The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 11 of 2018

B E T W E E N:

TRAVONE SALTUS

Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Smellie, JA
Gloster, JA

Appearances: Richard Horseman, Wakefield Quin Ltd, for the appellant; Carrington Mahoney and Karen King Deane, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **6th March 2019**
Date of Judgment: **15th March 2019**

JUDGMENT

Gun murder - murder by shooting – alleged confession by appellant that he was the shooter – prosecution on the basis of primary, alternatively secondary, liability – evidence of gang involvement - whether directions to the jury were adequate.

SMELLIE JA:

Introduction

1. The appellant Travone Saltus was tried between 10 September and 26 September 2018 and convicted for the offences of the murder of Lorenzo Stovell and the use

of a firearm in the commission of that offence. He appeals against conviction relying on six grounds of appeal which will be considered below.

2. This is the judgment on his appeal.

Background to the case against the appellant

3. This case involves yet another brutal and senseless killing of reprisal arising from gang rivalry among young Bermudian men. The evidence reveals an ongoing feud between groups who regard themselves as belonging to the rival Parkside/Middletown and M.O.B. gangs.

4. On 23 September 2012, Lorenzo Stovell was shot and killed. He was reputedly associated with the Parkside gang and wheel-chair bound from injuries inflicted in an earlier shooting incident. He happened to be in Somerset, in an area regarded by the M.O.B. gang as their "territory". Mere news of his presence appears to have prompted the shooting which resulted in his death.

5. As already mentioned, the appellant Saltus was tried by judge and jury and convicted on 26 September 2018 for the murder of Lorenzo Stovell. This was a retrial, the appellant having been earlier indicted and tried with others. He was convicted on that earlier indictment while his co-defendants, Zikai Cann and Cordova Marshall were acquitted.

6. On his appeal against that conviction, his conviction was overturned for reasons explained in a written judgment[1] and a retrial ordered. Consequently, this is his appeal against his conviction on the retrial. The central issue on this appeal is whether he was correctly and safely identified and convicted as the person who shot Lorenzo Stovell. Or, on the alternative case prosecuted by the Crown, whether he was among members of the M.O.B. gang who are alleged to have descended upon the bus in which Stovell was shot and by their presence and encouragement, aided and abetted the shooter.

The circumstances of the case

7. On the evening of the 23 September 2012, Lorenzo Stovell, also known by the nickname "Wawa", was with his sister and several of her girlfriends for the celebration of one of the friends' birthday. They hired a party bus and set out on a cross-islands pub crawl. At about 10:15 pm, after having stopped at other pubs

[1] See Saltus v The Queen [2018] CA (Bda) 13 Crim, 23 March 2018

along the way, the party bus arrived at Woody's Bar & Restaurant ("Woody's"), in the Boaz Island area of Somerset.

8. Upon arrival at Woody's, the revelers alighted the bus and went to the bar except for the bus driver, Menelik Isaac and Lorenzo Stovell. Stovell, being immobile, had been lifted onto the bus and seated immediately behind the driver for the duration of the trip. He remained there seated while the bus waited in the dark, in the layby across the main road from Woody's.

9. The girls from the bus mingled among the large crowd of patrons who were already gathered at Woody's. Khamilliah Smith, one of the girls, saw the appellant at Woody's when she arrived. Zurita Tucker, another of the girls who describes herself as a family member of Stovell's and very close to him, went to and from the bus on a number of occasions to check on him. In her words, from her testimony at trial, this was "*Because, like, he's from Town. He's a guy that's from Town, he's not from that area and...like being that he's paralyzed, I just didn't think it was safe, and obviously it wasn't.*"

10. On the last of her visits to the bus she had asked Stovell for money which he should have kept for her. He reported that he had handed the money over to his sister and this had upset her. As she walked away from the bus, in her annoyance she swore at him shouting out his nickname "Wawa, you f...ing asshole!" She was concerned nonetheless for Stovell's safety and so, as she walked away, she told him that she would gather their friends to return home. About five minutes later, while inside Woody's in the process of gathering her friends to leave, she was told that there had been a shooting outside in the area of the bus.

11. Fearing the worst, she went outside and headed toward the bus. She saw that the large gathering had been panicked by the sound of the shots. People were scampering about and "*lots of people started jumping on their bikes, and leaving.. a lot of the girls were coming up, started to gather around, to try to find out what had happened ".*

12. While no witness testified to how it happened, it appears inferentially that word of Stovell's presence in the bus had quickly spread among members of M.O.B. present at the scene. Woody's is known as a regular gathering place of the M.O.B. gang. A gunman, whether by himself or in the company of others, had approached the bus and shot Stovell four times.

13. According to the pathologist, Dr Christopher Milroy, two of those shots were fatal and one of those two inevitably fatal because it ruptured the heart. Three of the four shots had struck Stovell from behind and travelled in an upward trajectory through his body, consistent with him turning his back to his assailant while lunging forward in an attempt to avoid being shot. The fourth shot had entered from the front of the left thigh, passing downward and backwards exiting the back of the leg.

14. Dr Milroy opined that this injury was consistent with Stovell having been shot from the top downward in a sitting position and probably was the first injury.

15. The only known witness to the shooting was the bus driver, Menelik Isaac. However, because he was distracted while text messaging on his phone and because of the darkness outside the bus, the angle of approach of the assailant and Stovell's position behind him in the bus at the time of the attack, he was unable to identify the gunman. As Mr Isaac described the attack:

> "*Well I heard someone come up to the window.. I also heard someone say, "What the f… you doin' here?"… That's when Wawa started to get nervous and was telling me to go. He was actually moving about… like he was screaming to go, at one point.. and he actually hopped out of the seat that he was in…[explaining that he used his arms to push himself up and forward out of the seat to the floor] and that's when I heard the gunshots.. he was in back of me, to my left, between the seat and the engine cover…I was looking at him.. but when I heard the gunshots, I ducked down and I glanced back to my right.. I .. saw flashes right… after that I just started the engine and got him out of that situation.. got out of there as fast as I could…*
>
> *Q. When you glanced to your right, were you able to see if there was anyone outside of the bus?*
> *A. Yeah, I could see someone was standing outside the bus.*
> *Q. What could you tell us of the person you could see standing outside the bus?*
> *Not much…… was more like a silhouette, 'cause, um, you see the flashes…I don't think he was as tall as me.. I am*

six-three.. I just can't say whether he was light or dark (skinned) 'cause the lighting wasn't all that great..
Q. Could you say whether he was wearing bright clothing? Dark clothing?
A. .. it was definitely dark clothing…
Q. The person , the voice that you heard.. was it male or female?
A. It was a male voice."

16. Isaac went on to explain that he had driven to the nearby Port Royal Fire Station for help. This was, sadly however, a futile attempt. Lorenzo Stovell had died long before medical intervention was possible. No-one else present at the scene claimed to have seen the gunman. There was, however, an item of physical identification evidence which became of importance in the trial (as indeed it was at the first trial). This was a left palm print which was matched to Zakai Cann. It was found on the side of the bus immediately below the window through which Stovell had been shot.

17. This palm print became of particular importance in the trial when considered against the background of Menelik Isaac's further testimony and that of Voorhees Trott, to the effect that the bus had been thoroughly washed and cleaned only the day before, as it routinely was in preparation for a pub crawl hire. The question then for the jury, was whether it must have been left on the bus at the time of the shooting and so possibly pointing to Cann - himself a known member of the M.O.B gang - as the shooter. This question also arose because Zurita Tucker also testified to having seen Zakai Cann, whom she knew well before, among the gathering at Woody's. This was both upon her arrival as well as immediately after the shooting. She said that he was wearing white upper clothing and purported to identify him from CCTV footage of the scene, moving around in the crowd outside Woody's.

18. Based on this evidence of his presence at the scene, evidence of his association with the M.O.B. gang and the presence of his palm print at the bus window through which Lorenzo Stovell had been shot, Zakai Cann was, as already mentioned, tried along with Cordova Marshall, and the appellant as co-defendants at the first trial but he and Marshall were acquitted. His explanation then given for his palm print, but which was not adduced as evidence in the appellant's second trial, was that he had spoken to a girl on the same bus a couple of days before the incident and so that his palm print must have been left on the bus from that time.

19. Further evidence of some significance at the second trial came from Mr Rajai Denbrook who, along with his wife Rennika, were among the large gathering of patrons at Woody's at the time of the shooting. They had arrived at Woody's in separate vehicles – he on his motor bike and she in her car. On arrival they parked on the side of the drive way at the front of Woody's and went to the outside bar for drinks. They then returned to stand next to her car to finish their drinks. While there, Rennika brought Rajai's attention to a small group of five or six young men - anywhere from 20 to 30 years old – walking across the driveway towards the main road. He was able however, to observe them for only a few seconds as they disappeared into the darkness as they approached a triangular grassed area about half way between where he was standing with Rennika and the layby where the bus was parked. The men appeared headed in the direction of the bus.

20. He was speaking with Rennika when, only some 30 to 45 seconds later, he heard several gunshots coming from the direction of the bus stop (the layby) . After the first couple of shots, turning to look in the direction of the bus stop, he saw what must have been flashes from the gun barrel. He and Rennika took cover inside her car and shortly after he saw some young men, again five or six in number, coming back out of the darkness from the direction of the main road. At first sight they appeared to be in a hurry but slowed their pace as they emerged into the lighted area. They passed close to the car but he was unable to identify any of them, being able to observe only their general appearance and that one in particular seemed very excited and was visibly trying to calm himself down.

21. Understandably, he and Rennika decided to leave the scene as quickly as they could and so he went to his bike while she started her car to leave. As he was turning onto the main road from Woody's drive way, the light from his bike shone across the road to the bus stop. There he saw the bus still *in situ* and a motor bike stopped right beside it, towards the rear with only the rider on it. As he, the witness, turned onto the main road, the rider turned the bike around to leave and another young man ran out from the other side of the bus and hopped onto the back of the bike. This man on the back he recalled was wearing black baggy pants and a white top. He headed toward Somerset village and was very quickly overtaken by the men on the bike, heading in the same direction of the village.

22. For reasons to be discussed below, it was the prosecution's case that despite the lack of positive identification by Mr Denbrook, the man who was seen by him to

run from behind the bus and jump on the back of the bike, was the appellant. The prosecution also alleged that the rider of this bike was Malachai Brown.

23. However, on the prosecution's case, the crucial evidence at the second, as at the first trial against the appellant Travone Saltus, came from Troy Harris, a witness who described himself as a former M.O.B. gang member. Harris testified to a long friendship with the appellant, going back to when they were young boys growing up together in Somerset. He said that he Harris was not from Somerset originally but had moved there to live with his mother and, as an outsider, he had to win the confidence of the youth of the area, all already involved with the M.O.B[2] gang, and who were "sceptical of him". "*Travone was one of the people I was cool with when I was younger"*, he explained. *"So, when I came back up to Somerset, when I was up my mother's house up Charing Cross, he was one of the ones that.. accepted me , basically… I just used to call him Trevi.."*

24. Harris said that, so close had he and the appellant become, they "*did everything together*", and that the appellant had even given him a key to his apartment. He said that the appellant had become a member of M.O.B. and accepted as such, simply because he was from Somerset and so was regarded as "*one of their own*". But he explained that the appellant had had no particular standing or position in the gang. In his words:

> "*when it came to stripes and gang life, at that point in time, at that point in time before Wawa died, he had none of them… stripes is puttin' in work … Puttin' work, the definition of puttin' work is basically, you could do robberies, you could do shootin's, you could .. you could be the rider, that's putting in work… That's all that puttin' in work.. that comes under the category of puttin' in work. Even when guys are ridin' out and goin' town, night, say we all went to National Stadium, or somethin' like that, and a big fight broke out and yer there fightin', that's puttin' in work…That's lettin' people know where you stand, where you at,.. what's happenin'*".

25. Other members of the M.O.B. gang, some of whom had accepted him, were named by the witness. These included Cordova Marshall, Jokoi Burrows and

[2] Which the witness explained meant "Money Over Bitches."

Rashid Mohammad. Harris also revealed that he had known Lorenzo Stovell, whom he referred to by his nickname Wawa, very well; that he was " *like my Godfather, my close family friend, that we be like cousins .. my Momma deals with his people, my, you know, my daddy deals with his people. That's from Middletown days, when I was a little boy, ..that's my people".*

26. When asked whether Wawa had been involved in any type of gang life at all, he responded:

> "*Oh, well, let's be truthful, but of course…Obviously he was from Middletown and, around them times in the City, like you know, Middletown and .. it's just Middletown and the Parkside boys in it… but that was only for a so part.. so much of his life, though, may I put that out. That was only for so far of his life.. Meanin' he dressed back from that. He dressed back from bein' in the limelight of , all the foolishness that we guys are up to in Bermuda. He, he sat back a little. He was playin' football and doin' his thing… But he did get shot, the first time, and, and that paralysed him…Wawa was chillin'. Wawa was dealing with his family. He was playing football,.. he was doing things, hundred- and- fifty per cent."*

27. Harris continued in his testimony to explain that, despite the closeness between them, he had never told the appellant about his relationship with Wawa. And, as it happened, at the time Wawa was killed he the witness, had been serving a prison sentence. His said that his knowledge of the appellant's involvement in Wawa's killing came about in the following way.

28. He testified that upon his release from prison he had reconnected with the appellant and they had had a long conversation about different things. This was in May 2014, at first said to be May 2013 but later in his evidence corrected by him. He said he recalled the occasion very well because he and the appellant had been out to see the people participate in the annual End-to -End walk in May and had then returned to the appellant's apartment to hang out. The conversation, he said, turned inevitably to their mutual involvement with the gang and the appellant was advising him what he would need to do, having been away in prison, to regain the confidence of the others. In his words:

> " *He told me, this is what you basically have to do. He said, "look, you have to put in work". I mean, obviously I*

know what put in work means. So I .. he said, yeah, he put in his own work. And I said, what you mean you put in your work? He said basically "I bum(ped), .. Wawa". Then he called him a pirate.
The Court: He said I bumped him? ..
The witness: I'm just usin' slang. I'm sorry .. Obviously basically.. he said basically that he you know, he licked 'im, he licked 'im, like. Shot him.
The Court: Wawa?
The witness: And, yeah. Obviously he said Wawa. And then he is calling 'im a pirate… that's what we guys up the road call these town guys, we call them pirates, and they call us fish. It's the truth, but .. it's not a joke but its' the truth, this is what the reality of what we're living. This is, this is what is happening
The Court: So you call the town guys pirates and they call you fish?
The Witness: yes.. and obviously, being he was out (at) Woody's, this guy (meaning the appellant in the dock) told me he's out Woody's yeah, and a party bus come, yeah. This guy told me that my cousin was in a wheelchair, right, in a wheelchair, in a wheelchair, couldn't even walk, couldn't even get off the bus to even go to the party. These guys went… oh, boy, Trevi..

[The witness here became visibly upset and was offered a glass of water]

29. He continued*:*

"my cousin.. my cousin couldn't even walk… and yer tellin' me that you used my cousin to put in your first stripe of work … he said that he went up to the .. he said that he had a , a hoodie, a dark hoodie, he went up to the side of the bus. When guys told 'im that Wawa's on the bus, yeah, he went up to the side of the bus, he stood on the wheel of the bus… he had the draw.. you know the drawstrings.. of like a hoodie .. he did that (demonstrating the pulling of the drawstrings of a hoodie).. and he went up to the side of the bus, he put his hand through the window. He got up on the, you know, the wheel, put his hand through the window, and shot this guy about seven times.

No one in this court room cannot tell me that he did not say this..

By Mr Mahoney*:*

Q. And did he say what happened after he shot him?

A. Yes. He said he got off the thing and went cross the street where the gas station is , where, everybody knows Somerset where Boaz Island is, where the boats get gas, right there on the side. He said he stood there and he called Malachai.. and then Malachai was cross the street, obviously, um .. well, cross the street from the area.. if you could picture what I'm sayin' right next to the , you know Boaz Island Gas Station, the dock where they does get gas. Right across the street is obviously Woody's. So if he said that, come and get him and took 'im cross the bridge, cross the road, obviously back into Somerset…

Q. Did he say anything about the gun?

A. Yeah, it was a 9mm. The bottom of, the bottom of the clip, we guys just had to hold it up with.. they used to have to hold it up with tape, because it used to fall out. And they, ah, he took it, I think either Mano.. I think either Mano at the time, or Malachai at the time, must have took the gun back to Duerr's house. Back , back Across Boaz Island , where they initially got it from..

The Court: Well, are you telling us what you know or what he told you?

The witness: No, what I know. What I know for a fact. No, what I know, what he told me, for a fact.

The Court: Okay. So he told you that Mano or Malachai took the gun..

The witness:.. No, Mano and Malachai took the gun.. back to Duerr's house."

30. I break from the narrative of the witness here to note that it was explained that the reference to "Mano" was to Romano Mills and the reference to "Duerr", was to Christoph Duerr. Both these men known to be associated with the M.O.B. gang, were separately and respectively convicted for murder and being an accessory after the fact to murder.

31. At the second trial, the transcript of Duerr's evidence given at the first trial of the appellant, Zakai Cann, Malachai Brown and Cordova Marshall in February 2017 was read to the jury by consent of the defence. In it Duerr is recorded as having testified to being present at Woody's on the night of the 23 September

2012. He testified to having seen the appellant, Zakai Cann and Cordova Marshall at Woody's that night. He, Duerr, had been there awaiting the arrival of the party bus because a friend, Alicia, was expected to be among the girls on the bus and they had planned to go swimming that night. He said that after the bus arrived, he and Alicia were walking away from Woody's towards his home when he heard "*a couple of shots coming from Woody's direction*". Later he was contacted by Cordova Marshall by cell phone and asked to meet at Romano Mills' house, which like his was at Boaz Island. He went there where he met Cordova who handed over to him for safe keeping a bullet proof vest and a gun wrapped in a handkerchief, which later upon inspection he saw was a silver coloured nine millimeter. He kept the gun under his mattress and the following Monday night handed it back over to Cordova Marshall.

32. The police eventually recovered the firearm on the 18 June 2013 from Ramano Mills, while he was at the residence of a fellow M.O.B. member Khyri Smith-Williams. The said firearm was forensically linked to six other M.O.B. shootings one of which involved another M.O.B. member, Maurico Bassett, who was convicted for using the same firearm in an attempted murder which occurred in the Somerset area.

33. The statement of firearm expert Dennis McGuire was read in at the trial. He testified that the gun had been used in six other firearm incidents and, although the gun was in satisfactory operating condition, the rubber for the grip in which the ammunition clip was housed was falling off and was taped to keep it in place and that the right side of the ambidextrous safety (de-cocking lever) was missing and had been replaced with a screw. He opined , if the grip rubber fell off exposing the intricate mechanism underneath, it would affect the firearm's ability to fire.

34. From the foregoing evidence about the firearm, it was open to the jury in the second trial of the appellant, to accept that Duerr, was indeed the recipient of the firearm used in the shooting of Stovell and the keeper of the firearm on behalf of the members of the M.O.B. gang.

35. To return to the narrative of Harris' evidence, he said that when the appellant told him what he had done, his view of him changed. In his words:

> "*Listen to me, right. I used to love Trevi with the bottom of my heart, but when this guy told me that he killed my cousin, my fam, my whole heart went cold towards 'im."*

36. To make matters worse in his eyes, said the witness, the appellant had also explained to him that, after he killed Wawa, the other gang members stopped looking down on him. This was, as the appellant had explained, because they could no longer "*say that he ain't about that life*."

37. Harris' account of his own connection with the M.O.B. gang became ever more involved as his evidence unfolded. He spoke to his knowledge that Duerr was "*just a guy who was holdin' the guns*" and that Romano Mills was a member of M.O.B. And as to whether he knew Zakai Cann:

> "*Yeah, that's my family"*
> *Q. Was he a member of M.O.B.?*
> *A. Oh, man, man, man. Zakai Cann he's a associate, of of Somerset people.. and he is .. if you wanna put the word "gang member" there then , yes, he's , he's .. so name him.*
> *The Court: well, really it's what you say, not what Mr Mahoney or anybody else says.*
> *The witness; No, but this, this obviously this .. Zakai.. that's , that's .. Zakai Cann is a mem .. he's is a gang member, Miss*"

38. This admission of his family connection to Zakai Cann and the witness's obvious hesitation in acknowledging that Cann was an M.O.B. member, became of significance to the appellant's defence at trial. The manner of its treatment by the learned trial judge in her summation to the jury also therefore became of significance in this appeal and will be the subject of further examination below.

39. To return to his narrative of evidence, Harris also said that the appellant had told him that on the night of the shooting he, the appellant, was wearing a black or dark hoodie. In cross-examination by Mr Horseman, Harris admitted to a long history of offending with several convictions. He admitted that he was himself a notorious member of the M.O.B. gang but insisted that he wished to turn his life around and was convinced that the right thing to do was to give evidence against the appellant because of what he had done to his cousin Wawa. He said that he hoped that by telling the truth this would also help to bring about an end to the senseless gang rivalry that was still going on in the country.

40. It was suggested to him that a reason he was testifying against the appellant was to cover up for Zakai Cann whom he knew was the person who shot Lorenzo

Stovell. He insisted that, although Cann was a relative of his and someone to whom he was also very close, this was not true.

41. It was also suggested to him which he denied, that he had not come forward to the Police with his account until he had been arrested for an assault on his girlfriend and that he saw the opportunity to help himself in that situation by concocting his account against the appellant.

42. Finally, of significance to the prosecution's case, evidence was also adduced from PS Rollins of the Bermuda Police, on gang structure and behavior in Bermuda. He gave evidence on the historical rivalry between Parkside/Middletown and the M.O.B. engaging in tit-for-tat incidents of violence which have included assaults and shootings. He said that M.O.B. had a structure of "shot callers" at the top, lieutenants in the middle and soldiers at the bottom. The latter were responsible for carrying out orders such as assaults on rival gang members and putting in work such as protecting the gang and visiting the turf of other gangs to carry out shootings. Putting in work was a way of establishing oneself in the gang by showing a willingness to do what it took for the gang and boost its street credentials. He considered Lorenzo Stovell as someone loosely associated with Middle Town gang, which fell under the umbrella of Parkside, but the gang life was not his thing. PS Rollins opined that the appellant, Zakai Cann, Cordova Marshall, Mariko Bassett and Khyri Smith Williams were members of M.O.B.; Malachai Brown, Romano Mills associates of M.O.B., Christoph Duerr a friend of M.O.B. and the keeper of the guns; and that Troy Harris was a petty criminal who was friendly with M.O.B. but not a member.

43. PS Rollins said that guns were a valuable asset for gangs in Bermuda as they are used to protect the gang's turf and carry out tit-for-tat assaults. Whenever a gun was used, it is removed from the scene very quickly and to fail to return a gun after use would be a sign of disrespect to the gang. He further indicated that one would not expect to see a Parkside/Middletown person hanging out in M.O.B. territory. He said that he would first be concerned about that person's safety and their motive for being there.

44. He said that Freddy Maybury, a close friend of members of M.O.B., was murdered outside of Woody's at night in 2010 by an armed gunman. In August 2012, a few weeks before the Stovell murder, a man appeared at night outside Woody's with what appeared to be a submachine gun which jammed and the person fled the area via jet ski. No one has been arrested for either offences as yet, but Parkside is believed to be the perpetrator of both.

The Defence

45. The defendant raised an alibi. He testified that on the day of the shooting he was out in the sun all day on a raft. That when it started to get dark he went to Woody's to drink. He was at the bar when he felt sick and went outside to get some fresh air. When he caught himself he went home, fell asleep and woke up the next morning in the same clothes. That he was not at Woody's at the time of the shooting and was not involved in any way. He denied making any confession to Harris and denied any close relationship of confidence with him.

46. His sister Tianna Saltus testified in support of his alibi. She said that she was at the bar at Woody's when her brother came to her for the house key. She said that when she spoke to him he seemed intoxicated and she saw him leave the bar area but not the premises. She also said that he was not a member of M.O.B.

The grounds of appeal

47. There are six grounds of appeal which can be conveniently dealt with as four condensed grounds as follows:

1.

a. The learned trial Judge erred in law when she misdirected the jury in connection with secondary party liability when she directed the jury that voluntary presence without opposition or real dissent could amount to encouragement such as to render the appellant to be convicted of murder.

b. The learned Judge misdirected the jury in relation to secondary party liability when the Judge failed to make clear that the appellant would have had to have knowledge of the weapon being used <u>at the time of the offence.</u> The direction by the Judge suggested that the appellant could be liable for murder if he was aware through his gang membership that the shooter had access to the M.O.B. gun and he knew the shooter would use it in a tit for tat killing against a Parkside member at any time as opposed to the night of the offence. (emphasis added).

c. The learned judge erred in law when she left the secondary party theory to the jury when there was absolutely no

evidence that the appellant was part of the group that walked in the direction of the bus. Further, there was no evidence that the group of men even approached the bus. The sole witness to the shooting, Mr Isaac, testified that only one person approached the bus and fired the shot. It was therefore an error of law to leave the secondary party theory of liability to the jury as there was no evidence of any other person's presence with the gunman at the time of the shooting.

2. The Judge failed to give the jury any warning as to the identification of the appellant as one of the "group of men" that walked in the direction of the bus. It was the prosecution's case that the appellant was one of a group of men that moved in the direction of the bus and thus 'encouraged" the shooter. The prosecution purported to identify the appellant as one of the group in the prosecutor's closing arguments [(including by reference to CCTV footage)]. The learned judge should have directed the jury (that) there was no evidence of any purported identification of the appellant as one of the men that moved in the direction of the bus as there was no evidence given by any witness that purported to identify the appellant as part of that group at the time of the shooting. The learned judge simply left it to the jury that they could "infer" that the appellant was one of the group of men who moved in the direction of the bus, which was an error in law.

3. The learned trial judge erred in law when she directed the jury that defence counsel's failure to cross-examine Troy Harris on the specific issue of the "closeness of the relationship" could be used against the Defendant in connection with the jury's consideration of the Defendant's (appellant's) evidence.

4. Alternatively to ground 3, counsel's failure to cross-examine Troy Harris on the issue of the closeness of the relationship when the appellant had so instructed counsel, prejudiced the appellant's right to a fair trial.

Discussion on grounds 1a, b, and c.

48. These grounds arise against the background of the prosecution inviting the judge to leave for the jury's consideration a secondary case[3], not raised at the first trial, that if the jury were unsure that the appellant was the person who shot Stovell, then they should go on to consider whether he was present aiding and abetting by his presence and encouragement, the person who did the shooting. At the first trial the prosecution's case against the appellant, based primarily on Harris' evidence, was simply that he was the shooter.

49. However, given the presence of Zakai Cann's palm print beneath the window of the bus, and the evidence of witnesses of Cann's involvement with M.O.B., and his presence at the scene on the night, the prosecution became understandably concerned that the jury could been left in reasonable doubt that the appellant was indeed the shooter and this was so notwithstanding Cann's earlier acquittal at the first trial.

50. This, then, would have raised the question whether, if the jury rejected the appellant's alibi and accepted that he was present at the scene of the shooting, but did not accept that his confession to Troy Harris to being the shooter was true, they should go on to consider whether he was involved in the killing of Stovell as a secondary participant.

51. There was, therefore, some, if rather thin, evidential basis for the consideration by the jury of the secondary case against the appellant, that is: if they accepted that he was present at the scene as a member of M.O.B. for the purpose of actively assisting, at least by giving intentional encouragement by his presence, to the shooter.

52. But either basis for criminal liability clearly called out for very careful treatment by the learned trial judge. The two alternative bases of liability would clearly require careful separation, analysis and direction in the course of the summation to the jury, both as to the relevant facts and applicable law. It is in effect to the question of whether this was achieved by the learned trial judge, that these three combined grounds of appeal are directed.

53. It appears from the transcripts that the judge directed the jury on at least three occasions in the summation on the subject of aiding and abetting by

[3] There was debate before us on the hearing of the appeal whether it was the prosecution or the defence who insisted that this secondary case be left to the jury. Nothing turns on this at this stage as in the end, the primary and secondary cases were left to the jury and so the real question is whether or not the jury were properly directed by the trial judge in relation to it.

encouragement by presence. The second occasion was after the jury had retired for some three and a half hours[4] and in response to a specific question from the jury in these terms:

> "*One of the elements of the offences is "being concerned with others" Can you clarify?"*

54. Upon receipt of this question from the jury, the learned trial judge consulted with counsel on both sides before bringing the jury back into court for further directions. Following are important excerpts from those exchanges between the judge and counsel on how the alternative cases should be seen as having arisen and how they should be directed to the jury[5]:

> "***The Court***:.. *In this stage I'm talking about your primary case.*
>
> ***Mr Mahoney****; Yes, my Lady*
>
> ***The Court:*** *Just that if they accept Harris' evidence, then he would have been concerned at least with Malachai Brown ..*
> ***Mr Mahoney****: And the others who got the gun back, ..*
> ***The Court****: Right, ..*
> ***Mr Mahoney****: .. because it's everybody acting together.*
> ***The Court****; .. and that's why I mentioned.. and that's why I mentioned here, the gun was returned to Duerr. So, concerned with at least those two people, in your primary case.*
> ***Mr Mahoney****; Yes, my Lady.*
> ***The Court****: At least those two people in your primary case.*
> *And then .. or, on the Crown's case, if you reject Troy Harris' evidence or part of the evidence or are not sure that Harris (sic) (meaning Saltus) was the shooter, then the Crown's case is that he was among the men who went up to the bus and, full knowing what the shooter intended to do, was there to aid or encourage the shooter*

[4] See page 103 of the transcript of summation.
[5] Pp 108 – 113 of the transcripts.

to shoot Mr Stovell. That, .. involves him in being concerned with the others that were present at the time.
***Mr Mahoney**: And the alternatives, my Lady, the proper alternative is, if they accept that he did speak to Troy Harris, but they are of the view that what he told Harris was really .. he's trying to get credit for what somebody else did, but he puts himself there when all of that was going down.*
***The Court**: Oh, I see, yeah.*
***Mr Mahoney**: He can be conceived as acting with everybody; that's how the alternative comes in, my Lady. So they would have to accept .. it comes to that .. the alternative comes with the aspect of is it true? Did he tell him that - to cross that hurdle first? And is it true? In other words was he speaking the truth about himself, or was he trying to claim credit for what somebody else did, albeit he was part of the group to know all that in detail about the, how the shooting went down.*

55. I break from the transcript here to note that it will be seen that no directions in the terms last above suggested by Mr Mahoney were ever given. The exchanges between judge and counsel continued:

*"**The Court**; well can we be settled on, first of all, whether or not I'm just repeating the direction that I gave or that I am ..*
***Mr Mahoney**: I would say the directions you gave..*
***The Court**: Or that I am assisting them by mentioning what some of the other..*
***Mr Mahoney**: I think it's safest to repeat the directions and, um, .. because you might get, delve into the evidence and .. then we may get into issues directly, my Lady, which I think counsel is inviting the court to do.*
***Mr Horseman**: Well, one thing that I am inviting the Court to do, my Lady, there is no evidence that any group of guys went to the bus. They walked .. the best .. the highest the evidence was, they walked in the direction of the bus. No one saw any group of five guys go to the bus. The Denbrooks were clear that they can't say that they went to the bus. So, the way the directions [indiscernible]*

is being put to them, it's almost a fact that the evidence showed was that they moved, and the furthest it was shown that they got was the triangle of grass. There is no evidence.. in fact Isaac says there was one person who came to the bus. So they have to be satisfied that first, this group.. well, I don't know if they necessarily have to have gone to the bus, but I don't think phrasing it .. you're satisfied that he was one of the group that went to the bus.

***The Court**: Okay. You remember what I was doing, in effect, was, I was going through the elements that make up the offence of Murder.*

***Mr Horseman**: Yeah*

***The Court**; And the fourth element was being concerned with the others.*

***Mr Horseman**: Yes.*

***The Court**; So they're asking about that.*

***Mr Horseman**: Yes*

***The Court**: <u>So, I can just repeat the direction that I gave them</u>, which is basically that the prosecution case is intended to cover two theories as to how Mr Stovell was killed. First his evidence is that Saltus was the shooter. In that they rely on all the evidence, including gang motivation (based on) Mr Harris' evidence. However, if they are not satisfied of that, they also rely on evidence of circumstances, including gang evidence, they say, when taken together, shows the Defendant was one of the young men that went toward the bus and encouraged the shooter to shoot and kill. What Mr Mahoney's case was was that they should draw inferences from the direction in which the men were headed.* [emphasis added]

***Mr Horseman**: Yeah, I would..*

***The Court**; The fact that the men.. or young men and a couple of girls were seen at the back of the bus, the fact that after the shots were fired, the group of men that had been seen by two or more witnesses were also seen running back. So he's asking them to draw an inference that they went to the bus. He's saying that there is evidence that they went to the bus, unless, of course..*

Mr Horseman*: well, that' s when ..*
The Court*: .. we then delve into the evidence of Mr Cann's hand print and all of that..*

56. The learned judge then recites section 27 of the Criminal Code, relevant subsections of which will be set out below, and continued in the exchange with counsel:

> ***"Mr Horseman****: Can you repeat.. that happening, you say, that they could infer that the Defendant went up to the bus?*
> ***The Court****: Infer from evidence that they do accept.*
> ***Mr Horseman****: You know I think it needs to be made clear that there's no evidence that they made it to the bus.*
> ***The Court****: It's the prosecution case that they can infer that those young men went up to the bus.*
> ***Mr Horseman****; Okay.*
> ***The Court****; And it is the prosecution case that he was among those men. Is that not the case?*
> ***Mr Mahoney****: That is so.*
> ***Mr Horseman****: Mm-hmm.*
> ***The Court****: That he did so with the intention to aid the unidentified shooter, that because of his gang membership in M.O.B. he knew the shooter had access to an M.O.B. gun, that he knew the shooter would use it to kill in a tit-for-tat shooting against Parkside members or associates, and in this case it was Lorenzo Stovell.*
> ***Mr Horseman****: Yeah, so, if he has .. okay, if he has that knowledge, they can, yeah.*
> ***The Court****: Mmm. And then I directed them on the presence at the scene, which I first read out.*
> ***Mr Horseman:*** *Yeah.*
> ***Mr Mahoney;*** *So, therefore, my lady, I think it is best to just repeat the direction ..*
> ***The Court:*** *Right. Okay. Fine.*
> ***Mr Mahoney:*** *In regards to that narrow area.* [Emphasis added]
> ***The Court:*** *All right. We'll have the jury in."*

57. The learned judge then brought the jury in and gave them further directions. She reminded them of the elements of the offence of murder on which she had earlier directed them and then turned to what she described as the "*fourth element, being concerned with others*". True to the suggestion of Mr Mahoney that she limit her directions essentially to those given before, she did not go on to the jury on the importance of analyzing Harris' evidence in the context of the alternative case, as Mr Mahoney himself had suggested. She simply pointed out that, from the nature of the case that the prosecution had run and Mr Mahoney's address, the prosecution evidence was intended to cover two theories as to how Mr Stovell was killed, and that it was appropriate for the jury to approach their task by considering four issues as follows:

> "*The first is that.. is that Mr Saltus was the shooter, so that's not .. and you have no query about that. And they rely , of course, on all of the evidence. <u>However, if you are not satisfied of everything that Mr Harris has said,</u> they also rely on evidence of circumstances including gang evidence that they say, when taken together, show that the Defendant was one of the young men and they are asking you to infer this.. that the Defendant was one of the young men that went toward the bus and encouraged the shooter to shoot Mr Stowell.*" [emphasis added]

58. The judge then repeated verbatim section 27(1) of the Criminal Code[6], identified the elements of the secondary offence of aiding and abetting and then directed the jury as follows:[7]

> "*It is the prosecution's case that <u>you can infer from the evidence that you do accept</u>, that the Defendant went up to the bus with those young men to encourage the shooter; that he did so with the intention to aid the unidentified shooter; that because of his gang*

[6] ' Section 27. When an offence is committed, each of the following persons is deemed to have taken part in committing the offence, and to be guilty of the offence, and may be charged with actually committing it- (a) every person who actually does the act or makes the omission which constitutes the offence; and (b) every person who does any act or makes any omission for the purpose of enabling or aiding another person to commit the offence; (c) every person who aids another in committing the offence, and (d) any person who counsels and procures any other person to commit the offence..'

[7] Bottom of page 119- to top of page 120.

> *membership in M.O.B. he knew the shooter had access to the M.O.B. gun; that he knew that the shooter would use it to kill, in a tit- for- tat shooting against the Parkside member or associate- in this case it was Lorenzo Stovell*" [emphasis added]

59. I break here from the narrative of the summation again to note that no directions were given as to *why* the jury could or could not safely come to any of those conclusions on the state of the evidence and by reference to specific aspects of the evidence. Even more troubling is the absence of any directions on why it would be safe for the jury to reach any of those findings, if, as the words in emphasis above predicate, they did not accept everything from Harris' evidence.

60. While the finding of fact was the province of the jury, the circumstances of this case compel us to conclude that they called out for such directions from the judge. It did not suffice to leave the matter of comment on the important evidence only to the addresses from counsel.

61. The same must be said with even greater force of the following directions on the law on aiding and abetting:

> " *Where the prosecution alleges aiding by encouragement, such as from the presence of the person charged at the commission of the offence, such as by presence at the scene, and also that the person charged intended to encourage the commission of that offence by his or her presence, voluntary and deliberate presence during the commission of a crime, without opposition or real dissent, may be evidence of willful encouragement or aiding.*"

62. While from an examination of the leading case law it is seen that this direction taken by itself was not an incorrect formulation[8], it nonetheless behoved the learned judge to explain to the jury the evidence, if such she thought there was, which showed that the appellant intended by his '*voluntary and deliberate presence, without opposition or real dissent"* to willfully encourage the shooter to kill Lorenzo Stovell, for instance by the communication in some way of the intention to encourage.

[8] See: *Dennis Alma Robinson v The Queen* [2011] UKPC 3, on appeal from this Court.

63. As the Privy Council declared in *Robinson* (above) at [14];

> "*The commission of most criminal offences, and certainly most offences of violence, may be assisted by the forbidding presence of another as back-up and support. If D2's presence can properly be held to amount to communicating to D1 (whether expressly or by implication) that he is there to help in any way he can if the opportunity or need arises, that is perfectly capable of amounting to aiding and abetting within section 27(1)(b) and (c). It is however important to make clear to juries that mere approval of (ie: "assent" to, or "concurrence" in) the offence by a bystander who gives no assistance, does not without more amount to aiding. It is potentially misleading to formulate aiding according to the second particular without that qualification and without explaining that the communication of willingness to give assistance is a minimum requirement*."

64. This simply was not done. Yet we consider that in all the circumstances of the case, and notwithstanding the evidence of the appellant's connection to M.O.B., such directions were essential. In the formulation of any hypothesis of aiding and abetting because of presence, rather than himself being the shooter, the jury should have been directed to consider the possibility of the shooting having been a spontaneous action prompted by the mere presence of Lorenzo Stovell being found to be on M.O.B. "turf", and without the appellant having become a knowing participant even if he was at the locale.

65. The same must be said of the directions which followed on the final set of questions from the jury which were sent to the judge[9] after another hour of deliberations in these terms:

> "*Can you clarify:*
> *Prosecution must prove BRD [beyond reasonable doubt)*
> *1. Unidentified perpetrator committed offence.*
> *2. Travone Saltus ("TS") did acts to aid/assist.*

[9] At 6:32pm, see page 121 of the transcripts.

3. TS had intention to aid assist perpetrator in committing offence.
4. TS had actual knowledge of key aspects of offence including state of mind of perpetrator.

**Do all four must be proved BRD or any one of the four?"*

66. Before turning to look at the judge's final directions to the jury, it is important to note that while we are not given to know what the jury was thinking at this stage or indeed at any earlier stage, it is possible that they were not prepared to convict on the basis that Harris' account of the appellant's confession was both reliably related by Harris and correctly reflective of what the appellant had done. It was apparent from their questions that the crucial distinctions in fact and law between the prosecution's primary and secondary cases needed to be fully and clearly explained to them.

67. As more fully explained below, we are compelled to the conclusion that this was not done either. It is most convenient to explain by setting out the directions actually given at this final stage. The exchanges with counsel notwithstanding, and perhaps indeed because of some of these final exchanges with counsel as shown in emphasis above, the learned judge directed the jury in the following terms,[10] almost identical to the first directions she had given them on the subject[11]. Indeed, one will see that the jury's questions reflected the terms of those first directions:

" You want.. need to clarify for you ..the prosecution's burden that they must prove, beyond reasonable doubt, the four matters that you have set out here.
First of all you would only be considering this if you do not accept Troy Harris' evidence that Mr Saltus was the shooter; right? You would be considering this if you do not accept Troy Harris' evidence that Mr Saltus was the shooter. Or if you're not sure about Mr Harris' evidence, that Troy (sic) (meaning Saltus) was the shooter , and you want to consider the alternative. So in considering the alternative, you are considering whether or not Mr Saltus

[10] Pp 117 - 119
[11] Pp 26-29 of the transcript

aided or assisted the perpetrator. The perpetrator of course, being the shooter, who is as yet unidentified, So yes, you are correct that the unidentified perpetrator committed the offence that would have to be proved to your satisfaction, that is beyond reasonable doubt. Two, that Mr Saltus did an act or acts to assist that person; three that Mr Saltus had the intention to aid or assist that perpetrator in committing that offence, yes, you have to prove that; and four, that Saltus had the actual knowledge of key aspects of the offence, you say, including the state of mind of the perpetrator, and those key aspects I mentioned to you was knowledge of the gun, that the shooter intended to cause Lorenzo Stovell either grievous bodily harm, that is serious bodily harm or to cause his death.. All four would have to be proved to your satisfaction, that is beyond reasonable doubt"

68. While the foreperson acknowledged in response to a question from the learned judge that these final directions were of assistance, we see again the absence of any clarification by way of placing these important directions in the context of any evidence which the learned judge thought could sustain them.

69. For instance, no directions were given at this or indeed at any other stage, on the crucial evidence of the presence of Zakai Cann's palm print and whether, in the light of all the evidence in the case, including the fact that Cann had been previously acquitted of the offence, it would have been safe for the jury to convict the appellant on the basis that Cann was the shooter whom he intended to encourage, by his voluntary presence at the scene of the shooting. If not Cann, then which other gunman? And if someone else, on what basis would the jury find that the appellant had known about the intentions of that person and intended to encourage him? These were important issues on which the directions of the judge would have been very instructive, in particular because of the defence's suggestion to Harris that he had a reason for protecting Cann.

70. Any suggestion that such gaps in the evidence could be filled simply by inferences to be drawn from the appellant's involvement with M.O.B., would be tantamount to the impermissible conclusion of guilt by mere association.

71. A further obvious area of concern is the absence of directions relating to the treatment Harris' evidence of the appellant's alleged confession. These final

directions on the appellant's secondary participation clearly needed to be given to the jury in the context specifically relied upon by the prosecution, which was that they, the jurors, still needed to accept Harris' evidence as to the confession, even if in doubt about whether the appellant was the shooter.

72. As Mr Mahoney accepted at the hearing of the appeal, shorn entirely of Harris' evidence of the appellant's confession to being present at the time of the shooting, the other evidence relied upon by the prosecution – mainly the CCTV footage, the background evidence of PS Rollins on M.O.B. *modus operandi*, the appellant's involvement with M.O.B. and the brief earlier sighting of the appellant at Woody's on the night by Khamilla Smith- taken all together could not justify a conviction.

73. In other words, without Harris' evidence, the prosecutions' case merely invited the jury to speculate.

74. This should have been made very clear to the jury by the judge with the firmest of reminders in these particular contexts, that they could not rely on mere speculation about any aspect of the case to convict the appellant.

75. Another clear example of this danger can be found in the treatment by the prosecution- without guidance or intervention by the judge - of the evidence on which the jury was invited to conclude that the person seen by Mr Denbrook to run from behind the bus and jump on the back of the waiting bike must have been the appellant. Here, the prosecution invited the jury first of all to conclude, on the basis of Dionne Pearman's evidence, that the rider of the bike must have been Malachai Brown because he had been seen by her shortly before to have walked briskly from the direction of the main road and quickly get on his bike and ride out of from Woody's.

76. Even though it was the prosecution's case based on Harris' account that the appellant had told him that he was wearing a dark coloured hoodie that night, the prosecution invited the jury to find that the man on the back of the bike, described by Mr Denbrook as wearing a white top, must nonetheless have been the appellant. This particular hypothesis proceeded on no better footing than that, since on Harris' account the appellant must have been present, the appellant must have discarded his dark hoodie just before getting on the bike, revealing a white top, and that CCTV footage appeared earlier to show the image of a man who had on a dark top with what appeared to be a white undergarment!

That man was alleged by the prosecution to be the appellant but no witness identified him as such.

77. The failure to warn the jury against speculation like this which would be rife in circumstances where they could not rely on Harris' account for proof, of either the primary or secondary theory of the prosecution's case, in our view, rendered the verdict unsafe and unsatisfactory.

78. Our concerns about the inadequacy of the summing up on important issues in this case can be aptly framed in terms of dicta from the Privy Council in *Von Starck v the Queen (Jamaica):*[12]

> *"The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then ofcourse the judge is entitled to put it aside. The threshold of credibility in this context is , as was recognized in Xavier v The State (unreported) 17*

[12] [2000] UKPC 5 (28th February, 2000) at [12].

> *December 1998; Appeal No. 59 of 1997, a low one, and, as was also recognised in that case, it would only cause unnecessary confusion to leave to the jury a possibility which can be seen beyond reasonable doubt to be without substance . But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury..if there is evidence to support a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them."*

79. We do not need to spend too much further time on ground 2, which goes to the adequacy of the directions to the jury on the identification of the appellant as allegedly being one of the group of five or six men who went toward the area of the bus before the shooting and who returned to Woody's shortly after. This evidence was relevant only on the prosecution's secondary case which we have found to have been unsatisfactorily summed up to the jury.

80. Here too, evidence of gang activity by itself was insufficient. As the Court of Appeal held in circumstances of proven premeditation and co-ordination in *Dean Smith et al v the Queen*[13]*:*

> *"Once it was proved that any defendant had voluntarily joined the group then the necessary mens rea could be established by proving that the particular defendant joined the group in the knowledge that members of it were armed with loaded handguns and must, in the almost inevitable confrontation once they tried to enter a nightclub without paying, have realized the possibility that one of the handguns would be fired with intent to kill.*
>
> *Consequently, it does not avail any of these appellants to demonstrate the absence of evidence that he shouted encouragement, covered up or gathered around the gunmen. Criminal liability was established by showing voluntary participation in what the jury was entitled to conclude was armed gang activity. Proof of guilt could be*

[13] [2008] EWCA 1342

> *established by identifying any particular defendant as being present, voluntarily, in that gang activity. In those circumstances we reject the submissions of each of these appellants in so far as they were based upon the accurate proposition that it could not be shown as against any one of them that they had shouted encouragement, covered their faces, or gathered around the gunmen."*

81. Pernicious though the M.O.B. modalities are, in significant respects they present no analogy with the activities described in *Dean Smith*. For one thing, there is no evidence here that the shady group of men at Woody's were joined together in the knowledge that members of it were already armed. Any such inference would run contrary to the putative M.O.B. code that firearms were to be strictly safeguarded and allowed to be used only on the authorization of the "shot callers."

82. Moreover, the presence of Lorenzo Stovell at Woody's would have been unanticipated by M.O.B. and unlikely therefore to have been a reason for planned co-ordination of gang activity from which the necessary *mens rea* in each or any of the participants could be inferred.

83. CCTV footage was relied upon by the prosecution to invite the jury to find that the images of men seen moving around outside Woody's represented those members of the M.O.B. who, on Harris' account, would have been there when the shooting happened. These were asserted by the prosecution in closing arguments to include Zakai Cann, Malachai Brown and the appellant himself.

84. While Mr Mahoney argued before us that this use of CCTV was not for identification purposes but only to track the movements of persons who were otherwise identified, no such explanation was given to the jury by the judge. And no warning was given of the dangers of attempting to identify anyone by reliance on the images. This failure to direct the jury is another reason why we conclude that the conviction was unsafe and must be set aside.

85. Grounds 1a, b, c, and 2 are, for all the foregoing reasons, established.

86. Grounds 3 and 4 did not feature in the oral arguments before us and, in the light of our decision on the other grounds, it is not necessary to address them.

87. The appeal is accordingly allowed.

C.S.P.S. Clarke

Clarke P

Smellie JA

Elizabeth Gloster

Gloster JA