Neutral Citation Number: [2025] CICA (Crim) 9

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

CICA CRIM APPEAL No. 0001 of 2024
(formerly Ind. 34 and 93 of 2022)

ERICK BRIAN WILLIAMS SOTO

Applicant

V

HIS MAJESTY THE KING

Respondent

Before: The Hon Sir Richard Field, Justice of Appeal
The Rt Hon Sir Jack Beatson, Justice of Appeal
The Rt Hon Sir Anthony Smellie KC, Justice of Appeal

Appearances: Mr Charles Miskin KC instructed by Mr Keith Myers for the Appellant.
Mr Scott Wainwright of the Office of the Director of Public Prosecutions for the Respondent.

Heard: 6 November 2025

Judgment delivered: 21 November 2025

JUDGMENT

Smellie, JA

1. On Thursday, 6 November 2025, we heard the arguments on this application and reserved judgment. This is the judgment of the Court.

2. The Applicant and co-defendant Justin Kyle Jackson, were jointly indicted for the offences of the murder of Harry Elliot Jr and for the unlawful possession of a firearm allegedly used in the commission of that murder.

3. On 2 November 2023, following a trial before Hon. Justice Richards KC and a jury, the Applicant was convicted, by a majority of the jury of ten to two, of the offences of manslaughter and unlawful possession of the firearm. His co-defendant Jackson was unanimously convicted of the same offences. The Applicant was sentenced to ten years imprisonment on each count, with the sentences ordered to run concurrently. Jackson, who has not appealed, was sentenced to a total of 11 years and 9 months, ordered to run consecutively to a sentence of 28 months for a separate and unrelated firearm offence.

Circumstances of the offences

4. The indictment arose from an incident involving an attempted robbery on 25 April 2022, shortly after 8pm, at No 190 School House Road in central George Town. These premises included a shop at which persons would attend to buy tickets for the "numbers game", a form of illegal lottery.

5. The deceased, Mr. Elliot, was a regular player of the numbers game and happened to have been present at and was about leaving the shop, when two men, later identified by the police investigation and at trial admitted to be the Applicant and co-defendant Jackson, entered the premises. Jackson was ahead, with the Applicant immediately behind him. As shown on CCTV footage from the scene, the Applicant had his head and face covered as he approached the premises, Jackson was bare-headed with his face fully visible.

6. As the two entered the very confined space of the lobby to the shop, Jackson said words to the effect of "*this is a robbery*", and is shown on further CCTV footage from a camera located

in the doorway, to have then pulled a gun from his waistband. Eye witnesses inside the shop (Mr. Keron Cupid the owner and Mr. Venrick Ellis, both of whom testified) heard the sound of the firearm being loaded. Jackson was then directly facing Mr. Elliot. There was the explosion of a gunshot and Mr. Elliott fell to the ground. He had been fatally shot. Jackson and the Applicant fled the scene on foot but were later picked up in the vicinity by a car driven by one Caine Thomas, about whom more below.

7. From the same CCTV footage, Jackson could be seen to have stumbled backwards onto the Applicant, at the time when the firearm was discharged. The entire incident, from the entry of the two assailants into the confined space of the doorway of the premises, to the discharge of the firearm, is shown on the CCTV footage to have happened in a matter of a few seconds.

8. Although he was not called to testify to it, it was Jackson's defence, as put in cross-examination by his counsel, Ms Bennett-Jenkins KC, of Crown witnesses and of the Applicant, that the discharge of the firearm was unintentional. In this regard, counsel invited the jury's attention to the fact that Jackson appeared on the CCTV footage to have stumbled backwards onto the Applicant when the firearm was discharged, the result, it was suggested, of his stepping back to avoid Mr. Elliott as the latter moved to exit the doorway. It was also suggested that as he stumbled backwards, Jackson also tripped over mats placed at the doorway, which was itself made slippery from rainwater carried on the shoes of persons entering the premises, during what had been a rainy afternoon.

9. In light of the verdict of not guilty of murder but guilty of manslaughter in relation to both defendants, it must be taken that the jury accepted that the shooting was unintentional.

10. On the same basis, the jury must however, have concluded that Jackson and the Applicant both knew that the firearm was loaded. And in doing so, they must have rejected a further suggestion from Jackson's counsel, put in her cross-examination of the Applicant, that Jackson believed that the firearm was unloaded.

11. Jackson's case, as suggested to the Applicant in cross-examination, was that the firearm had been given to Jackson by the aforementioned Caine Thomas, just prior to the incident, while the three, including the Applicant, were together in Caine Thomas's car. It was then, Ms

Bennett-Jenkins KC suggested, that Thomas also assured Jackson that the firearm was unloaded. This suggestion was not accepted by the Applicant.

12. Caine Thomas was never arrested and never called to testify. He died a few days after the events from being shot in an unrelated incident.

13. On the basis of directions properly given to the jury by the trial judge, the jury were entitled to conclude, as they must have done in arriving at their verdicts, that both defendants knew that the firearm was loaded. These directions[1] were to the effect that, as a necessary prerequisite to a conviction of either defendant for murder or for manslaughter as an alternative to the offence of murder, the jury must be sure that the defendant knew that the firearm was loaded.

14. As the Applicant was also convicted for the offence of manslaughter, this direction must also have been acted upon by the jury in relation to him, that is: they must have accepted that he was aware of the presence of the firearm carried by Jackson and that it was loaded.

15. The suggestions put to the Applicant by Ms Bennett-Jenkins KC as to what Caine Thomas had said in the car, the Applicant's rejection of those suggestions and his steadfast denial of knowledge of the firearm, became the subject of further directions given by the trial judge to the jury as to their approach to the assessment of the Applicant's evidence, premised by her upon guidance from *R v. Makanjoula* [1995] 1 W.L.R. 1348.

16. These directions are the fulcrum of the Applicant's application for leave to appeal as he complains that they would have unfairly undermined his credibility in the minds of the jury as they assessed his defence. His defence, having admitted to entering the numbers shop with Jackson, was that "*I was unaware of any weapons*". Further, that it was his understanding, obtained from his exchanges with Jackson and Thomas while in Thomas's car, that he and Jackson were to have carried out the robbery "*bare-handed*". He complains that the trial judge ought not to have given the direction which she gave based on *Makanjoula,* (in effect that the jury should regard the Applicant's evidence with caution where it appeared that he might have an interest of his own to serve adverse to that of his co-defendant*)* because it unfairly

[1] In keeping, for instance, with dicta from *R v Sam Perman* [1996] 1 Cr. App. R. 24

undermined his credibility as to the central point of his defence, which was that he did not know that Jackson had a firearm.

17. The context in which this all came about requires of fuller explanation. The context can be gleaned more fully from the prosecution's case and from the Applicant's evidence given in his own defence at the trial, all of which was carefully summarized by the trial judge in her summation to the jury.

18. Mr. Keron Cupid, the owner of the numbers shop, gave a statement and later testified at trial that Mr. Elliott, having completed his numbers play and with money in hand, had signaled to him that he wanted to leave. He, Cupid, pressed the door release buzzer when two men, later identified to be Jackson and the Appellant, appeared at the door.

19. Mr. Cupid agreed that the events were very fast. He said that Jackson uttered something to the effect "*this is a robbery*" and pulled a gun from his waistband. Jackson was facing Mr. Elliott when Jackson "*racked the slide*" of the gun which Cupid, an ex-police officer, explained meant selecting a round. This is what another witness Mr. Ellis, described as hearing "*the gun crank*". Jackson was backing away as Mr. Elliott approached him when the firearm went off. Mr. Cupid said that Jackson had a '*bewildered look'* after the gun went off as if to say '*I did not mean to do that'*. This bit of evidence may well also have weighed with the jury in their deliberations and their return of verdicts of conviction for the lesser offence of manslaughter.

20. Mr. Cupid confirmed that the Applicant was behind Jackson and was not carrying a weapon.

21. The police had obtained and presented video footage, not only from the cameras at the numbers shop but also of roadside and private footage which showed the movements of Caine Thomas's car, as it was driven by him with Jackson and the Applicant onboard, over a period of some two hours and forty-five minutes before the incident. There was also telephone evidence which, for the purposes of the trial, was simplified and reduced into agreed admissions. This evidence strongly suggested and it was the Applicant's case, that Caine Thomas was the chief planner of the robbery. His phone had been in touch with both the Applicant's and Jackson's (although the Applicant said that Jackson used Thomas's phone to call him) earlier that day and Thomas had driven Jackson and the Applicant to his, Thomas's grand-mother's house, at Kensington Close, George Town. From there they were driven at

least twice around the area of the shop, for what seemed like reconnoitring, when, according to the Applicant in his testimony, "*Caine Thomas was showing us where to go*". This was supported by CCTV footage of his vehicle's movement. At the time of the foray into the shop, Thomas dropped Jackson and the Applicant off close to the shop and picked them up afterwards, returning them to his grand-mother's house at Kensington Close. There the Applicant was shown on CCTV footage and admitted by him at trial, to have been involved in cleaning the car.

22. This conduct of the Applicant after the event, became the basis for a further alternative verdict against him being left to the jury, for being an accessory after the fact to murder or manslaughter if the jury found that Jackson, as the shooter, had committed either of those offences. In the end, as the Applicant and Jackson were both found guilty of manslaughter, no verdict was required to be returned on this count.

23. Jackson was arrested a few days after the incident and made no comment during his interview by the police. The Applicant was arrested several months later. He also made no comment during his interview. However, in a prepared statement he said that he knew nothing of the incident at the numbers shop and denied any involvement.

The trial

24. As already mentioned, Jackson who was first on the indictment, did not give evidence. Among the agreed facts tendered at the trial, he admitted to being the unmasked assailant and so, to being the shooter. But, as explained above, he relied -through cross-examination by his counsel and through suggestions put by her to Crown witnesses and to the Applicant - on a number of circumstances to avoid a finding of intentional shooting. The firearm was never recovered and so could not be tested. Inferences to be drawn by the jury, favourable to Jackson's case of lack of intent to shoot, were therefore not diminished by any evidence about the lightness or otherwise of the trigger mechanism of the firearm.

25. The Applicant, unlike Jackson, testified in support of his defence. At the time of the incident he was 20 years old and had no previous convictions (this too, was in contrast to Jackson).

26. In essence, he said that on the late afternoon of 25 April 2022, he had been picked up by Jackson and Caine Thomas in Caine Thomas's car at his family home in Newlands, expecting

to be given a lift to West Bay where he had planned to spend the weekend at his grandmother's house. But he never got to West Bay. Instead, he went driving around the environs of George Town with Jackson and Caine Thomas in Thomas's car. This sojourn, as described by the Applicant and shown on CCTV footage, included stopping at a service station and on another occasion stopping while Thomas collected his young daughter from her mother and dropped her at his grandmother's address at Kensington Close. By then it was, as shown on CCTV footage, 7:34pm.

27. According to the Applicant, it was then, for the first time, that the idea of the robbery was mentioned, and this was by Caine Thomas. Prior to then, as they drove around, the three were simply listening to music. As he related in evidence- in- chief, marshalled by his counsel Mr Miskin KC, it was as they had dropped off his daughter that Thomas "*just started mentioning to me and Justin that he needed help robbing this place .. at 190 School House Road*" And later, in cross-examination by Ms Bennett-Jenkins K.C, that Thomas had then said that "*he wanted me and Justin to go and do the robbery*". Contrary to another suggestion from counsel, he insisted that there was no fourth man in the car who, along with Thomas, was putting pressure on him and Justin to do the robbery. Indeed, that there was no pressure at all applied to do the robbery. Rather, as the Applicant asserted, for his part "*I wanted extra cash (which later in cross-examination he said was to buy shoes and clothes) so I agreed to go*".

28. There was, he insisted, nothing else said about how the robbery was to be carried out, apart from that they "*would just go and grab the money*". Thomas had given him, the Applicant, a mask which he put on to avoid being identified. Jackson chose not to use a disguise but he, the Applicant, had not heard it said in the car that this was because the robbery would not be reported to the police because the numbers shop was an illegal business. Nor that the shop had been robbed before when, for that reason, no report was made. He did not know Caine Thomas at all before that day, Jackson he had known for at least three years and trusted him as a friend.

29. As to the incident itself, the Applicant said that as Mr. Elliott came towards them, Jackson stepped back, pushing him, the Applicant, backwards in the very confined space of the entrance foyer at the numbers shop. He then heard a loud bang. He did not hear the gun being "*cranked"*. He and Jackson immediately fled the scene and shortly after they were picked up by Caine Thomas. He heard Jackson tell Thomas that he thought that he had shot someone and later, in cross-examination that Jackson had actually said "*I think I shot someone, the gun*

went off but I don't know." The Applicant also related that Thomas swore at Jackson and demanded his gun back, a demand with which Jackson complied.

30. Of pivotal importance to his application for leave to appeal, the following exchanges are recorded as having taken place in the cross-examination of the Applicant by Ms Bennett-Jenkins K.C:

Q *The idea for the robbery was Caine Thomas', agreed?*

A *Yes, ma'am.*

Q *I am not going to deal with the other [fourth] man any more, but Caine told you he needed a little bit of help with the robbery, didn't he? He said it would be easy, do you agree?*

A *I don't recall him saying that.*

Q *Don't you? Your memory seems very poor of the two and a half hours you were in the car with Caine. So far, you have told us there was a bit of music, and then a rather random suggestion to go and do a robbery. Should we see if we can prompt your memory a bit? Caine saying it would be easy, didn't he?*

A *Like I said, I don't recall him saying that.*

Q *And Caine said because it was a numbers place, they wouldn't report a robbery to the police?*

A *I don't remember him saying that, ma'am.*

Q *Is your memory normally very bad, Mr Soto?*

A *Who say that I have a bad memory?*

Q *It's just you aren't able to give any real detail, are you, about the conversation about a criminal event that you were going to take part in. Is there a reason why you won't deal with those details?*

A *No, ma'am, that's what happened that night. I am telling the truth.*

Q *And this is right, isn't it, that you have said that you did not know that a gun had been given to Justin; is that your evidence?*

A *Yes, ma'am.*

Q *The gun was Caine's, wasn't it?*

A *Well after the fact I did find out about that, yes.*

Q *Because Caine was the one saying give me back my gun, in the car after that, wasn't he?*

A *Yes, ma'am.*

Q *I just want to understand, in terms of the robbery, you were told nothing about it, not told what to do, yes?*

A *Yes, ma'am.*

Q *'Cause I have asked you what Caine said and you said really nothing. What were you meant to do?*

A *Well to my knowledge, to go and grab the money.*

Q *Okay. Just go and grab the money. But what was the discussion about who was going to grab the money?*

A *Ma'am, there was no discussion about who was going to grab the money.*

Q *Must have been a very quiet car. There is no discussion about what's going to happen or how it is going to happen or who is going to do what, or is it just you are unwilling to give real detail on the real truth?*

A *Ma'am, there wasn't no discussion on who was going to grab the money.*

Q *You knew very well, did'nt you, that Caine Thomas gave a gun to Justin in the car after he dropped off his daughter. And that was how the robbery was going to go. You know that don't you?*

A *No, I do not know.*

….

Q *Let's look at it the real way, shall we. Caine Thomas handed over a gun. He told Justin, he told you in the presence of the other man that it wasn't loaded; didn't he?*

A *Ma'am, I do not recall that happening.*

Q *You don't recall, right. Let's see if I can prompt your memory a little bit more. What about when he said what you had to do was go with the gun, wasn't loaded, it wasn't needed to be, because all you needed to do was produce it and to make a bit of noise. Does that ring a bell with you?*

A *No it doesn't. "*

31. With Justin Jackson having admitted that he carried the gun to commit the robbery, the plain purpose of that cross-examination was to seek to establish, through his co-accused the Applicant, that Jackson had reason to believe that the gun was unloaded. Conversely, as it was the Applicant's case that he knew nothing of the gun before the foray into the numbers shop, it was his case that Jackson was solely responsible for carrying the gun and so he should not be convicted of any of the offences open to the jury on the indictment.

32. The prosecution, for its part, in cross-examination of him, sought to refute the Applicant's account, including by emphasizing that he had lied to the police in his prepared statement when he denied any knowledge at all of the incident. Unsurprisingly, this is how the Deputy DPP concluded that cross-examination:

> "*Q* *Did you tell the police that you didn't have a gun and you didn't know Justin had a gun?*
>
> *A* *No, ma'am.*
>
> *Q* *Did you tell the police that you willingly went along with a plan to rob, to get extra cash to buy your shoes and clothes?*
>
> *A* *No, ma'am.*
>
> ...
>
> *Q* *And the reason why you didn't was that you were trying to protect yourself?*
>
> *A* *Yes, ma'am.*
>
> *Q* *I am suggesting to you Erick, that you knew that Justin had a gun because Caine Thomas, and even on your story, Caine Thomas would have handed over that gun to Justin in your presence?*
>
> *A* *No, ma'am, I did not know that Justin received a gun from Caine Thomas at that time.*
>
> *Q* *And you would have not gone to those premises unarmed, unprepared, not knowing what you were walking into, if you didn't believe that Justin had a gun?*
>
> *A* *Ma'am, like I said, I did not know that there was any gun involved.*
>
> *Q* *Or any weapon because you told my friend [Mrs Bennett-Jenkins K.C.] that you didn't think he had any weapon at all; is that true?*
>
> *A* *Yes, ma'am.*
>
> *Q* *So you were going there empty-handed to commit robbery of an unknown premises and of unknown persons; that's what you want us to believe?*
>
> *A* *Yes, ma'am, that's the truth.*
>
> *Q* *I don't have any further questions, please."*

33. Following the conclusion of the Applicant's evidence, submissions were made on all sides about what were then draft legal directions to be given by the trial judge to the jury generally, including on liability as an accessory after the fact. On Monday 30 October 2023, there were

further submissions which included the issue whether a "*Makanjoula Direction*" should be given, with Ms Bennett-Jenkins KC arguing strongly for such a direction in relation to the evidence given by the Applicant, in particular that he was unaware of the gun and had not heard Thomas give Jackson the assurance that it was unloaded.

34. Mr Miskin KC on behalf of the Applicant, submitted that such a direction would undermine his case. This was because Jackson had not given evidence and so strictly had not presented a "case", simply a "position" as suggested by his counsel, that the evidence was insufficient to warrant a conviction. And so, nothing that the Applicant had said undermined a "case". The anxieties in the Jackson camp were unwarranted and that it was dangerous to undermine by judicial direction the credibility of a defendant of good character on a murder charge in circumstances where the co-accused had not given evidence.

35. Any such direction, Mr Miskin submitted, would have a tendency to undermine the Applicant's evidence on important matters.

36. Ms Bennett-Jenkins KC replied nonetheless supporting such a direction and maintained that Jackson did have a case.

37. The Deputy DPP, representing the prosecution, did not contribute to this aspect of the debate.

38. In this regard, the trial judge ruled as follows:

> " *In respect of this particular aspect, I am grateful to counsel for providing the case of ..Perman… Having read it and considered the circumstances of this particular case, it appears to me that on one view, the defendant Soto, in giving evidence is putting all the blame on the defendant Jackson .. It was put to him that they had been told that the gun was not loaded. He said he didn't hear any such thing. And so, it seems to me that he is placing the blame for carrying the loaded gun entirely on the defendant Jackson. At least, that's on one vierw of the facts.. So, in my view, the case that has been advanced by the defendant Jackson, through the witnesses, through cross-examination, may well be undermined or may appear to be undermined by what was said by the defendant Soto. So in my view, it is appropriate in this case to have the Makanjuola direction*."

39. And in the event, the trial Judge accordingly directed the jury as follows:

> *"Finally, when you consider the evidence in the case Mr Soto has given, which bears on the case of his co-defendant Jackson; on one view of his evidence, he has sought to place the blame for having a loaded weapon solely on the shoulders of Mr Jackson. The evidence of this defendant bears upon the case of the other. In these circumstances, you should consider, you should have in mind that the defendant may have an interest of his own to serve and may have tailored his evidence accordingly. Whether he had done so with interest of his own to serve and has, in fact, done so, this is entirely for you to decide, but you may think that there is a need to approach his evidence with caution*."

40. Mr. Miskin complains on behalf of the Applicant, that not only was this direction unwarranted and misplaced in and of itself for the reasons he argued before the trial judge, its potential undermining impact was compounded by the fact that it followed other directions based on *Lucas v R* [1981] QB 720 (to the effect that a defendant's lies to the police could be evidence of guilt if it is about a significant issue, and in the absence of other reasonable inference, such as shame, fear or loyalty) and a direction about the Applicant having failed to mention facts, in particular knowledge of a gun, in police interview.

The Law: corroboration and the need for caution

41. A view of the current state of the law in this area is perhaps best taken against the historical background and a very helpful summary is given in the Crown Court Compendium[2]. Historically, there were specific categories of cases in which, because of the nature of the allegation or type of witness, a direction to the jury was required that they should look for corroboration of the evidence in question. These categories involved the evidence of an accomplice, of a complainant in the trial of a sexual offence and evidence given by a child. In this sense, corroborative evidence had to be relevant, admissible and credible and evidence which was independent of the source requiring corroboration. And its relevance had to sound in the fact that its effect was to implicate the accused[3].

[2] Part I -July 2024 (April 2025 Update) as set out at *Archbold* 2025 Ed. 4-468 and *Blackstone's* 2025 Ed F5.1
[3] The former well known case law in these regards included Scarrott [1978] QB 1016 at p1021, DPP v Kilbourne [1973] AC 729 at 746; DPP v Hester [1973] AC 296 at 315 and Whitehead [1929] 1 KB 99.

42. In the United Kingdom, the requirement to give a corroboration direction was abrogated by section 32(1) of the Criminal Justice and Public Order Act 1994. In this jurisdiction, the requirement has been abrogated by section 41 of the Evidence Act (2021 Revision), with a significant saving provision in section 41(3) in relation to any trial or proceedings which began before the 31st March 2004, thereby preventing the abrogation from having retrospective effect and notwithstanding its mere procedural nature[4].

43. Although corroboration in the strict sense is no longer required in support of evidence coming from any of the sources identified above, the case law has evolved to recognize that circumstances may nevertheless require the judge, as a matter of discretion in summing up to the jury, to give a warning about the need for caution in the absence of supporting evidence. The leading authority is *Makanjuola* although some cases decided subsequently, two of which will be mentioned below, have emphasized the need for a warning where there are what may be described strictly as "mirror-*image cut throat defences*" or "*modified cut-throat defences*"[5]

44. In *Makanjuola* (at p1351 D) Lord Taylor CJ gave the following guidance:

" *To summarise:*

(1) Section 32(1) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
(2) It is a matter for the judge's discretion what, if any, warning he considers appropriate in respect of such a witness, as indeed in respect of any witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.
(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence or will it necessarily be so because a witness is alleged to be an accomplice. <u>There will need to be an evidential</u>

[4] In this regard similar to the abrogation effected in England and Wales by section 32(1) and (4), as explained in *Makanjuola* by Lord Taylor CJ in his judgment on behalf of the Court of Appeal
[5] *R v Petkar, R v Farquhar* [2004] 1 Cr. App. R. 22 (2003) and *R v Jones (Wayne), R v Jenkins* , reported as *R v WJ* [2004] 1 Cr. App. R. 5 (2003) and *Jones* [2003] EWCA Crim 1966 (hereinafter "*Jones and Jenkins*)

basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

(7) It follows that we emphatically disagree with the tentative submission made by the editors of Archbold, Criminal Pleading, Evidence and Practice Vol 1 (1995 ed.) pp 1911-1912 para 16.36 [(that) "Furthermore, if a judge does give a warning,it seems likely that the [pre-1994 Act] law as to what evidence is capable of corroborating a witness will continue to apply. It seems to follow also that if the judge does give a warning, he will still need to tell the jury what corroboration is and identify the evidence capable of being corroborative".] Attempts to re-impose the straitjacket of the old corroboration rules are strongly to be deprecated.

(8) Finally, this Court will be disinclined to interfere with a trial judge's exercise of his discretion save in a case where that exercise is unreasonable in the Wednesbury sense."
[emphases added]

45. As the Crown Court Compendium notes (op cit, at [5]), the need to consider giving a discretionary warning of the type described in *Makanjuola* arises whenever the need for special caution before acting on the evidence of certain types of witness, if unsupported, is apparent.

46. Among those types of witnesses/categories identified as worthy of consideration, "*Co-defendants*" are listed first, with the explanation that "*An accused may have a purpose of their own to serve by giving evidence which implicates a co-defendant, citing inter alia, Jones and Jenkins (above), a case involving cut-throat defences in which each of the defendants in part placed blame on the other. In Jones and Jenkins at [47], Auld LJ commended counsel's suggestion that in such cases the jury should be directed:*

(a) To consider the cases of each defendant separately;

(b) The evidence of each defendant was relevant to the case of the other;

(c) When considering the co-defendant's evidence, the jury should bear in mind that the interest may have been an interest to serve; and

(d) The evidence of a co-defendant should otherwise be assessed in the same way as the evidence of any other witness."

47. In *R v Petkar and Rv Farquhar* (above), the English Court of Appeal, per Rix LJ, in following *Jones and Jenkins*, reaffirmed the need for a direction to the jury to exercise caution when assessing the adverse evidence of co-defendants who may have an interest to serve. And that this was notwithstanding the danger that a warning concerning the evidence of cut-throat defendants might devalue the evidence of both co-defendants in the eyes of the jury and undermine the defence of each and the difficulties of moulding the warning to the particular facts of each case.

48. It must be noted that R *v Perman*, the case cited and relied upon by the trial judge in her decision (extracted above) to give the direction in this case, was decided before abrogation of the corroboration direction was effected by statute and therefore, before the guidance given in *Makanjuola* was available. The prevailing approach then, in circumstances of an apparent cut-throat defence, was to issue the full-blown corroboration warning. Even so, it must also be noted that the complaint about the failure of the judge in *Perman* to have given that warning, was held to be without merit precisely because there was no adverse evidence given by the co-defendant as alleged and no basis for thinking that he had an interest to serve that was inimical to the case of the other defendant.

Discussion and conclusions

49. That is *a fortiori* the situation here, says Mr. Miskin, for reasons which it must be said, carry considerable force. Here Jackson did not give evidence. The Applicant did but, contrary to the sense taken of it by the trial Judge that he was seeking to put all the blame on Jackson, his evidence did not seek to incriminate Jackson in any material way as Jackson admitted possessing the gun and unintentionally and accidentally, pulling the trigger.

50. The case advanced by the defendant Jackson through cross-examination by his counsel, was simply one that he had not intended to shoot anyone, supported by an opinion from Mr. Cupid

that his facial expression was such as to suggest that state of mind at the moment of the shooting and by the uncontroversial evidence of the confined and slippery nature of the space and setting of the mats which caused him to stumble. These were matters which, if anything, were supplemented in Jackson's favour by the Applicant himself who accepted, in cross-examination, that Jackson had stumbled backwards onto him and that when they got back to Thomas's car, Jackson had said that he " *thought he had shot someone, the gun had gone off but he did not know*". None of this was undermined by the Applicant's evidence and more fundamentally, as *Makanjuola explains*, his denial of an unevidenced suggestion may not be treated as undermining Jackson's defence.

51. The Applicant's defence was that he did not know of the gun. In order to be able to maintain that defence, he denied the suggestion put to him by Ms Bennett-Jenkins KC that they had been told by Thomas that the gun was not loaded. There was no evidence that such a conversation had in fact taken place. This was merely a suggestion from counsel and as *Makanjuola* also makes plain (in emphasis above), an evidential basis does not include mere suggestions by cross-examining counsel.

52. On that basis alone it must therefore be concluded that the direction given by the trial judge was wrong in principle.

53. But perhaps the more telling point is this. The Appellant's defence was, as already stated, that he did not know that there was a gun. The direction therefore went to the heart of his defence. It effectively cautioned the jury to be careful about accepting his evidence on the crucial issues of his knowledge of the presence of the firearm and whether it was loaded while, for the reasons identified above, being of no significant value to Jackson. Not only did Jackson admit to carrying the gun, but there was also the evidence of the cranking or rack(ing) of the slide mechanism for selecting a round, from which the jury may well have found that Jackson believed it was loaded, even while being in doubt as to whether he meant to shoot.

54. For all the foregoing reasons, it is impossible to resist the conclusion that the direction ought not to have been given. Even if, viewed as a matter of exercise of discretion by a very experienced trial judge, one might not go so far as to conclude that it was unreasonable in the *Wednesbury* sense (per *Makanjoula* at point (8) above – a test which itself perhaps places undue emphasis on logicality rather than on effect), it was by any measure disproportionate.

It risked undermining in the eyes of the jury the Applicant's defence, even while it could have been of only marginal benefit to his co-defendant Jackson's defence.

55. Can it properly be said nonetheless that the jury were bound to have arrived at the same decision for the purposes of applying the proviso under section 9(1) of the Court of Appeal Act (2023 Revision)?

56. We do not think that that can safely be said in relation to the conviction for manslaughter which depended on the all important factors in the Applicant's case, not only of knowledge of the gun but also on knowledge that it was loaded. There simply was no evidence as to that latter state of mind, barring the suggestion from counsel which, although he rejected it and despite its dual potential for being both incriminatory (knowledge that there was in fact a gun) and exculpatory (belief that the gun was unloaded), was not admissible evidence. Apart from being an improper basis for the direction, it should therefore not have been left to the jury for consideration as evidence capable of undermining credibility.

57. That being the case, the conviction for manslaughter cannot stand.

58. Different considerations apply however, to the conviction for unlawful possession of the firearm which did not require knowledge that the gun was loaded but which must have been returned by the jury being satisfied that the Applicant knew that Jackson was carrying a gun and lent himself to its unlawful possession in that way for the purpose of staging the robbery. We consider that in all the circumstances of the case, the jury were entitled to come to that conclusion. Indeed it was an irresistible conclusion, given the implausibility of the Applicant's defence that the intention was to carry out the robbery "bare-handed' and given, moreover, that even on his own case, he and Jackson were together with Thomas in the car at all times from inception of the plan to commit the robbery after Thomas dropped his daughter at 7:34 pm until, only some 25 to 35 minutes later, the Applicant and Jackson alighted from the car on their foray into the numbers shop and during which time Jackson must have been given the gun by Thomas. In those circumstances, the jury was obliged to conclude that the gun was handed over to Jackson by Thomas in the Applicant's presence and so with his certain knowledge that it had been done.

59. It is the totality of the evidence about the planning and staging of the robbery that arises for consideration here. When this is considered, along with the clear directions from the trial

judge that the jury may not convict a defendant on the basis only that he might have lied to the police or even in his testimony to the court but must instead be satisfied to the requisite standard from the totality of the evidence[6], the jury were in our view, bound to reject the Applicant's defence that he was unaware of the presence of the firearm.

60. It is therefore appropriate to conclude that the conviction for unlawful possession of the firearm is a safe conviction, notwithstanding the wrongful direction given to the jury, purportedly on the basis of *Makanjuola*.

61. The Application for leave to appeal is granted and the appeal is allowed to the extent that the conviction and sentence for manslaughter are set aside but the conviction and sentence for unlawful possession of the firearm are upheld.

[6] As given also in writing to the jury when they retired by way of a written route to verdict.