Neutral Citation Number: [2025] CICA (Crim) 8

IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT CRIMINAL DIVISION

Criminal Appeals 9 and 10 of 2023
Ind No. 0032/22 & 0007/22
SC# 559/22 & 1944/21

BETWEEN

KEVAN MAXHOWARD SMITH

1st Appellant

SHARIS ALEXANDRA FORD

2nd Appellant

V

HIS MAJESTY THE KING

Respondent

BEFORE:

The Rt Hon Sir John Goldring, President
The Rt Hon Sir Michael Birt, Justice of Appeal
The Hon Clare Montgomery KC, Justice of Appeal

Appearances: **Mr. Jonathon Hughes and Mr Gregory Walcolm for the Appellants**
Ms Nicole Petit, ODPP for the Respondent

Date of Hearing: **17 September 2025**

Draft circulated: **26 September 2025**

Date of Judgment: **08 October 2025**

JUDGMENT

Sir Michael Birt, JA

1. On 8 November 2022, following a trial before Frank Williams J (Actg) and a jury, the appellants were convicted of possession of an unlicensed firearm and also possession of ammunition for that firearm. Subsequently, on 5 May 2023, the appellants were each sentenced to 10 years imprisonment. They have both appealed against conviction.

2. The court heard the appeals on 17 September and allowed both appeals at the conclusion of the hearing. What follows constitutes the reasons for that decision.

3. The prosecution case can be summarised as follows. Smith and Ford were in a relationship and Smith had been cohabiting with Ford at Ford's apartment for a number of months prior to their arrest. On 5 November 2021, Micah Blake attended at Ford's apartment as he believed that there had been some form of incident at the apartment concerning his girlfriend, who was a long-time friend of Ford. At the apartment, he was threatened by a man with a firearm. He did not identify Smith as the man who threatened him, but understood the man to be Ford's boyfriend. He reported the matter to the police the next day.

4. On 10 November 2021, the police executed a search warrant at Ford's apartment. They found a black plastic case in the bottom of the oven. Inside the case was a Tanfoglio Force 99 9mm pistol with five rounds of ammunition. DNA samples were taken from the firearm and the plastic case. All of these were mixed samples in that they contained DNA from more than one person.

5. The expert witness called for the prosecution, Mr Christian Taylor, stated that there were three samples which had produced material evidence.

6. In relation to what he referred to as Mixture 1 (from item TT3), which was taken from the grip of the firearm, he said:

> *"Assuming a mixture of three persons, the DNA results from Mixture 1 are estimated to 460 million more likely if they originate from Sharis Ford and two unknown people than if they originate from three unknown people, unrelated to her."*

Mixture 1 contained no DNA which could be attributed to Smith.

7. In relation to Mixture 2 (taken from item TT5), which was taken from the trigger and trigger point of the firearm, Mr Taylor said:

> *"Assuming a mixture of three persons, the DNA results for Mixture 2 are estimated to 130 million times more likely if they originate from Kevan Smith and two unknown people than if they originate from three unknown people, unrelated to him."*

8. In respect of Ford he concluded:

> *"Assuming a mixture of three persons, the DNA results for Mixture 2 are estimated to 4 million times more likely if they originate from Sharis Ford and two unknown people than if they originate from three unknown people, unrelated to her."*

Addressing the possibility that both Smith and Ford could be contributors to Mixture 2, he said:

> *"Assuming a mixture of three persons, the DNA results for Mixture 2 are estimated to 16 quadrillion times more likely if they originate from Kevan Smith, Sharis Ford, and one unknown person than if they originate from three unknown people, unrelated to them."*

9. In relation to the sample from the plastic case (referred to as TT9 or Mixture 3) Mr Taylor said this:

> *"Assuming a mixture of two persons, the DNA results for Mixture 3 are estimated to 1,100 times more likely if they originate from Kevan Smith and one unknown person than if they originate from two unknown people, unrelated to him."*

10. At his police interview, Smith declined to answer any questions, but produced a short prepared statement. It referred to an incident on 3 October 2021 when he had been attacked by three men and continued "*Since this event, I have been in fear for my life and very conscious of the need to defend myself*." His statement went on to say "*As for the 5th of November 2021, I deny showing Micah Blake a gun and I deny threatening him. This is all I have to say at this time*."

11. Unlike Smith, Ford at police interview answered all the questions asked of her. She denied any knowledge of the firearm and said that her DNA (the samples had not been analysed at that time) would not be found on the firearm. She also produced a short prepared statement which read: *"I do not know anything about this firearm. I have not seen it before and it was not there the last time I used the oven, which was a few days ago. I cannot assist any further."*

12. Neither Smith nor Ford gave evidence at the trial. Their defence appears to have concentrated on challenging the interpretation of the DNA evidence and raising questions about possible

contamination during the collection of evidence and whether proper procedures for handling evidence had been followed. In addition, they raised the possibility of transfer of DNA as between Smith and Ford on the basis that they were in an intimate relationship and were cohabiting in the premises.

13. As already stated, the jury found Smith and Ford guilty of the counts against each of them in relation to unlawful possession of the firearm and the ammunition.

Grounds of Appeal

14. The appellants relied upon a number of alleged misdirections or deficiencies in the judge's summing up. Three of these grounds were raised by both appellants and each of them raised one further individual ground. The three common grounds related to (i) the standard of proof, (ii) adverse inferences from the defendants not giving evidence, and (iii) the defence case concerning the DNA evidence. The additional ground raised by Smith related to the judge's direction concerning circumstantial evidence and the additional ground raised by Ford related to the judge's failure to give a good character direction in her case. We shall discuss each of these in turn.

(i) Standard of proof

15. At pp 13-14 the judge directed the jury as follows:

> *"In this case, you would have heard it said, as well, that the evidence – the burden of proof lies on the Crown throughout the case. So it is the prosecution that has brought these defendants here, so there is a burden, a burden of proof, or a duty on the prosecution to prove to you the guilt of the defendants, and the prosecution is required to do that according to a particular standard – that is, beyond a reasonable doubt or so that you feel sure.*
>
> *So what it really calls for you to do is to assess the evidence carefully, consider the directions that I'm giving you, put everything together, the directions and your view of the evidence, and if you are left in any doubt at all – and it should be a reasonable doubt, a doubt based on a reason, it shouldn't be a gut feeling or a whim or fancy – but if you are left with a reasonable doubt about the case, then you would be duty-bound to return a verdict of not guilty.*
>
> *If, on the other hand, you review the case very carefully and you are satisfied about the guilt of the defendants, or either of them, then you would also be duty-bound in keeping with your oath to return a true verdict. And if you're not in any doubt at all, no reasonable doubt, it would be verdicts of guilty."* [emphasis added]

16. The appellants submitted that, by attempting to explain to the jury what the phrase *'beyond a reasonable doubt'* meant, the judge was acting against the weight of common law guidance, which suggests that a judge should simply direct a jury that they must be *'sure'* in order to convict. Thus the Crown Court Compendium at chapter 5 says: "*It is unwise to elaborate on the standard of proof although if an advocate has referred to "beyond reasonable doubt", the jury should be told that this means the same thing as being sure*."

17. They also referred to the observation of Moses LJ in *R v Majid* [2009] EWCA Crim 2563 where, in relation to a case where the jury had raised a question as to what exactly was meant by beyond reasonable doubt, he said at [12]:

> *"Any question from the jury dealing with the standard of proof is one that most judges dread. To have to define what is meant by "reasonable doubt" or what is meant by "being sure" requires an answer difficult to articulate and likely to confuse. No doubt that is why the Judicial Studies Board seeks to avoid it in the direction they give to judges. The judge on receiving that question and debating it with counsel, said that he did not understand altogether what the jury meant. It seems to us that it is plain that the jury were asking what type of possibilities might be excluded from the road to their conclusion. The question, we suggest, could have been answered simply by telling the jury to exclude any fanciful possibility and act only on those which were realistic. But the judge chose not to do so and entered into a debate with Mr Tomlinson as to the propriety, on the one hand, of a direction that the jury should be sure, as opposed to a direction that they should be satisfied beyond a reasonable doubt."*

18. Mr Hughes and Mr Walcolm submit that a reasonable doubt and a doubt based on a reason (as in the emphasised passage above) are not the same thing. We agree. The direction suggests that the jury must have a specific reason for any doubt whereas the jury may simply find themselves in the position of not being sure of guilt.

19. Ms Petit, on behalf of the Crown, submitted that any misdirection was rectified by the judge at the conclusion of his summing up when he said at p 73:

> *"And remember I said the burden of proof is on the prosecution throughout, and it is they who have brought the defendants there, and they need to satisfy you of the guilt of the defendants so that you feel sure that they are guilty of the offences charged on the indictment."*

20. The difficulty is that at no stage did the judge specifically state, as the authorities make clear he must, that being sure of guilt is the same as finding guilt proved beyond reasonable doubt. We

think that there was a real risk that, because of the different expressions used by the judge at different points in his summing up, the jury may have been under a misapprehension as to the required standard of proof.

(ii) Adverse inferences from not giving evidence

21. At pp 71 – 72, the judge directed the jury as follows:

> **"***The defendants could, if they wish, take the witness box like the other witnesses and give evidence as the other witnesses did, in which case they would have been subjected to cross-examination, questions could have been asked. That is one option open to them. But they also have the right, an absolute right, to remain silent and not to say anything at all. You will recall yesterday that there were – they took the second option, to not call any witnesses, not say anything in their own defence. And that is something – as I said, that is a right. That is something to which they are entitled, the choice that they have, and they indicated that they are relying on the statements. When they said that, you will recall that I asked whether they were aware – each of them, whether they are aware one, that they had reached the stage where they could give evidence on their own behalf and call witnesses, and each of them said yes. And they were also asked if they were aware that, with their decision not to call any witnesses and their decision not to give any evidence, it was open to the court and open to you as jurors to draw any inference that might seem proper or appropriate.*
>
> *As I indicated to you, you can draw inferences either that go towards establishing innocence or towards establishing guilt. It may be a matter for you. It's something for you to take into account, along with all the other evidence in the case. Is there any significance to be attached to this, the fact that these allegations are being made and they have not – apart from what is contained in the prepared statements – not really said anything in their defence?*
>
> *Bear in mind that that is one of the rights they have. Remember I said there are two choices, either to give evidence or to remain silent, not to say anything. But it is something that it would be open to you to consider and see whether or not any inference can be drawn from that, either that will go towards innocence or will go towards guilt. It will be a matter for you at the end of the day."* [emphasis added]

22. Following an intervention from Mr Hughes, the judge supplemented his direction at p 87 by saying:

> *"Another matter that I should mention to you as well, when I was telling you earlier about the possibility of the drawing of inferences in relation to their silence at trial, it is important for you to bear in mind as well that in order for you to draw an inference, an adverse inference, you must already have taken a certain view of the Crown's case, and that is that it is strong enough that it calls for an answer from*

them. If, when you look at the Crown's case, you are of the view that it does not call for an answer from them, or either of them, then it would not be open to you to draw that adverse inference."

23. We were referred to *R v Cowan* [1995] 3 WLR 818 where, at 824, Lord Taylor of Gosforth CJ highlighted certain essentials about the direction which a judge should give concerning the drawing of adverse inferences when a defendant does not give evidence. Thus the judge should direct the jury (i) about the burden of proof remaining upon the prosecution throughout and what the required standard of proof is; (ii) that the defendant has the right to remain silent; (iii) that an inference from failure to give evidence cannot on its own prove guilt; (iv) that therefore the jury must be satisfied that the prosecution has established a case to answer before drawing any adverse inferences from the defendant's silence; and (v) that the jury may draw an adverse inference if they consider that the defendant's silence can only sensibly be attributed to his having no answer or none that would stand up to cross-examination.

24. The appellants accept that the judge dealt with items (i), (ii) and, following a prompt from Mr Hughes on behalf of the defence, (iv) above. However, they contend, correctly, that the judge did not deal with items (iii) and (v).

25. Furthermore, on behalf of Ford, Mr Walcolm (who did not appear below) submits that, in the emphasised passage at para 21 above, the judge materially misstated the position. It was incorrect for him to say that Ford had not said anything in her defence except in her prepared statement; on the contrary, during her police interview she had answered all the questions put to her and had explained her case that she did not know anything about the firearm.

26. In our judgment, Mr Walcolm's submission is correct. When giving this direction about adverse inferences from the decision not to give evidence at the trial, the judge should have pointed out that Ford had answered questions and put forward her case during her police interview. Taken together with his failure to deal with items (iii) and (v) from *Cowan* as described at para 24 above, we consider that there was a material misdirection in the summing up on this topic in respect of Ford. So far as Smith is concerned, the only deficiency in the summing up on this issue was the failure to deal with items (iii) and (v) from *Cowan*.

(iii) The summing up on the DNA evidence

27. The appellants criticise the way in which the judge dealt with the DNA evidence. The judge dealt with Mr Taylor's evidence at pp 57 – 68. At pp 78 – 85, Mr Hughes asked the judge to elaborate on one aspect of his direction but the judge declined to do so.

28. The direction on the DNA evidence was not a model of precision. It did not bear any resemblance to the standard directions. This is a matter of regret as the standard directions provide a useful checklist for the matters that should be drawn to the attention of the jury.

29. The Judge observed at the start of his summing up that "*the main issue in this case is credibility and reliability.....*" and *"whether [the jury] accept what the expert is saying to you on his evidence that certain persons could not be excluded."* However, given the nature of the cross examination, it was clear that this was incorrect and that the real issue in the case was the possibility of the DNA being present as the product of secondary or tertiary transfer rather than any evidence capable of challenging the DNA itself.

30. It is true that, when summarising Mr Taylor's evidence, the judge reminded the jury of questions which defence counsel had put to Mr Taylor concerning the possibility of transfer of DNA either by the police when carrying out their search or by reason of the fact that the appellants were cohabiting.

31. However, at no stage did the judge correct his mistake described at para 29 above as to the main issue in the case or make clear to the jury that the appellants' defence was based on the possibility of innocent transfer of DNA. Indeed, despite having read carefully the transcript of the summing up before the hearing of this appeal, the members of the court had to make inquiries of counsel during the hearing as to exactly what defence was being run at trial as it did not appear from the summing up. We were advised that the possibility of innocent transfer was a key plank of the defence. In those circumstances, it was the duty of the judge to make clear to the jury that the defence case was that, despite the existence of the DNA evidence, there might be an innocent explanation by reason of innocent transfer. It was not sufficient for the judge simply to quote from the answers given by Mr Taylor to certain questions asked by defence counsel. Accordingly, we find that there was a material misdirection in this respect.

32. The appellants make certain other criticisms of the way in which the judge dealt with the DNA evidence, but we do not think it is necessary to address these. Of themselves, we would not have considered that they gave rise to any risk of the convictions being unsafe.

(iv) Inferences from circumstantial evidence

33. On behalf of Smith, Mr Hughes criticises the judge's direction in the summing up concerning inferences which could be drawn from circumstantial evidence. At pages 7-8 of the transcript, the judge said this:

> *"It is open to you as well, Madam Foreman and your members, to draw certain inferences in the case, and that really involves looking at the facts that have been proven and coming to a conclusion on the basis of those facts as to what could've happened on the day in question, what might've happened, and so on."*

Having then given an entirely apt example, involving a cat eating a bird, of when inferences could properly be drawn, the judge went on as follows:

> *"And it's open to you to draw inferences in this case. You could draw an inference either to establish guilt or that goes to establishing innocence, but, in drawing the inferences, the inferences must be the only inferences that you can reasonably draw from the facts that have been presented in the case.*
>
> *And while it is open to you to draw inferences, on the other hand it is not open to you – or you should not speculate. And by "speculate" I mean just guessing, just coming up with particular theories or ideas as to what might have happened and so on. You are to have regard only to the evidence in this case. So, by all means, you may draw inferences, but you are not to speculate or guess about any gap that there might be in the case."*

34. Mr Hughes submits that this was a confusing direction. In particular, the references in the underlined passage to coming to a conclusion as to what '*could've happened*' and which '*might've happened*' on the day in question were an invitation to guess or speculate, which was not cured by his subsequent direction about not speculating or guessing. It had the potential to operate adversely against the appellants.

35. It would have been preferable for the judge not to have used the two expressions just referred to, but these have to be read in the context of all that he said on the subject of inferences. In the latter part of his direction, he was absolutely clear to the jury they should not speculate or guess and that to draw inferences, the inferences "*must be the only inferences that you can reasonably draw from the facts that have been presented in the case*." In the circumstances, the jury cannot have been under any misunderstanding as to what was necessary before they could draw inferences. We therefore reject this ground in relation to the summing up.

(v) Failure to give good character direction

36. Ford is a person of good character in that she has no previous convictions. As well established since *R v Vye and Others* [1993] 97 Cr. App. R.134, she was entitled to a good character direction from the judge both in relation to her credibility concerning the answers she gave in her police interview and in relation to the likelihood of her now having committed the offences with which she was charged.

37. The judge gave no such direction. It seems from what we were told at the hearing that it may have been the case that counsel then representing Ford (not Mr Walcolm) did not raise the matter with the judge and it is not clear whether the judge was aware of the fact that Ford was of good character.

38. In the circumstances we do not criticise the judge for not having given the relevant direction. Counsel representing Ford should have drawn the matter to his attention and indeed the prosecution should also have alerted the judge to the issue. Nevertheless, the failure to give the direction was particularly important in this case. Unless all the appellants' DNA was introduced inadvertently to the firearm and the plastic case by the police during the search, the DNA was very likely to have come either from both appellants having touched the firearm or from only one appellant having done so (with innocent transfer of the DNA of the other). In those circumstances the good character of Ford was clearly a material consideration for the jury to consider.

Summary

39. The misdirections which we have found have to be considered in the round. This was a case where, given the DNA evidence, the key plank of the defence case was that the DNA had been innocently transferred. This might have been by reason of the police doing so during the execution of the search. But it might also have been a case where Ford's DNA had been introduced to the firearm by Smith handling it in circumstances where, being in an intimate relationship with Ford, he had Ford's DNA on his skin. The position might also have been the reverse, with Smith's DNA being introduced as a result of Ford handling the firearm. These were the key issues for the jury to consider.

40. Unfortunately, the judge failed to make this key part of the defence case clear and also gave a potentially confusing direction on the standard of proof and inadequate directions (particularly in the case of Ford where he misstated the position, but also in the case of Smith because he did not

cover all the points mentioned in *Cowan*) in relation to adverse inferences from the fact that the appellants did not give evidence at trial.

41. Putting all these matters together, we came to the clear conclusion that the conviction of Ford cannot be regarded as safe.

42. The position in relation to Smith is not quite so clear cut in that there was no misstatement of his factual position concerning adverse inferences from his not giving evidence, there was no failure to give a good character direction, and the case against him was stronger in that there was evidence before the jury that he was in possession of a firearm at Ford's apartment a few days before the police search. However, because of the judge's failure to make clear the defence case concerning the possibility of innocent transfer of DNA and the other deficiencies in the summing up we have referred to earlier, we came to the conclusion that his conviction is also unsafe.

43. Accordingly, we allowed both appeals and quashed the convictions. However, there is clearly evidence against both appellants and accordingly we ordered that there be a retrial. We remanded both appellants in custody pending bail applications to the Grand Court.

44. Finally, by way of postscript, we should add that Smith also raised an issue of apparent bias relating to the identity of one member of the jury. Having been alerted to this issue at an earlier hearing, we directed that evidence should be taken from the juror concerned and such evidence was before us at the hearing of the appeal. However, in view of the fact that we are allowing Smith's appeal because of the matters discussed above, we did not hear counsel on the apparent bias point and accordingly we have not considered it further.