The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 5 of 2018

B E T W E E N:

JAHMICO JAHMAH RODDY ROGER TROTT

Appellants

- v -

THE QUEEN

Respondent

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

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

Date of Hearing: **7th, 8th and 11th March 2019**
Date of Judgment: **15th March 2019**

JUDGMENT

Recognition and identification evidence – whether identification carried out in breach of section 3.30 of the Code of Practice should have been excluded – whether a sufficient Turnbull direction was given – adducing fresh alibi evidence – counsel's alleged failure to follow client's instruction – requirement of counsel to make an attendance note – admission of two-component particle GSR evidence – jury bias.

CLARKE P:

Introduction

1. On 7 March 2018 Jahmico Trott, the appellant, was convicted by the jury of five offences namely (i) the Attempted Murder of Daniel Adams; (ii) Using a firearm to commit an indicatable offence; (iii) Carrying a firearm with criminal

intent; and (iv) Handling a firearm. On 6th April 2018 he was sentenced to a term of imprisonment of 25 years in all. He now appeals against that conviction on six grounds. He also appeals against sentence on the grounds that no allowance was made for the time that he had spent in custody.

The case against the Appellant

2. The case against the appellant, as presented by the Crown, was as follows. On Sunday 14th May 2017, which was Mother's Day, the complainant, Daniel Adams was at the residence of his cousin, Marekco Ratteray, in Elliot Street, Hamilton in the upper level above the Bulldogs Sports Bar, which is at the corner of Elliott Street and Court Street. At around 6.00 pm Troy Burgess, Jr and other associates of the appellant were seen[1] walking south along Court Street from the direction of the Elliot Street car park on the side of the road opposite to the building in which the apartment was. This group eventually congregated just across the road from the entrance door of the building and looked towards it.

3. Shortly afterwards, the appellant emerged from the Elliot Street parking lot, just to the right of where Burgess was standing. He was armed with a black firearm. He ran across the street and entered the building where Ratteray's residence was. He was dressed in dark clothes – a hooded sweatshirt with the hood pulled over a baseball cap on his head, black gloves on his hands, dark distressed jeans, and dark sneakers with a distinctive grey pattern. The lower part of his face was concealed with a red scarf.

4. The appellant knocked on the door of Ratteray's apartment. Ratteray went outside onto his porch to see who it was and immediately recognised the appellant although he had the red scarf across his face from his nose down. The appellant was about 10 feet away from him and he could see his eyelashes which he described as distinctly bushy/girlie. The appellant kept asking him to open the door saying words to the effect "*Ro, just open the door, this isn't*

[1] On CCTV Footage, as were several other incidents of the case

for you". Ratteray recognised the appellant's voice as he was someone whom he saw and spoke to daily and whom he had known for around ten years. (The appellant had been overseas for some time before returning to Bermuda in February 2017). He had seen him the same day shortly before the incident. He would see the appellant and Tony Burgess daily in the vicinity of his residence, by Bulldogs.

5. Ratteray saw a revolver in the appellant's hand which the appellant was holding downwards behind and between his legs. Ratteray ran back inside after slamming the door to the porch and alerted Adams as to what was happening. Ratteray accepted in his evidence that it was likely to be a matter of some 5-6 seconds during which he spoke to the man at the door. Unable to get Ratteray to let him into the apartment, the appellant climbed along the wall of the balcony and crossed onto the porch in order to try and gain entry into the apartment from the door to the porch.

6. Ratteray and Adams fled the apartment. Adams fled down the steps towards Court Street. Ratteray jumped over the wall of the balcony, then scaled a fence and ran across the adjoining empty car park of the Jamaican Grill. The appellant ran through the apartment and down the steps to Court Street in pursuit of Adams.

7. Once on Court Street Adams tried to flee the area on his motorcycle which was parked on the sidewalk on the west side of Court Street just outside the building. But he could not get it started. The appellant managed to catch up with Adams, who was much bigger than the appellant**,** and there was a vicious struggle for the firearm (which Ratteray witnessed) during which the appellant fired 3 shots at Adams' head. In the course of this the appellant fell to the ground and Adams got on top of him. Adams said that he immediately recognised the appellant, notwithstanding the red scarf, which slipped during the struggle enabling Adams to see his face. At this point Adams and the appellant were face to face and Adams was actually breathing on him. Adams

had known the appellant from when he (Adams) was about 14 years old and saw him from time to time since the appellant's return to the island.

8. As Adams was getting the better of the appellant, Troy Burgess Jr ran across the road to help the appellant by pulling Adams off him and attempting to hold on to him. This allowed the appellant to get back onto his feet and fire the gun again at Adams. As Adams tried to disarm the appellant again Troy Burgess Jr tried to hold on to Adams as the appellant discharged the gun. After he got up Adams, now no longer close enough to restrain the appellant, took cover behind a parked vehicle and the firearm was discharged again. He sustained a graze wound on the top of his head. He had various abrasions on his hands and knees.

9. Adams then ran to the Hamilton Police station, shouting the appellant's name arriving there by 6.08 pm. He made a report identifying the appellant as the gunman who had tried to kill him.

10. All this happened on a sunny afternoon and was captured by CCTV cameras erected in the area.

11. The appellant attempted to make good his escape on a motorbike through the Elliot Street parking lot which led onto Union Street. As he exited the lot at speed, he collided with a car, driven by Larenzo Ratteray, which was travelling south along Union Street. Larenzo Ratteray had been driving south down Court Street and had heard the sound of the gunfire. He reversed, turned left along Angle Street and then went south down Union Street when the collision occurred. The front bumper of the car was damaged on its right side. Larenzo Ratteray noticed the black gun in the appellant's hand and backed up his car and drove off. He described the appellant as 5'6" to 5' 8" tall and of light complexion.

12. The appellant had fallen to the ground. But he hastily jumped up and ran off, abandoning his motorbike in the vicinity of the collision. He rode off on

another motorbike which was parked outside a nearby house toward King Street and then onto Curving Avenue.

13. The collision was not captured on CCTV but the appellant was captured on CCTV when riding away from the collision scene and making his way along Curving Avenue.

14. An investigation was launched and on Monday 15th May 2017 the appellant was arrested at 38 King Street, the residence of his girlfriend, Lakeisha Darrell, and taken to Hamilton Police Station. A search warrant was executed at her residence and a bullet proof vest was found.

15. The Police reviewed CCTV cameras from the area. They noted a man, wearing shorts, riding a motorbike on the day of the incident at about 5.50 pm from Curving Avenue onto King Street in the direction of the place where the appellant was arrested. The timing on the CCTV was 5.50 but that was probably about 5.45 in real time. At about 7 minutes later the same man was observed, now a passenger but still in shorts, on the back of a motorbike coming from King Street and continuing onto Curving Avenue wearing a blue cap which appeared to be similar to the one that the appellant appeared to be wearing. Further CCTV footage, from Camera 9 ("the Camera 9 footage"), showed a man on Kirby Avenue, now fully clothed. He went into a house on Curving Avenue and came out of it soon afterwards. His left hand appeared to swing in a normal fashion as he walked; but his right hand was kept to his side, rather as if he had some form of deformity. The prosecution case was that that was because he was carrying a gun in that hand. At about 6.00 pm in real time the same day a man was seen walking from Curving Avenue into King Street. This was recorded on Camera 6 and I refer to the footage of it as "the Camera 6 video" The prosecution case was that the man concerned in each of these videos was the appellant and that, in the last of them, he was heading briskly towards the Elliot Street parking lot across from Ratteray's residence at the Bulldog's building.

16. On Wednesday 19th July 2017 several police officers including PC Lakila Hart reviewed the Camera 6 video to see if they could recognize anyone. PC Hart recognised the appellant as he walked from Curving Avenue into King Street intersection toward the parking lot on Elliot Street. She had known the appellant from conducting frequent patrols, usually once per week, of the Court Street area. She had also seen him before her shift started earlier on Mother's Day at brunch at the Hamilton Princess.

17. A video was lifted from the appellant's phone, which had been seized on 15th May. The video recorded footage of the appellant a few days before the incident, which showed him wearing dark sneakers with, the prosecution contended, the same distinctive grey pattern as he had worn at the time of the shooting and which, the prosecution contended could be seen in photographs of him which were on his phone which the police seized.

18. The motorbike that the appellant was riding out of the Elliott Street parking lot, and which he abandoned after the collision, was found to have a significant number of three component gunshot residue particles with all three chemical components of lead, antimony and barium present, as well as a large number of two component particles. The Appellant's right palm had 2 two-component particles which, between them, included all three chemical components present. His left palm had 1 two-component particle consisting of lead-barium.

19. It was Troy Burgess Jr's case that he was there at the incident but that he was, in fact, acting as a peacemaker. The jury acquitted him.

Discussion

20. As will be apparent from the above summary the appellant was allegedly recognised, by three individuals: (a) Marekco Ratteray, who said that he was very familiar with him and saw him at close quarters; (b) Daniel Adams, who also said that he was very familiar with him and saw him literally face to face (he said that he was 80% sure that it was the appellant); and (c) PC Hart.

Ratteray gave his witness statement two weeks before the trial, after he had been called to the police station and arrested in respect of several warrants.

21. In his summing up the judge warned the jury of the special need for caution before convicting the appellant in reliance on the evidence of identification and gave a detailed explanation as to why such caution was needed. He drew attention to counsel's suggestion that Marekco Ratteray might have some incentive to say what he did because there were outstanding warrants for fines and he was awaiting sentence for offences of violence to which he had pleaded guilty; and counsel's suggestion that the evidence of PC Hart should be viewed with suspicion because she was being invited, two months after the incident, to look at the CCTV in the presence of DC Donawa and DC Sabean, both of whom had been involved in the investigation, the suggested inference being that information had been passed on to her and that she was not recognising the appellant of her own volition. He referred to the fact that, according to Ratteray, and as Adams accepted, Adams had been drinking that day before arriving at his cousin's apartment and that he had smoked some cannabis. The judge put squarely before the jury the possibility that Adams had imbibed so much alcohol and cannabis and had seen the gunman for so short a time that he could not accurately identify or recognize him.

22. Later, when the jury raised a request for a repeat of the direction on identification the judge gave them a detailed explanation of what should be their approach and an exposition of the relevant evidence.

Ground 1

23. The first ground of appeal is that the judge erred in law by not excluding the evidence of PC Hart as counsel had invited him to do.

24. Reliance is placed on the following provision of the Code of Practice:

> *"3.30 Nothing in this Code inhibits showing films or photographs to the public through the media, or to police officers for the purposes of recognition and tracing*

> *suspects. However, when such material is shown to potential witnesses, including police officers, to obtain identification evidence, it shall be shown on an individual basis to avoid any possibility of collusion, and, as far as possible, the showing should follow the principles for video identification if the suspect is known (see Annex A) or identification by photographs the suspect is not known, see Annex E."*

25. The evidence of PC Hart was as follows. She "*knew of*" the appellant from about 2012. She would see him on patrol in the vicinity of Court Street. In cross examination she accepted that it might be February 2017 when she first saw him. She would see him maybe once a week (sometimes less or not at all) depending on her shift and had last seen him on the day of the incident after brunch between 2 and 4.

26. On Wednesday 19th July 2007 she was invited by DS Smith to see some CCTV footage. She was not told in advance what footage she was going to see; nor were any names of any suspects given to her. She was aware that there were suspects in this matter but was not aware that footage of the incident was what she was going to view. Before seeing the footage, she was met by (i) DS Roberts, who was to conduct the interview and was independent of the investigation; (ii) DC Sabean, who was to operate the video, and who had collected the CCTV imaging from Court Street; and (iii) DC Donawa**,** who was to take the notes. DS Robert's evidence, to which the judge referred, was that he was unaware that DCs Donawa and Sabean were involved as, if he had known, he would have suggested that they not be there.

27. PC Hart accepted that she was aware that DC Donawa was one of the lead investigators and that they were friends. She said that that had no impact upon her recognition of the appellant. When shown the Camera 6 video she observed a brown-skinned male walking along Curving Avenue onto King Street in the general direction of Court Street wearing a greyish blue hoodie, a blue baseball cap, distressed jeans and dark coloured sneakers. She recognized him to be the appellant; she said that she did so from his goatee beard and that she recognised his facial features. She identified a particular

spot in the video, a still of which was exhibit 16, where the image enabled her to identify the appellant.

28. DC Donawa's evidence was that she had no discussion with PC Hart about the case prior to the recognition process. She recognized in her evidence that it was an error for her to be there. She said that she and PC Hart were friendly, but not close friends.

29. Mr Horseman further submitted that the learned judge should have held a *voir dire* before deciding to admit PC Hart's evidence; and that exhibit 16 was not of sufficient quality to permit of recognition. PC Hart's evidence had been that it was clearer on the laptop and it was clear enough for her.

Discussion

30. As it seems to us the Code was primarily directed at ensuring that films or photographs were shown to persons who might identify a suspect individually, in the sense that potential identifiers should make any identification separately from each other, thus avoiding the possibility of one witness' recognition being bolstered, or even prompted, by the recognition of others. In this case DC Sabean and DC Donawa were not identifiers of the appellant. Nevertheless, an identification exercise of this kind, involving a police officer, ought not to take place in the presence of police officers who are concerned with investigation of the crime concerned, not least because of the danger that the validity of any identification may be, or appear to be, compromised. It was, as the judge held when ruling on the admissibility of this evidence, unfortunate that DC Donawa was present at the identification exercise, given the identification information she had, identifying both the appellant and Troy Burgess Jr, when she interviewed the complainant. It was, as he said, a significant error and a serious breach of the Code.

31. We do not, however, accept that the circumstances in which PC Hart recognized the appellant should have led to her evidence on that topic being withheld from the jury or that the judge was bound, before reaching his

decision to hold some form of *voir dire,* as to why it had taken so long to get PC Hart's evidence and as to the extent of her friendship with DC Donawa. Whether *a voir dire* would be appropriate at any future trial would be a matter for the trial judge. It was open to the judge to take the view that this was not a case where the fact that the identification had taken place in the presence of DCs Sabean and Donawa meant that it had to be excluded from the jury's consideration either because its probative value was so minimal, or because any value in it was so outweighed by the circumstances in which the identification had taken place, that it should not be put before them. Nor do we accept that the CCTV footage, of which Exhibit 16 is a still, was not such that someone in PC Hart's position could not safely make any identification. Whether the jury could rely on her evidence was, of course, for them to decide. The admission of her evidence was not unfair. If, however, the evidence was to be admitted it was necessary for the judge to give the jury an appropriate direction in relation to it.

32. As to that, the judge cautioned the jury carefully to scrutinise the evidence of PC Hart to ensure that she had not purported to recognize the appellant out of some untruthful creation in her own mind; and told them that they needed to be satisfied that she did not recognize him knowing what to look for and/or to say it was the appellant, when in fact she did not fully recognize him. They also needed to be sure that she was not unduly influenced in her purported recognition by some source other than her own familiarity with the appellant e.g. by being unduly influenced by DC Donawa who knew that the appellant was, as the judge put it, being fingered by Adams. He also told them to take account of the fact that DC Donawa was present at the viewing and to consider what role she might have played, *"without entering into the realm of speculation*". They must, he said, also take into account that the appellant had by the time of PC Hart's investigation already been arrested and charged and that this recognition was a full two months after the event. It was, as the judge explained, only if, after careful and full scrutiny of her evidence, the jury felt sure that it was valid, that they could accept it.

33. The appellant submits that this direction was deficient in that it failed to direct the jury that PC Hart's purported identification was in breach of the Code, and that her initial reaction was qualified in that she said that she thought that the appellant was the gunman or that it looked like him.

34. We have carefully considered the summing up, which must, of course, be viewed as a whole, and, in particular the extensive passages in it relating to the need for caution before convicting the appellant on the basis of evidence of recognition. In our view it was both appropriate and fair. We do not think it was incumbent on the judge to refer in terms to the Code. Nor was he bound to make reference in the summing up to the terms in which PC Hart said that she recognized the appellant, which were before the jury. But it would have been better if he had. She had said, when the recognition exercise took place, that it looked like the appellant because of the goatee beard. It was suggested to her in cross examination that she was not positive and she said that she was.

35. We are also satisfied that the verdict of the jury was not unsafe because of the admission of the evidence of PC Hart. The circumstances of PC Hart's purported recognition of the appellant were before the jury. It was not suggested to DCs Donawa and Sabean that they had helped or prompted her in her recognition nor was there any evidence to that effect. The jury was given appropriate warning as to the caution with which they must approach such evidence. Further PC Hart was not the sole person who recognized the appellant. She was but one of three, the other two of whom were directly involved with the appellant during the incident. Adams had declared the appellant to be his assailant within minutes of the incident. The relevant CCTV footage of the incident from Camera 6 was available to the jury to make their own assessment of the validity or otherwise of PC Hart's recognition of the appellant (rather than of course, their own identification of the Appellant from it).

36. Our attention has been drawn to the case of *R v Smith & Or*s [2008] EWCA Crim 1342, where one of the grounds of challenge to the conviction of one of the defendants[2] was the identification evidence of a single police officer from CCTV images. The court described the purported identification by the police officer of the appellant in that case by his face as insufficient and inadequate, such that, if that was the only evidence, the verdict would have been unsafe. The Court stressed the need for some record of the process which would assist in gauging the reliability of the assertion of recognition by the officer. We regard the circumstances of that case as markedly different from the present one, in which the evidence of PC Hart was not the only recognition evidence and a record was made of the interview process, upon which Counsel was able to cross examine and did so.

Ground 2

37. The second ground of appeal is that the trial judge erred in law by not warning the jury of the dangers of making their own comparison between the Camera 9 footage and the defendant in the dock.

38. The background to this ground of appeal is as follows. The jury retired to consider their verdict at 11.40 a.m. They were brought back shortly thereafter for some further directions and again retired at 12.18 p.m. They came back at 4.11 p.m. with a note asking to see a particular portion of the CCTV evidence, which was the Camera 9 footage in which a person said to be the appellant was walking along King Street having stopped at the house where it was said he collected the gun. The judge said that they could do so. The jury saw the footage both at normal speed and, at their request, frame by frame, and then retired again. Counsel for the appellant raised with the judge his concern that it appeared that the jury might be attempting to make their own comparison between the footage and the appellant in the dock. He asked the judge to warn the jury that they should not be attempting to make a comparison given the quality of the video. The judge refused that application

[2] Christie, whose appeal is dealt with at [63] to [79] of the judgment transcript

and it is his failure to do so which is said to be an error of law which renders the conviction of the appellant unsafe. Reliance is placed on the decision of the English Court of Appeal in *R v Ali* [2008] EWCA Crim 1522 [38] – [42]. That was a case where the jury, who asked for a video to be replayed to them after they had retired (as it was – in Court), were obviously comparing the images with the defendant himself in the dock. The conviction was held to be unsafe because the trial judge had failed to direct the jury of the risk of mistaken identification and of the need to exercise particular care in any identification which they make for themselves.

39. Here the situation was very different. The judge rejected the defence application on the basis that one could not see from this particular video footage whose face it was and that the point that the prosecution had been making about this piece of evidence was that one could, the prosecution said, see that the man in it was swinging one arm suggestive of the fact that he had a gun in the other, either in his pocket or down his side, and that the point of looking at the video was to see whether he was swinging one arm or two.

40. It seems to us that the judge was entitled to take the view that it was not necessary to give a further direction. In the body of his summing up he had given a clear and appropriate direction on the dangers of identification. It is apparent to us from looking at the footage that it was the Camera 6 footage which potentially enabled identification, and that the significance of the Camera 9 footage was what it showed about how the man in both footages was moving (or not moving) his hands, which was the purpose for which the prosecution relied on it. In any event we cannot regard the conviction as unsafe because the judge failed to give a further direction.

Ground 3

41. The third ground of appeal is that the trial judge erred in law by failing to give a full and proper identification/*Turnbull* direction to the jury specifically directed to the facts of the case.

42. The appellant accepts that the judge did give a *Turnbull* direction and attempted to tailor it to the facts of the case. But, he says, the judge failed to draw to the attention of the jury that Larenzo Ratteray, an eye witness, said that the gunman who crashed into his car was "*sort of guessing …just over say, 5'6", 5'8""* tall and of light complexion. The appellant was about 6' 1" and of dark complexion.

43. The judge's summary of Larenzo Ratteray's evidence was short and did not include any reference to his evidence about the height of the gunman or his colour. Larenzo Ratteray, of course, did not, himself, purport to identify the gunman, whom he only saw when he collided with his motor car. Nevertheless, it seems to us that the judge should have referred to these characteristics of the man who collided with Mr Ratteray's car since Mr Ratteray was an independent witness and the characteristics, as described by him do not tally with those of the defendant.

44. However, in the light of the positive identification of the appellant by Marekco Ratteray and Adams, as well as that of PC Hart, and the terms of Larenzo Ratteray's identification ("*sort of guessing*"), we would not regard the conviction as unsafe because of the judge's failure to refer to these characteristics.

45. It would also have been open to the jury to find, as it was clear from the various CCTV footage, that the assailant said to be the appellant, did not fit the description given by Larenzo Ratteray, either in terms of height or skin tone.

46. The appellant also contends that the judge should have drawn attention to the fact that there was no evidence of any injury to the appellant, even though he had been in a fight with a stronger man and had been in a collision with a car. Although in our view it might have been better if reference had been made to this issue, we do not regard this omission as rendering the summing up

unfair. The physical contact between the men outside the Bulldogs building as shown on the CCTV footage lasted but a matter of seconds and there is no evidence to suggest that the collision with Larenzo Ratteray's car must have resulted in obvious injury.

Ground 4

47. The appellant contended in his notice of appeal that his conviction was unsafe because the forewoman of the jury was a cousin of Adams, the victim. The claim was that she failed to disclose this close family relationship so that, in the circumstances, there was a real possibility of bias. It was also suggested that she was a cousin of Marekco Ratteray in whose residence Adams was before the incident in question.

48. In the light of this contention we caused the Registrar to interview the forewoman. Her evidence is that she was not in any way a cousin of Adams, nor was she a friend of his, nor did she know him before the trial. The same was so in respect of Marekco Ratteray. She was well aware that she could not sit on the jury if she knew people involved in the case. This was the third time she had sat as a juror. She understood that she would have to disclose any relationship with anyone involved in the case; she was aware that the judge asks at the beginning of the trial (as he did here) if there are any issues in relation to a list of people and a juror has to say if she knows them. At an earlier trial she had to declare her knowledge of the defendant and had done so. In the present case she knew neither defendant nor any of those whose names were read out as persons who might be involved.

49. In the light of that evidence Mr Horseman confirmed that this ground was no longer pursued.

Ground 5

50. The appellant says that his trial counsel, Mr Richardson, failed to follow his instructions to call as an alibi witness, Lakeisha Darrell, his girlfriend at the time, despite being instructed so to do. The appellant says that he learnt later

that his trial counsel had previously had a sexual relationship with Ms Darrell, which had not been disclosed to him. There was therefore, a conflict of interest which had a bearing on whether Ms Darrell was called as an alibi witness. If the appellant had known of the previous relationship, he would, he says, have retained new counsel and called Ms Darrell.

51. The appellant, Ms Darrell, and Mr Richardson have each sworn affidavits and have given oral evidence before us.

The appellant

52. In his affidavit the appellant says that on the day of the incident Ms Darrell arrived back in Bermuda from a trip overseas. He received a text informing him of her arrival at the airport at approximately 4 p.m. She sent a further text message telling him that she was on her way home and would be arriving there shortly. At this time the appellant was at a restaurant in the Hamilton Princess. He then received a further text from Ms Darrell saying that she was now home. He left the Hamilton Princess and went to her residence at 38 King Street. He arrived at about 5.00 pm. After trying on some clothing that she had bought for him, and talking for a bit, he lay down in bed and watched a program on his telephone. According to him Ms Darrell then went to get a Kentucky Fried Chicken and was gone for no more than 15 or 20 minutes. The appellant stayed in the house. About 45 minutes after she got back, he received calls from friends who had just heard that a shooting had happened in Court Street. It would not, he says, have been possible for him to leave the house, participate in the crime and be back before she returned.

53. The appellant says that, although Ms Darrell was scheduled as a witness at the trial and her name read out to the jury, on the day that she was due to testify his counsel said that he did not want to call her because it would allow the prosecutor to ask her about the bullet proof vest that had been found at her house. The best course, counsel thought, was to go straight to closing arguments. It was only in speaking with Ms Darrell after the conclusion of

the trial that she told him that she and his counsel had once been involved in a relationship. (It was not suggested to him that he had known of this before).

54. In his oral evidence the appellant said that prior to the trial he was going to give evidence and so was she, and those were his instructions. Mr Richardson told the appellant that he had spoken to Ms Darrell, who had said that she was reluctant to give evidence but would do so, if need be. Mr Richardson was worried about subpoenaing her. On the day she was supposed to give evidence he said that he did not want to call her because she would be asked about the bullet proof vest and it would look like she was covering up for him; and "*it will be over for you, kid*". After the prosecution finished their case Mr Richardson advised him not to take the stand, because he would be asked about the video. The best course was to go straight to closing argument. If he took the stand, he would be likely to be found guilty and the best course was to go straight to closing argument. The appellant said that he wanted to give evidence and was told that he did not have to do that and that Mr Richardson could do it (semble the job) for him. The appellant said that he did not know that he could give instructions to his counsel. He thought he had to go with what his lawyer told him. He told Mr Richardson that he should call her, and Mr Richardson said that that was not the course the appellant should take. He would not have had Mr Richardson as counsel if he had known of the latter's involvement with his partner. If he had had another lawyer, he would have called her. When, after the trial, he learnt of Mr Richardson's involvement with Ms Darrell, he was upset. He accepted that Mr Richardson was a very good lawyer and handled the case, generally, well, but gave him bad advice not to call her.

55. He accepted that Mr Richardson said he was concerned about calling a reluctant witness and that he did not like calling such witnesses. He also accepted that Mr Richardson had said that it was his choice whether to call her. Mr Richardson's advice was not to call her because of the problem arising from the bullet proof vest. When Mr Richardson said he was going straight to closing argument the appellant said that Mr Richardson must do whatever he

wanted to do. Mr Richardson used the words "*it is your choice*" but it did not seem to him as if he really had a choice.

56. When cross examined by Mr Mahoney, he accepted that he did like to talk. He also referred to having given instructions to lawyers in the UK, where he faced a charge for murder, before returning to Bermuda, of which charge he was acquitted.

Ms Darrell

57. In her affidavit Ms Darrell said that, after she had reached home and spent some time with the appellant, she left him lying on the bed. She went outside to clean her car; then drove to the Phoenix Drug Store on Reid Street where, having parked her car outside, she was inside for no more than 5-7 minutes. She then walked around the corner to the Kentucky Fried Chicken on Queen Street, where she was ordering and getting food for about 10 minutes. She then walked back to her car and drove directly home. This took about 3 minutes. She was away from her home for approximately 15, and no more than 20, minutes. When she arrived, the appellant was still in bed, relaxed and in the same clothes that he had been in when he arrived. When the trial started, she told the appellant's counsel that she did not want to take the stand but definitely would do so if it was necessary. During the course of the trial she received a text from Mr Richardson where he asked her again if she would take the stand. She texted him to confirm that she would and asked when she should be at court so that she could notify her place of employment. She went to court on the day she was supposed to testify and was told that Mr Richardson had decided not to call her as a witness. The police had found a bullet proof vest at her house and he felt that the prosecution would try and use that against the appellant; and he said that he did not want to put her though that. She was confused and did not understand the reasoning behind not calling her.

58. In her oral evidence Ms Darrell confirmed that during the trial she was in court frequently, although not every day. She believed that the lawyers had

the final decision. She also accepted that Mr Richardson was entirely professional.

Mr Richardson

59. In his affidavit Mr Richardson said that the issue of whether to call Ms Darrell as an alibi witness was discussed prior to trial, at which stage the appellant did not instruct him to call her. Had he done so he would have had to have given an alibi notice. The issue was revisited prior to the appellant being put to his election. (In his oral evidence he confirmed that this was between the close of the prosecution case and the appellant coming into court to state whether he was to give evidence or not). It was decided that he was not going to give evidence and the appellant endorsed the brief to that effect and confirmed this in open court. (In his oral evidence he also said that the judge asked the appellant to confirm that he was not going to give evidence and had received advice. This was confirmed by the Court Smart recording).

60. The appellant also raised again the issue of Ms Darrell being a witness. Counsel advised him that it was his (the appellant's) choice but that he had some concerns. No alibi notice had been given which might be the subject of adverse comment if she were called; the revelation of a bullet proof vest being found at Ms Darrell's residence would not assist his case, and there were no real grounds to exclude such evidence if it arose; and, when he spoke to Ms Darrell about giving evidence, she was reluctant to do so, but had agreed that, if compelled by subpoena, she would do so. The appellant, having been told that it was his choice, agreed to close the defence case without calling any further evidence. As to his relationship with Ms Darrell they had had a brief encounter in 2002 (i.e. 15 years previously) and he had not spoken to her or interacted with her since. That had no bearing whatever on the advice which he gave.

61. In his oral evidence Mr Richardson said that as the trial started he had not looked at Ms Darrell as a genuine alibi witness but as one with a small "a" in the light of the audio visual recording of her interview to the police in which

she had said that she was away from 38 King Street for an hour when that address is only a couple of minutes from the scene of the crime. She was reluctant to give evidence and it was his experience that such witnesses do not come up to proof. At the start of the trial it was not the position that she was to give evidence. He had no proof from her, then or thereafter. She said that she stood by her statement to the police. As to the appellant, he told him that it was his choice whether he wanted to give evidence. The appellant had an open mind about whether he would do so and would get the chance to elect.

62. After the close of the prosecution case there was the discussion about calling Ms Darrell or not doing so and he outlined the drawbacks in doing so. He accepted that the appellant could tell him what to do.

63. According to Mr Richardson, his entire file has gone missing. He informed the court that at no time had he made any attendance notes of his meetings with the appellant or the advice which he had given.

The audio-visual recording

64. In her interview with the police which began at 19.55 on 15 May 2017 i.e. within two hours of the incident, Ms Darrell first said that she left home at about five and came back at about six or shortly after six. When asked if it could have been later or earlier, she said that it could have been a little later or a little earlier and that she was not too sure. She described going to the Phoenix Drug Store, which she said normally closed at about six or five and then to the Kentucky Fried Chicken, where she got a two-piece meal and a Zinger. She then went home. She said that she had no idea that there was a bullet proof vest behind her bed. She was asked if she knew why the appellant had it. She said "*is it like a cool thing to have or something?*" and said she had no idea why he had it. A little later in the interview she said that she left after 5 but that it may have been about 5.30 because she thought that she got home before or shortly after six.

Discussion

Calling the appellant

65. It is not one of the grounds of appeal that Mr Richardson failed to follow instructions to call the appellant as a witness; nor did the appellant's affidavit evidence suggest that. We are quite satisfied that the appellant knew that he could give evidence, if he wanted to. He is not a stranger to the criminal courts. He had given instruction to lawyers before. He was required by the judge in open court to make an election as to whether to give evidence or not. He confirmed that he declined to give evidence, adding that, as the Court had already heard, "*it is not me*" - a statement which the judge ruled was not evidence. Mr Richardson confirmed that there had been an endorsement of his brief and we understand that some document confirming that he was not to give evidence was signed by the appellant; but that document is not before us. The appellant had, of course, to make a decision as to what to do. But he must have realised that he had a choice. That choice fell to be made in the light of the advice as to the problems facing him if he did give evidence to which Mr Richardson referred. We are satisfied, having seen and heard the appellant that he is not a man who would somehow be cowed into not giving evidence and that, having received such advice, he chose not to give evidence.

Calling Ms Darrell

66. Of greater concern is the position in relation to Ms Darrell. Mr Richardson should not have been acting for the appellant in a case where a potential witness was someone with whom he had had some sort of relationship, albeit a long time ago. He certainly should not have been doing so without informing the appellant of that relationship. In addition, as stated above, Mr Richardson appears to have kept no attendance notes in relation to the issue of calling her as a witness, or indeed any other advice he gave, which is manifestly unsatisfactory. The fact that he has not done so makes it the more difficult to reach a conclusion as to what exactly occurred.

67. As to that, it seems to us unlikely that the appellant instructed Mr Richardson to call Ms Darrell and that Mr Richardson then simply failed to comply with

his instructions. It is, also, apparent to us that a decision was not made before the trial that Ms Darrell would be called. If such a decision had been made, there would have to have been an alibi notice, and it would have been wrong for Ms Darrell to attend in court before she gave evidence. She was, however, a possible witness. Her name was given to the jury as one of those who were involved in the facts to which the case related.

68. When the prosecution case was over a decision had to be made as to whether or not she should be called. It is common ground that there was discussion as to the disadvantages of calling her, including (as the appellant accepted) the possibility of adverse comment on the lack of an alibi notice, and of her being cross examined on the bullet proof vest; together with her reluctance, which, in Mr Richardson's view, did not bode well. We are quite satisfied that the appellant was given a choice as to whether she should be called and decided in the light of Mr Richardson's advice as to the problems, not to call her.

69. The question arises, however, as to whether, in the light of the undisclosed relationship between Ms Darrell and Mr Richardson, the appellant was, in effect, deprived of the benefit of the independent advice which he thought that he was getting, and whether the conviction is unsafe or there has, otherwise, been a miscarriage of justice,

70. As to that, one of the considerations which Mr Richardson had in mind was that Ms Darrell was a reluctant witness and, according to her evidence, he did not want to put her though cross examination about the bullet proof vest. It is thus possible that his advice not to call her reflected, consciously or unconsciously, some personal consideration for her; and that counsel with no link to her would or might have given different advice.

71. The dangers in calling her as a witness were those identified by Mr Richardson. Her immediate response to the police, made within an hour after the appellant was arrested at her residence 38 King Street was to the effect

that she had left the appellant at her residence on the day in question ar around 5 00 pm and returned probably about or shortly after 6 00 pm. In other words, she was absent for much longer than the times claimed in her affidavit.

72. Ms Darrell's residence was less than 3 minutes' walk from Court Street where the incident occurred, and the actual incident took no more than a few minutes. By 18.07 Adams was at the Hamilton Police Station where he made his report and identified the appellant as his assailant. At the same time the appellant (if it was him) was seen making his way on a white motor bike proceeding down King Street in the direction of Ms Darrell's house. From the time when the appellant (if it was him) was seen on Curving Avenue as a passenger on the bike and the time when (if it was him) he collided with Mr Ratteray's car was some 14 minutes. The time needed to commit the crime was thus only a limited proportion of the time during which Ms Darrell had originally said that she was absent.

73. Ms Darrel would, no doubt, have been vigorously cross examined about her evidence as to how long she was absent from her apartment, in the light, especially, of the conflict between the time estimate given to the police and the one to which she proposed to testify. She would also be likely to have been cross examined about the bullet proof vest which was found by the police behind her bed, which she had indicated to the police must belong to the appellant. Such evidence could have been very damaging to the appellant.

74. At the same time, her evidence was that she arrived back at her apartment at around 18.00, when the appellant was still in bed in the same clothes as he had been in when he arrived. If that was so, then, even if she was wrong about how long she had been away, the jury might well find that they could not be sure that the appellant was the man who tried to kill Adams.

75. We cannot, of course, tell what would have happened if she had been called as a witness. But, given that two of the members of the jury had doubts as to

whether the appellant was guilty, it is at least possible that Ms Darrell's evidence would have led more members of the jury to take that view. They might have been persuaded that, in the light of her evidence as to when she arrived back, the appellant could not have been the attempted murderer; or that it was unlikely that he would choose the afternoon of his partner's return, and after learning that she had arrived, to try and kill someone.

76. The circumstances in which this court will overturn a conviction on account of the supposed failings of counsel must of necessity be extremely rare: *R v Clinton* [1993] 2 All ER 998. An egregious failure to call critical evidence ("*when all prompting of reason and good sense pointed the other way*") may have that consequence. But, in general, appellants are not to have their convictions set aside because a tactical decision was taken one way and the opposite decision might have led to a different result.

77. The prior relationship between the appellant's counsel and the potential alibi witness is, however, a consideration absent from any previous cases of which we are aware. We have come to the view that, in circumstances where the advice which led to Ms Darell not being called was given by a lawyer who, unbeknown to the appellant, had had a previous relationship with her, a reasonable observer would take the view that there had been a mis-carriage of justice.

78. The significance of that circumstance is twofold. First, it raised the possibility that the advice given was influenced, consciously or subconsciously, by a wish not to put a former girlfriend through what could well be something of an ordeal. Secondly, it meant that the appellant did not have, as he thought he had, the benefit of advice from a lawyer who had no connection with the incident or any actual or potential witness. If he had known of the relationship, the likelihood is that he would have secured another lawyer, who might have given different advice. Alternatively, he might not have been disposed to accept the advice that he was given.

79. Any reasonable observer would, rightly, think that this is not the way that our justice system is supposed to work, and that it had, in this case, miscarried.

80. We would add that the absence of any record or note of the decision not to call Ms Darrell makes it difficult to discern exactly what was the sequence of events and the content of any discussion between lawyer, client and potential witness; and, in the light of certain further matters, to which we refer in an addendum to this judgment, which is not to be published without our leave, we have considerable concern as to exactly what the position was, and the nature of the discussions, when the question of whether or not to call Ms Darrell fell to be resolved.

Ground 6

81. The sixth ground of appeal is that the judge erred in law when he admitted evidence of two-component particles of gunshot residue (GSR) which were detected on the appellant's palms, because that evidence was more prejudicial than probative. The appellant was arrested by an armed police officer and he could have been the source of the two-component GSR found on the appellant's palms.

82. Gunshot residue is composed of three components: lead, barium and antimony. Particles may, also, be found which consist of only one component (lead or barium or antimony); or two of the three components, fused together; or all three components fused together.

83. A substantial number of two-component and three-component particles were found on the motorcycle which crashed into Mr Ratteray's car. These included five 3-component and twenty-one 2-component particles on the right handlebar/grip/lever/control buttons. The particles found on the appellant were as follows:

- *The appellant's right palm*

Two 2-components, one barium-antimony, one lead-barium.

- *The appellant's left palm*
  One 2-components, lead-barium.

84. The components found on the motorbike do not, of course, show that the bike was being driven by the appellant, as opposed to tending to show that its rider had been close to gunshot. The appellant submits that the prejudicial effect of this evidence far outweighed any probative value it might have. The presence of the two-component particles on the appellant's palms, was, however, evidence which was consistent with his having been close to gunshot. This was not inconsistent with the low number of such particles, since the gunman was said to have been gloved, and, in addition, the appellant was not arrested until the next day so there was time for the particles to be lost. The particles could have come from the policeman who arrested him but that did not, in our view, mean that the evidence of their existence should have been kept from the jury.

85. The judge gave a careful and detailed direction to the jury in respect of the evidence of Farah Helsel, a GSR expert. As she explained, GSR generally refers to all the particles (in the three categories) which are expelled from a discharged firearm. One-component particles are commonly referred to as "*commonly associated with GSR*". But they can be found in several other sources. She did not bother with those. Two-component particles are known as "*Consistent with GSR".* These may be found in other sources, which she identified, but in fewer sources than one-component particles are found in. These she reports, after considering their morphology and their chemistry, which may indicate that they are derived from some source other than GSR e.g. fireworks. Three-component particles are known as "*characteristic GSR*" because they are highly specific to the discharge of a firearm. There are very few other sources from which they can be found.

86. She gave evidence of the two- and three-component particles found. Her evidence was that these particles were consistent with a person discharging a firearm or coming into contact with a thing or person upon which these particles were. The judge referred expressly to her evidence that the presence of these particles does not necessarily mean that the person in question fired the gun; and that they could be acquired by contact with something that has them on it e.g. a police car or a police station or common area where persons carry firearms. She also accepted that if a firearm officer handcuffed a suspect it was not impossible that he could transfer particles to the suspect.

87. The judge also referred to the evidence of DC Joshua Bolden of the Armed Response Unit. He was the officer who arrested the appellant on 15th May 2017. His evidence was that he had the appellant put his hands on top of his head and he then handcuffed him by the arms. He did not touch his hands The judge observed that the Crown relied on this as suggesting that the particles on the appellant's hands were unlikely to have come from the officer, and more likely to have arrived on his palms when he was taking his gloves off; and that the defence suggested that it was possible, or probable, that the particles on the appellant's palms were transferred to the appellant during the handcuffing process, or when the appellant was transported to the police station in a Police unit car which police officers get in.

88. In our view the judge was not in error in allowing the Crown to adduce evidence of what was on the appellant's palms, and his summing up was appropriate and fair. We do not accept that because a possible explanation for the particles on the appellant's palms was that the two-component particles came from the arresting officer the jury should have been denied the evidence of what was found on those palms. That evidence was part of the whole picture and it was for them to determine what significance, if any, they attached to it. As this court said in *Deven Hewey and another v R* [2016] CA Bda Crim at [35] this type of evidence has to be considered in the context of the other evidence in the case.

89. Mr Horseman submitted, as he had to this court in *Pearman-Desilva v R* [2017] CA Bda Crim at [20] that where two inferences can be drawn from the presence of two-component particles on an individual, the one most favourable to the defence must be adopted, with the result that this evidence should not have been allowed to be before the jury. We disagree, as did the court in *Pearman -DeSilva*, and for the same reason. Evidence of this kind falls to be considered in combination with the rest of the evidence. There are often items of evidence in which a jury could draw one of two or more inferences. That is not, however, a circumstance which means that the evidence ought not to be before the jury at all.

Conclusion

90. Accordingly, we shall allow the appeal against conviction on ground 5.

91. As to the appeal against sentence, the appellant should, as the Crown accepts, have been given credit for the time that he had spent in custody prior to his conviction, and, if we had not allowed the appeal against conviction, we would have allowed his appeal against sentence to the extent of ordering that his sentence should be reduced by the amount of such time.

C.S.P.S.C.J.-R.M.

Clarke P

Smellie JA

Elizabeth Gloster

Gloster JA