Neutral Citation Number: [2023] CA (Bda) 21 Crim

Criminal Appeal No. 2 of 2022

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON MR JUSTICE WOLFFE
CASE NUMBER 2020: No. 28

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- - - - - - - - - - - - - - - - - - - -

Between:

TAAJ ONIEL MUHAMMAD

Appellant

- and -

THE KING

Respondent

Mr. Charles Richardson, Compass Law Chambers, for the Appellant

Mr. Carrington Mahoney, Office of the Director for Public Prosecutions, for the Respondent

Hearing Date: 3 June 2023
Date of Judgment: 17 November 2023

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APPROVED JUDGMENT

SMELLIE JA:

1. The Appellant appeals against his conviction in the Supreme Court on 24 February 2022, for two offences: the murder of Ronniko Burchall on 30 December 2018, the result of gunshot injury to the head, and the use by the Appellant of a firearm in the commission of the murder. The conviction followed a trial before Justice Juan Wolffe and a jury, resulting in the jury's unanimous verdict. The fatal shooting took place at the St David's Cricket Club on the occasion of its annual Christmas Party, on 29 December 2018.

2. The arguments, presented on the Appellant's behalf on the appeal by Mr Richardson, centred around his challenge to the evidence of Amber Jackson, the main prosecution witness. She testified about an intimate relationship she had developed with the Appellant whom she had known from childhood and about his confession to her, at different times after the incident on 29 December 2018, to having shot and killed Ronniko Burchall, who was commonly known as "Warrior".

3. Ms. Jackson's credibility and reliability as a witness thus became of central importance to the trial and the presentation of her evidence and its consideration by the jury became the subject of scrutiny and criticism on the appeal. We will come below to examine, in turn, each of the grounds of appeal argued on behalf of the Appellant. Following immediately is a description of the circumstances surrounding the murder of Ronniko Burchall, as presented on the prosecution's case.

The prosecution's case

4. On Friday 28th December 2018, the Appellant is shown on CCTV camera recordings to have arrived at the St David's Cricket Club. Upon his arrival at about 11:23pm, he moved around inside the hall of the Club exchanging greetings and eventually stood at the top of the railing to the staircase leading up to the second-floor balcony, which overlooked the car park of the Club premises. His movements upon arrival and in and around the Club during the next two hours and those of certain of his acquaintances, including one Kenneth Wade Jr in particular, were

recorded from different angles captured by different cameras – numbered 3, 5, and 7 – in place at the Club premises.

5. In testimony given by Amber Jackson and Detective Constable Anneka Donawa of the Serious Crime Unit of the Bermuda Police Service, images of persons captured on the CCTV footage were recognized and identified. The Appellant was identified by these witnesses on footage from cameras 3 and 5 upon his arrival and as he moved around the Club premises. From footage of images captured on Camera 7, Amber Jackson also testified to recognizing the Appellant as the assailant who shot Ronniko Burchall.

6. This identification evidence from the CCTV footage, also became the subject of the grounds of appeal argued by Mr Richardson.

7. While the prosecution was not required and did not seek to establish a motive for the killing, it was the theory of its case as presented by Mr Mahoney, that the Appellant acted in concert with others present at the scene, to target Ronniko Burchall. Those others included Kenneth Wade Jr with whom the Appellant was shown on the CCTV footage to be in close contact, as they moved about and mingled with others at the Club. The motive was suggested to the jury as arising from an ongoing feud between rival members of the notorious and fractured Parkside gang.

8. As shown on the CCTV footage from Camera 7 which overlooked the car park, at about 11:39 pm on 28 December 2018, Ronniko Burchall arrived on his motor bike which he parked in the car park, near the bottom of the staircase entrance to the Club. The Appellant who was then standing on the balcony, appeared to observe Burchall's arrival, as he is shown on the CCTV footage to have then looked over the balcony railing. The Appellant immediately then entered the hall of the Club. Shortly after, he was seen to return to the same area on the balcony, then in the company of Kenneth Wade Jr who had been inside the hall.

9. Ronniko Burchall ascended the staircase to the balcony at about 11:41 pm and entered the hall. The Appellant and Kenneth Wade Jr moved from the area of the staircase railing and went to

the center door entrance to the hall. This was recorded at 11:44:41 pm[1] , with the Appellant then appearing to have been speaking with someone on his cellphone, as indicated by the phone with its lit screen being held to his face.

10. Ronniko Burchall was then shown on camera 5, standing inside the hall of the Club, in front of the bar. At 11:45:07 pm, as shown on camera 3, the Appellant and Kenneth Wade Jr descended the staircase. Some 26 minutes later, at 12:11:14 am (now on 29th December), Wade returned up the staircase alone and remained on the balcony in the area of the center door entrance to the hall, overlooking the car park. The Appellant is not shown to have returned up the stairs.

11. At 1:28:38 am, Ronniko Burchall is shown on camera 3 to have exited the center door of the hall, onto the balcony where he spoke with a security guard. This was a Mr Dennis Parsons who also testified at the trial. Burchall then proceeded down the stairs on his way to his bike. As shown on Camera 7, very shortly afterwards, at 1:30:15, the rear lights of a car parked in the car park were turned on. This car was at the far end of the car park near a playing field adjacent to the Club premises.

12. The prosecution invited the jury to regard this as a signal because only 4 seconds later, at 1:30:19, the assailant as captured also on Camera 7, was seen to run from the area of the playing field toward Ronniko Burchall, brandishing a gun. He shot Burchall to the head before Burchall could escape on his bike, just out of sight of camera 7 which recorded only the flashes from the nozzle of the gun. The assailant then ran back in the direction from whence he came, as shown on camera 7. He was seen by Dennis Parsons to run up the long flight of steps along the slope at the far end of the field, as he disappeared into the darkness going in the direction of the area known as Cashew City. It was only then, at about 1:33 am, that the rear lights of the parked car were turned off.

13. The assailant was described by Dennis Parsons as wearing a grey long-sleeved hoodie sweat top with the hoodie over his head. He had on a mask, was slim built and about 5 feet 9 inches

[1] The times recorded on the CCTV footage were established in evidence to have been one hour ahead of the actual times.

tall. These descriptions of clothing and physical appearance became relevant to the identification of the Appellant as the assailant, by reference to the testimony of Amber Jackson and forensic evidence also adduced at the trial.

14. Ronniko Burchall suffered a penetrating gunshot injury to the head and died on Sunday 30 December 2018, while in hospital.

15. On Monday 31 December 2018 at about 2pm, police officers attended the residence of the grandmother of the Appellant where he sometimes resided, at 3 Anchorage Lane, St George's Parish. The officers were armed with a search warrant obtained pursuant to the Firearms Act. They spoke with the grand-mother who then handed to them a grey long-sleeved hoodie sweat top and a pair of American Designs distressed acid-washed jeans.

16. Both items of clothing were seized and examined forensically. From the grey hoodie sweat top was recovered a number of particles, one of which was found to be characteristic of gunshot residue "GSR" (i.e.: comprising of the three essential component elements - lead, barium and antimony) and thus highly specific to the discharge of a firearm. Also recovered was a total of 9 two-component particles, 5 of which were recovered from the grey hoodie sweat top and 4 from the jeans pants. All of these 9 particles were opined to be consistent with having been discharged from a firearm. As the ballistics expert Tarah Helsel explained, these 9 could however, also have emanated from other sources, such as fireworks, brake pads, batteries and other common-place sources. But as she also further explained, when found in combination with particles having the three essential components which are characteristic of GSR, two component particles are regarded as part of that GSR population.

17. Mr Mahoney invited the jury to regard this evidence as supporting the identification of the Appellant as the assailant but Mr. Richardson, in his seventh ground of appeal developed at the hearing, complains that the trial Judge erred in allowing the admission of the evidence relating to GSR, as it was more prejudicial than probative.

18. DNA analysis was performed by an expert, Dr Barbara Llewellyn, on swabs taken from the inner neck lining and cuffs of the grey hoodie sweat top. A male profile was obtained at 10 loci which matched that of the Appellant, with a random occurrence statistical ratio of 1 in 274 billion, thus indisputably linking him to that item of clothing.

19. As already mentioned, the main witness for the prosecution was Amber Jackson. As related in her testimony and as summed up to the jury by the trial judge, she and the Appellant had known each other for many years as they grew up together in St George's Parish. She knew him since she was 12 years old and he was 2 years her elder. They both attended at the local Clearwater School and up until the end of 2018, she described their relationship as that of close friends who would see each other quite often, almost every day in St George's, such as at the St George's Cricket Club and Churchill's Liquor Store. They would "chill, smoke and drink together".

20. She testified that commencing on 14 February 2019, their relationship became intimate and that they would see each other every day and slept together every night. At the outset, she noticed that the Appellant was a troubled sleeper, either not sleeping at all or "*twitching or jumping in his sleep*". When she asked him about this, he would say that he had a bad dream and "*just brush it off*".

21. She continued that throughout the relationship they had had arguments and that the Appellant was very obsessive and controlling. As to her reason for testifying, she said that the Appellant had confided in her that it was he who shot Warrior. She testified that around about April 2019, the Appellant started to get loud and aggressive towards her and would always threaten her that if she was ever unfaithful to him that "*I have got one body. You will be my second*." This, to her, meant that he had killed somebody and that she would be his second. He would also say "*I'm not afraid to get another one*". She thought that the Appellant took pride in what he said he had done.

22. She continued that one night right before summer 2019 when she and the Appellant went to the Mini Yacht Club in St George's, and while sitting on the porch overlooking the Harbour, the Appellant uttered further admissions. That he said how he "*blew his head off*", and that he, the

Appellant, ran out to Cashew City and swam across St George's Harbour. Further, that the Appellant had pointed to a little green lighthouse in the middle of the Harbour and said that that was where he had dropped the gun in the water, and that he was going to get the gun retrieved. She understood this as the Appellant's clarification that it was he who shot Warrior, without expressly saying his name.

23. She said that this made her sick to her stomach, that she was numb, speechless and afraid; and further, that she never asked any questions, and he never brought it up again, apart from on one occasion just before Cup Match 2019, when the Appellant said to her "*I have already shot Warrior and you will be my next*." She was at home alone with the Appellant at the time.

24. Their relationship ended on 4 July 2020 when, after having threatened her life many times, she was physically attacked by the Appellant. She testified that out of fear she had gone into hiding and some four days later she went to the police and made a report, including about the Appellant's admissions to his shooting of Warrior.

25. This evidence from Amber Jackson was identified to the jury by the trial judge as potential evidence of a confession which, if they accepted it and found it to be a truthful admission on the part of the Appellant, they could treat it as evidence of his guilt. This was subject to the warning which the judge also gave the jury, that before relying on it, they should consider whether there was independent evidence to satisfy them that the confession was true.

26. In this regard, the prosecution sought to persuade the jury that the information which Amber Jackson says the Appellant admitted to her, could only have come from the Appellant himself. Further, that what Amber Jackson said the Appellant told her was consistent with other independent evidence obtained from other witnesses. In this latter regard, the prosecution relied upon: (1) the evidence from Detective Constable Anneka Donawa that the Appellant, whom she came to know from her contacts with him during the investigation of the case, was identified by her from her viewing of the CCTV footage, as being at St David's Cricket Club on the night of 28 December 2018 , (2) the evidence of Dr Barbara Llewellyn, that the DNA on the grey hoodie sweat top matched that of the Appellant and which coincided with the description of the

assailant as wearing a similar grey hoodie sweat top and (3) the evidence of the ballistics expert Tarah Helsel, that GSR was found on the grey hoodie sweat top, indicating that, if other accidental modes of contact with GSR were discounted, the Appellant must have been in contact with or in close proximity to a firearm when it was being fired.

27. We regard the judge's directions to the jury on their approach to the evidence of confession as set out above at [25], to be unexceptionable. And we do not understand Mr Richardson to say otherwise.

28. At common law, where the defence, as in this case, is that no confession was made, that becomes an issue for the jury and there is no need for a *voir dire* for the prior determination by the judge of its admissibility. The truthfulness of the confession and the weight to be given to it will, in those circumstances, be matters for the jury to decide: ***Ajodha v The State*** [1982] AC 204.

29. In this context also, it was appropriate for the judge to have cautioned the jury as he did, to consider whether there was any independent evidence to support Amber Jackson's account of the Appellant's confession.

30. The Appellant's challenge here, as already mentioned, goes to the veracity of the witness, Amber Jackson herself. It was put to her in cross-examination and submitted to the jury by Mr Richardson, that she had concocted the alleged confession from the Appellant and his threats against her life, for a specific reason; that is, to achieve her ambition of moving to live overseas. This was in anticipation, correctly as it transpired says Mr Richardson, that doing so would qualify her for relocation overseas, within the witness protection relocation programme.

31. The Appellant also challenges the reliability of the evidence of his identification by recognition, as given both by Amber Jackson and DC Donawa, from their viewing of the CCTV footage. Both of these witnesses, prior to the trial, had been shown the CCTV footage from the Club, as recorded on the fatal night. Amber Jackson was asked to review it on the basis of her stated long-standing acquaintance with the Appellant. DC Donawa, on the basis of her dealings with

the Appellant; after his arrest and during the investigation of the case leading up to trial when, on three occasions she had interviewed him and on two occasions, when she took buccal swabs from him for DNA analysis. She had also, on a number of occasions, seen him at court during pre-trial appearances. His complaint through Mr Richardson, nonetheless, is that she lacked the kind of special knowledge of the Appellant, required to enable a reliable identification from the recorded images.

32. Further to his challenge to the reliability of the evidence of Amber Jackson and DC Donawa, Mr Richardson complains about what he submits was the impermissible embellishment of Amber Jackson's identification/recognition evidence by Mr Mahoney, in his closing speech to the jury. This was when Mr Mahoney invited the jury to observe certain peculiarities of the dress and gait of the assailant by comparison with those of the Appellant, all as said to be discernible from the CCTV footage.

33. The arguments for the Appellant will now be considered as presented and argued by way of the grounds of appeal.

The Grounds of Appeal

34. These are set out in the Notice of Appeal as follows:

> "1. *The learned Trial Judge should not have allowed the jury to consider the "gait" analysis that that the prosecution relied on for the first time in its closing speech.*
>
> *2. That the Learned Judge failed to give a direction which was sufficient to prevent a jury from still considering the submission of the Crown as to "gait" comparison.*
>
> *3. The learned trial Judge erred in not giving further consideration to declaring a mistrial in light of the above complaint.*
>
> *4. The Learned Trial Judge erred in allowing the evidence of DC Donawa as to identification/recognition of the (Appellant).*
>
> *5. This ground which aimed to criticize rulings given during the trial on the admissibility of hearsay evidence, was abandoned at the hearing.*

> *6. That in all the circumstances the totality of the admissible evidence against the Appellant in this case was insufficient to safely convict and the conviction of the Appellant is unsafe.*
>
> *7. This is the ground added at the hearing; viz: that the Learned Trial Judge erred in allowing/admitting the GSR evidence as it was more prejudicial than probative."*

35. Grounds 1, 2 and 3 were argued together by Mr Richardson. His submission is that in the absence of evidence from any expert as to "gait" comparison or analysis, there was no justification for the submissions made by Mr Maloney in his closing speech, which moreover, were made without notice to the defence and without the leave of the Court. The complaint is that during his speech, Mr Maloney invited the jury repeatedly to compare the way the Appellant "*walked or moved or dragged his leg*", as identified in images from camera 3 by Amber Jackson, with images of the assailant also identified by Amber Jackson to be the Appellant, as captured on camera 7.

36. At pages 227 to 234 and 244 to 245 of the Record of Appeal, the following remarks are recorded as made by Mr Mahoney in reference to Amber Jackson's testimony (with the CCTV footage being intermittently shown to the jury). They come against the further background of it having been established at the beginning of her testimony, that Amber Jackson had attended twice at CCTV viewing recognition procedures, conducted by the investigating officers prior to her testifying in Court. During those viewings, she was recorded as having recognized and identified the Appellant on footage from cameras 3, 5 and 7, including by facial recognition on the camera 5 footage:

> "*So you will recall that she was actually shown camera 3 first, which is when the (Appellant) arrived and she identified him on camera 3 first when she was doing the procedure with Mr Foote*[2]*. And then she was taken back to camera 5 where she again identified him on camera 5. You will recall that camera 5 is where the facial features are much more pronounced than on camera 3…*
>
> *In regards to camera 5, when she identified him she identified the (Appellant) at 12:24:46, which is just a tad off from Ms Donawa because Ms Donawa purported*

[2] One of the two investigating officers (the other being Mr Clifford Roberts) who conducted the procedure for the viewing of the CCTV footage with Amber Jackson, prior to the trial and recorded her responses in which she identified the Appellant.

> *to recognize him at 12:24:45. You will remember when I asked her to come down here, if she recognized anybody to stop, and then she used the cursor to point out whom she identified and she said, "**This is Taaj Muhammad, I recognize him by his face (sic)[3], his facial hair, his body structure, his belt, pants below his waist and the way he is walking**". And that last portion I want you also to bear in mind because she said that "**He has a unique way of walking**". And it is my submission that when you look carefully at the footage you will see that he in fact has a unique (way) of walking, in particular the right leg and I will show you shortly when I am going through the footage. In regards to camera 3, this is on the porch at 12:23:09 and remember that although we are looking at the camera time that the real time is one hour less. So at 12:23:09 she said "***that is Taaj Muhammad**", **she identified him by his body language and how he is walking***. …And you will notice when she pointed him out he was where, in the vicinity of the staircase? *He had not moved closer up to the camera, he was much closer to the staircase when she identified him on camera 3. And that is relevant because you will recall that when she recognized him on camera 7, that was the recognition procedure with Mr Roberts, she could not see his face but **she was able to recognize him by virtue of how he was holding up his pants, the pants down below [the waist], the limp**, **the stick** (sic)[4]. You will remember all of that. I will go through that as well.*
>
> *So she said that he would normally wear his pants below his waist. You will hear: oh, but that is (not) a big thing, all these young men wear their pants below their waist. When you look at the footage the defendant seems to carry it to a new low. Whereas everybody's pants were somewhere here, his were almost somewhere closer to the knee. And you will notice it, you will just look for yourselves and you will see. So you see some people pull it up, pull it up: his were way down here, which is relevant because you remember when she was shown camera 7 she was talking about* "***See, there he is holding up the pants***"….

Continuing from page 232 - 233 of the ROA:

> "*Right, pause there. I want you to focus on the right leg and I am going to ask that it be played regularly and then we will go back and you will notice the right leg, how he tends to sweep the right leg or drag it and it is almost as if the right leg is like there is a knock at the knee. So could you go back a bit please to 12:23:02 and just watch it normally and just focus on the right leg as he is coming towards the camera and then we will put it at our speed so you can see clearly (recording played). So there he comes down the steps, he is coming down, greeting people. You notice the right leg? Let us do it again. Could you put it at half speed please,*

[3] The transcript of her evidence does not record her as here saying "*by face*" (transcripts 4 February 2022 p 17 lines 4-16) but she had only moments earlier confirmed that she had recognized the Appellant by face from camera 5 footage and so stated at the viewing recognition procedure (see transcripts 4 February 2022 p 14 lines 29-33; p15 lines 1-9 and 20-21 and p 16 lines 1- 5).

[4] The transcript 4 February 2022 at p 18 lines 1 – 16 records the witness as saying when shown the footage of the images of the assailant from camera 7: "Stop. *That's Taaj … The way he was holding up his belt and how he ran as if he was skipping … Um, it wasn't necessarily a run. Then again, he had to hold up his pants, so it was like a skip*."

*particularly between 12:23:13 to 12:24. (Recording played) Watch the right leg. You notice he kind of draws the right leg? You notice it is almost like a "K" with his right leg? Okay, could you let it play regularly please? (recording played). You may say what is the significance of that. You will recall and it will come up when we look at camera 7 of the shooter where Amber Jackson talks about a skip, a limp. And poor Mr Roberts was taken to task that he was the one who used the word "limp" and put "limp" in Ms Jackson's mouth when in fact when she saw the footage, she was the one who said "the limp/ skip". This is from camera 7 where the shooter is coming across. "**He has that walk, it's a limp**". We will come back to that. So we are going to continue. (recording played) Just pausing there. In terms of identification, there is independent evidence from Ms Donawa that puts the (Appellant) there. They both pointed out the same person whom they recognize. In regards to Ms Jackson it was suggested to her that: oh, you could not see him in camera 5 [covering the area in front of the bar inside the hall of the club], the camera is not clear enough for you to make him out. Oh really? This is somebody she grew up with, this is somebody she was living with, this is somebody she was sleeping with: do you think she is mistaken in regards to who she pointed out? And also, she said his movement, the body language, how he walks. Okay, so let us watch this now. So, he arrived and then could you just play it from there please? (recording played). Just back a bit please.*

(recording played) … (from page 234 of the ROA): Mr Mahoney continues:
"All right, so that is the cursor and he is going inside at that point. So we already saw on camera 5 that he went inside with some people and eventually came back outside. Muhammad came back outside on camera 3 at 12:29:30

Pause please. So that is him there, that is Taaj Muhammad there and that is Kenneth Wade closer down to the camera leaning against the railing. Then as he is coming down he will eventually come down to where Kenneth Wade is. Could you let it play please? (recording played) Pause. Again, watch the right leg. Let us do that again at our speed. (recording played) Regular speed, it is almost like he walks with a limp when he goes, in on the right. Go back to 12:29:30 please. Play, put it at our speed please. (recording played). And you will notice there the chair on the balcony and you will notice it is a bit pronounced when he is in the vicinity of that chair. Do you notice it, how the right leg .. something seems to have happened to that leg? He seems to drag that right leg and limps down when it is in regular speed … when you see him just about passing the chair, just watch the right leg one more time.. (recording played) And do you notice that chair right at the balcony that he has to pass? Just when he hits the vicinity of that chair you will notice the right leg. Do you notice it goes in almost like a knock knee like? There you go …. [emphases added]

[From page 244 of the ROA] Mr Mahoney continues:
"You *remember I said that this was a targeted killing because other people were here. Okay, let us watch this portion now and I am going to play it regular. It is around 2:31:15. So, it is going to be played regular and I want you to watch the*

> *right leg please, especially as he comes closer to go to the right of the screen. Watch the right leg. And you will notice what Ms Jackson referred to as he kind of drags his feet, he has that walk, it's a limp. And in the interview recording she said at 2:31:31 "**He's doing that limp there, that skipping, that skipping, that, right there**" .. So I am going to play it at regular speed and then half speed and just focus on the right leg. (recording played). You see the drag on the right leg? Let us do it again at half speed. (recording played) She said it is this when he is running back you can see him pulling up his pants with his left hand. (recording played) Watch. Do you notice it, the right leg? ... Okay. So you recall it was suggested to Ms Jackson that there is nothing unique about his run and all that. Interestingly before I forget, it was suggested to the identifying witnesses that probably they were mistaken or they could not identify anybody from that distance and so on. Ms Jackson said, "**well he came close enough for me to recognize him on camera 5**", and she was able to recognize him by his gait or the way he held up his pants and so on and also others as well. So this is independent evidence, the footage, that you can use to see whether or not there is anything that supports her evidence in respect of the guilt of the (Appellant) . In addition to that, remember the grey hoodie which from there I will move to what happened after the shooting*."

37. Had Mr Mahoney curtailed his commentary upon Amber Jackson's evidence (which is for convenience identified in bold italics in the passages from his speech above) to his last immediately preceding comments from page 244 of the ROA, there would, in our view, have been no basis for complaint. In those latter comments, it appears that he was simply, in effect, inviting the jury to consider her evidence as given and to look at the CCTV footage to see for themselves whether or not it revealed what she said it did, as her basis for identifying the Appellant.

38. However, as also revealed in the passages from his speech in emphases above from pages 232 to 234 of the ROA, Mr Mahoney went further, by inviting the jury to "*watch the leg*", specifically as the person identified as the Appellant walks and runs. He directed the playing of the footage at normal speed and at half speed and invited the jury then to undertake the analysis of the gait of the Appellant for themselves, focusing on "*the dragging of the right leg*" and further inviting them to agree with his own references to traits such as "*the drawing of the right leg like a "K*" " and "' *.. it goes in almost like a knock knee*".

39. This, Mr Richardson submits, was impermissible and all the more egregious because it was done for the first time in Mr Mahoney's closing speech and without notice to the defence or leave of the Court.

40. He cited ***Kiari Tucker v R*** [2020] CA (Bda) Crim 7, in which this Court conducted a detailed review of the law and practice relating to the admissibility of gait analysis evidence. Evidence from an experienced consultant podiatric surgeon had been admitted at the trial, on the basis of his medical and forensic expertise in gait analysis. An issue raised on the appeal before this Court, was whether the trial judge had been wrong to admit the expert's evidence without first having conducted a *voir dire* in which his qualifications and expertise could have been tested by the defence. A further issue was whether it was proper for the prosecution, then as it happened represented also by Mr Mahoney, to have been allowed to refer to a side-by-side gait comparison footage of "Man X" (the unidentified perpetrator) and the appellant Tucker, containing portions of two original CCTV videos of Tucker and Man X, played at the same time.

41. While rejecting both arguments[5], this Court (per Sir Christopher Clarke P.), nonetheless recognized (at [133] – [135]) the limitations and dangers of gait analysis evidence, especially such as might arise from a side-by-side comparison of video-graphic images of the gait of the accused with images of the unidentified perpetrator and where that kind of evidence is introduced without prior notice to the defence.

42. The circumstances of the present case are notably different. Here there is no expert evidence of gait analysis but the evidence of witnesses (Amber Jackson and DC Donawa) who were acquainted, in differing degrees, with the Appellant, and who testified to having recognized him from the images seen on the CCTV footage. Theirs was thus evidence of fact, not opinion, to be accepted or rejected by the jury depending on what the jury thought of the truthfulness and reliability of the witnesses.

[5] The appeal was allowed and conviction set aside on other grounds relating to the fairness of the trial.

43. We accept however that in this case, it was indeed improper for Mr Mahoney, in effect, to have invited the jury to conduct their own gait analysis, although this was not done on the more troublesome basis of an edited side-by-side comparison footage. Here the invitation, misguided as it was, was one for the jury to compare the unedited images they saw from camera 7 with those said by Amber Jackson to be of the Appellant from camera 3, to decide, not only whether they could rely upon her evidence but also whether both images revealed similar peculiarities of gait, including those which Mr Mahoney proposed going beyond any mentioned by Amber Jackson; viz : "*the drawing of the right leg like a "K*" " and " *.. it goes in almost like a knock knee*".

44. With adequate notice to the defence and with the leave of the Court, a jury may be allowed to view CCTV images, even when edited by way of a side-by-side presentation, to decide for themselves whether the images could properly be relied upon as basis for the testimony of a witness, whether an expert by way of opinion (as in ***Tucker v R***) or lay witnesses of fact, as in the present case. This proposition, which ultimately is one of common sense and fairness, finds ample support from the following passages from ***Tucker v R*** itself at [133] – [135]:

> "*133. ...good practice requires that material of this nature is not sprung on the defence by the prosecution, particularly when it derives exclusively from material – the CCTV footage – in the possession of the prosecution. In a case such as this, if there is an issue as to whether the jury should be allowed to see it, the matter needs to be raised with the judge who can consider any question as to whether the "argument of the prosecution" may incorporate some hidden flaw or require some specific warning. If that had been done in the present case, we have little doubt but that the judge would have allowed the prosecution to use the footage.*
>
> *134. We do not accept that the jury was not entitled to look at the footage side-by-side. Mr Francis [(the expert witness)] in assessing similarity between Man X and the appellant had initially looked at the footages independently. That is how he had dealt with them in his evidence. But he had also reviewed them together, albeit not before the jury. We cannot regard it as illegitimate, nor did Mr Francis' evidence so suggest, for the jury, who had ultimately to decide whether Man X and the appellant were the same, ever to look at the footages side by side.*
>
> *135. It would have been appropriate to warn the jury to take care when considering the side-by-side footage which the prosecution had put forward by way of argument since (a) this exercise had not been done before; (b) Mr Francis had not been asked about it; (c) there was a danger of cognitive bias in the jury in that, seeing two*

> *images side by side, the jury might unconsciously be inclined to see a similarity that was not truly there; and (d) to make reference to whatever the defence had said in its final submission on the subject*."

45. In ***Attorney General's Reference (No 2 of 2002)*** [2003] 1 Cr App R 21 , the Court of Appeal for England and Wales held that, on the authority of the case law as it then stood, there were at least four circumstances where, subject to the judicial discretion to exclude, evidence was admissible to show and, subject to appropriate directions in the summing up, a jury could be invited to conclude, that the defendant committed the offence on the basis of a photographic image from the scene of the crime:

> (*1) Where the photographic image was sufficiently clear, the jury could compare it with the defendant sitting in the dock: R v Dodson and Williams (1984) 79 Cr App R 220.*
>
> *(2) Where a witness knew the defendant sufficiently well to recognize him as the offender depicted in the photographic image, he or she could give evidence of this: R v Fowden and White [1982] Crim L. R. 588, Kajala v Noble (1982) 75 Cr App R 149, R v Grimer [1982] Crim L R 674, R v Caldwell and Dixon (1994) 99 Cr App R 73 and R v Blenkinsop [1995] 1 Cr App R 7; and this might be so even if the photographic image was no longer available for the jury: Taylor v Chief Constable of Chester (1987) 84 Cr App R 191.*
>
> *(3) Where a witness, who did not know the defendant, had spent time viewing and analyzing the photographic images from the scene, thereby acquiring special knowledge that the jury did not have, he or she could give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the contemporary photograph were available for the jury: R v Clarke and Peach [1995] 2 Cr App R 333.*
>
> *(4) Where the witness was suitably qualified in facial mapping he could give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided both were available to the jury: R v Stockwell (1993) 97 Cr App R 260, R v Clarke [1995] 2 Cr App R 425 and R v Hookway [1999] Crim L R 750"*

46. These guiding circumstances from ***AG's Reference (No. 2 of 2002)*** have been subsequently followed and applied, including by the Court of Appeal in England and Wales itself, in ***Faraz Ali v Regina*** [2008] EWCA Crim 1522.

47. From the foregoing overview of the case law, it is clear that the evidence given by Amber Jackson and DC Donawa based upon their review of the CCTV footage, was admissible in law.

Amber Jackson's evidence may properly be classified as testimony coming within Circumstances (2) from ***AG's Reference*** (No. 2 of 2002), as set out above and we do not understand Mr Richardson to be saying otherwise, subject to his arguments in relation to the admissibility of DC Donawa's evidence to be considered below under Ground 4. Nor has he contended that her evidence was inadmissible.

48. His submissions on these Grounds focus instead upon Mr Mahoney's invitation to the jury, amounting to what he describes as a "*deliberate attempt to queer the defendant's pitch*" by his improper suggestion that they conduct their own gait analysis; and for having done so without notice to the defence or leave of the Court and all contrary to the advice given in ***Tucker v R*** (as set out above), a case in which Mr Mahoney himself appeared as counsel for the prosecution.

49. While we understand Mr Richardson's consternation, we do not accept that Mr Mahoney sought deliberately and improperly to affect the fairness of the trial. We do however, regard his invitation to the jury as an unrestrained and incautious failure to follow the guidance given in the case law against the potential dangers of gait identification evidence.

50. An obvious danger, as explained in ***Tucker v R*** (above) (at [135]) is that of a "*cognitive bias*" potentially arising in the jury, from being invited to view the images, in the absence of expert evidence, not for the purpose only of evaluating the evidence of lay witnesses who claim to identify the Appellant but also with a view to identifying him themselves by carrying out their own gait analysis. The danger is that they may be "*unconsciously inclined to see similarities that were not truly there";* and would be carrying out an analysis for which they lacked the necessary expertise.

51. The potential danger was recognized immediately and was sought to be addressed by Mr Richardson in submissions to the trial judge, inviting him to discharge the jury and direct a mistrial. The trial judge declined to do so, opting instead to direct the jury on their permissible approach to the evaluation of the identification evidence and to disregard Mr Mahoney's invitation.

52. Mr Richardson maintains that the trial judge was wrong not to have discharged the jury as it was "*nigh impossible to remove (the) unauthorised gait analysis from their minds*". His ultimate submission in this regard however, is that the judge having decided not to do so, was obliged to deal with the matter during his summation by directing the jury in the strongest terms to exclude any such gait analysis from their minds but failed to do so and that this failure amounted to a miscarriage sufficient to justify setting aside the conviction of the Appellant.

53. It is therefore to the judge's treatment of this issue that we turn finally, for the resolution of these grounds of appeal.

54. The trial judge's comments to the jury with respect to this issue are found at a number of paragraphs in the summation. Mr Richardson submits that the relevant directions appear only at [42] but as set out below, they were more extensively given at [26], [29], [35] and [42] as well, and in terms which satisfy us that the jury was adequately and properly directed. First from [26] , giving the general cautions on the acceptance of identification evidence:

> "[26*] Looking at the evidence as a whole, i.e. taking all of the evidence into consideration, it is a matter for you as to whether the descriptions given by witnesses satisfy you beyond reasonable doubt that it was the accused who committed the offences charged. The case against the accused depends to a large extent on the correctness of one or more identifications of him which he alleges are mistaken. To avoid the risk of injustice in this case (such as has happened in other cases in the past), I must therefore warn you of the special need for caution before convicting the accused in reliance on evidence of identification… You must therefore consider the quality of each witness's evidence of identification separately and you must have regard to the possibility that more than one person may be mistaken…*"

55. He continued at [29] focusing, more specifically, on the identification evidence from the CCTV footage:

> "[*29] You should also look to see whether there are any weaknesses in any of the identification evidence, or if there is any evidence which, if you accept it, might undermine the identification evidence. I must therefore remind you of the specific weaknesses which appeared in the identification of Amber Jackson and DC*

> *Donawa's evidence. I will deal with this as I turn to the situations where identification or recognition is made from CCTV footage. Before I do that though, I must give you a very important warning. You must not – I repeat, must not- reach your own conclusions as to the identification or recognition of the accused. That is, when viewing the CCTV footage you must not yourselves make a comparison between the person in the CCTV footage and the accused who is sitting in the dock and then go on to decide whether or not it is the accused in the CCTV footage. As strong as the urge may be, it is vital that you resist the urge because you do not want to run the risk of making a mistaken identification yourself. Your consideration is limited to whether or not you accept or reject the evidence of Amber Jackson and/or DC Donawa as to who they say they identified or recognized on the CCTV footage*".

56. Then followed at [35], more general directions on the jury's approach to the assessment of the witnesses' evidence, reminding them to "*decide whether...the quality of the footage was good enough or not good enough...to determine whether or not the identification made by Amber Jackson and DC Donawa are reliable. You should bear in mind that both Amber Jackson and DC Donawa said that the footage was clear enough for them. It is a matter for you as to whether you accept their evidence in this regard*."

57. The judge continued in this regard at [36]:

> "You *will have the opportunity if you wish to do so to view any parts of the footage in open court. But as I stressed to you earlier, you must not – and I repeat, must not – reach your own conclusions as to the identification or recognition of the accused … Your consideration is limited to whether or not you accept or reject the evidence of Amber Jackson and/or DC Donawa as to what they say they identified or recognized on the footage."*

58. And finally, for present purposes, from [42]:

> "*You are invited to look at the footage on camera 3 and from that to assess whether the person who the prosecution say is the accused is dragging his leg and/or showing a limp whilst walking. He asks you to focus on his feet and assess for yourselves whether this is occurring. I respectfully direct you to decline that invitation, as such assessment from this section of camera 3 is not within your ability to do as jurors. Having said that, there is other evidence as to the way in which the accused walks which you can take into consideration, particularly from Amber Jackson, who when referring to camera 7 said that she recognized the person in the CCTV footage as the accused by the way he was skipping or limping. In these circumstances you are entitled to look at this part of camera 7 in the footage*

> *and determine whether or not you accept or wish to rely on Amber Jackson's evidence as to any skipping or limping of the accused*."

59. The effect of the immediately preceding directions from [42] must be assessed with that of the earlier directions at [26], [29], [35] and [36]. We find no basis for doubting their cumulative effect to remind the jury of the dangers of Mr Mahoney's invitation and of the need for their own strict approach to their consideration of the CCTV identification evidence. Not only was the language used by the judge clear and appropriate, it must be assumed, in the absence of any reason for doubt, that his directions would have been understood and applied faithfully by the jury. The empirical basis for such a conclusion has often been noted and approved by the courts. In ***R v B [2007] EMLR 145***, the English Court of Appeal, in assessing the risks of a publication affecting the impartiality of jurors in a subsequent controversial terrorism trial, held inter alia, that the integrity of juries remained the bedrock of fair trials. Further, that experience has shown that juries are diligent in following judicial directions to focus on the evidence before them and that following directions also welled from the innate belief of juries that a trial should be fair. This decision was more recently followed and applied by the English High Court in ***A.G v Associated Newspapers Ltd and another*** [2011] 1 WLR 2097, where, at [39], Moses LJ cited the following observations of Sir Igor Judge P, from [31] of the judgment in ***R v B:***

> "*We cannot too strongly emphasise that the jury will follow [appropriate directions] not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial to be fair.*"

60. We have no reason to doubt the equal robustness of the jury system of Bermuda, nor the steadfastness with which the jury in this case would have heeded the directions of the trial judge. The trial judge was correct in his refusal of the application to discharge the jury and these three grounds of appeal are accordingly refused.

Ground 4: admission of DC Donawa's evidence

61. This ground of appeal relates to the ruling of the trial judge during the trial that DC Donawa could give evidence to the jury, on the basis of her identification of the Appellant on the CCTV footage as being present at St David's Cricket Club on the night of the shooting.

62. As Mr Richardson presents the crux of the complaint, it is that "*the case authorities on the point seem to make it clear that before a police officer can make an identification of a suspect from CCTV images (unless it can be said that the suspect is well known enough to them to be able to perform a proper recognition) that officer should possess "special knowledge" which enables them to give such an opinion on identification to the jury*".

63. The cases relied upon by Mr Richardson for this proposition are ***R v Clare and Peach*** [1995] 2 Cr App R 333 and ***AG's Reference No. 2 of 2002*** (above). The principle from the former is summarized in the latter as set out above at [45]. The principle may conveniently here be referred to as ***AG's Reference*** "***Circumstances* (3)**". It is that which Mr Richardson submits should have guided the trial Judge's decision on whether or not to admit DC Donawa's evidence.

64. The trial judge relied however, upon "**Circumstances (2)**", on the basis, not of DC Donawa having acquired any "*special knowledge*" of the Appellant from viewing and analysing photographic (or videographic) evidence from the scene (Circumstances (3)) but from her own first-hand knowledge of the Appellant gained from sustained personal contact with him on a number of occasions prior to the identification, albeit these having occurred some three years prior to the identification and amounting in total to about one (1) hour spent in his presence.

65. It is necessary to refer to the trial judge's written reasons for his decision[6], following the voir dire which he held on this issue of admissibility, beginning at [7]. There he provides a summary of the evidence then given by DC Donawa (in terms consistent with the evidence given by her afterwards before the jury):

[6] Given on 1 February 2022 with his written reasons delivered on 4 February 2022.

"7. DC Donawa was the sole witness to give evidence on the voir dire and in examination-in -chief she said that back in December 2018 she was part of the investigative team making inquiries into the shooting at SDCC [St David's Cricket Club] (she was assigned as the file officer). Being a part of the investigative team DC Donawa said that she came into contact with the Defendant on the following occasions:

(i) On the 4th January 2019 when he was brought into the custody area of the Hamilton Police Station ("HPS") and where she took a buccal swab from the Defendant's mouth which, she says, involved her seeing the Defendant's face. After the taking of the buccal swab she then, along with DC Mathurin, took the Defendant into an interview room where an interview was conducted. It does not appear that she had any further dealings with the Defendant that day.

(ii) On 5th February 2019 at HPS where she conducted a second interview of the Defendant. It does not appear that she had any further dealings with the Defendant on that day.

(iii) On the 13th June 2019 when she took another buccal swab from the Defendant.

(iv) On various instances over the past three (3) years when the Defendant appeared in Court in relation to this matter (such as for mentions and trials) and at such times she could see his face and upper body. She was unable to say exactly how many instances she would have seen the Defendant in Court settings.

8. DC Donawa gave further evidence that throughout the buccal swab and interview processes that she was able to see every part of the Defendant's face and body (such as his shoulders and legs) as she escorted him into the interview room and sat with him whilst he was being interviewed. She described the Defendant as having a thin build and that he was slightly taller than her, and, she believed that the Defendant had facial hair.

9. DC Donawa went on to say that on the 29th December 2018 she collected CCTV footage of the SDCC from a company called "GET Security" and that on the 31st December 2018 she handed it to a DC Christopher Sabean (who had already given oral evidence at the trial proper relating to the CCTV footage at the SDCC). She did not do anything with the CCTV footage at that time. However, on the 19th and 20th January 2022 (i.e. approximately 3 years after) she viewed the CCTV footage and on the 21st January 2022 she prepared a log of what she observed. She explained that she did so further to a request from Mr Carrington Mahoney (the lead Prosecution Counsel in this case) to review the CCTV footage to see if she could identify a person named "Gregory Wade at 12.23.00 am time mark on Camera 5. It should be noted that by the time of the voir dire that evidence had already been heard in the trial proper

from DC Sabean as to the presence of Gregory Wade at the SDCC on the night of 28th/29th December 2018.

10. DC Donawa said that as she was looking for Gregory Wade on the CCTV footage that she "stumbled across" the Defendant who(m) she recognized on the CCTV footage. As a result, she says, she went through the CCTV footage of Cameras 3 and 5 and from the time stamp of 11.00 am (sic) to the time stamp of 2.30am. She said she did this to ascertain when the Defendant arrived at and when he left SDCC. She said that as she did this she was able to recognize other persons from the footage, namely a Kinte Smith, a Dominic Butterfield, a Kenneth Wade Jr, and the victim Ronniko Burchall.

11. DC Donawa closed her examination in chief by saying that she was not able to identify Gregory Wade from the CCTV footage (who(m) she was initially asked to identify) and that she had not viewed the said CCTV footage prior to the 19th January 2022."

66. As also summarized in his written reasons by the trial judge (at [12]), in cross-examination by Mr Richardson, DC Donawa, acknowledged among other things that:

(i) She did not know the Defendant before the 4th January 2019 (when she took the first buccal swab) but that he had a face which she cannot forget.

(ii) It took her about 12 minutes on the 4th January 2019 to take the buccal swab on that occasion, including the time she awaited the arrival of a doctor to examine the Defendant before the swab was taken.

(iii) The interview of the Defendant on the 4th January 2019 was from 11.24 am to 11.42 am, i.e. 8 minutes but that there had also been about 5 minutes prior to the interview as set up time and 5 minutes at the end for signing and closing of the interview. So, on the 4th January 2019, she would have been in the Defendant's presence a total of 30 to 40 minutes.

(iv) The interview on the 5th January 2019 was from 4.09 pm to 4.19 pm, i.e. 10 minutes. However, inclusive of time taken by her for bringing the Defendant out of his cell to the interview room, for preparation of the interview and for its closing, she estimated the total time taken to have been 19 minutes.

(v) On 12 January 2019 she had had further contact with the Defendant from 11.04 am to 11.11 am; i.e. 7 minutes and on 13 June June 2019 , for a further 10 minutes to collect the second set of buccal swabs. She accepted that over the period 4th, 5th and 12 January 2019 and the 13th June 2019, she would have had contact with the Defendant for a total of less than one (1) hour.

(vi) She could not say how many mentions [dates] in Court that she attended where she saw the Defendant and she accepted that at the mentions he would have been "whipped [ie: whisked] in and out of Court".

(vii) The request to identify Gregory Wade from the CCTV footage came by telephone and she was asked to look at camera 5 at time stamp 12.23.00 am. She does not know why she was directed specifically to this time stamp and she accepted that she could not see Gregory Wade in the CCTV footage at this time or for one (1) minute thereafter. She did not accept that she was sent by Mr Mahoney to view the footage to identify persons other than Gregory Wade, and she said that she did not anticipate that she was going to find additional people in the footage.

(viii) When she viewed the CCTV footage she was in the Serious Crime Unit boardroom and she was alone. On the 19th January 2022 she looked at Cameras 3 and 5 of the CCTV footage from 10.30am to 1,30 pm, i.e. 3 hours, and that on the 20th January 2022 from about 10.30am to 8.30pm with a 1 1/2 hour lunch break. She was stopping and reviewing the footage and was going back and forth between the two cameras.

(ix) She did not have a photo of the Defendant before looking at the footage and she identified him from memory as she cannot forget his face. She identified him from the CCTV footage by" his whole face and that is what stood out to her."

67. Against that background of DC Donawa's evidence, we see from his written reasons the following findings by the trial judge, leading to his decision to admit her evidence before the jury:

(i) At [17] "*Having assessed the evidence heard on the voir dire, and having considered the cited authorities, I find that the circumstances upon which DC Donawa made her recognition of the Defendant from the CCTV footage falls within Circumstances (ii) of AG's Ref No. 2 of 2022".*

(ii) At [18]: "Under *(Circumstances (2)) of the A-G's Ref No. 2 of 2002 I must be satisfied that DC Donawa knew the Defendant "sufficiently well to recognize him as the offender" in the CCTV footage. I am so satisfied. Mr Richardson was perfectly entitled to challenge DC Donawa about the total time of one (1) hour that she had the Defendant in her presence on the 4th, 5th, and 12th January and on 13th January (sic) 2019 and about the limited opportunities that she may have seen the Defendant during Court proceedings. However, while on the surface one (1) hour may not seem like a lot of time it is important to consider the nature and cumulative effect of that one hour".*

He then proceeds to examine the circumstances of the contacts DC Donawa had with the Defendant before reviewing the CCTV footage.

(iii) The trial judge went on at [19] –[20] to consider the case authority of ***R. v Blenkinsop*** [1995] 1 Cr App R (S) 7 (referenced in ***A-G's Ref No.2 of 2022*** among the cases cited as authority in support of its proposition in Circumstances (ii) and in which case, by comparison with the case before him, he noted that the police officer had been in contact with the suspect for only three (3) minutes during an interview, prior to identifying him in certain photographs., contact which was nonetheless found to be sufficient for a safe and reliable identification.

(iv) The trial judge then went on at [21] to state: "*I therefore find that the totality of all the instances that DC Donawa would have seen and/or interacted with the Defendant in January and June of 2019, and the occasions on which she would have seen the Defendant in Court settings, would have afforded her ample time and opportunity to know the Defendant sufficiently well in order for her to recognize him on the CCTV footage on the 19th January 2022*".

(v) And of further import to the present issue, at [22] he reflected on the role and task of the jury to come, in our view, quite appropriately in these terms: "*In saying this, I am acutely mindful of the fact that DC Donawa made the recognition just over three (3) years after she would have taken the buccal swabs and interviewed the Defendant. This however, and the extent to which DC Donawa knew the Defendant, goes directly to the weight of the evidence and not to its admissibility. The jury could no doubt place this three year span of time into the balance, including their assessment of the quality of the CCTV footage, when deciding whether they find DC Donawa's recognition of the Defendant to be reliable. Especially when they are properly directed as to the dangers of mistaken identity which could plague identification evidence*".

(vi) Finally concluding at [23]: "*Therefore, I find that the evidence of DC Donawa's recognition of the Defendant from the CCTV footage is admissible under circumstances (ii) of the A-G's Ref No.2 of 2022*."

68. Apart from the bald contention that the trial judge should have held that the circumstances of DC Donawa's identification of the Appellant came with Circumstances (3) rather than Circumstances (2) of **A-G's Ref. No. 2 of 2002,** and that the requirements of Circumstances (3) were not met, Mr Richardson raised no criticism of the judge's reasoning or conclusion.

69. We consider that it was well within the ambit of a reasonable assessment of the circumstances for the judge to have concluded as he did. He directed himself correctly on the applicable law,

concluding, correctly also, that DC Donawa's evidence should be admitted, leaving the issues of its reliability and weight for the jury to consider with appropriate directions to be given on their treatment of identification evidence.

70. As discussed above at [42] – [45] and as recorded at other stages of the summation, such directions were given appropriately to the jury.

71. We therefore find that this ground of appeal also fails.

Ground 7: the admissibility and probative value of the GSR evidence

72. This challenge to the admissibility of the GSR evidence was not raised at the trial and emerged for the first time as a ground of appeal only after the commencement of the hearing. Mr Mahoney therefore understandably objected to leave being given to argue it. Having heard Mr Richardson's arguments *de bene esse*, we are satisfied that the issues raised can be dealt with summarily as follows.

73. The thrust of Mr Richardson's argument is that as the expert Miss Tarah Helsel testified to having recovered only a single particle of residue which was characteristic of GSR (i.e., comprised of the three essential elements of lead, barium and antimony), with all the others being common place particles of only one or two of the component elements, that evidence was all together more prejudicial than probative and so should not have been presented to the jury.

74. In light of the case authorities, including most authoritatively that of the Privy Council on appeal from this jurisdiction in ***Hewey v The Queen*** 2022 UKPC 12, that argument is plainly untenable.

75. In **Hewey** , a similar ground of appeal was argued against the decision of the trial judge to admit evidence of the presence of one and two component particles found on the appellant and items associated with him (upheld on appeal before this Court on this point).

76. At [32] the Privy Council (while allowing the appeal on other grounds) concluded that the trial judge had correctly exercised his discretion to admit the evidence in the context of all the evidence in the case and that the Court of Appeal had correctly declined to interfere with the exercise of his discretion.

77. In arriving at that decision the Privy Council provided the following analysis (from [30] to [31]) and in doing so approved of dicta from an earlier decision of the English Court which is also relied upon by Mr Mahoney in response here:

> "*30. At the trial it was the evidence of both Ms Murtha and Mr White (respectively the ballistics expert witnesses for the prosecution and the defence) that, as a matter of science, evidence of the presence of one-component and two-component particles, in the absence of any three-component particles, did not demonstrate that the source of those particles was the discharge of a firearm as opposed to a different source. However, it does not follow from this that such evidence is irrelevant or inadmissible The presence of one-component and two-component particles is evidence which is consistent with their source having been the discharge of a firearm and which, when considered in conjunction with other evidence in the case is capable of being both relevant and probative…Moreover, the guidance emanating from the (American Society for Testing and Materials and a Scientific Working Group on GSR) appears to say that one-component particles (and it must follow also two-component particles) can support the interpretation as to origin of three- or two-component particles in the same population.*
>
> *31. An analogous point, in the same context, arose in* ***R v George (Dwaine)*** *2015 1 Cr App R 15. There, the prosecution relied on expert evidence of two three-component particles and two two-component particles on a coat associated with the appellant. It was objected that the evidence should have been excluded because of the low level of particles, ie the limited number of relevant particles. In dismissing this ground of appeal, Sir Brian Leveson P explained that the fact that scientists had adopted a cautious approach to reporting low levels of residue, such that for that residue, on its own, no evidential significance could be attached to it, did not mean that the evidence was necessarily inadmissible or irrelevant. He continued:*
>
> *"The jury are more than able to assimilate evidence as to potential significance or lack of significance or recovered evidence, provided that there is explanation of that potential significance, for example, by reference to what might occur in the environment or might otherwise be the consequence of entirely innocent contamination.*

> *The importance of this point can be illustrated by reference to the forensic value of the absence of evidence. Whereas it is correct to say that absence of evidence is not the same as evidence of absence, the failure to recover anything that could even remotely be consistent with gunshot residue might provide a forensic argument supporting the proposition that involvement in the discharge of a firearm is disproved by the absence of particles that could be gunshot residue. The submission that the evidence now available demonstrates that the original forensic evidence should not have been placed before the jury is rejected.*"

78. The foregoing dicta from the Privy Council (approving that from the Court of Appeal in ***R v George***), confirm that there is no hard and fast rule precluding of the admissibility of evidence of one- or two-component particles found by themselves, let alone when they are found in a population with one or more three-component particles. The question of admissibility will depend upon the circumstances of the case, in particular, upon the context in which the particles are recovered to be considered in conjunction with all the other evidence in the case.

79. In the present case, as already mention there were recovered from the items of clothing linked to the Appellant a single three-component particle which was characteristic of GSR and several two-component particles which the expert Miss Helsel, opined was consistent with the presence of GSR and which when found in combination with particles comprising the three essential components which are characteristic of GSR, are regarded as part of that GSR population. This evidence was clearly admissible on the authority of the case law from **Dewy v R** and **R v George.**

80. Nor, in or view, can there be any proper complaint about the directions given to the jury by the trial judge as their assessment of this evidence. His directions were detailed and extensive. For present purposes, it will suffice to take excerpts, beginning at [154] of the summation (p 97 of the ROA):

> *"I want to remind you that as to analysis she (Miss Helsel) says that she looks for two different types of particles. The first are called particles characteristic of GSR, which are also known as three-component particles because they contain all three of the element(s) of lead, barium and antimony, altogether in a single particle. She said that these are highly specific to the discharge of a firearm and it is their presence which allows her to say if GSR is present on a sample. She said they also look for two-component particles, and those are particles that contain two of the elements. These are referred to as being consistent with GSR, as opposed to*

> *characteristic, because they can and will come from the discharge of a firearm. However, there are other sources of those particles where it is not as conclusive as to the presence of GSR by themselves, but if they are found in combination with the particles characteristic of GSR, then they are acting as part of that GSR population…*
>
> *She told you that there are other possible sources of two-component particles and they can commonly come from brake pads, fireworks, batteries, glass, additives paint, or fishing rigs."*

81. And pertinent to arguments put before the jury on the Appellant's behalf (the Appellant opting, as was his right, not to testify), (1)as to the inherent improbability of the Appellant's confession, including his escape from the scene by swimming across the harbour from Cashew City without any suggestion of him having first removed or disposed of the clothing he was then wearing , and (2) as to the possibility of innocent contamination from other sources; the trial judge gave the jury the following directions:

> "*She said that GSR does not break down or degrade over time, but they are easily removed. They can last on an undisturbed surface indefinitely, but depending on what occurs on that surface or what activity there has been, the particles can easily be removed… [137] She said that what a person does before collection can cause particles to be removed, such as normal use of hands, wiping hands, and washing hands can remove most if not all particles. In respect of clothing, she said that if there is GSR on the article of clothing, if it had been sitting on the floor undisturbed for days those particles are not going anywhere. But if the clothing is worn, brushing up on things or making contact with other surfaces, then this can remove the particles. If the clothing is laundered, it can also remove particles. She said that particles can be easily transferred. She elaborated that if there is GSR on a surface and that surface comes into contact with something else, then the particles would be transferred from the surface on to whatever touched it. She agreed with Mr Richardson that it is easy to pick up GSR if you touch a surface with it on it, such as a door handle to a shop or on a bike*".

82. As the case law also explains, the probative value of the GSR evidence was of course, a matter for the jury to assess, along with all the other evidence in the case.

83. The duty of the trial judge was to remind them of the evidence and to explain its scientific meaning to assist then in understanding its relevance. This duty was, in our view, adequately

discharged as shown from the foregoing excerpts and as expanded upon in the rest of the judge's summation.

84. The evidence relating to GSR was properly admitted and explained to the jury. Its probative value was not outweighed by any potentially prejudicial effect. This, the 7th ground of appeal, is also accordingly refused.

85. The fifth ground of appeal was abandoned at the hearing and, in our view, properly so.

86. The final (as set out above at [34] the 6th) ground of appeal, was not developed by Mr Richardson in arguments. He introduced Ground 6 in his written submissions in these terms: "*Ground 6 is a residual ground that depends to some extent on the view (the Court) takes of the other grounds advanced"* And at the end of his written submissions he left the following remarks about this ground of appeal*:* "*We advance the above submissions [all those presented on the other grounds] in support of the contention that the remainder of the admissible evidence against the appellant was not sufficient to safely convict him. We would seek to develop this ground depending upon the view taken by the Court of the preceding grounds of appeal*".

87. In the light of our foregoing conclusions on the grounds of appeal which were argued, we are entitled to assume that Mr Richardson would not seek to develop Ground 6 any further. He would be wise not to do so. We would regard an argument that the conviction in this case is unsafe, to be untenable.

88. The Appeal should accordingly be dismissed.

GLOSTER JA:

89. For the reasons given by Justice Smellie, and with which I agree, I too would dismiss the Appeal.

CLARKE P:

90. I also agree. The Appeal is therefore dismissed.