The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 12 of 2019

B E T W E E N:

KHYRI CARLOS SMITH-WILLIAMS

Appellant

- v -

THE QUEEN

Respondent

Before: **Clarke, President**
Kay, JA
Bell, JA

Appearances: Jerome Lynch QC and Sara-Ann Tucker, Trott & Duncan Ltd., for the Appellant;
Carrington Mahoney and Kenlyn Swan, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **Tuesday, 11 June 2019**
Date of Judgment: **Thursday, 25 July 2019**

JUDGMENT

Conduct of trial judge – hearsay evidence of alternative offender – pressure on jury – fresh evidence.

KAY JA:

Introduction

1. On 8 October 2018 in the Supreme Court before the Hon. Justice Greaves ("the Judge") and a jury, Khyri Carlos Smith-Williams ("the Appellant") was convicted of the premeditated murder of Colford Lloyd Ferguson, and using a firearm whilst

committing an indictable offence, namely the murder. Although the trial did not take place until October 2018, the events with which it was concerned took place as long ago as 4 February 2011. There is no doubt that Colford Ferguson was murdered on that date. The question has always been: who was the murderer? The Appellant denies that he was involved in any way. At trial, the case for the Crown was that Ferguson was shot by Rasheed Muhammad, who had been taken to and away from the scene on a motorcycle ridden by the Appellant. Muhammad has never been charged with the murder.

2. The reason why the Crown was able to prosecute the Appellant so long after the event was that, years later, an associate of the Appellant, Troy Harris, provided evidence that on two occasions the Appellant had confessed to his participation in the murder. This evidence was admissible against the Appellant but not against Muhammad.

3. At trial, the case for the Crown was that the murder was gang-related. The Appellant and Muhammad were members of, or connected with, the MOB gang. Their territory is in and around Somerset. Ferguson, probably as a result of mistaken identity, was believed to be a member of the Parkside gang whose territory is in the City of Hamilton. At the time of the murder, he was working on a house situated in MOB territory. He was with Ryan Furbert. Furbert did not actually see the murder but he was close by at the time. On 7 February 2011, he was interviewed by the police and gave an account of the events of that day. He did not give evidence at the trial because he had left Bermuda. However, an agreed version of what he had told the police in February 2011 was put before the jury. Since the trial, he has sworn an affidavit in England on 1 February 2019, adding to the account he had given to the police in February 2011. Also, Rasheed Muhammad was interviewed under caution in April 2018 and denied involvement in the murder.

Grounds of appeal against conviction

4. The Appellant now appeals against conviction and advances the following grounds:

(1) The judge behaved inappropriately during the evidence of Troy Harris;

(2) The judge wrongly excluded evidence about the possibility that other named suspects might have been the murderer;

(3) The judge did not adequately sum up the evidence of the case for the Appellant;

(4) The judge made inappropriate comments to the jury about what would happen if they did not reach verdicts on the day of their retirement;

(5) The Court ought to admit fresh evidence which was not before the jury and which if it had been, might have resulted in a different outcome.

5. I shall consider these grounds in that order, although in his appeal submissions, Mr. Jerome Lynch QC began with, and placed greatest emphasis on ground (5).

Conduct of the Judge during the evidence of Troy Harris

6. There is no doubt that Troy Harris was the main witness called by the Crown. His evidence was that he was very close to the Appellant but not to Rasheed Muhammad, whom he despised. On two occasions, the Appellant had spoken to him about the Ferguson murder. The first occasion was when they were both imprisoned in the Westgate in 2014 through to 2015. On that occasion he said that the murder was the result of the misidentification of Ferguson as "a Parkside guy" and that it was Rasheed Muhammad who had misidentified him. The second occasion was later, when Harris and the Appellant were out of prison but electronically tagged. This time Harris said that the Appellant was intoxicated

and more loquacious, describing how they had thought that the victim was Jakai Morris who was considered to be a Parksider. Muhammad had been the shooter and the Appellant had taken him to and from the same by motorcycle. Both men – and Harris – were MOB members. It was not until 2016, when Harris was in prison in England, that he first gave his account of the Appellant's confessions to the Bermuda police.

7. It is obvious from a review of the transcript that Harris was an unusual witness. His language was uncompromisingly crude and vernacular. He described his closeness to the Appellant by repeated references to their *"fucking pussy"* together (later abbreviated by the judge to "FP"). One passage reads as follows:

> *"**THE WITNESS**: Yes I have fucked pussy.*
> ***THE COURT**: You've – this stuff with other fellas as well; right?*
> ***THE WITNESS**: Yes.*
> ***THE COURT**: Yes*
> ***THE WITNESS**: That's what we do. That's what we do.*
> ***THE COURT**: Right.*
> ***THE WITNESS**: That's what we do, sir.*
> ***THE COURT**: Yer, yer boys…*
> ***MR. LYNCH**: Wish you wouldn't say 'we'.*
> ***THE WITNESS**: That's what we boys do.*
> ***THE COURT**: Good.*
> ***THE WITNESS**: That's what we – from St George to Somerset, that's what brethrens do.*
> ***THE COURT**: Okay. Move on, please. All this sex is beginning to get me horny."*

8. When talking about Rasheed Muhammad, the following exchanges occurred :

> *"**THE COURT**: You call him what? Dirty, stinkin' rat?*
> ***THE WITNESS**: Yeah. Half these guys up in Somerset don't, don't*
> *Like that guy, man. All of 'em talk behind Rasheed's back, man, 'cause he's a grimey little faggot, you know I wish he was around when I was out there man.*

MR.MAHONEY*: By the way, did they used to call him any particular way?*
A*: Yeah, I call him grimey, inna.*
Q*: You call him grimey?*
A*: Yeah, I'm, I'm vexed at the situation, inna, because…if that little faggot would never have came and done that and said what he said, he would have never went about his business to go and do that. You understand what I'm sayin' to you?*
Q *: Okay. All right..*
A*: So, yeah, to me he's a little faggot."*

9. Then of the Appellant, he said:

*"**MR. MAHONEY**: And you say 'he', you're referring to who?*
A*: Khyri He knows that I know, and I know that he knows. So regardless of what anyone else thinks, he could sit here with his fancy lawyer, I know the fuckin' truth, you understand me, and I put that on my life. If it wasn't the truth, I wouldn't be up here in front of all these beautiful fuckin' Bermudians doin' this shit. Trust me when I tell you, I would have stayed my ass in England.*
MR. LYNCH*: This is not an opportunity for a speech, thank you very much.*
THE COURT*: All right.*
THE WITNESS*: I'm not giving a speech. It's the truth*
MR. LYNCH*: He has counsel, instructed by the Crown to do that.*
MR. MAHONEY*: He's explaining…*
THE COURT*: Sometimes when a gentleman needs to express himself and address the floor…*
THE WITNESS*: You know what that is right? I'm, listen, I ain't gotta adhere to it, I ain't gotta sugar-coat nothin', this is the way I talk You could understand me, people understand English, they know exactly what I'm sayin'. I'm not gonna sit here and use some high vocabulary that this guy uses. I'm not from this guy's area, I'm from the fuckin' hood, this what I use, this what I'm sayin', straight up."*

10. There is a complaint on behalf of the Appellant that the Judge's approach to dealing with Harris was too indulgent and conversational. These examples are proffered:

> "***THE WITNESS****: It's the truth, man. I'm sorry, Mr. Greaves, I get all all up in my emotions. I'm sorry.*
> ***THE COURT****: It's all right. Yeah, you've said it."*

And a little later:

> *"**THE COURT**: All right, sir. Just, wait on the questions. Please put some more water there for Mr. Harris.*
> ***THE WITNESS****: Yeah, my lips. Thank you.*
> ***THE COURT****: It's water, right?*
> ***THE WITNESS****: Nah, it's some vodka, there's some vodka right There, they give me some vodka. Nah, it's water. It's water. I appreciate it.*
> ***THE COURT****: All right."*

11. Essentially, this ground of appeal amounts to a complaint that the judge did very little to restrain the witness's excesses but allowed him to persist in using vulgar and profane language. The witness was allowed to give evidence in his chosen style which was thereby given tacit approval. The acquiescence of the judge and his conversational approach tended to underwrite its credibility to the prejudice of the Appellant.

12. I do not consider this ground of appeal to be sustainable. Anybody familiar with serious criminal trials in this jurisdiction in recent years knows that the Judge has a very personal style whereby he engages with witnesses, defendants, juries and advocates in an informal way, often using casual language and rich metaphors. In relation to Harris, it was important that the judge should facilitate his evidence, whatever it turned out to be. If he took the view (and I suspect that he did) that the best course was to let the witness have his say – subject to the rules of evidence – rather than seek to inhibit him, it seems to me that that was

an exercise of judgment which was open to him. I do not accept that, in itself, the freedom accorded to the witness was prejudicial to the Appellant. Indeed, it might have been thought that the outspoken coarseness of the witness would be more likely to accrue to the detriment of the Crown. Either way, Harris was a dramatic witness who provided the jury with a great deal of material with which to assess his veracity. His evidence extends to almost 400 pages of transcript.

13. Although this ground of appeal fails, this is not to say that this Court condones everything said by the Judge. In particular, his comment *"all this sex is beginning to get me horny"* was inappropriate and inimical to the dignity of court proceedings. Mr. Lynch was justified in criticising it. However, I do not believe that it damaged the defence or had the potential to undermine the safety of the conviction.

Alternative Killers

14. This ground of appeal is to the effect that the judge wrongly prevented the defence from exploring with the senior investigating offices, Detective Inspector Redfern, the possibility that the murderer or murderers was or were other named persons. This issue often arises in criminal trials. Sometimes the defence are permitted to adduce evidence about other suspects, either by cross-examination or by formal admission, even though, strictly speaking, the evidence is or is based on inadmissible hearsay. A degree of latitude is tolerated. However, there is no rule of evidence that permits this as of right as an exception to the hearsay rule. It is generally inadmissible for a jury to be encouraged or enabled to deliberate on the guilt of persons they have not seen on the basis of things allegedly said by other persons they have not seen.

15. In the present case, a middle course was taken. DI Redfern was cross-examined about other suspects, and he confirmed four names. He also referred to other

arrests, including that of Rasheed Muhammad. However, none of these people was charged because of lack of evidence.

16. All this is best illustrated by a passage in the cross-examination of DI Redfern when Mr. Lynch elicited that Deunte Darrell had been bragging about being the murderer. A little later the judge ruled the evidence inadmissible. The question had been asked on the basis of information contained in a disclosed application for a search warrant. The judge ruled that the defence could rely on evidence that Darrell had been a suspect, had been arrested and named in a search warrant but not on the inadmissible evidence of the content of the application for the search warrant.

17. At first sight, there may seem to be a degree of tension in the English authorities on this issue. In *Turner (1975) 61 Cr. App. R. 67*, Lawton LJ said (at page 88)*:*

> *"This Court does not find in any of these cases any authority for the proposition advanced in this case that hearsay evidence is admissible in a criminal case to show that a third party who has not been called as a witness in the case has admitted committing the offence charged. The idea, which may be gaining prevalence in some areas,, that in a criminal trial the defence is entitled to adduce hearsay evidence to establish facts, which if proved would be relevant and would assist the defence, is wholly erroneous."*

18. A similar approach is evident in *Blastland [1986] AC 41*, where Lord Bridge said (at page 271):

> *"Thus, to allow this evidence of what Mark said to be put before the jury as supporting the conclusion that he, rather than the appellant, may have been the murderer seems to me, in the light of the principles on which the exclusion of hearsay depends, to be open to still graver objection than allowing evidence that he had directly committed the crime. If the latter is excluded, as evidence to which no probative value can safely be attributed, the*

same objection applies a fortiori to the admission of the former."

19. That this was the orthodox position at common law is acknowledged by the current editions of *Archbold* and *Blackstone*. The tension to which I have referred arises from *Greenwood [2004] EWCA Crim 1388*. Although the Court of Appeal Criminal Division referred to *Blastland* , it did not refer to the passage I have set out above. On one reading, *Greenwood* appears to permit a more generous approach than that adumbrated in *Turner* and *Blastland* : see in particular the judgment of Waller LJ at paragraph 41(i) :

> *"if [the Defendant] has evidence which proves that someone else did the murder, he must be able to adduce it.*

20. However, on close analysis it seems to me that that must be a reference to evidence which is properly admissible and does not offend the hearsay rule. Waller LJ observed at paragraph 37:

> *"[Blastland] was accordingly concerned in the main with the application of the hearsay rule. The decision of course raises difficulties for a defendant where the only means by which a defendant can seek to prove a fact is by reference to some hearsay evidence."*

21. The guidance contained in paragraph 41 of the judgment was designed to demonstrate how the strict application of the hearsay rule can be mitigated by the Crown making formal admissions. However, it frankly accepts that the making of such admissions is a matter for the Crown alone. It cannot be compelled to make the admissions. On this analysis, *Greenwood* is not in conflict with *Turner* and *Blastland*. The common law validates the approach of the judge in the present case. In England and Wales there is now a more permissive approach to hearsay evidence, in particular in section 114 of the Criminal Justice Act 2003, but there is no similar provision in the Bermuda

legislation where the modern exceptions to the hearsay rule are narrower and more specific. The law of Bermuda does not entitle a defendant to adduce evidence in the way sought by Mr. Lynch in relation to the hearsay bragging of Deunte Darrell.

22. In this Court (but not at trial), Mr. Lynch submits that the statements of witnesses provided by the Crown as unused material were admissible pursuant to section 78 of the Police and Criminal Evidence Act 2006. This is to misunderstand the scope and context of section 78. Its purpose is to limit the operation of section 75 which provides for the admissibility, subject to certain conditions, of first hand hearsay contained in a document as evidence of any fact of which direct oral evidence by the person would be admissible. Its scope is confined to circumstances where the maker of the statement is dead, unfit to attend court, outside Bermuda, untraceable, in fear or being kept out of the way. Section 78 then adds that where a statement which would otherwise be admissible by virtue of section 75 was not made pursuant to certain statutory provisos, it shall not be given in evidence unless the court is satisfied that it ought to be admitted in the interests of justice (as to which, the court is required to have regard to certain prescribed factors). In other words, section 78 *reduces* the admissibility of statements made in documents which would otherwise be admissible under section 75. In the present case, Mr Lynch has not identified any statement contained in a document which would be admissible pursuant to these provisions.

Inadequate Summing-up of the Defence Case

23. The Appellant elected to give evidence. He denied being an MOB member. He denied confessing to any involvement in the murder to Harris. He denied that his relationship with Harris had been as close as Harris had described. He had never met Colford Ferguson. Rasheed Muhammad had been and is still his

friend. He had no idea who shot Ferguson. All this and more was summarised for the jury by the judge.

24. Mr. Lynch complains that in a summation which lasted about three hours, only about 15 minutes was devoted to the Appellant's evidence and case. However, this gives a false impression. In terms of time, at least half of the summation was taken up with legal directions. More importantly, the Appellant's evidence was essentially simple. He denied all involvement. What he had said on other relevant issues was fairly and more than adequately summarised by the judge, who also referred to other aspects of his case. The trial had been a relatively short one, given the gravity of the offence, and the highly accomplished Mr. Lynch had addressed the jury for more than an hour in the afternoon of the day before the summation commenced. I have no doubt that all the important features of the Appellant's case were fairly and squarely before the jury and nothing omitted by the judge resulted in an injustice.

Pressure on the Jury

25. At the end of the penultimate day of the trial, with just the summation and retirement of the jury adjourned to the following day, the judge addressed the jury in terms which, it is submitted on behalf of the Appellant, exerted undue pressure on them to return a quick verdict. In order to assess this submissions, it is necessary to set out the judge's words at some length:

> *"I think there is something else I should add, bearing in mind s decision of the Court of Appeal in recent times… There are times when a jury might not be able to reach a verdict on time and the Court may have to consider whether to separate them or allow them to be separated, or to house them in a hotel or something like that.*
>
> *In this jurisdiction there is no provision for separation of jurors, so once you start to deliberate we have to keep you together all the time…So if you are unable to reach a verdict, we would have to put you up in a hotel.*

> *I shall caution you, not to scare you or to pressure you, but that hotel stay is no bed of roses. It's not going to be beautiful. It's not going to be going up to the Hampton and stretching out and having a nice evening and relaxing and so on. It's almost like jail. You are not allowed to communicate with anybody or any such thing. Have to get someone to deliver your nighties for you and your toothbrush and all of that stuff. You are locked in a room and you are kept there, until the next day when you are brought to court…All right?*
>
> *I say that only to prepare you in case you think you might be around for the whole of the night and bring along your stuff. All right? Thank you. See you tomorrow."*

26. The recent cases of *Leshore and Simmons [2016] Bda LR 115* and *Saltus v The Queen, Criminal Appeal No. 7 of 2017*, have encouraged trial judges to prepare juries for the possibility that, once they are in retirement, they may be unable to return home before they deliver their verdict. In *Saltus*, Baker P referred to the need for jurors to be alerted in advance to this possibility. He said (at paragraph 22):

> *"The danger is that if no advance warning is given the judge is left with a dilemma. If he gives no warning before the jury has retired to consider its verdict, the jurors may feel under pressure to deliver a verdict because they have, for example, child care commitments. If, on the other hand, he only tells them late in the day that if they cannot reach a verdict they will have to go to a hotel overnight and continue their deliberations the next morning, that too is obviously unsatisfactory because they may not have been given the opportunity to make the necessary arrangements to be away from home. There needs, in our judgment, to be a standard practice whereby juries are routinely warned at the start of a trial that there is a risk that the problem may arise. They should then be warned more specifically when the time for their retirement approaches, so that they can make any necessary arrangements in case the need arises."*

27. The judge plainly had this guidance in mind when he addressed the jury in the present case. I am sure that he did not intend to pressurise the jury. His intention was to alert them in accordance with the guidance. The question is whether, by going beyond the practicalities and, in particular, by his figurative language – "no bed of roses…almost like jail" – he may have unintentionally exerted pressure on the jury.

28. The Judge referred at two points to pressure. Even before the passage I set out above, two pages earlier in the transcript, he said:

> *"No one likes to rush a jury or make the jury feel that it is under pressure to reach a verdict by a certain time…"*

29. Two pages later, he said:

> *"I shall caution you not to scare you or to pressure you…"*

30. Those were the words which immediately preceded the "no bed of roses" passage.

31. It would have been better if the judge had not descended into detail about the quality of life in the hotel. However, the question for us is whether, by so doing and in the language in which he expressed himself, he crossed the line such that we cannot be satisfied that the verdicts were unaffected by pressure. I am wholly unpersuaded by this ground of appeal, which Mr. Lynch concedes is, by itself, insufficient to sustain a successful appeal. Juries in Bermuda and elsewhere take great care to return true verdicts consistent with their oaths, according to the evidence. At trial, both counsel and the judge referred to the relative brevity of the trial and the straightforwardness of the issues. I do not find anything of substance in this ground of appeal.

Fresh Evidence

32. The fifth ground of appeal is in the form of an application to admit fresh evidence. The application is in respect of an affidavit of Ryan Jay Furbert sworn on 1 February 2019 and an unsworn affidavit of Rasheed Muhammad, together with the transcripts of his police interview in April 2018.

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

> (i) The evidence sought to be called must be evidence not available at this time of the trial; and
> (ii) The evidence must be relevant to the issues; and
> (iii) It must be credible, that is capable of belief; and
> (iv) If the evidence is admitted, the Court will, after considering it, go on to consider whether there might have been a reasonable doubt in the minds of the jury with regard to the guilt of the Appellant if that evidence had been given, together with the other evidence in the case.

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

Ryan Furbert

35. Ryan Furbert was working with Colford Ferguson on 4 February 2011 and was nearby at the time of the murder. At first, it was thought that Furbert might have been the intended victim as a result of an altercation he had had some two months earlier when his gold chain had been taken by Trey Simons and Furbert

had damaged Simons' motorcycle in retaliation. However, at trial, following the evidence of Troy Harris, the case for the Crown was more that the murder was one of mistaken identity in the context of a MOB/Parkside territorial conflict. It was not suggested that Furbert or Ferguson were Parksiders.

36. The Crown had intended to call Furbert at trial. In the immediate aftermath of the murder, he had made a witness statement on 6 February 2011. It was confined to the chain-snatching incident in November. He was next interviewed by the police on the following day, 7 February. He described what he had seen and heard at the time of the murder. He was further interviewed on 20 August 2012 and provided additional information about both events. By the time of the trial, he was in England. His evidence, drawing on the witness statement and the interview record, was read by agreement. The jury were also provided with a document headed "Formal Admissions", wherein the Crown and the defence had recorded selected highlights from the earlier material.

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

Rasheed Muhammad

38. As I have said, the case for the Crown, based on the evidence of Harris, is that Muhammad shot Colford Ferguson. The Appellant now seeks to adduce evidence from Muhammad in the form of a recent unsworn affidavit and the records of police interviews with him on 18 and 19 April 2018, when he was interviewed under caution following the revelations by Harris.

39. It is necessary to set out a brief history of Muhammad's position during these proceedings. We have an affidavit of Ms. Sara Tucker who has been Mr. Lynch's junior throughout. It states:

> *"During the trial I had indirect contact with Muhammad indicating that we wished him to give evidence and to make himself available. He did not. We were unclear as to whether he was even in the jurisdiction but we had no evidence that he was either scared, in fear or otherwise being restrained from giving evidence.*
>
> *I have been in contact with Rasheed since he visited [our] offices on the 19th October 2018, following the conviction of the Appellant, emphasizing his dismay at the conviction and his desire to assist the Appellant. In particular, we discussed why he did not come forward for the Appellant's trial. It was only at this time that he explained his fear of reprisal in coming forward not only for himself but for his family during the trial but because of his history with the Bermuda Police Service.*
>
> *Following this meeting we engaged in further communications by email and WhatsApp, as we sought to detail what would otherwise have been his evidence during the trial into an Affidavit for the purposes of the appeal. It became clear that he was no longer in the jurisdiction and was now residing in the UK – we still do not know where.*
>
> *On his instructions I drafted the Affidavit in its original form and sent it to him on 5th February 2019 for his approval. There was some toing and froing between us and I sent him the final draft on 23rd February 2019*

> *when he confirmed he was happy with the content and he would print and sign it with a solicitor the following day…He did not. I have maintained contact with him but he has vacillated between signing the document and not. He had promised many times that he would do so. He never did.…*
>
> *Whenever I sought to follow up with Rasheed on his swearing of the document he has said he continues to be challenged by forces close to him which are keeping him away from these proceedings for his own safety and that of his family still present in Bermuda.*
>
> *I last contacted him on Saturday, 8 June 2019, via WhatsApp…where he expressed his wish to help the Appellant but his unwillingness to come forward due to family pressure keeping him away and their continued desire to preserve his and their safety.*
>
> *I am satisfied that despite my efforts over the past six months, Rasheed although wanting to participate is either not willing to out of fear or is unable to because he is kept from doing so by others."*

40. Ms Tucker does not exhibit any of the emails or WhatsApp messages. Moreover, her statement about Muhammad's elusiveness during the trial is not wholly accurate. In the course of the hearing, we were told, and it is now agreed, that Muhammad was in fact in the court building on the second day of the trial and a police officer had made Mr. Lynch aware of this at the time. The indirect contact referred to by Ms. Tucker was limited to contact via the Appellant's family. There was no direct contact between the Appellant's legal team and Muhammad before or during the trial. He had not provided any statement or proof of evidence to them.

41. The unsworn affidavit of Muhammad includes these passages:

> *"Prior to the trial and during the course of proceedings I was contacted on numerous occasions by members of the Appellant's immediate family to present myself to his attorneys in attestation of his defence. It was my desire*

to contact Counsel for the Appellant to discuss the information I had which might have assisted the Appellant during the course of his trial but my fear of doing so was greater than my will. I knew once I gave my side I would be asked to participate and I was not mentally in a position to cope with the thought of my involvement or what that could bring about. I did not involve myself and trusted very few people at that time. I refused further contact from those involved and absented myself from making contact with either the Appellant or counsel and I deliberately did so because of fear and not believing the police could or would protect me.

…due to the uncorroborated evidence of a sole witness in the trial…I was concerned about my own public participation during the course of the murder trial. I did not want to appear to incriminate myself in the eyes of others or render myself a target the consequences of which could be fatal; they still are and I will have to think about my future and where it will be. But, I have since taken stock and realised that I should have made myself personally available for the accused at his trial and that my evidence may have had an impact on his defence and the outcome of the trial.…

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

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

> *If given the opportunity I would be prepared to take the stand and provide my full account of my evidence."*

42. The records of the police interview with Muhammad on 18 and 19 April 2018 include the following. When asked if he could remember where he was at the time of the Ferguson murder, he said:

> *"No, I can't recall, but I know I used to work, like, seven days a week and I used to work from seven in the morning 'til eight in the afternoon and it was every day, weekends, holidays…I was very busy. I used to work for KS Watersports then."*

43. He said he was a friend of the Appellant but he denied that he was a member of MOB or any other gang, whilst admitting that since the age of 15 he has had a MOB tattoo on his chest. He said that he did not know who Ryan Furbert was. In the second interview, the officers referred to a witness (unnamed, but obviously Harris) who had come forward and said that the murder was committed by Muhammad and the Appellant, to which Muhammad replied: "No comment". When he was told that the witness was saying that Ferguson was mistaken for Jakai Morris, he said "I have no idea what you're talking about". The record of the interview was a mixture of denial and "no comment".

44. The first question to arise in relation to all this is whether the evidence, such as it is, was not available at the time of the trial. I say "such as it is" because an unsworn affidavit from an alleged accomplice does not immediately inspire confidence. The fact is that Muhammad's evidence is not shown to have been unavailable at the time of the trial. He had not manifested fear to the Appellant's legal team at that time. He was in the court building for part of the trial. We are not told of any attempt to secure his attendance as a witness by legal process nor of any attempt to obtain a statement or a proof of evidence from him until after the trial. There was no application for a short adjournment in order to find him. Whether or not Mr. Lynch would have called him with nothing more than

his interview record as a foundation, and in the knowledge that Muhammad would have had to be advised by the judge as to his privilege in relation to self-incrimination is difficult to fathom. For my part, I am not satisfied that the evidence of Muhammad – and I repeat, such as it is – is evidence that was not available at the time of the trial.

45. There is also some doubt about whether it is capable of belief. Not only is Muhammad unwilling to attend to give evidence (contrary to the assertion in the carefully proposed unsworn affidavit), he is not willing to swear the affidavit before an English Solicitor. This means that the only account which can be formally attributed to him is the one in his police interview. When asked where he was at the time of the murder, his first words were "I can't recall". It is true that he then proffered that he would have been at work because he worked a thirteen hour day, seven days a week. Mr. Mahoney understandably expresses scepticism about that as a working pattern in a water sports business in February. Mr. Lynch submits that it is an alibi and one that the police have not troubled to investigate. However, even if the account of the thirteen hour working day is broadly accurate, it would not exclude the possibility of occasional absence, particularly out of season.

46. In my judgment, there are insurmountable problems in the way of admitting the so-called fresh evidence of Muhammad. The notion that a conviction for premeditated murder might be set aside on the basis of an unsworn affidavit attributed to the alleged principal offender where the only other material attributable to him is his denial in interview when under arrest and caution seven years after the event is unattractive in the extreme. As it is, the application does not satisfy the prescribed tests. Accordingly, I would not admit the evidence.

Conclusion

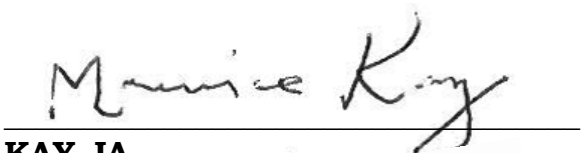
47. It follows from what I have said that I would dismiss this appeal. I reach this conclusion having considered the grounds of appeal both individually and collectively.

BELL JA:

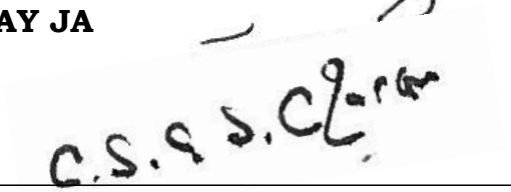
48. I agree.

CLARKE P:

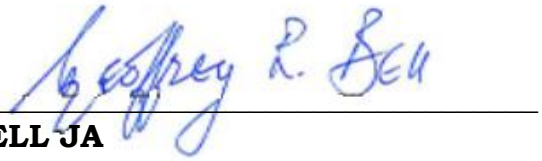
49. I also agree



KAY JA



CLARKE P



BELL JA