/chats in this case do not afford arguable grounds for contending that the Applicant's convictions are unsafe (or, in this jurisdiction, otherwise afford arguable grounds that, without such disclosure, substantial injustice may be done), then there was no obligation on the Crown to disclose them to the Applicant. For the reasons set out above, I do not consider that the messages/chats here afford any such grounds.

Conclusion

48. For those reasons, subject to my Lords, Kawaley and Hargun JJA, I would refuse this application to admit fresh evidence and re-open the appeal, leaving the Applicant's convictions to stand.

HARGUN JA:

49. I agree.

KAWALEY JA:

50. I also agree.