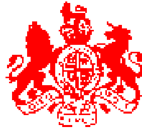

The Court of Appeal for Bermuda

CRIMINAL APPEALS Nos. 3 & 4 of 2015

Between:

LE-VECK ROBERTS & CHRISTOPH DUERR

Appellants

-v-

THE QUEEN

Respondent

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

Appearances: Mr. Mark Pettingill, Chancery Legal Ltd, for the 1st Appellant
Mr. Richard Horseman, Wakefield Quin Ltd for the 2nd Appellant
Mr. Carrington Mahoney and Ms. Nicole Smith, Department of Public Prosecutions, for the Respondent

Date of Hearing: **20, 21, & 24 March 2017**

Date of Judgment: **12 May 2017**

JUDGMENT

Direction on Premeditated Murder---Unjustified Criticism of Defence Expert---Gang Evidence---Cross-examination of Defendant on Expert Evidence not Called---Admissibility of Defendant's Witness statement.

PRESIDENT

1. On 6 April 2015 these two appellants were convicted on two counts of premeditated murder contrary to section 286A(1) of the Criminal Code and two counts of using a firearm while committing an indictable offence contrary to section 26A of the Firearms Act 1973. Roberts was additionally convicted of

taking a motorcycle without lawful authority and was acquitted of an offence of attempted murder. Duerr pleaded guilty to two counts of possession of a firearm and one of possession of ammunition. Each was sentenced to life imprisonment for the premeditated murders with 25 years to be served before consideration for parole. Each was sentenced to concurrent sentences of 10 years' imprisonment for the firearms offences.

Roberts' Conviction Appeal

2. The Crown's case against Roberts was that these were retaliation shootings. From November 2012 he had had issues with the Parkside gang. He believed that members of the gang had discharged a firearm at his house on 8 or 9 November. Leading up to January 2013 he made arrangements to obtain a United States passport. This was ready from 22 January 2013.
3. On the 16 January 2013 he and a man named Benjamin went to the Parkside area to the house of Ziko Majors where the prosecution claimed they shot and injured him. This led to the attempted murder charge of which Roberts was acquitted. The same gun was however used a week later to commit the two murders of which he was convicted.
4. On the 23 January 2013 Roberts, Benjamin and a third person went to the same area of Curving Avenue in Pembroke where they stole a motorbike BP950. A few minutes later three men on motorcycles arrived outside Belvin's Variety store in Happy Valley Road travelling from the direction of Curving Avenue. They slowed and circled in the road outside the store. Rico Furbert was coming out of the store. He shouted: "They are outside. It's more than one person. They've got guns" He and Haile Outerbridge then ran towards the back of the store. Roberts went into the store and appeared to follow Furbert. Shots then rang out from the back of the store. Ahisha Francis, who was working in the store, pressed the panic button and the police were called. Francis described the shooter as taller than her. She is 4'11". He said nothing and walked back outside the store with long strides. He wore a dark jacket and a helmet with a tinted full-faced visor that was down. Both Furbert and Outerbridge died from gunshot wounds. Four shots were fired.

5. The motorcycle BP950 was found some 300 or 400 metres from Roberts' residence. Component particles of gunshot residue were found on the vehicle. Roberts then got a lift on another motorcycle to his father's residence where he was seen by Patti Robinson who lives across the road at 31 Hillview, Warwick. Ms. Robinson heard a motorcycle ride in through the gate of her property. She was unable to identify the rider who pulled his visor down so that his whole face was hidden. Roberts, however, was the pillion passenger whom she had known for many years. He waved and called out: "Hi Auntie". She was surprised to see him as the pillion passenger as he was normally the rider. Ms. Robinson then noticed her outside light was off. Roberts had unscrewed the bulb so that the yard that Ms. Robinson shared with his father was in darkness. She screamed at him to put it back in which he did. Early the following morning Roberts took a photo of the front page of the Royal Gazette reporting the double murder. This was later found on his cell phone.
6. On the evening of 25 January 2013 police officers went to Roberts' home. They noticed several motorcycles in the yard. One matched the description of one used in the shooting of Ziko Majors on 16 January. Roberts was arrested and was wearing a bullet proof vest under his shirt. Particles characteristic of gunshot residue were found on both of his hands and on other items seized. Material including photographs was found on his phone glorifying the MOB gang and showing hostility towards Parkside.
7. The case against Roberts depended on circumstantial evidence. There was no identification of him as the shooter. The circumstantial evidence included evidence from an imaging expert who had examined pictures of the gunman at the scene which showed dark tones that possibly matched tattoos on Roberts' right hand and upper wrist. There was also evidence from Akelah Hendrickson who had a relationship with Roberts. She said that there was one occasion on which he had promised to call her back but did not. When eventually he did he said that he could not call before because he had jumped overboard to remove gunpowder from his clothes. But she was unable to recall the date of the conversation. On another occasion, when she visited his residence, he unwrapped a towel and showed her a dark gun.

8. At the time of the offences Roberts was on probation and therefore unable to travel overseas without permission from the Department of Court Services. Unbeknown to them, he had applied for and obtained on 22 January 2013 a United States passport. Following his arrest he was released on bail and travelled on this passport to America. He resisted the subsequent extradition proceedings but was eventually extradited.

Identification Evidence

9. Mr. Pettingill who appeared on the appeal for Roberts, but did not represent him at the trial, began by challenging two aspects of what can be broadly be described as identification evidence. The first relates to the evidence of Patti Robinson and the second the interpretation of the stills of the gunman suggesting tattoos on the right hand/wrist region.
10. Patti Robinson did not give evidence in person. Her evidence was read to the jury under section 75(1) of the Police and Criminal Evidence Act 2006 because she was in fear. The complaint in the amended notice of appeal is that the judge erred in allowing her evidence to be read in and subsequently failed to give an adequate ruling on how the jury should deal with identification. There was clear evidence that Ms. Robinson was in fear. Her statement concluded by saying that it had taken her a long time to make it as she was afraid of the repercussions. She was offered protection but did not wish to leave Bermuda, her family, and friends. She was too fearful to come court and give oral evidence. The judge had a discretion to exercise and he took account of the relevant facts including the prejudice to Roberts through being unable to cross examine her. I can see no basis for interfering with the judge's exercise of his discretion.
11. In the course of his ruling the judge read from the relevant passage in *Archbold* setting out the various matters that should be taken into account. These included that in an identification case it is necessary to give an appropriate warning about the dangers of identification evidence. The judge concluded his ruling saying that these were all directions that would carefully and appropriately be given to the jury. Mr. Pettingill picked up on this and submitted that a full *Turnbull* direction should have been given in respect of Ms. Robinson's evidence. This was not,

however, an identification case. She had known Roberts for many years and there had been previous instances of him unscrewing and removing the light bulb. He knew her sufficiently well to call her "Auntie". It is to be noted that the objections to the admissibility of her evidence were on the basis that the defence wished to cross-examine her about her previous convictions and the use of drugs and suggest that, if not untruthful, she might be mistaken or confused. In my judgment this was a recognition rather than an identification case and a full *Turnbull* direction was unnecessary and indeed would have been confusing to the jury. The witness was very familiar with Roberts.

12. When Ms. Robinson's evidence was read to the jury the judge gave them an appropriate direction about how to approach her evidence and the disadvantage to the defence of being unable to test her evidence. He pointed out that just as with identification there could be mistakes in recognition cases too. In my judgment the judge's direction was adequate for the circumstances of the case. It is not in every recognition case, whatever the facts, that a full *Turnbull* direction is required, see *Capone v R* [2006] UKPC 34 para 22.
13. When the judge summed up he described Ms. Robinson as an important witness whom the defence would have liked to cross-examine. He mentioned that he had earlier directed the jury how they must approach her evidence. He told them to keep those directions in mind but did not repeat them. I do not think he was obliged to repeat them.
14. What can be gleaned from Ms. Robinson's evidence is that she saw him some 37 minutes after the murders riding pillion on a bike she would ordinarily expect to see him driving and timing that fitted with the earlier abandonment of BP950. There is also the question why he removed the bulb to put the yard in darkness. In my judgment the judge dealt appropriately with Ms. Robinson's evidence.

CCTV Video Footage

15. This ground of appeal complains that the judge erred in law in allowing evidence of CCTV footage to be put before the jury. It was, it was argued, of such poor quality that the jury could not rely on it to identify Roberts, and its prejudicial effect outweighed its probative value. Mr. Pettingill expanded on this ground

arguing that it was inappropriately used as identification evidence and the judge gave it greater significance than it justified.

16. The main area of complaint concerned evidence relating to what could be to a tattoo on the shooter's hand/forearm area that the prosecution contended matched one on Roberts. The prosecution called Jacqueline Pestell, a Senior Forensic Imagery Investigator. She found moderate support for the man in the CCTV footage (the shooter) having tattoos consistent with Roberts. Her expert opinion was that there was moderate support for the dark tones observed on the CCTV footage being tattoos. On the scale of likelihood moderate support, she said, came between limited support, meaning some evidence, and strong support. At the top of the scale was powerful support. In cross-examination she said it could be skin pigmentation or a birthmark or a smudge or a shadow, or it could be a tattoo. These were the reasons why there was only moderate support.

17. The defence likewise called an expert, John Fowler, in the interpretation of CCTV footage. He said he could see no tattoos on the CCTV footage and what he could see were just shaded shadows. In his opinion there was not even limited support.

18. No application was made to exclude the evidence of Ms. Pestell. The defence had their own expert whose opinion differed from Ms. Pestell's and this was plainly a case in which it was for the jury to listen to the differing opinions of the experts and decide what, if any, assistance was to be obtained from the evidence of either or both of them.

19. I cannot accept the submission of Mr. Pettingill that because the tattoo evidence was evidence of identification it required a *Turnbull* type direction. *Turnbull* directions are required because of the proven risk of human error where there is identification by an individual or individuals. In the present case the Court was concerned with expert interpretation of CCTV footage, the issue being whether there was something on the CCTV footage that could match a tattoo on Roberts. It was a matter for the judge in summing up to direct the jury appropriately as to their approach to this evidence and the significance that they might attach to it. It is therefore necessary to turn next to how the judge dealt with this.

20. In the first place, before summarising the evidence the judge began with the standard warning that the facts were for the jury and that they should ignore any

views he might appear to express if they did not agree with their own. He was entitled to express a view but it was not his job to try and persuade them one way or the other. Mr. Fowler admitted in evidence that he had made prints of the CCTV images slightly lighter in order to try and see the available detail. Mr. Mahoney for the Crown suggested that he had done this in order deliberately to blur the image. Both experts were cross examined at great length.

21. The judge said at p.152 of his summation:

> "So let me pause here to direct you and remind you again that regardless of the opinion of any expert, including the imaging expert, anyone at all, she can only, or they can only give you their opinion of their findings and the basis upon which these findings were found. The real question as to what the matter means is entirely yours. That means you have to look at the evidence as a whole and determine for yourselves whether, having regard to all you now know or find, that those marks in those images are tattoos on the shooter, that they are similar or the same as those on the Defendant's hand, and lower arm, and that it was the Defendant that did the shooting, before you can apply that evidence to convict him, bearing in mind at all times that the Defendant has to prove or disprove nothing."

Having made that general observation the judge returned to the topic of the experts at p.300, pointing out that the prosecution was inviting the jury not to accept Mr. Fowler's evidence where it differed from that of Ms. Pestell because he'd lightened the very area which she said was shade giving moderate support for the contention that it might be a tattoo or something else. He went on:

> "So you may think the prosecution is entitled to say this witness tried to fool you until forced to accept that he 'lightened' out the area, and you may think the prosecution are entitled to ask you to find that he only did that to assist the Defendant and not you, and therefore if he is found wanting on that, he must be found wanting on the other images as well, and his explanations thereof therefore."

A little later he went on:

> "Of course on the other hand you may think the defence is not at all in agreement with that, the prosecution position. They are saying that that was just

> used to demonstrate so the man could see clearer, and unfortunately that's how it came out."

22. The judge made the critical point at p.303 that everybody accepted that: "you can't tell if it was a tattoo or not." That was for the jury to determine having regard to the whole of the evidence. The experts' opinions could only take them so far. The judge said again at p.306:

> "As I have repeatedly told you, what (the marks) are, having regard to all the evidence in this case, is a matter entirely for you, not the experts. You can accept and/or reject whatever or whichever expert evidence you desire."

23. In my judgment the judge dealt appropriately with this aspect of the evidence. The evidence of Ms. Pestell, if the jury accepted it, was of some probative value. There was moderate support for the shooter having a tattoo in the same location of the hand/wrist as Roberts' tattoo. In *Attorney-General's Reference No 2 of 2002* [2002] EWCA Crim 2373 Rose LJ gave guidance on the admissibility of evidence relating to photographic images from the scene of an offence. The present case falls within category (iii), see para 19. The jury saw the images and had the advantage of the expert's interpretation. Although the judge in his summation expressed rather more strongly the prosecution's complaint about Mr. Fowler's evidence than had been put to him in cross examination, the difference between the two experts was plain for the jury to see.

24. In my judgment the conflicting expert evidence about the tattoos was properly before the jury. The judge appropriately explained the differences between them and that it was for the jury to decide what evidence they accepted and its relevance to the case as a whole.

The Premeditated Murder Direction

25. This ground of appeal, which applies to both Appellants, was argued by Mr Horseman, who appeared for Duerr. Counts one and three charged both Appellants with premeditated murder contrary to section 286A(1) of the Criminal Code Act 1907. At the time of the commission of these offences premeditated murder was distinguished from murder. Both offences carried mandatory life

sentences but premeditated murder carried a longer period of detention before eligibility for release on licence. Premeditation is defined by section 286B:

> "Premeditation is established by evidence proving, whether expressly or by implication, an intention to cause the death of any person, whether such person is the person actually killed or not, deliberately formed before the act causing the death is committed or the omission causing the death is made, and existing at the time of the commission of that act or the making of that omission."

Unfortunately the judge fell into error on a number of occasions in directing the jury as to the mental element necessary to constitute the offence of premeditated murder. He failed to distinguish between what was necessary in murder and what was necessary in premeditated murder. In order to commit premeditated murder the element of premeditation is required as defined by section 286B. The mental element required for the offence of murder under section 287 is different because it is sufficient if the perpetrator intends to cause grievous bodily harm, and in fact kills. An intention merely to cause grievous bodily harm is a lesser intention than an intention to kill and is insufficient for premeditated murder.

26. The Crown's case against Roberts was different from that against Duerr. Roberts was alleged to have fired the shots whilst Duerr was the armourer alleged to have provided the gun. He was charged as a secondary party. The judge correctly directed the jury at p.60 that before they could convict either appellant of count one they had to be sure he had killed with premeditation. He then went on unnecessarily to tell them that murder could include killing someone with an intent to cause grievous bodily harm. He continued at p.63:

> "And remember that knowledge is also an important component, particularly when it comes to Mr Duerr. He had to have known, at the time, when he get/or handed over the firearms, delivered them up, that the intention was to use them to cause the death of somebody, regardless of who was going to do it, to cause the death, or regardless of who …whose death they were going to cause, or regardless of what place they were going to cause this death. Right. The intention must have been to kill or to cause grievous bodily harm. Grievous bodily harm means that….it means serious interference with someone's health or

> comfort. Now, you know a bullet in a fella must cause a fella serious discomfort to his health. Right? So that should be no big issue."

Then he went on:

> "The act must have been carried out with premeditation. What is the meaning to that?"

He then recited the definition in the Criminal Code and continued:

> "So (if) you find, for example, that, let's say it is Mr Roberts, and he left wherever he left and went all the way to Curving, with the intent to kill somebody, and when he gets there….that would be the premeditation…. and when he gets there he still puts it in, in motion, it is still in motion at the time he doing it, …so all premeditation is is a little intention before the intention is put into place. All Right?
>
> And in the case of Mr Duerr, let's say that you found that Mr. Duerr did assist and so on, it would be that he, at the time when he was handing over the firearms and so on, that he knew that the plan was to kill the person, or cause the person or persons grievous bodily harm. And that would still be operating at the time of whoever carried it out, at the time of the killing. So the premeditation would be established."

It is impossible to read this passage other than saying that Duerr would be guilty of premeditated murder if he handed over the gun knowing that the plan was to cause someone grievous bodily harm.

27. The judge went on to compound his error when dealing with the difference between the attempt to murder Zico Majors, of which Roberts was acquitted and the substantive murder cases. The intent required in both cases was an intent to kill. But again the judge told the jury that in the murder cases the necessary intention was either to kill or to cause grievous bodily harm. Later in his summing up when referring to Duerr he again mentioned awareness that the gun was going to be used to kill somebody or cause him grievous bodily harm. (p.219). And just afterwards at p.220 he said:

> "I understand the prosecution to be saying, on the basis of the evidence and the law, you should find the defendant Duerr guilty of counts one to four because

> he knew at the relevant time that the firearms were intended to be used… for that; that is, that he knew the firearm in this case was to be used to kill or cause grievous bodily harm to another human being, even if he did not know how specifically, whom….sorry…..did not know specifically whom and by whom, and he must have handed over that gun knowing that and agreed to receive and keep them after the event."

28. The error was repeated by further references to an intention to cause grievous bodily harm, including at pp 262, 350, 362, 369 and 378. Whilst these were all references to the state of mind of Duerr, and I shall deal with their significance when I come to deal with his appeal, they are not without some significance in Roberts' case. Both men were charged with premeditated murder and they compound the initial unnecessary reference that an intention to cause grievous bodily harm was enough for murder when in fact the charges were premeditated murder. Furthermore, the case was throughout advanced by the Crown against both Appellants on the basis that it was premeditated murder or nothing.

29. It is most regrettable that at no stage was the judge's attention drawn to the repeated misdirection. Had this been done the judge would no doubt have corrected it. The Crown's position on the appeal is that the case against both Appellants was always put on the basis of premeditated murder and that an alternative verdict of murder was never an option. Roberts did not give evidence and his case was that he was not the person who shot Outerbridge and Furbert. The case is similar to *Hewey and Dill v The Queen*, Criminal Appeals Nos 9 and 11 of 2013 in which the judge made a similar error and there too the case was premeditated murder or nothing. The difference in *Hewey and Dill* was that the judge in that case corrected his error. Here it was repeated many times and he did not.

30. The judge did initially correctly direct the jury about the need for premeditation and what it amounted to and most of the subsequent misdirections were directed to the case of Duerr. The case against Roberts was put from first to last on the basis that he deliberately shot the victims as a planned retaliation and was one of premeditated murder. The only issue was whether he was the shooter. I cannot see that he could have been prejudiced by the misdirections and accordingly the safety of his convictions for premeditated murder is not affected.

Gang Evidence.

31. This ground of appeal is that the "gang evidence" should not have been admitted because it amounted to evidence of bad character and its prejudicial effect outweighed its probative value. The leading authority on this topic is *Myers and Ors v the Queen* [2015] UKPC 40.

32. After the shots were fired at Roberts' house in November 2012 he was interviewed by the police who were obviously interested in the identity of the perpetrator or perpetrators. In the course of the interview he volunteered that members of the Parkside gang did not like him. He denied association with the MOB gang but said he had a cousin who was. He said he had told the police previously that Parkside guys were after him. The only reason he could think of was that he had a cousin from Somerset. The Crown's case was that the shots fired at his house in November provided the motive for retaliation.

33. The Crown called Sgt Rollin, the well-known expert in Bermuda gangs. No objection was made to his evidence. The Crown's case was that, although not a defendant at the trial, the second man with Roberts at the time of the shootings was Gariko Benjamin. Sgt Rollin identified Benjamin as a member of MOB. He also identified a ring worn by Roberts on a chain around his neck as looking like a West Side ring. West Side is closely associated with MOB. He also identified Duerr's connection with MOB, in particular through a photograph showing a gun with bullets arranged in the shape of a G and an S, "GS" representing Gully Side which he associated with MOB. Sgt Rollin described Furbert as associated with, but not a fully-fledged member of, the Parkside gang. Outerbridge too was not a gang member, but associated with, Parkside. Guns, he said, were kept in a safe place and returned after use.

34. Rollin was not cross-examined on behalf of Roberts and only briefly on behalf of Duerr. His evidence was largely unchallenged. Zico Majors' evidence was that he knew people connected with Parkside and there was a voice note found on Roberts' phone showing connection with MOB and hostility towards Parkside.

35. The judge in summing up explained the relevance of the gang evidence. He said this at p.260:

> "Well, the gang-related evidence is only admitted to establish that Mr Roberts was so closely associated with persons or persons of the MOB, to whom the relevant firearms in this case appears to belong, that despite its preciousness to that group, he was able to achieve access and use of it. This close association, the prosecution is saying, is demonstrated by the telephone records that you have, those line of [indiscernible] records, which shows his contact with Gariko Benjamin, for example, an MOB man, whom the Crown says was his partner in these enterprises for which he's charged. The photos of him wearing jewellery similar to that worn by Benjamin, which speaks of the West Side and so on, which the prosecution is entitled to say shows a sufficient sympathy with the group that its members would trust him with their firearm, for this enterprise."

In my judgment the gang evidence cannot realistically be described as evidence of bad character. It was properly admitted in order to explain a motive for the killings and access to the weapon that was used. Sgt Rollin's evidence had clear and substantial probative value and was properly admitted.

The Evidence of Angela Shaw

36. Angela Shaw is a forensic scientist with expertise in gunshot residue. She was called on behalf of Roberts. The Prosecution had called Allison Murtha. The issue giving rise to this ground of appeal arises in respect of a three component particle of gunshot residue found on the back of Roberts' left hand following his arrest two days after the murders. Ms. Murtha agreed that gunshot residue from someone who's fired a gun does not normally remain on their hands for more than six to eight hours if they have engaged in normal activity, but it could be transferred from another source from an item that was present when the firearm was discharged. Ms. Shaw's evidence was that gunshot residue on the hands will only remain for up to a maximum of four hours, that it was probably deposited just before he was sampled. As he was arrested by armed officers that was a potential source of contamination. She accepted in cross-examination (p.1728) that re-contamination from, for example, his own clothing, was also possible and

she could not say whether that had occurred in the present case. At p.1734 she was asked by the judge:

> "The question still is a direct question that requires a direct answer. You cannot say how that three-component particle got on the back of (Mr Robert's) hand is that correct or not?"

To which she answered: "Correct".

37. When the judge summed up he said at p. 284:

> "When Miss Shaw said that in her opinion that three-component particle could not have come from the shooting done on the 23rd of January 2014 [sic], I am directing you that she exceeded her role, her jurisdiction, at that. She's in my view not entitled to tell you that. That is a jury issue. Only a jury can tell you that. All right? Even with the explanations she gave, I say to you, she cannot tell you that. And the simple reason why she can't tell you that is she doesn't know under what conditions that particle got there. Okay? She can only tell you what the particle is. All right? Why it should not have been there or not. But she cannot choose between whether it came from an officer or whether it came from the shooting on the 23rd. Only you can do that. Okay?"

This is a most unfortunate passage because it contains an unjustified criticism of Ms. Shaw and seems to have been based on a misunderstanding of her evidence. There was much common ground between the experts. Ms. Shaw's evidence-in-chief was that gunshot residue will only remain on hands for up to a maximum of four hours. When she was cross-examined she agreed that secondary transfer was a possibility, either by contamination from contact with armed officers or, more pertinently from the prosecution's point of view, by transfer from contact by the Appellant with, for example, gunshot reside on his helmet, bullet-proof vest or clothing.

38. I cannot accept that Ms. Shaw exceeded her role. It was never her evidence that the three component particle on the back of the Appellant's left hand could not have come from the shooting either directly or indirectly. The judge returned to the topic at p.292:

> "The Roberts defence, however, has asserted that you should accept Miss Shaw's evidence, a witness of truth from science, and that it constitutes reasonable doubt that any of these particles, whether the single three-component GSR or any or all of those other particles, despite that they are barium, lead and antimony in their various varieties and numbers came from the discharge of a firearm, and in particular discharge of the firearm in this case, and particularly the revolver on the 23rd of January 2013.
>
> On the other hand, the prosecution is asking that you reject Miss Shaw's evidence. She is not an honest witness, she is a bender of the truth, science and opinion and that except in the areas where she's in agreement with Ms Murtha, whether they're by forced admissions in cross-examination or otherwise, you should reject her evidence. It causes no doubt that can be termed reasonable to the Crown's case.
>
> You will recall I have directed you that no expert can tell you what interpretation or opinion to form about any evidence. What the evidence means is entirely up to you. You have to determine its meaning according to all the evidence you have heard. The experts have not heard all the experts have not heard all the variations of evidence you have heard, so you may apply your common sense, look at the other evidence in the case which weakens or displaces the opinion of any expert, or strengthens or supports it, and you may reject or accept any evidence of any expert, as you consider fit."

39. I have read carefully the whole of the evidence of Angela Shaw and at no point was it put to her that she was dishonest or a bender of the truth, science or opinion. Furthermore, the case of *R v Stockwell* [1993] 97 Cr App R 260 makes clear that an expert may give his opinion on matters within his or her expertise that are likely to be outside the experience of the jury but that the judge's job was to put the expert evidence in its proper perspective and the jury was not bound to accept it.

40. In the circumstances it is necessary to look and see what, if any, effect these regrettable errors on the part of the judge may have had on the safety of Roberts' conviction. The jury can have been in little doubt of the view held of Ms. Shaw by the judge, but in truth there was very little difference between the evidence of the

two experts, a point that the judge himself made at p.1741 during Angela Shaw's cross-examination. The evidence relating to the gunshot residue on the back of Roberts hand was but a small part of the considerable circumstantial evidence against him.

The Evidence of Akelah Hendrickson

41. Roberts and Akelah Hendrickson had a relationship between 2010 and about September 2011. They maintained communication for some time after the relationship ended. On one occasion during the relationship when she was visiting him he showed her a gun wrapped in a towel which he then took to the closet. On another occasion he promised to call her back on his cell phone but did not. When he eventually did call Ms. Hendrickson asked him why he had not called earlier and his answer was that he had jumped overboard to remove gunpowder from his clothes. The defence objected to the admissibility of this evidence but the judge admitted it. There was no precision as to the dates of these events but they both appear to have been some time before the shooting. The basis of the judge's decision was that the evidence was probative to show that Roberts had access to firearms and experience in how to lose particles from a discharged firearm.
42. Mr. Pettingill submitted the evidence was prejudicial because it showed a propensity to deal with firearms outside the context of the offence charged. It was prejudicial but it was probative too. Probative evidence often is prejudicial. The prosecution was entitled to lead evidence to rebut possible defences. The whole purport of his interview with the police following the shooting at his house was that he could think of no reason members of Parkside had hostility towards him, a position that was entirely inconsistent with access to and the discharge of guns.

Severance

43. This ground of appeal is that the judge was wrong in law to deny severance and that all the counts on the indictment should not have been heard together. The substance of this complaint is that counts five to seven should have been

severed. These are the counts relating to possession of firearms and ammunition to which Duerr pleaded guilty. No transcript of any ruling on a severance application was produced. It seems to me obvious that both Appellants should be tried together. Indeed there had been a previous successful joinder application which was not subject to appeal. The essence of the case against the Appellants was that whilst Roberts was the shooter, Duerr supplied the weapon. As Mr Pettingill developed his argument it appeared that his real complaint was that the jury should not have been told of Duerr's guilty pleas. This point was not taken at the trial and had it been would in my view have been bound to fail.

The Voice Note

44. A voice note was taken from Roberts' phone on 25 January 2013. It was played to the jury and a copy exhibited. Its only relevance was that it showed hostility to members of Parkside. It was appropriately led in evidence as it had some probative value.

Treatment of Defence Witnesses and Defects in the Summing Up

45. These two grounds of appeal are expressed in general terms and Mr. Pettingill did not expand on them in his submissions. The treatment of defence witnesses relates to the evidence of Mr. Fowler in relation to the tattoo and Ms Shaw in relation to the gunshot residue and there is really nothing to add to my conclusions on the grounds of appeal that relate specifically to them. It is true that the judge intervened on many occasions, particularly during the evidence of Ms. Shaw but this was largely for the purposes of clarification or to keep control of the proceedings.

46. As to the summing up, the complaint is that the summing up was: "convoluted, factually inaccurate, biased and inequitably unfair. The judge was palpably unassertive and incomplete when summing up the Defendant's case. The cumulative effects of these errors is that the Defendant was denied a fair trial." Leave was not given on this ground and, although the application for leave was renewed it was not argued by Mr. Pettingill. In order to get a ground of this nature on its feet it is necessary to particularise in detail, with references, the

particular passages relied on. That was not done in this case and broad generalisations are not enough. It should also be pointed out that the Appellant chose not to give evidence, so there was no account from him to contradict the evidence of prosecution witnesses and the inferences that might be drawn from it.

Ruling that there was a Case to Answer

47. The judge in his ruling that there was a case to answer on the first four counts said simply that the evidence speaks for itself. It was a matter for the jury the weight to be attached to it. I agree. In summary, Roberts had a motive because of his issues with Parkside. The same firearm was used as in the Zico Majors shooting. The motorbike BP590 was used in the shooting and then abandoned with gunshot residue particles on it close to his residence. Soon after he was seen by Patti Robinson, uncharacteristically on the back of another bike at his father's house. He tried to conceal himself and his colleague by unscrewing the light in the yard. Then there is the photograph of him holding a copy of the front page of the Royal Gazette with the story of the murders and the numerous gunshot residue particles found on his clothing when the police went to his home two days later plus the three component particle on the back of his left hand. There was also the shadow evidence that could have matched a tattoo. Added to this there is the telephone and internet activity on the night of the murders and his planned departure from Bermuda, leading to his subsequent extradition from the United States. All these factors together led to a compelling case of circumstantial evidence against him that the judge inevitably concluded called for an answer.

Conclusion in Roberts' Case

48. Roberts chose not to give evidence himself that might have answered the various points relied upon by the Crown. He was, of course, fully within his rights not to go into the witness box and this did not add one iota to the case against him. But it did leave the Crown's evidence unchallenged, and the jury to draw appropriate inferences from it. He did call two expert witnesses, but their evidence in the end did not differ greatly from the experts called by the prosecution. I have considered

carefully whether the errors on the part of the judge that have been identified affected the safety of the conviction and have concluded that they have not. Accordingly in my judgment this is an appropriate case in which to apply the proviso under section 21(1)(a) of the Criminal Appeal Act 1964, no substantial miscarriage of justice having occurred. I would therefore dismiss his appeal against conviction.

Duerr's Conviction Appeal

49. The case against Duerr was that he was the armourer and kept the firearms for members of MOB. He supplied the firearms when they were needed. Photographs from his computer showed that he had been a custodian at least since 2011. His pleas of guilty show he was still a custodian on 28 January 2013. About two or three weeks before the murders Rutica Belboda, Duerr's then girlfriend, was shown two guns by Duerr. He showed her how to open the barrel and where the bullets went. He then put them back under the mattress. On 28 January she telephoned a friend in the police because of her concerns. While he was in the bathroom she took photographs of the guns, replaced them under the mattress and then sent the photographs to her friend by WhatsApp. The police arrived to execute a search warrant. Duerr grabbed the guns and went into the attic. She noticed he was on the phone. He was calling Romano Mills about the illegal items in his possession He then left the premises, holding a white plastic bag but as he evaded the police he dropped drugs and ammunition from the bag. Between 23 and 24 January Romano Mills had been to Duerr's residence and handed him a plastic bag containing two firearms, ammunition and drugs.

50. On 29 January, Duerr gave himself up to the police. He was arrested and gave a "no comment" interview. The murder weapon was recovered from 45 Seawall Drive, Sandys on 24 April 2013. It contained two live rounds and four spent casings.

51. On 31 May 2013, Duerr volunteered to give a witness statement and did so in the presence of an attorney, Larry Scott. It was not given under caution. In that statement he said that the murder weapon and two other weapons were handed to him either on the day of the killings or on the following day by someone whom

he said he was not prepared to name but who he claimed was not the killer, albeit he told Duerr exactly how the murder happened.

52. He then went on to say that he had been present both before and after the shooting of Lorenzo Stovell which had taken place in September 2012 and that he had been handed a weapon and a bullet proof vest.

53. Of the weapons that had been in his custody, the murder weapon was already in the possession of the police. He knew the identities of the shooter and the man who stole the bike but was not prepared, for his own safety, to disclose them. He said the murder weapon was liable to malfunction in that it jammed and then shot again. After he had escaped from the police on 28 January he stashed the weapons, later retrieved them and handed them on to someone else.

54. Mr Horseman, who appeared for Duerr on the appeal but not at the trial, argued three grounds of appeal. These are the judge's misdirection on premeditated murder, the admissibility of his witness statement of 31 May 2013 and cross-examination of Duerr on DNA evidence that was never lead by the Crown.

Premeditated Murder

55. I have already covered this ground at paras 25 to 30 supra in relation to the appeal of Roberts. It only remains necessary to consider the consequences of the repeated misdirection in the case of Duerr in that he was not the shooter. He was charged as an accessory before the fact, the allegation being that he was the provider of the murder weapon. His state of mind at the time that he handed over the weapon was therefore critical. In *Shorter and Ors v R* [1989] LRC (Crim) 440 this Court approved the submission of the Attorney-General in these terms:

> "The distinction between premeditated murder and murder is the presence in premeditated murder of a deliberately formed intention to kill, so formed before the *actus reus*, and existing at the time thereof. It must be a deliberate and calculated act. An instantaneous reaction to an emotional crisis when the act causing the death is done suddenly in the heat of passion or as the result of a sudden spontaneous intention to kill, that would not amount to premeditated murder but to murder under s.287(1)(a) of the Criminal Code. An intention deliberately formed, as is required for premeditated murder, means an

> intention not the result of an automatic reflex action or formed when there is a temporary suspension of one's reason....Our legislature intended to create a capital offence to cover those homicides whereby not only is there an intention to kill but that intention precedes the act for sufficient time to permit the perpetrator to desist."

Premeditated murder is no longer a capital offence but the legislature does require a longer period in custody during a life sentence before eligibility for consideration for parole. The element of premeditation necessary to constitute the offence is in my view no different today from that described in 1989.

56. The judge's numerous references that I have referred to at para 27 supra to an intention to cause grievous bodily harm in my judgment amount to a clear direction to the jury that they should find Duerr guilty of premeditated murder if they are satisfied that when he handed over the gun he knew it was to be used for causing someone grievous bodily harm. Whilst that would be a sufficient *mens rea* for murder, it is not sufficient for premeditated murder and the convictions for premeditated murder cannot stand.

Admissibility of the Witness Statement

57. The judge ruled that parts of Duerr's witness statement of 31 May 2013 were admissible and parts were not. Mr. Horseman argued that the whole of the statement should have been excluded because it was not made under caution, it was made to a family member who was a member of the Bermuda Police Service and was made on the advice of a lawyer whom the police had recommended to Duerr.

58. The background to the making of the statement is to be found within it where Duerr explains that he was in custody and believed he could assist the police in their investigation as he had information that he wished voluntarily to provide. He said he had been given no promise or inducement. The reality is that he had been in possession of firearms to which he had no answer, indeed he subsequently pleaded guilty, and thought he might improve his position on sentence by assisting the police. At the same time he no doubt had an eye on distancing himself from the murders.

59. As to the lawyer, Duerr explained in his statement that he was in the process of changing lawyers. Mr. Mussenden was too busy with other cases and he could not get hold of Mr. Richardson. The judge concluded that whilst it was best practice for the police not to recommend any particular lawyer, he was not, in the circumstances going to rule the statement inadmissible on that ground. Duerr had taken counsel from Mr. Scott and appeared to be satisfied with him. It was, said the judge, not necessary to go into any issue as to whether Mr Scott was competent or incompetent. He was, said the judge, an experienced criminal lawyer who had practised for a long time with much success. In my judgment the judge was correct in his approach.

60. The complaint about the relative arises in this way. On 30 May 2013 Duerr was already in custody at Westgate. He was arrested on suspicion of the two murders and taken to Hamilton Police station. He was there interviewed under caution on two occasions but made no comment. On the following day Duerr said he wanted to speak to the police but he would only speak with Mrs. Burns, who is, apparently, a cousin. Thereafter the interview took place with D.C. Beach and D.S. Burns. I cannot see anything objectionable, particularly in a small community. Importantly, D.S. Burns was the one person to whom Duerr was prepared to speak.

61. The absence of a caution was the point that troubled the judge. He concluded there was no prejudice to Duerr in relation to his statement about the guns, how he had been in possession of them, how they had been used by others and secured by him. He thought his statement relating to the Stovell murder was also admissible because it went to the issue whether he knew the purpose to which the gun might be put on 23 January. However, he felt that Duerr ought to have been cautioned at the point at which he switched from the guns to the Belvin's murders because from that moment on he was making more direct statements about the murders with which he had been charged. He concluded that he could not be sure that if cautioned he would have continued as he did and that part of the statement was therefore inadmissible.

62. The issue before us is whether the judge should have gone further and ruled out the whole statement or alternatively that part of it referring to the Stovell murder.

Should Duerr have been cautioned at the outset, or at the point where he began to discuss the Stovell murder? On the previous day he had twice been cautioned and made "no comment" interviews. Furthermore he had the advice of an attorney and wished to give information to the police to whom he was speaking at his request. In my judgment the statement was properly admitted. Whilst it is arguable that Duerr should have been cautioned at the point where he began to discuss the Stovell murder, the statement was voluntary and I cannot to see that its admission affected the fairness of the proceedings.

63. Mr. Horseman made the point that the effect of the judge's ruling was to rule out the exculpatory part of the statement which was consistent with his defence that he only received the guns after the Belvin's murders and therefore was only guilty as an accessory after the fact. However, that exclusion was at the request of the defence.

DNA Evidence

64. This ground of appeal relates to the cross-examination of Duerr about DNA evidence that was not led, but could have been led by the Crown. It concerned Duerr's DNA on shell casings and live rounds from the murder weapon. Candy Zuleger was the DNA expert called by the Crown. During cross–examination of Duerr Mr. Mahoney showed him her report of 3 June 2013 and referred him to the section headed: Sample 13-00097 (2 live rounds and 4 casings). Duerr's counsel objected on the ground that the passage there referred to had not been led in evidence by Ms Zuleger. The objection was overruled by the judge and Mr Mahoney then put the substance of the report to Duerr which was:

> "A partial DNA mixture consistent with originating from at least two people was obtained at 14 loci. A major donor could not be determined. Christoph Duerr is included as a possible contributor to the mixture at 12 loci. Based on these results, the combined frequency of occurrence of the mixed DNA profile obtained for sample 13-00097 (2 live rounds and 4 casings) for unrelated individuals in the following populations is approximately 1 in 114,000,000 (114 million) for the White Bermudan Population. 1 in

> 4,000,000,000 (4 billion) for the Black Bermuda Population. Garon Smith and Terry Thomas are excluded as contributors to the mixture."

65. It was then put to him that these were from the black firearm, the murder weapon that was recovered by the police from the premises of Terry Thomas on 24 April 2013. The judge then intervened:

> "So let me get the point then. So you're suggesting to him, therefore, that this firearm which he say he never saw before the 23rd is now discovered someplace else. We know it's the Belvin's firearm. And it has----de rounds in it got in his---- DNA attributable to him. That's what you're suggesting to him".

To which Mr. Mahoney replied in the affirmative. Duerr then agreed that his DNA was found on the two live rounds and four spent casings in the barrel of the revolver. He then said he received the black revolver the day after the shooting.

66. We have seen a transcript of the objection to Ms. Zuleger's report being introduced in this way. The judge neither called on the prosecution nor gave any reasoned decision. In my judgment he was in error. The proper procedure is that the prosecution should call, or agree with the defence all the evidence on which they intend to rely as part of the Crown's case. Occasionally it is possible to call evidence in rebuttal where it becomes relevant in circumstances that the prosecution could not have foreseen when they presented their case: see *Blackstone's Criminal Practice 2016*, Section F6. What is not permitted is cross-examination of the defendant on the basis of the evidence an expert might have given had she been called.

67. Mr. Horseman makes the point that this is effectively introducing expert evidence by the back door. Why bother, he submits, to call expert witnesses at all. If the judge is right it would be enough to disclose the expert's report to the defence and ask the defendant to read it out in cross-examination. Duerr was no DNA expert, he had no personal knowledge of the tests conducted or the continuity of the evidence. The evidence was important because the Crown needed to connect Duerr to the murder weapon before the murders. Mr. Horseman's submission is that without this evidence the Crown would not have succeeded. Duerr's case

was that he was only guilty as an accessory after the fact. In my judgment the Crown was in error in not eliciting the evidence from Ms. Zuleger in chief. Having failed to do so their only alternative was to seek to have her recalled. Mr Mahoney says that was not practicable but that is not a good reason for what occurred. He also submits that the Crown understood that the DNA evidence would not be in issue. This is not accepted by the defence and the Crown could have confirmed their understanding by obtaining a formal admission but they did not do so.

68. The significance of the error is illustrated by the way in which the judge dealt with this aspect of the evidence in his summing up. He said at p.36:

> "The evidence of Mr Duerr is that he never saw that firearm before the 24th. So he had nothing to do with that firearm and/or its ammunition before the 24th, which was the day after the Belvin's murder. Okay? And therefore he could not be guilty of aiding or assisting, or enabling anybody to carry out these murders, therefore he is not guilty. That's an example. The Crown is saying that's a lie. That's a lie, designed by the Defendant, because he knows he is guilty. It is a lie out of the consciousness of guilt. That's what they are saying. And it proves how guilty he is. And one reason they are saying, they are saying they have proved that is a lie, because his DNA was on the rounds inside. How could it get on there? He admits and accepts that the DNA expert examined the four empty rounds and the two live rounds that were misfired, in this six-shooter gun. So there was no other thing, that's six rounds. And their case is he has to be lying on that, and then, for a guilty reason, because how else would his DNA have got on, on that----in those rounds that were inside that firearm, if he had not touched it or seen it before, wasn't in possession before. And they're saying no, he delivered it up, and the inference they're drawing, he delivered it on the 23rd, knowing exactly what he was going to do with it."

Then at p.314:

> "So the question you have to ask yourself is why the ammunition in the revolver now, bearing his DNA, if he only got it on the 24th ? And never opened it, never check it, never did anything with it, just ran away with

> it when the police came? Why is his DNA on there? The prosecution is saying it's there because you know you had it between the 16th and the 23rd, and you loaded it up. And you know why you loaded it up."

69. At p.325 the judge sought to justify the prosecution not having called the DNA evidence. He said this was because Duerr had pleaded guilty to possession of the revolver and the ammunition. What he overlooked however was that the counts to which he pleaded guilty all alleged possession on 28 January 2013 and by his pleas he did not admit possession on any earlier date.

70. Finally the judge retuned once again to the DNA at p 328. He said:

> "----you might think the prosecution are entitled to ask you to consider, well, if according to Mr Duerr, he only received that weapon on the 24th of January 3013, after the murders, and had never seen it before, and giving how he dealt with it, no evidence of his ever opening it or ever examining or touching any of those cartridges inside its cases, how then can DNA attributable to him be on the cartridges inside it, unless he is lying and did, in fact, see, handled and likely loaded and delivered that weapon to some persons whom the prosecution says were among the assailants at a time prior to the 24th of January 2013. And they are saying on the 23rd is the likely time. Furthermore, that those empty cartridges from which the deadly bullets were fired, with the two miss-fireds, about which he earlier spoke about and included as well. Now you may think, or not, the prosecution is entitled to ask you to find that that is compelling evidence, together with the other evidence in the case, proving that Mr Duerr was a knowing, willing and intentional participant in the commission of the crime charged, and in Counts one to four should be accordingly found guilty thereof."

These passages make very clear the impact the admission of the DNA evidence in this way is likely to have had on the jury's deliberations. In my judgment the convictions on Counts one to four against Duerr cannot stand and must be set aside. I would substitute on counts one and three verdicts of guilty as an accessory after the fact to murder under section 292 of the Criminal Code. Duerr's evidence amounts to an admission of this. In cross-examination at p.2032 he said he was told about the murders by the person who gave him the

firearms and it was, as Mr. Horseman submitted, Duerr's case that he was only guilty as an accessory after the fact. The judge touched on this at p.381 of his summation but did not give the jury a specific direction about how they might convict Duerr as an accessory after the fact to these murders. We however have power to substitute these verdicts under section 22(2) of the Court of Appeal Act 1964.

Conclusion in Duerr's Case

71. I would accordingly allow Duerr's appeal, set aside his convictions on Counts one to four and substitute the convictions on Counts one and three with convictions for being an accessory after the fact to murder. I would wish to hear submissions on whether he should be retried on the premeditated murder charges.

Sentence

72. We were invited to stand the sentence appeals over to the June sitting of the Court. This I would do, including determining the appropriate sentence for the substituted offences in the case of Duerr

Signed

____
Baker, P

I agree

Signed

____
Bell, JA

I agree

Signed

____
Clarke, JA