Neutral Citation Number: [2022] CA (Bda) 15 Crim

Case No: Civ/2013/09

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON. MR. JUSTICE GREAVES
CASE NUMBER 2012: No. 030

Sessions House
Hamilton, Bermuda HM 12

Date: 12/08/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL CHARLES-ETTA SIMMONS (AG)

- -

Between:

DEVON HEWEY

Appellant

- and -

THE QUEEN

Respondent

Mrs Simone Smith-Bean, Smith-Bean & Co Limited, for the Appellant
Ms. Cindy Clarke, Ms Nicole Smith and Maria Sofianos, Office of the Director of Public Prosecutions for the Respondent

Hearing date: 9 June 2022

- -

APPROVED JUDGMENT

SIMMONS JA:

Introduction

1. This appeal concerns the question whether the Court should order a retrial of Devon Hewey ("the Appellant") for the premeditated murder of Randy Robinson which occurred on 31 March 2011.

2. The Appellant was charged on indictment No. 30/2012 with his co-defendant, Jay Dill, both of whom were convicted by a jury at trial on 25 February 2013. The facts of the case are compendiously set out in the judgment of the Judicial Committee of the Privy Council ("JCPC") which are gratefully adopted and need not be rehearsed in this judgment.

3. Each defendant appealed to this Court (differently constituted) against their conviction and sentence. Both appeals were dismissed on 18 March 2016 with reasons delivered on 13 May 2016.

4. The Appellant applied to the JCPC to have his conviction and sentence quashed. His application was made pursuant to Section 10 of the Judicial Committee (Appellant Jurisdiction) Rules 2009, as there is no provision in the Bermuda Appeals Act 1911 for this Court to consider the grant of leave in respect of criminal appeals to the JCPC.

5. The JCPC granted the Appellant leave to appeal on two grounds which were:

    a) *"The trial judge wrongly admitted the evidence of the one-component and two-component particles of lead, barium and antimony found on the appellant's person and his possessions. That evidence was highly prejudicial and had no probative value. That evidence should have been excluded at trial.*

    b) *Having admitted that particle evidence, the trial judge's directions to the jury on that evidence were inaccurate, imbalanced and unfair in that:*

        i. *The directions did not reflect the evidence of the GSR expert called by the prosecution, nor the evidence of the GSR expert called by Mr Dill, but instead inflated the evidential value of the one-component and two-component particles.*

        ii. *His directions did not include key aspects of the particle evidence that pointed away from the appellant, including a clear and unequivocal statement that no three-component GSR particles were found on him or his clothing or on any of his multiple belongings that were tested."*

6. In its judgment of 11 April 2022, the Board allowed the Appellant's appeal, set aside his conviction and sentence and remitted the matter to this Court for it to consider the question of a retrial pursuant to section 21(1)(b) of the Court of Appeal Act 1964 ("the Act"). In summary, their Lordships found that the learned trial judge:

i. wrongly reversed the burden of proof requiring the Appellant to show that the one and two component particles which make up gunshot residue ("GSR") were not acquired from innocent sources;

ii. made a substantial error in explaining the effect of the scientific evidence relating to GSR which likely influenced the jury;

iii. wholly failed to mention a vital qualification that the GSR expert attached to her evidence; and

iv. summed up the case in a way that at times was muddled, and whose tone was tendentious and unbalanced.

Counsel's Submissions

7. We have heard argument from the Director of Public Prosecutions who seeks a retrial. Ms Smith-Bean for the Appellant resists an order for retrial on the basis that, *inter alia,* it would be unfair, prejudicial and against the interests of justice for her client to be retried.

8. I have considered the oral and written submissions of the Appellant and the Respondent, whether they are set out fully here or not, and I record the pertinent points as follows.

The Crown's Submissions

9. Ms Clarke submits that the Court's approach when considering the question of a retrial must assess the interests of justice principle. The correct approach, she submits, is to realise that it is not a hard-edged concept but it requires an exercise of judgment in which several relevant factors, including the gravity of the alleged offences, have to be weighed in the balance.[1] As to those factors, she places reliance on the authority of *Reid [1980]* AC 343, which provides that the Court must consider:

a) the seriousness and prevalence of the offence;
b) the probable duration and expense of a new trial;
c) the ordeal to be undergone for a second time by the Appellant;
d) the lapse of time since the commission of the offence and its effect on the quality of the evidence; and
e) The strength of the prosecution case at the original trial;

10. Ms. Clarke submits that this is not a case where the verdict of the jury had been set aside on the ground that the evidence adduced by the prosecution was insufficient to justify a conviction by a reasonable jury properly directed. This is a case, she says, where the Board was unable to conclude with confidence that no substantial miscarriage of justice had actually occurred as a result, in particular, of the misdirection in respect of component particles of GSR. The particle evidence was not considered by the Board to be inadmissible.

[1] See *R v Maxwell* [2010] UKSC 48

11. As to the ***seriousness and prevalence of the offence,*** the indictment charges the Appellant with Premeditated Murder and Using a Firearm whilst Committing an Indictable offence. The sentence upon conviction is life imprisonment with a substantial tariff to be served. Ms Clarke says as to this factor, by way of example, that since the Appellant's conviction, there have been 20 indictments for murder by firearm; and 15 indictments involving other firearms offences. I interject here to highlight that these statistics only relate to matters before the Court, although it is common knowledge, of which I can take judicial notice, that there have been several unprosecuted incidents concerning similar offences.

12. As to the factor – ***probable duration and expense of a new trial*** – Ms Clarke submits that the evidence portion of the original trial of both defendants took place from 4 February 2013 to the 25 February 2013. A total of 31 witnesses were called to give *viva voce* evidence. She estimates that the probable duration of a retrial is 10 working days (2 weeks); since there will only be one defendant, in which case the evidence of all 31 of the witnesses will not be relevant. With the advancement of Court technology, there is no extraordinary expense to be considered. Additionally, she relies on the fact that the Appellant is legally aided and will be in a position to fund his defence without personal cost.

13. As to ***any ordeal to be suffered by the Appellant***, Ms Clarke says that it would be minimal. The Appellant did not file his application for permission to appeal to the JCPC until 3 years after his appeal to this court had been finalised. She noted as well that the Appellant was also convicted of Perjury, Corruption of a Witness and Fabricating Evidence under an unrelated indictment and was sentenced to, and served, a sentence of six years' imprisonment which was ordered on or about 4 December 2015. Ms Clarke therefore contends that for a portion of the time that he has spent in custody, the Appellant has been serving a sentence for an unrelated offence.

14. In considering the ***lapse of time***, Ms. Clarke accepts that it has been 11 years and 3 months since the commission of the offence. However, she does not accept that the quality of the evidence has been affected in such a way that would cause prejudice if a retrial were ordered. The case against the Appellant, she says, was not reliant on individual identification accounts of witnesses, but on various strands of circumstantial and forensic evidence; including DNA, GSR, gang and telephonic evidence.

15. As to the fresh evidence that the Appellant sought to rely upon at his first appeal before this Court, she submits that that does not diminish the prosecution case because (a) the proposed evidence from Kevin Busby does not contradict his evidence at trial where he described the rider and the shooter as wearing dark or black coloured clothing; and (b) the proposed evidence from Hewvonne Brown and Pelealkhai Williams, who are intended to be called by the Appellant, is not credible.

16. Finally, in addressing the ***strength of the prosecution case***, Ms. Clarke relies heavily on the JCPCs *obiter dictum* at paragraph 51, where it expressed its view that the case against the Appellant, although based on circumstantial evidence, was nevertheless a strong one. She further submits that a retrial in this matter would not offend the Court's sense of justice and propriety, nor will a retrial undermine public confidence in the criminal justice system, nor bring the system into disrepute. To the suggestion by Mrs Smith-Bean that the admission of gang evidence would be

highly prejudicial to the Appellant, Ms Clarke submits that the JCPC's decision in *Meyers v The Queen* [2015] UKPC 40 does not prohibit the admission of gang evidence, but rather highlights that the issue of admissibility and the extent to which a witnesses' evidence could go, is a matter left to the control of the trial judge.

Appellant's Submission

17. Unsurprisingly, Mrs Smith-Bean for the Appellant accepts that the seriousness of the offence is a relevant factor when determining whether to order a retrial. However, she asserts that it is not the determining factor nor the primary factor for consideration. She submits that the Board in *Reid* was clear that no one factor is necessarily more important than another, and the weight to be attached to each will vary from case to case. This, in my view, is indisputable. In my view, the seriousness of the offence in this case – premeditated murder – is one that attracts considerable weight.

18. Mrs Smith-Bean relies on a number of authorities including cases from the JCPC and other Commonwealth Caribbean appellate courts where it was held that the delay between the commission of the offence and a potential retrial displaced the public interest in the prosecution of serious offences, including offences of murder. See *Charles v State* [2000] 1WLR 384 [11years]; *Shivnarine v State* (2012) 80 WLR 357 (11 years).

19. As to the factor concerning ***delay and expense of a new trial***, Mrs Smith-Bean says that the public expense and resources that will be incurred by a further attempt to convict the Appellant are significant. The first trial lasted four weeks (28 January – 25 February 2013). A number of witnesses giving evidence on these matters travelled to Bermuda from the United States. All of them were cross-examined at the first trial, and would be similarly required for cross-examination at any retrial. She identifies these witnesses as key witnesses for the defence; and that additional issues for cross-examination have arisen since the first trial, which I will come to further below

20. She contends that it would be entirely unfair for transcripts of their evidence from the first trial to be read into the record without cross-examination. She also adopts this argument for other witnesses in the case where new issues for cross-examination have arisen. She includes: the armed arresting officers, Sergeant Rollin, and Kevin Busby. Furthermore, the Appellant anticipates that, if an order for a retrial is made, he intends to call at least two international expert witnesses (one from the US and one from the UK) in support of his defence.

21. She suggests that there are also likely to be significant admissibility arguments, at the very least, on (a) the particle evidence concerning GSR; and (b) the 'gang' related evidence. She further contends that all evidence that pertains to Mr Dill is not probative of the Appellant's involvement, and will need to be excluded if any semblance of a fair trial is to be achieved. On that point, it is her position that if the evidence used to convict Mr Dill is determined to be inadmissible, then the Appellant would have no case to answer.

22. Briefly put, Mrs Smith-Bean asserts in respect to the ***ordeal to be suffered by the Appellant*** (should a retrial be ordered), that the murder occurred in March 2011, which is now more than 11

years ago. In the current climate, a retrial is unlikely to take place, "realistically", for another two years on account of the backlog in criminal cases. In her view, it is oppressive to keep the Appellant in this state of uncertainty and anxiety about his future for 13 years (through no fault of his own), and then to put him through the ordeal of another trial. She submits that the delay in his case and the toll that it has taken on the Appellant should not be under-estimated and should be accredited significant weight.

23. I hasten to add here that the concern expressed by Mrs Smith-Bean that the Appellant will have to wait for a prolonged period of time, if a retrial was ordered, is a concern shared by this Court. This Court is very well acquainted with the guarantee of a fair hearing within a reasonable time by an independent and impartial court established by law as set out in section 6(1) of the Bermuda Constitution Order 1968. However, it is within the Court's power to direct the Supreme Court to give priority to cases remitted for retrial, as we would expect to be the case, especially a case where the liberty of the subject is of paramount concern.

The Law

Power of the Court to Order re-trial

24. This Court does not derive its power to Order a retrial from the JCPC. The power of this Court to order a new trial is contained in section 21(1)(b) of the Act which provides:

> *"(1) 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 any ground there was a mis-carriage of justice, and in any other case shall dismiss the appeal:*
>
> *Provided that the court may —*
>
> *a) ...*
>
> *b) in an appropriate case and if the interests of justice so require, set aside the conviction and sentence of the appellant and remit the case to the Supreme Court to be re-tried; and in any such case, the Court may make such order as it thinks fit for the detention of the appellant in custody pending the re-trial or for his release on bail or otherwise."*

25. It is incontrovertible that this Court is subject to the directions of the JCPC. Therefore, this Court is bound by the decision of the JCPC which has quashed the conviction and sentence of the Appellant and remitted the case to us to determine whether there should be a retrial. Accordingly, section 21 of the Act must be construed as though the Court of Appeal has set aside the conviction and sentence.

26. The use of the word "may" in section 21 of the Act indicates that this Court has a discretion to order a retrial following the quashing of the conviction on appeal if it appears to the Court that the interests of justice so require. This was the position taken in *Au Pui-kuen v The Attorney General of Hong Kong*, Privy Council Appeal No. 39 of 1977. In *Au Pui-kuen*, Lord Diplock stated that:

> *"their lordships have already indicated that the power of the Court of Appeal of Hong Kong to order an appellant in a criminal appeal to be re-tried is a discretionary power. It is conferred in the broadest terms by s. 83E(1) of the Criminal Procedure Ordinance:*
>
> > *'Where the Court of Appeal allows an appeal against conviction and it appears to the Court of Appeal that the interests of justice so require it may order the appellant retried.'*
>
> *The power to order a re-trial owes its origin not to the common law of England but to the Indian Code of Criminal procedure more than a hundred years ago. A similar power not always conferred by identical words, has subsequently been incorporated in the criminal procedure codes of many other commonwealth jurisdictions. In some as was the case in Hong Kong before 1972, the power to order a new trial is unqualified in any explicit reference to the requirements of justice; in some "shall order" is substituted for "may order" which appears in the Hong Kong Ordinance. In their lordship's view these minor verbal differences are of no significance. The power to order a new trial must always be exercised judicially…*
>
> *The discretion whether or not to exercise the power to order a new trial in any particular case is confided to the Court of Appeal of Hong Kong and not to their lordships' Board. To exercise it judicially may involve the court in considering and balancing a number of factors some of which may weigh in favour of a new trial and some may weigh against it."*

Factors to be determined in considering order for re-trial

27. In *Travone Saltus v The Queen*, Criminal Appeal No 7 of 2017, this Court having allowed the appeal, was faced with the question of a retrial, which it did, in the end, order. Sir Scott Baker P , said this at paragraph 25 of the judgment:

> *"We were referred to Reid v The Queen [1979] 2 All ER 904 and R v Maxwell [2010] UKSC 48. These cases make it plain that the overriding consideration is whether the interests of justice require a retrial having regard to the particular circumstances of the case. The allegation in the present case is murder, a most serious offence. The critical question is whether the evidence of Harris stands up to cross-examination. If it does the Appellant has a case to answer; if it does not, he does not. It is in our judgment in the public interest that his evidence should be heard and tested."*

28. The principles considered in *Saltus* were few in comparison to those set out in the leading authorities mentioned therein. It was clear that Baker P, in exercising his discretion, was

concerned only with the public interest consideration, the type of offence and the strength of the prosecution case if a retrial were ordered. This was a correct approach as it considered the principles in the cited authorities.

29. In my judgment, the exercise of discretion when determining the question of a retrial should be weighed against the principles pronounced in the JCPC decision in *Dennis Reid v The Queen* [1978] AC 343, which are instructive. There, Lord Diplock had this to say about the power to order a re-trial and the principles to be applied:

> *"The power to order a new trial is conferred upon the Court of Appeal of Jamaica by section 14 (2) of the Judicature (Appellate Jurisdiction) Act, which is in the following terms:*
>
> > *"Subject to the provisions of this Act the court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the court may think fit."*
>
> *Although the verb used is mandatory: "the court shall…, if the interests of justice so require, order a new trial," any consideration of what the interests of justice require in a particular case may call for a balancing of a whole variety of factors, some of which will weigh in favour of a new trial and some against, and not all of which are necessarily confined to the interest of the individual defendant and the prosecution in the particular case. The weight to be given to these various factors may differ from case to case and depends very much on local conditions in Jamaica with which the court of appeal is much more familiar than their Lordships and is better qualified to assess."*

30. As to the principles themselves, he goes on at paragraph B page 350, thus:

> *"The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.*
>
> *The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases*

that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica."

31. However, in *Reid*, their Lordships warned against treating the factors to be assessed as an exhaustive list of considerations in deciding whether or not to order a retrial. Lord Diplock at paragraph C on page 349 provides:

> *"Their Lordships would be very loth to embark upon a catalogue of factors which may be present in particular cases and, where they are, will call for consideration in determining whether upon the quashing of a conviction the interest of justice do require that a new trial be held. The danger of such a catalogue is that, despite all warnings, it may come to be treated as exhaustive or the order in which the various factors are listed may come to be regarded as indicative of the comparative weight to be attached to them…"*

32. Counsel have endeavoured to address some of the factors set out by Lord Diplock which are deserving of consideration. I have set out their submissions in broad terms above. However, it becomes necessary to assess some of the factors in greater detail and to address one in particular that seems to have been overlooked by Counsel: the current state of public opinion in Bermuda.

33. In *Reid*, Lord Diplock emphasised that the interest of justice that is to be served by the power to order a new trial is the interest of the public in Jamaica; that those who are guilty of serious offenses should be brought to justice and not escape it merely because of some technical blunder by the trial judge, whether in his conduct of the trial or in his summing up to the jury.

34. I can take judicial notice of the extent to which the public in Bermuda readily and overtly express their dismay at firearms offences in Bermuda, and in particular murders committed by firearms. Comments passed on sentencing firearms offenders appearing before the courts often express the extent to which family members of victims of firearms offences live in fear of retaliatory shootings. Outside of the court process, the concerns of the public about the impact of such offences tearing at the very fabric of the family structure and the community generally, express support for high sentences and the need to remove offenders from the community for life are expressed in newspaper articles, radio talk shows and discussions among interest groups. Further there have been calls for a Royal Commission on the frequent occurrence and seeming lack of curtailment of such offences. It goes without further comment that these observations reflect the public interest factor in relation to Bermuda highlighted by Lord Diplock. In my estimation high importance should be given to the public's desire for appellants to be retried where the quashing of their conviction arises out of technical blunders by the trial judge, as clearly was the case here.

Discussion

35. As was the case in *Saltus* and *Reid*, the Court must consider factors including the strength of the prosecution case, along with other factors set out above, and balance those against the public interest in convicting those guilty of murder. The strength of the prosecution case at trial can be

assessed from the evidence presented at trial. Having considered that evidence I set out below the barest of the facts that have been highlighted on the Appellant's behalf.

What evidence was before the jury?

Description of the assailants

36. In her written submissions and before the court Mrs Smith-Bean took issue with the description of the assailants. There was no eye witness identification or recognition evidence of the assailants given at trial. She contends that the evidence of Mr Busby relating to the description of the assailants does not match the height or build of either the Appellant or Mr Dill, the co-defendant. She particularly points out that the clothing of the assailants was described as all black or dark, with black helmets that had visors that were full face or tinted. It is her contention that the above description contradicts the prosecution case which was based on the Appellant wearing a bright red jacket on the night in issue.

Telephonic communication

37. Phone records were obtained from a telephone associated with the Appellant. The records indicated that the Appellant telephoned the number of one Christopher Parris who was identified by the gang expert as a "gang leader and a shot caller of the 42 gang". The call was made at 8:32pm, however it was not answered. The call corresponds with the outer limits of the estimate of the time of the shooting of Mr Robinson. The records of the Appellant's phone show that between 8:22pm and 8:26pm he made a four minute voice call. That time range is within the parameters of the shooting. The Appellant intends strenuously to object to the introduction of the phone records evidence between the co-defendant Mr. Dill's phone and Mr. Parris on the basis that it is prejudicial to him.

38. The jury also heard evidence of voice notes found on the phone of Mr Dill. He admitted in evidence that they were his voice notes. In them he spoke of having the will to kill someone. Mrs Smith-Bean takes exception to the admissibility of that evidence in any retrial. In my view, it is highly doubtful that the latter evidence would be held admissible against the Appellant, save perhaps for the circumstance set out below concerning gang motive; however I hasten to add that the issue of relevance is a matter for the trial judge, and that judge should determine that issue without reference to this court's view on it.

Gang evidence

38. In Mrs Smith-Bean's oral submissions before this Court she asserted that there was no, or no credible evidence that the Appellant was a member of a gang. She submitted that the Appellant was not in any photos of gang members, and that no specifics were presented to the court of his association with a gang. She contends that what was said by Sergeant Rollin in trial amounted to bare assertions. She cites *Myers* as authority for her submission that the gang evidence will be inadmissible against the Appellant.

39. Mrs Smith-Bean has correctly stated that the JCPC in *Myers* criticised Sergeant Rollin's evidence as containing a number of bare assertions unsupported by the basis for them. Further, he did not sufficiently distinguish between assertions based on his own observations and contacts, and those to which others had contributed. In the result, some evidence in the trial amounted to nothing but hearsay. The court also signified that gratuitous assertions of other illegal activities of a gang, such as drug trafficking are inadmissible. They pointed out that the duty of the trial judge is to draw the line between legitimate probative value and unfair prejudicial effect.

40. Sergeant Rollin was accepted as a gang expert in the Appellant's trial. His evidence at trial was that the Appellant was known by him as a mid-level member, a soldier of the 42 gang. He submitted into evidence photographs of persons he identified as gang members, including the Appellant, throwing up gang signs of the 42 gang. One such photograph was stated in evidence to have come from the Appellants own cell phone. That evidence does not in my opinion fall foul of what the JCPC stated was permissible evidence from Sergeant Rollin.

41. One other observation of the Board in *Myers* bears mention. It concerns motive. The prosecution relied on motive in the trial of the Appellant and it is their intention to call that evidence in any retrial. Mrs Smith-Bean submits that the slapping event between the mother of the deceased, Mr Robinson, and Mr Dill, the co-defendant, which took place at a football match, had nothing to do with the Appellant, and that he was not even present during its occurrence. It is her ardent position that the prosecution will not be able to admit this (or other gang) evidence in proof of motive. I believe that the JCPC's guidance on the point is invaluable, instructive and applicable.

42. Referring to motive the Board had this to say at paragraphs 43 and 44:

> *"In a case of murder or attempted murder, as in most criminal cases, evidence of motive is relevant but not necessary…evidence that there existed a feud between gangs was relevant to identity, which was the core issue in dispute. It went to show that those two defendants had a motive to kill the victims. It showed that they were members of a group which was likely to have felt aggrieved, and moreover, to have reacted by targeting the deceased on grounds of his membership of the opposing association. In each case, the evidence contributed to the proposition that it was the defendant who had done it, by supporting the other evidence that it was he who was responsible."*

Further at paragraphs 46 and 47:

> *"the fallacy in this submission made on behalf of Myers and Cox is the implication that the motive must prove the case against the defendant all by itself before it can be admitted. Even if motive may occasionally do this, much more often it is but one strand in a case, together with either circumstantial or eye-witness evidence. In these two cases there were both, and the shared motive supported the other evidence. It thus makes it probable that the defendant was responsible…*
>
> *Put another way, the evidence in these two cases rebutted the argument "why on earth should this defendant, who has no proven connection with, or dispute with, the deceased, have taken it into his head to shoot him?.*

43. The prosecution's case against the Appellant was not that he was the shooter, but rather the shooter's mode of transport to and away from the scene of the shooting, that he shared a gang motive either because the murder was retaliation for an unspecified attack or a attacks by another gang or because of the 42 gang's rivalry with other gangs. They further relied on evidence indicating that, as is their wont, gang members attack family members of a rivalry gang when the rival gang member is not available for attack (whatever the reason). Mr. Robinson was known to have two cousins in the Park Side Gang. It was the prosecution's contention therefore that members of the 42 gang would be an enmity directed at Mr. .Robinson's relatives. In those circumstances it would appear that the statement of the Board in Myers above applies with equal force.

44. Finally, in respect to the ambit of gang evidence, the Board in *Myers* added this guidance:

> *"it follows from the principles set out above that the ambit of gang evidence will depend, in any particular case, on what legitimate role it may have in helping the jury to resolve one or more issues in the case. It is not possible to lay down general rules for gang evidence beyond that…it was relevant for Sergeant Rollin to give evidence that the rival gangs were in the habit of wreaking serious violence or death upon each other..."*

45. In the circumstances I am unable to accept Mrs Smith-Bean's submissions as credible. Cogent gang evidence was placed before the jury as part and parcel of a circumstantial evidence strand in the prosecution case.

Particle evidence

46. Before the JCPC much was made of the one-component particles said during the trial by experts to be commonly *associated* with GSR and two component particles said to be *consistent* with GSR which were found on the Appellant's red jacket seized in a police search of the Appellant's residence in relation to their relevance and value.

47. Mrs Murtha of the RJ Lee Group submitted a number of reports and supplemental reports that were referred to in the trial. She was cross examined on them by the prosecution. She stated, *inter alia*, in reference to the report of February 6, 2013 that:

> *"Even though it cannot be stated with absolute certainty that one-component and two-component particles originated from the discharge of a firearm, these particles are still reported out because they could have come from the discharge. When one-component and two component particles are present with "GSR particles" (particles that contain lead, antimony and barium, with correct morphology), it lends weight to the "population of GSR particles" present on the samples being examined. As such these one-component and two-component particles do have an evidentiary value."*

It is to be noted that the JCPC said this of those two categories of particles:

"*at the trial it was the evidence of both Mrs Murtha and Mr White that, as a matter of science, evidence of the presence of one-component and two-component particles, in the absence of any three-component particles, did not demonstrate that the source of those particles was the discharge of a firearm as opposed to a different source. However it does not follow from this that such evidence is irrelevant or inadmissible. The presence of one component and two-component particles is evidence which is consistent with their source having been the discharge of a firearm and which, when considered in conjunction with other evidence in the case , is capable of being both relevant and probative. Moreover the guidance emanating from the ASTM and SWIG appear to provide that one-component particles (and it must follow also two-component particles) can support the interpretation as to the origin of three or two component particles in the same population."*

Proposed new evidence if a retrial ordered

The particle evidence

48. One of the lynch pins of Mrs Smith-Bean's submissions is the prejudice, she asserts, the Appellant will suffer if the GSR particles found on the clothing of Mr Dill were admitted into evidence against the Appellant in order to give context and weight to the one-component and two-component particles found on the Appellant's clothing.

49. It is apparent from the attachment to the third report of Angela Shaw, a GSR expert, who filed three reports considered by the JCPC, that the guidelines for scientist including GSR experts regarding industry practices and or recommendations have changed.[2]

50. Mrs Smith-Bean also relies on the fact that in the Supreme Court case of *R v Jahmico Trott* Criminal Case 27 of 2017, Tera Helsel, a GSR expert who works for the RJ Lee Group, stated this in her evidence in reference to a change in reporting standards of GSR particulate:

> *"…two-component particles can form from the discharge of a firearm, but there are other sources of two-component particles…so we actually do not do a manual analysis…of the one-component particles. So we leave those ones un-analysed due to the vast number of sources. Right. Because we don't report on the number of one components".*

51. Mrs Smith Bean cites *Samuel Augustine and Regina* CR-AP 15/2016, a decision of the Court of Appeal for the Turks and Caicos Islands, in support of her submission that both one-component and two-component particles should be given no weight when assessing particle evidence, and in particular, their relationship to GSR evidence. She has also prayed in aid a report on the incidence of GSR particulate that has been found to exist in random samples taken in various locales in Bermuda.

[2] The Court was referred to the Standard Guide for Reporting of Forensic Primer Gunshot Residue (pGSR) Analysis by Scanning Electronic Electron Microscope/Energy Dispersive X-Ray Spectrometry (SEM/EDS)

52. The JCPC allowed the admission of fresh evidence *de bene esse*. While the Board was more concerned with the errors, lack of clarity, and lack of guidance to the jury as well as mis-description and omission of the evidence on GSR particulate by the trial judge, they highlighted other issues concerning GSR evidence that arose from the fresh evidence that was in contention between the experts, which led them to raise the following questions to wit:

> *"(i) In the light of evidence that the presence of a three-component particle may indicate that one-component particles in the same population are the product of firearm discharge, is it permissible to aggregate the three component particles found on Dill with the one-component and two-component particles found on the appellant and items associated with him and to treat them as one population for this purpose?*
>
> *(ii) Is it permissible to aggregate the one-component and two-component particles found on different items associated with the appellant and to treat them as one population for this purpose?*
>
> *(iii) Does the presence of a two-component particle in the same population as one-component particles indicate that the one-component particles are the product of firearm discharge?"*

53. The Board went on to endorse the view that it would be impossible to resolve the above issues in light of the substantial disagreements between the experts without the benefit of hearing cross-examination of the experts on their written reports.

54. We can no more resolve the conflict in the expert GSR particle evidence than the JCPC could for the same reason.

55. Having heavily weighted the prevalence and seriousness of the offence of murder by firearms, there is in my judgment a substantial public interest in having the GSR experts' evidence tested by cross-examination. The result may support the Appellant's challenge to the admission, interpretation or value to be placed on the particle evidence. On the other hand, the result may not weaken the prosecution case to that extent. Ultimately the interest of justice will have been served in a fair trial setting before a judge who can give clear and helpful guidance to a jury (should it come to that) to assist them in their role as "judges of the facts".

56. Looking at this from a broader prospective the benefit of the cross-examination of the GSR experts would make an invaluable contribution to jurisprudence in Bermuda. This I anticipate will not only guide the trial judge who may be charged with a retrial, but also judges in cases of a similar nature involving the use of firearms and the incidences of GSR particulate evidence.

CCTV Footage

57. Mrs Smith-Bean intends to adduce CCTV footage into evidence should a re- trial be ordered. The Court reviewed the CCTV footage, which in my view, is intended to be adduced as alibi evidence.

58. According to some of the various witnesses, the shooting took place between 8:25pm and 8:30pm. In the JCPC's judgment at page 2, paragraph 3, it is recorded that the prosecution case was that between 8:20pm and 8:30pm a witness saw the arrival of what were said to be the Appellant and Mr Dill at the site of the killing. Mrs Smith-Bean indicated that during the examination of Jay Dill, he said that during the material times on 31 March 2011, both he and the Appellant were together. Mrs Smith-Bean intends to rely on the CCTV footage to contradict Dill on this point.

59. She submits that during the time of the shooting the Appellant can be seen on the CCTV footage on a motorcycle arriving by himself at the Mid-Atlantic Boat Club ("MABC") on North Shore Road, Pembroke parish. This evidence, she asserts, contradicts Dill's assertion that both he and the Appellant were together "all night", including the relevant time of the shooting. As it seems to me, this footage does not appear to advance the Appellant's position. In my estimation it takes us nowhere for at least two reasons:

    i. The Record of the CCTV Viewing at page 3157 of the Record of Proceedings confirms that the time stamp on the MABC CCTV recording is 1 hour and 40 minutes ahead. This fact is not in dispute. A person is seen in the video arriving in the parking lot of the MABC at '22:19:20'on a motor cycle. Moments later at '22:20:06' that person is then seen crossing the bar area. It must be said that the video is of poor quality. But if I were to take at face value that the person in the footage was, as Mrs. Smith-Bean identifies, the Appellant, then this evidence does not seem to assist by virtue of simple maths. If the time stamp on the CCTV recording was 1 hour and 40 minutes ahead of 'real time', then adjusting the time during which the Appellant was seen on the footage means that he was caught on the CCTV at 8:40:06pm. This is 10-15 minutes after the shooting took place according to the estimate of it occurring between 8:25pm and 8:30pm.

    ii. Mrs. Smith-Bean relies on the CCTV confirming that the Appellant was dressed in a red Helly Hanson jacket with a silver reflective strip along the back. She contends that by virtue of this sighting, the evidence of Kevin Busby refutes the Crown's case that one of the persons on the bike – both of whom it was said were dressed in "dark or black" clothing – could have been the Appellant. It is Ms. Clarke's contention that the possible 15 minute interval referred to above could accommodate a change of jacket as has been suggested by Ms Clarke.

60. In furtherance of these two issues the following observations are made. Firstly, it is disputed that Mr Dill and the Appellant were together "all night", notwithstanding Mr Dill's assertion in his evidence at trial. During the trial, the Appellant chose not to cross-examine his co-defendant for the purposes of refuting the suggestion that during the time of the murder both he and the Appellant were together. The CCTV footage was not relied on at all. Since the jury found that, the jury must have found that Dill was the shooter as their guilty verdict demonstrates, then, it stands to reason that they accepted the evidence of Dill that the Appellant was in his company "all night", which included at the time of the shooting. In my view, if the CCTV footage were admitted in a new trial it would be open to the jury to accept or reject that during the time of the shooting, the Appellant was at the MABC. Equally, it would be open to the Jury to infer that the Appellant was, at the time of the shooting, with Jay Dill if that evidence is before the jury.

61. Secondly, given the proximity between the location of the shooting (Border Lane, Pembroke), MABC (North Shore Road, Pembroke) and the Appellant's residence 7 Palmetto Road, Devonshire, and given the time difference between the shooting and the Appellant's arrival at the MABC, it is quintessentially a matter for the jury to determine, if they believe, as the Crown submit, that the Appellant had sufficient time to change from a dark jacket to his red Halley Hansen jacket and make his way to the MABC. Local knowledge of each *locus in quo* and the approximate distance between them will place the jurors in the best place to assess both the prosecution's and Appellant's theories on this evidence.

GSR Experts

62. Mrs Smith-Bean has indicated that, should a retrial be ordered, she intends to rely on the evidence of a GSR expert concerning a field test conducted in Bermuda.[3] This report suggests that single component particles that make up GSR are liberally found throughout Bermuda.

63. Mrs Smith-Bean bundles the telephonic communication evidence with the gang and GSR particulate evidence to support her assertion that they ought not to be admitted in any trial because, *inter alia*, they lack foundation, and are only relevant to Mr Dill. It is her case that without this evidence the prosecution case would not make it beyond the no case stage. For that reason, she has urged upon this court to refrain from ordering a retrial, because in her submission, the admission of such evidence would be prejudicial and unfair to the Appellant.

64. I have determined above that an exploration of the seeming conflicts in the experts' GSR particulate evidence can only be properly assessed by testing through cross examination. The telephonic communication is so closely linked in time and geography to the shooting of Mr Robinson, that it ought to be viewed at the very least in that context. It would be open to the Appellant to challenge the admissibility of such evidence as having no relevance to his case. However, I cannot agree with Mrs Smith Bean that the relevance and or admissibility of that evidence, in all the circumstances of the case, is for this court to decide.

Discussion II

65. The evidence at trial formed a part of what the JCPC opined was a strong prosecution case. While it is a fact that the Appellant will be retried alone, there is no gainsaying that the overriding legal principles governing parties to offences provided for in sections 27 and 28 of the Criminal Code Act 1907 will still have relevance in a retrial.

66. Where real evidence exists in a trial and there are cogent legal arguments touching on the admissibility and or value to be placed on such evidence, it would be wrong in principle for an appellate court to attempt to resolve those issues. *A fortiori* I also reject Mrs Smith Bean's contention that this court ought to adopt her submissions and not order a retrial having regard to the fairness principle expressed in section 93 of the Police and Criminal Evidence Act 2006, or

[3] The Privy Council observed at paragraph [49] of its judgment that in the second report of Ms Shaw, dated 9 September 2021, it noted "*evidence of background levels of one-component and two-component particles in the environment in Bermuda.*"

otherwise provided by law. It is an ordinary part of the trial process that real and circumstantial evidence is led in a criminal trial and inferences can be drawn therefrom; whether they are is quintessentially with in the province of the jury to decide, if the evidence is first admitted by the trial judge.

67. Significant weight ought to be given to the strength of the prosecution case at trial. It cannot be said at this point that a weakening or undermining of that case has been made out by the submissions of Mrs Smith-Bean. Indeed she has enthusiastically understated some of the evidence as has been demonstrated above. A fair amount of her submissions amount to a conflation of her misapprehension of some evidence led at trial and a portent of the case that she will run at the subsequent retrial. The JCPC has previously observed, see *Panday v Virgil* [2007] UKPC 24, quoting Lord Hoffman in *R v Loosley* [2001] UKHL 53) that:

> *"…the quashing of his conviction restores the appellant to the position he was in before the unfair trial. Why should his success gain him immunity from what is conceded to be the position he now faces under the Court of Appeal order: a fair trial upon charges properly brought?"*

Conclusion

68. In my judgment, it follows from all that has been set out above that the interests of justice requires that the Appellant should be retried, which order was made orally on 17 June 2022. All directions given at that time continue to apply. I considered above that the seriousness of the offence, its prevalence, the strength of the prosecution case and the current state of public opinion in Bermuda attract considerable weight in balancing the relevant factors in this case. They outweigh all other factors and consideration in this exercise.

69. A salient point made in *Reid* was that it is not necessarily a condition precedent to the ordering of a new trial that this court should be satisfied of the probability that it will result in a conviction. The points raised by Mrs Smith-Bean whilst in some respects thought-provoking are matters for determination by the trial judge on application insofar as admissibility is concerned, or are quintessentially within the province of the jury to assess as to the facts. In ordering a new trial, everything will be at large including any legal arguments and factual issues.

KAY JA:

70. I agree.

CLARKE P:

71. I, also, agree.