The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 17 of 2015

B E T W E E N:

JAQUII PEARMAN-DESILVA

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Kay, JA
Bernard, JA

Appearances: Richard Horseman, Wakefield Quin Ltd., for the Appellant
Cindy Clarke and Maria Sofianos, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **2 November 2017**
Date of Judgment: **17 November 2017**

JUDGMENT

Admissibility of single particle GSR evidence – judge's treatment of hearsay evidence introduced in cross-examination of co-defendant – effect on safety of conviction in circumstantial evidence case – challenge to recognition evidence

BAKER P

1. The Appellant, Jaquii Pearman-DeSilva, was convicted in the Supreme Court on 15 September 2015 of the murder of Prince Edness ("the deceased"). He was also

convicted of two counts of using a firearm to commit an indictable offence, contrary to section 26A of the Firearms Act 1973 and two further counts of possessing a firearm and ammunition, contrary to sections 2 and 3 of the same Act. All the convictions were by a majority of 11 to 1. He was subsequently sentenced to life imprisonment for the murder with 10 years' imprisonment concurrent for the other offences and an order made that he serve 35 years before consideration of eligibility for parole. He appeals against conviction.

2. On 7 December 2014, soon after 8.20pm, the deceased was shot dead by a passenger on a bike whilst walking on a footway not far from Southampton Rangers Football Club. The issue at the trial was whether the Appellant was the shooter. Prior to the shooting there had been a heated exchange at the Club in which it was alleged the Appellant was involved and the deceased was heard shouting as the bike left the Club words to the effect: "I am up here…come up here". Shortly beforehand the deceased had told a witness, Cameron Hill, that he was meeting someone.

3. The Appellant was identified on CCTV getting onto the back of a bike outside the Club, wearing a light coloured helmet. The bike went to the Southern part of the parking lot where the Appellant got off the bike and walked towards a van. He was out of view for a short time before returning to the bike which left, with him as the passenger, very shortly before the shooting took place.

4. After the shooting, a police car containing Sgt. Minton was approaching the area when a bike sped by in the opposite direction. The police car, which was joined by another police car, gave chase. Heavy traffic and pedestrians caused the bike to turn round. When its way was blocked by Sgt. Minton's car it turned into a private drive at 174A Middle Road directly adjacent to Waterlot. As it did so the passenger fired two shots at the police car. The bike, which had been stolen was recovered from the yard of 174A Middle Road. The rider and the passenger made good their escape on foot.

5. About 10 minutes after the shooting, at around 8.30pm, the Appellant arrived at the house of Ms Caisey, not far from where the bike had been abandoned. He asked her to close the door and said he was a friend of Marcus, Ms Caisey's fiancé's son. She noticed vomit on the side of the Appellant's leg.

6. Ms Caisey received calls telling her of the shooting and who had been killed. When she told the Appellant he became very upset and wiped his eyes with a red paisley print little scarf. The Appellant told Ms Caisey that Marcus had dropped him off at her house because the police had warrants for him and there were a lot of police down by Waterlot. Marcus had been going to drop him off at his girlfriend's house. The Appellant stayed at Ms Caisey's for three hours until Wayne Tucker, Ms Caisey's fiancé, took him to his girlfriend's house in his car, with the Appellant in the front passenger seat.

7. The following day, 8 December, the police executed a warrant at Seymour Farm, the girlfriend's house, and seized various items including a red paisley bandana and a light coloured helmet which it was formally agreed the Appellant had left there the previous evening.

8. On 3 January 2015, when the police attended Clear View Guest House to arrest him, he ran out of the back of the building and jumped over a cliff into the sea. He was eventually persuaded to come out of the sea and was then arrested on suspicion of murder and cautioned. He made no reply and on being escorted to the police vehicle appeared weak and started vomiting. He gave a "no comment" interview to the police and did not give evidence at his trial.

9. It was common ground that the same gun was used to shoot at the police car as to murder the deceased. There was no forensic evidence linking the Appellant to either the shell casings or the bike.

10. Whilst there was no evidence of three or two component particles of gunshot residue (GSR), there was some evidence of one component particles linking the Appellant to the killing. They were as follows: on the light coloured helmet, four lead and two antimony; on the front of the red paisley bandana, five lead, seven antimony and four barium; and on the back two lead and five antimony. On stubs taken from the front passenger seat of the car in which he travelled later in the evening five lead, seven antimony and one barium. Thus a total of 42 one component particles comprising 16 lead, 21 antimony and 5 barium and so, although there were no three component particles that comprise GSR as such, all three constituent elements were present in single particle form.

11. Mr Horseman, who has appeared before us for the Appellant, but did not appear at the trial, has argued a number of grounds of appeal.

GROUNDS 1 and 2: GUNSHOT RESIDUE

12. The contention is that the evidence of Alison Murtha, the expert called on behalf of the Crown, should not have been admitted because it was not probative that the Appellant had discharged a firearm and further that its admission was unfair because the Crown had not tested control samples to detect the presence of single component particles in the normal environment. In the alternative Mr Horseman contends that the judge failed to direct the jury to approach the evidence with sufficient caution as the evidence had little probative value.

13. The judge rejected the defence application not to admit the evidence saying that particle evidence was circumstantial evidence and that in all the circumstances it should be admitted (p.624).

14. We referred to the case of *R v George* [2014] EWCA Crim 2507 in which the English Court of Appeal set aside a conviction that was based in part on the evidence of GSR. That, however, was a case concerning a rather different issue, namely whether two and three component particles were associated with the

shooting incident in question rather than some shooting incident. The present appeal is about the evidential value of single component particles. *George* and other English authorities do, however, emphasise the need for caution in the handling of evidence alleged to be GSR and how scientific learning has advanced in recent years.

15. Mr Horseman vigorously argued that this was the first case in Bermuda in which single particle evidence alone had been admitted and that he had been unable to find an instance in any other Commonwealth country in which it had been admitted or indeed even sought to be admitted. In the UK even two component particles with the correct morphology would not be reported as GSR. (See McGuire p.488). This, he submitted, was because it was of no, or at best very little, probative value and likely to have considerable prejudicial effect. There is, however, an important difference between GSR and the elements that comprise it.

16. Ms Murtha is a forensic scientist and expert in the analysis of GSR. She explained that GSR is material that comes out of a firearm whenever a firearm is discharged. When analysing something for GSR she looks for three specific elements or a combination of all three. These are lead, barium and antimony. When a particle contains all three elements it is regarded as "highly specific" or "characteristic" of GSR. When a particle contains only two of the elements it is regarded as "consistent" with GSR. When a particle contains just one element it is regarded as "commonly associated" with GSR.

17. She explained that when she is looking for particles that could have originated from the discharge of a firearm she is looking for particles that contain one, two or all three of those elements, but she added that they also have to have the corresponding morphology, namely that molten or rounded shape that indicates they came from a high temperature reaction. The single component particles that she examined, from the three different sources in the present case – the light

coloured helmet, the red paisley bandana and the car seat – all had the correct chemistry and morphology that is commonly associated with GSR. There were no less than 42 in total and amongst that 42 were all three elements in varying numbers. Her evidence was, therefore, that each one might have come from the discharge of a firearm but on the other hand it might not.

18. Assessing the probative value of this evidence seems to me to be similar for example to assessing whether a shoeprint with some similarities was made by a particular shoe or a partial fingerprint with less than the number of ridge characteristics for certainty was made by a particular finger. The weight to be attached to the evidence necessarily turns on the other evidence in the case.

19. Bearing in mind the number of single element particles, the different sources from which they originated and the fact that they were all of the correct chemistry and morphology to have come from the discharge of a firearm, I am satisfied that the judge was right to admit the evidence. He had, of course, when summing up to make clear to the jury the limitations of this evidence and the fact that the particles could have come from sources other than the discharge of the murder weapon.

20. The thrust of Mr Horseman's argument was that there were two inferences that could be drawn from the single particle evidence; the particles might have come from the discharge of the murder weapon or they might not. Where, he argued, there are two inferences that can be drawn from a piece of evidence, the jury must be directed to draw the inference more favourable to the defence. But this was a circumstantial evidence case. The single element particle evidence cannot in my judgment be looked at in isolation from the rest of the evidence in the case or indeed ignoring the number of particles and where they were found.

21. A further point taken by Mr Horseman was that some control samples were sent to Ms Murtha, but that instructions were given by the police not to test them. As

the single component particles could have come from numerous sources, testing the control samples was necessary to ensure that single particles were not present in the environment. The admission of the evidence was therefore unfair; it should have been excluded.

22. Ms Murtha was asked about this in cross examination and said the police did not ask for them to be examined. The forensic scientists, as is sometimes the case, were directed which of the samples sent to them they were to analyse and the control samples were not among them. In my judgment it was appropriate for the jury to try the case on the evidence presented to them. There was no evidence that the single element particles or any of them came from any source other than the discharge of a firearm, although it was accepted that this was possible. However, I am unpersuaded that examination of the control samples would have advanced the case. Juries are often told to try the case on the evidence they have heard and not to speculate on what has not been called.

23. When the judge summed up, he gave a most careful and detailed direction on the GSR evidence beginning at p. 929. He explained that no three component particles were found, and only one two component particle which was not relevant because it was on a visor that was not evidentially material. He gave a clear exposition about one component particles and how they are commonly associated with GSR but could come from other sources and that those sources were more numerous than those for the fused two component particles. He also reminded the jury that Ms Murtha had looked at the chemistry and morphology to see if the particles had been treated by high heat and pressure. He summarised at p 933 in these terms:

> *"So, in short, as I keep saying, what they are and what they mean depends on the context of this case, when you put all the circumstances together and you put one and two and three and four together and you add them up,*

> *what does it come to, or what is it doesn't come to; that's what it is.*
>
> *"Will you say that those particles come from another source in the end, when you look at all the circumstances, or will you say, no, they came from discharge of a firearm, and not only that but I believe they came from the firearm discharged in this case, by this man, or not; that's where the question is."*

24. He went on to remind the jury that the control samples had not been analysed and said at p.940:

> *"The defence is entitled to suggest that this should be viewed in a reasonable doubt as to whether the samples taken and analysed in this case are a true indication of what was really said to be found by the analyst, or by the analysis, or whether those particles reported were not already in the atmosphere or that the stubs were already dirty particles. You remember he (defence counsel) addressed you much on that in his address."*

25. He also reminded the jury of evidence that there had been studies in other jurisdictions showing that particles were shown to be in the atmosphere and at or near places where firearms had been handled but that there was no evidence of any such study in Bermuda.

26. At the end of his summing up, when he summarised the case for the defence, the judge said the contention was that it was not proved that the particles came from any firearm, let alone the firearm in this case and it was not enough for the prosecution expert to say they could have come from a firearm or from another source. If she did not know, how could they know? It all added up to at least a reasonable doubt. Furthermore, the remainder of the car was not tested so how could the jury know that the particles in the front seat area were not from another source.

27. I am satisfied, not only that the particle evidence was properly admitted, but also that the judge carefully explained its limitations to the jury and the defence case in respect of them.

GROUNDS 3 and 4: HEARSAY EVIDENCE

28. The essence of these grounds is that hearsay evidence was admitted that was inadmissible against the Appellant; the judge never directed the jury properly about it, and it prejudiced the Appellant to the point that his conviction is unsafe.

29. What happened was this. At the trial, there was another defendant, Joshua Usher, who was also charged with the murder. He was, however, discharged following a no case submission at the close of the prosecution case. D.C. Mathurin was the Deputy Senior Investigating Officer and when he was cross-examined on behalf of Usher he was asked why Usher had been arrested, to which he answered that the police had received information that the deceased had been murdered by his own colleagues, and that he was giving information to the police. There was no specific suspect so they arrested a few members of the Parkside gang to maximise the opportunity to obtain some forensic material. He was then asked why the police did not look at the video of events at the Club to try and identify a suspect, to which he answered that they had received credible information with regard to the Appellant and focussed on him. This information was that he had gone uninvited to Ms Caisey's house soon after the murder. The cross examination on behalf of the co-defendant was perfectly proper, and there was no objection to it on behalf of the Appellant. However, the hearsay evidence that the deceased had been murdered because he was a police informer was not evidence against the Appellant.

30. After D.C.Mathurin had given evidence, the Crown's case concluded and there were no-case submissions on behalf of both defendants. The co-defendant's submission succeeded but the Appellant's failed.

31. Thereafter, no submission was made on behalf of the Appellant, that the judge should direct the jury that the evidence of D.C. Mathurin, which was that the police had information that the deceased had been murdered by his own colleagues and had been a police informer, was hearsay and not evidence against the Appellant. Nor was the matter raised by prosecuting counsel, but neither was it relied upon by her in her final speech to the jury.

32. Unfortunately, however, the judge ventilated the subject in his summing up at p.968, where he said this:

> *"They had arrested several associates of the deceased, Prince Edness, because their information was that he was killed by his own associates, acting on behalf----on the belief that he had been snitching to the police. Hence Mr Usher, Hart and others were arrested.*
> *Now let me pause there for a minute 'cause you remember Mr Richardson had made some suggestions in his cross-examination that the police like they were just walking around willy-nilly, taking up people and arresting them. Right? And--- so they weren't-----they didn't know who they were looking for, so like they were picking on people. That might be the impression that had come across.*
> *And this officer explains that it was because they had information that the Defendant-----that the deceased, Mr Edness, was killed by his own people, because the information was that his people believed there were snitchings.*
> *Now, I know as Bermudians now you gone---in your head gone out in there, nosying a little bit, and you're thinking, well, look, how being killed by his own people? We heard in this evidence that he was a gangster, he was a Parksider, we can see from the video, that at the time he was killed he was wearing a Parkside shirt, that Dark Side, Parkside, Darkside, whatever it is, come over to the dark side, I think is one of the names that was used for Parkside, I think. Right.*
> *But I must halt you there, because this is not a gang case. The police haven't led any evidence in this case suggesting, the prosecution suggesting that the Defendant is a gangster, that the Defendant is a member*

of Parkside. They haven't suggested that. So nobody must draw any inference that the Defendant is a gang member, and therefore shot the man as a result of that. All right.
Such evidence can be ------ inferences can be pretty prejudicial. The idea is that you mustn't feel, Okay, he must be a gangster too, so all them bad, you know; convict him. That's not what this is about. All right?"

There then follows the passage which is the major subject of complaint.

"That, however, does not diminish the evidence of D.C. Mathurin, when he said he might be shot, if you believe that, the police information was that the associates of Mr Edness believed he was snitching. Because why it does not is because Mr Pearman is an associate of Mr Edness, I think you can find that, without thinking about any gangs or anything like that. All right?

And why you can find that is because Mr. Pearman had said, according to Ms. Caisey, if you accept Ms. Caisey's evidence, said that he said that Prince was not all bad. He used to look out for him. He used to take him out and shop for him and make sure he had all the things he needed. So Prince was his friend or associate.

You also know, Prince being a man from that Parkside area, Court Street, round Princess Street and Curving Avenue and that kind of area out there, right? You also know that. That the Defendant comes from that area. As a matter of fact, you heard Detective Sergeant Kenton Trott says those are the areas he sees him----- he sights him in, if you accept Kenton Trott's evidence that he knew him from before. All right.

So, without being prejudicial, you can on the bare evidence, as you heard it, draw those kind of inferences. All right?

And you might think, you don't have to be in a gang to believe that somebody's snitching on you. You are neighbours. You might have some neighbours you just can't stand because they're too mouthy. Malicious, as we would say in local language. You know, always poking the nose and talkin'. You would really like to punch out their window."

33. This passage of the summing up comes right at the end of the judge's summary of the evidence, and he then went on to summarise the prosecution and defence cases. He began his summary of the prosecution case at p.972 with these words:

> *"The case for the Crown, as I understand it is that Mr Edness was no Sunday School boy. He had some issues. His associates appear to have the view that he had become a snitch, passing on information to the police. And I use the word "associates" in the broad sense. They include friends.*
> *…*
> *He had recently been released from custody in a high-profile matter. That evening, the 7th of December he visited the area of the Southampton Rangers. A major event had been going on there. There were several people there, as shown by the CCTV footage. Among these were some of his old associates."*

34. The problem is that the judge is arguably inviting the jury to conclude that the Appellant frequents the Parkside area, that the deceased is a Parksider and that the Appellant is an associate of his. Accordingly he had a motive to kill the deceased because he believed that the deceased was snitching.

35. Mr Horseman relied on para 67 of the judgment of Lord Hughes JSC in *Myers v R, Cox v R, Brangman v R* [2015]UKPC 40 in which he said:

> *"Evidence of a specific alleged trigger event or events is another instance of something which is not part of a general body of learning, but specific to the case; hearsay evidence is not admissible, and the case of Cox affords an example: see paras 16 and 49 above."*

36. The judgment in that case was given on 6 October 2015 and Greaves J had summed up in the present case some three weeks before on 15 September 2015, so Lord Hughes judgment was not available to him. However, Ms Clarke for the Crown accepts that there was no admissible evidence against the Appellant that he had a motive for shooting the deceased because he believed he was an informer. Indeed the Crown had never put the case against him in that way.

Accordingly, the judge was in error in this passage of his summing up. Motive, Mr Horseman submitted, can be powerful evidence in a murder case but it must be proved by admissible and not hearsay evidence. I agree.

37. Mr Horseman has a further complaint that although the judge directed the jury that this was not a "gang" case, he let in gang evidence through the back door. This was not a "gang" case in the ordinary sense of a dispute between members of different gangs or of one gang and an outsider. On the other hand, there was evidence of a connection between the deceased and Parkside, in particular a picture of the deceased's body in the mortuary clothed in a Parkside shirt. I do not think the judge can be faulted in his reference to the connection between the deceased and Parkside or to his reference to roads in the Parkside area. There was no objection at the trial and most jurors are likely to have a broad knowledge of the territory of particular gangs. Indeed Ms Clarke told us there was mention of Parkside at the time of jury selection.

38. In fact, it was not the Crown's case as presented to the jury that the deceased was a snitch. That had been introduced into the case solely through the cross-examination of D.C. Mathurin on behalf of the co-defendant. Ms Clarke, told us that in her final speech to the jury she did not refer to the "snitch" motive, putting her case simply on the basis that the deceased had become involved in a heated exchange in the Club and had beckoned others to come after him. There was no evidence of the subject that gave rise to the heated exchange, although the jury may have inferred that it related to snitching.

39. The judge in continuing his summary of the Crown's case noted that the Appellant was among those present at the Club and that he had been recognised by Detective Sergeant Trott. He went on to mention, without saying anything about the reason for it, that the deceased had been embroiled in a heated exchange, and that the Appellant had left the Club, got on as the passenger to a motor cycle, then got off it, disappeared from sight for a short period before

returning, and once more mounting it before it rode off in the direction of the deceased.

40. In summary, the judge was in error in directing the jury that the Appellant was an associate of the deceased and therefore could have been one of those who believed he was snitching, thus giving him a motive for the killing. How significant this error was in the context of the case as a whole, and the safety of the conviction, is something to which I shall return.

GROUND 5: LUCAS DIRECTION

41. The evidence to which this relates is that the Appellant told Ms Caisey that he had come to her house because he had been with her fiance's son Marcus, and he had dropped him off because there were warrants out for their arrest and he did not want to be caught. Mr Horseman did not pursue this ground with any great vigour and in my judgment he was right not to do so. As Ms Clarke pointed out, the need for a Lucas direction is where there is a risk that the jury may conclude, that because the defendant told a lie it follows that he must be guilty of the offence with which he is charged. It was never established one way or the other whether there was any warrant for the Appellant's arrest. If it was a lie, it was peripheral to the central issue in the case, namely whether it was the Appellant who shot the deceased. What the Appellant said to Ms Caisey, was his explanation for arriving unexpectedly at her house in circumstances in which it could be inferred that he was seeking to avoid apprehension for the shooting. No Lucas direction was necessary and the judge dealt with the matter appropriately in his summing up.

GROUND 6: RECOGNITION EVIDENCE

42. The Appellant's submission is that the CCTV footage outside the Club was of poor quality and the judge should have excluded it. Footage was shown from both inside and outside the Club. Detective Sergeant Kenton Trott gave evidence that he recognised the Appellant inside the Bar wearing a grey hooded top and a

maroonish t-shirt underneath. This was not challenged at the trial. It was about 50 minutes before the shooting. He saw the same person again outside the Club, shortly before the shooting. When he got onto the rear of a motorcycle as the passenger, they rode across the parking area to a van where he dismounted and disappeared from view for a short time before returning to the bike, which set off with the Appellant again on the passenger seat in the direction of where the shooting took place shortly thereafter. The witness was able to identify the Appellant having known him since 2012 and seen him about once or twice a month. This was therefore a recognition case rather than an identification case.

43. Whereas the quality of the CCTV footage inside the Club was good, there is no doubt that the quality of the footage outside the Club was poor and prevented facial recognition. The jury saw the footage and were able to form their own view of the reliability of Sgt. Kenton Trott's evidence that he saw the same person outside the Club wearing the same light coloured clothing as the Appellant had been wearing inside. In my judgment, the judge was right to admit the evidence. When summing up the judge gave a full and careful *Turnbull* direction, later returning to the subject of recognition on more than one occasion.

44. The second limb to this ground is that the judge did not draw the attention of the jury to the difference between Sgt Kenton Trott's description of the Appellant's clothing at the Club, and his clothing as described by Ms Caisey when he arrived at her house. According to Ms Caisey, he was wearing a black hoodie, black jeans and black sneaker boots. The judge described Ms Caisey as an important witness. He gave a careful summary of her evidence. He said at p.888:

> *"He was wearing black hoodie, sweat top, black jeans, black sneakers, high top, had a black helmet. There is that crash helmet. You may consider, having regard to the rest of the evidence whether she is correct mistaken or confused about the colour of that helmet. The*

prosecution would say she is. The defence may say otherwise."

45. Although the judge referred only to the colour of the helmet, it was plain that there was conflicting evidence about the colour of the Appellant's clothing too, a fact that the jury must by then have appreciated. The conflicting evidence about the colour of the Appellant's clothing and helmet was an important issue in the case and a matter that it is plain the defence kept firmly in the minds of the jurors.

46. The Crown's case was that the Appellant was wearing a light coloured top and light coloured or light grey helmet. The colour of the helmet was supported by the evidence of Donna Durham and Det. Sgt. Gilbert, but there was contrary evidence from Ms Caisey and P.C. Smith about the colour of the helmet and Ms Caisey about the colour of the clothing. I am unpersuaded that the judge can be faulted for his treatment of this aspect of the case.

CONCLUSION

47. The critical question is whether the judge's failure to explain to the jury that the hearsay evidence that the deceased was a snitch or police informer and that this provided a motive for his murder by friends or associates, was not evidence against the Appellant affects the safety of the conviction. In answering this question, it is necessary to consider the whole of the evidence against the Appellant and assess its strength. There was no direct evidence against him; the case was based on circumstantial evidence.

48. There was undisputed evidence that the Appellant was at the Southampton Rangers football Club not long before the murder. We were shown a helpful log of the CCTV footage. There was a heated exchange in which the deceased had beckoned persons who knew him to come after him. Very shortly before the shooting, the Appellant was identified as the passenger on a bike leaving the parking area of the Club and travelling in the direction of the shooting. The

shooting was around 8.20pm. There is a clear inference that whatever happened or was said at the heated exchange led to the shooting. Whilst neither the Appellant nor anyone else was identified as the shooter, the shooting was by the passenger on a blue bike that had been stolen and was subsequently found abandoned nearby. The passenger on the same bike fired shots at the police as it tried to make good its escape.

49. Soon afterwards, the Appellant arrived at Ms Caisey's house at 3, Riviera Road, Southampton, not very far from where the shooting had occurred and asked to obtain entry, saying he was seeking to evade the police but for reasons unconnected with the murder.

50. Single particle elements of GSR were found on three items connected with him that night. First, a red bandana that he was wearing when he arrived at Ms Caisey's. Second, a light coloured helmet that was also in his possession that night and matched the colour of the helmet identified by Donna Durham and Det Sgt. Gilbert as worn by the pillion passenger. Third, the passenger seat area of the car that took him from Ms Caisey's to his girlfriend's house later in the evening. There was a total of 42 particles and they included all three elements, lead, barium and antimony that are necessary to constitute GSR. Further, they were all of the appropriate chemistry and morphology.

51. It was not necessary for the Crown to prove a motive for this murder. Its case was put on the basis that it was the heated exchange at the Club that led to the murder but there was no evidence as to the detail of the heated exchange, who started it or what it was about. The gloss added by the judge referring to the inadmissible evidence that the deceased was believed to be a snitch was not relied on by the Crown, and in my view, added little to the circumstantial case against the Appellant. He was identified as being the passenger on a bike that left the Club very shortly before the shooting, travelling in the direction of where the shooting took place. The passenger on a bike was identified as the person

who fired the shots. Numerous single particles of GSR suggested the Appellant had been close to the discharge of a gun that evening, and soon after the shootings he went to, and spent three hours in the house of a person whom he did not know. Thereafter, rather than going to his home, where the police might have found him, he went to his girlfriend's house with the incriminating exhibits of his helmet and the bandana. The bandana, described by Ms Caisey as "a red paisley print little scarf" was consistent with Sgt Gilbert's evidence of a scarf or handkerchief in the hand of the person who fired the gun at the police (see summing up p.975).

52. The Appellant called no evidence to refute the inferences that could be drawn from these various strands of evidence, either individually or collectively, and I am satisfied that if the judge had correctly directed the jury as to the hearsay evidence introduced by the co-defendant and never relied on by the Crown, the jury would have reached the same result. Accordingly, I would dismiss the appeal.

Baker P

Kay JA

Bernard JA