IN THE CAYMAN ISLANDS COURT OF APPEAL

CACR027/2014
IND 77/12 88/13
#04126/2012

BETWEEN:

Brian Emmanuel Borden

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

Before:

The Rt Hon Sir John Chadwick, President
The Hon Sir Richard Field, JA
The Rt Hon Sir Alan Moses, JA

Appearances: Trevor Burke QC instructed by Nicholas Hoffman of Priestleys for the Appellant and Andrew Radcliffe QC instructed by Tricia Hutchinson Senior Crown Counsel for the Director of Public Prosecutions

Hearing: 18 November 2015
Judgment and oral ruling delivered: 20 November 2015
Transcript of oral ruling approved and released: 14 April 2016

MOSES, J

We do not believe that during the course of this somewhat lengthy judgment we should keep this Appellant in suspense, and so we should say at the outset, although we shall give full reasons, that this appeal is dismissed.

On 6 August 2014, Justice Henderson, after trying this Appellant without a jury, convicted him of the murder of Robert Bush on 13 September 2011, contrary to section 181 of the Penal Code (2010 Revision), and sentenced him to life imprisonment.

Robert Bush was murdered on 13 September 2011. The time and place of the murder were of significance. It was around 11:15 pm, near the intersection of Birch Tree Hill Road and Captains Joe and Osbert Road. Two men shot him and he died of two gunshot wounds to the head, one caused by a shotgun blast and one by a .38-calibre or 9mm bullet.

At trial the prosecution sought to prove that one of those two assailants was this Appellant, Brian Borden. It is important to note at this stage that the Crown conceded that the judge could only convict if he was sure that the principal witness, Marlon Dillon, was telling the truth in what the judge described as the essential assertion that Borden had confessed to him that he was one of the killers. The Appellant did not give evidence. The judge said at the outset of his judgment that if he was not sure that Dillon was telling the truth Borden must be acquitted.

After considering the reasons why he should treat the witness Dillon with caution, as he put it, the judge directed himself that it would be dangerous to accept Dillon's evidence unless there was independent evidence to support and confirm it. The judge concluded that the independent evidence did sufficiently confirm the truth of Dillon's evidence that Borden had confessed and he found Borden guilty.

At the core of this appeal lies the contention that had the judge been aware of documentary evidence which the prosecution failed to disclose before trial and which has only emerged in dribs and drabs right up to the hearing of this appeal, there was a real possibility he would have disbelieved Dillon. As the prosecution accepted, had Dillon been disbelieved as to the confession he said Borden had made to him, Borden should and would have been acquitted.

Allied to his submission that had the judge been furnished with this evidence and been able to observe the effect of its deployment in cross-examination of Dillon was Mr. Trevor Burke QC's submission, on behalf of the Appellant, that the judge failed properly to assess the reliability and credibility of Dillon (Ground 3). We shall identify and consider the other grounds when we have considered the factual context in which this appeal arises.

The facts we summarise are taken from the judgment of Justice Henderson. Marlon Dillon was associated with the Birch Tree Hill gang in West Bay, amongst whom were numbered, according to the evidence, Borden and a man called David Tamasa, who was tried with Borden for this murder and acquitted at the close of the prosecution case. Robert Bush, the victim, was associated with Logwoods gang located in a different part of West Bay. In the years and months before the shooting Borden had made repeated threats to kill Robert Bush, according to a friend of Brian Borden, Tracy Watler, a girlfriend of Borden whose reliability was, in the main, accepted by the judge. In July and August 2011, shortly before the shooting, Borden had stalked Bush because he believed he was associating with her.

Bush had an occasional but intimate relationship with Myra Ebanks who had lived in the Logwoods area, but at the time of the shooting was living in the Birch Tree Hill area just

off Captains Joe and Osbert Road. Brian Borden knew of this and had no difficulty with it. Bush was in the habit of fetching Myra Ebanks in his car, but, because of a problem between the gangs, he would not linger at their pick up point in the Birch Tree Hill area.

On the night before the murder, events occurred near to the scene of the usual pick up point which involved another man said to be connected to the shooting, Jordan Manderson. He was a man, said by the defense, to be one of two men who had shot Robert Bush. Near to the junction of Captains Joe and Osbert Road was a yard belonging to a witness Tishara Webster. Myra Ebanks said in evidence she had had a conversation that evening of 12 September 2011 in the yard with Jordan Manderson in which he said that Bush and he had had an exchange, "Robert showed me vibe and I wanted to show Robert a vibe back": a possibly hostile exchange.

Jordan Manderson, according to Myra Ebanks, said to her: “these boys” — the judge commented “presumably members of the Birch Tree Hill gang” — “want to hurt Robert”. She could not remember the precise word used. She then recalled that Jordan Manderson had said they wanted to hurt him, but as long as he was around that would not happen "because they have to come to me for their things" and she understood that to mean guns or weapons.

That evening Robert Bush called her. She walked out and she saw Jordan Manderson and Robert Bush outside the yard speaking in a friendly manner. Bush then asked her to fetch a Rizla and alcohol for him from the yard, the Tishara Webster yard. This appeared to Myra Ebanks to be very disrespectful and a show of strength. But Jordan Manderson did not apparently react and, as it were, she said, backed down.

We turn then to the day of the murder. Call and cell phone records from Borden's phone, which the judge found to have been in his possession at the time, showed that he was at home during the day and early evening. In the evening, Jordan Manderson met Myra Ebanks at her house, which was near the scene of the murder, and he appeared to her to want to form some sort of relationship with her.

According to Myra Ebanks, Robert Bush called her and asked her to walk out to the intersection of the road so he could pick her up, as was their custom. She said she could not because she was still looking after her daughter — her mother had not yet come home. Jordan Manderson then returned and noticed that Myra Ebanks was upset because Robert Bush was angry. At that point, Jordan Manderson received a telephone call. The voice on the line was not identified by the judge, but she heard whoever it was say “get the things ready, we're coming for them”. After that phone call, Jordan Manderson asked Myra Ebanks to call him or to message him to let him know what she was doing later in the evening, hoping to meet her at Tishara's yard. Manderson did not

have his own Blackberry, so he asked if she could communicate with him through a Blackberry belonging to a David Ebanks. Robert Bush called again asking her if she was ready, and again she said that she was unable to leave because her mother had not yet arrived and he became angry. Then Myra Ebanks' mother arrived home and she sent a message to Robert Bush telling him that the mother had arrived home.

This account given by Myra Ebanks matches the facts found by the judge based on the evidence of the telephone and call records which establish a significant sequence of events. It was at 10:54 p.m., as the records show, that Myra Ebanks contacted Robert Bush telling him her mother had arrived home and presumably indicating that she was free to go out to him. She and Robert Bush spoke at eleven o'clock. David Ebanks, a man said by the defense to be implicated with Jordan Manderson, sent a message to Myra Ebanks 'way you going?' That was at 11:02.

One minute later, at 11:03, Borden called the cell phone associated with Keith Montague, the man who the prosecution allege Borden was subsequently to name in the confession described by Dillon as the other murderer. Borden, as we have said, had been at home during the day and appeared, according to the records, to have remained there until about 19 minutes past 10:00 in the evening. But contrary to what he stated in his alibi notice, he was not at home when he made that phone call at 11:03 pm. On the contrary, he was in the Birch Tree Hill area at the approximate location of the murder. One minute after he had made the call to Keith Montague’s phone, at 11:04, up until 11:07 pm, there was an exchange of messages between David Ebanks and Myra Ebanks. David Ebanks sent a message at 11:04 saying "he dun know". In reply thereafter at 11:06 pm, Ms. Ebanks sent a Blackberry message to Robert Bush asking where he was. One minute later, at 11:07 pm, David Ebanks sent another Blackberry to Myra Ebanks saying "just tell him da". One minute after that, at 11:08 pm, David Ebanks sent a Blackberry message saying "OJ", probably meaning, said the judge, OK. Robert Mackford Bush and Myra Ebanks then exchanged two Blackberry messages in which she said she was waiting for him to arrive. At 11:14 pm, David Ebanks sent a Blackberry text message to Brian Borden. It is of importance to recall that the content is not available. It is unknown. That is because David Ebanks deleted Brian Borden as a contact on his Blackberry, thereby removing the evidence of the contents of the message. That that contact was deleted is confirmed in a message confirming the deletion sent at 11:25 but only received by Brian Borden's Blackberry at 11:52 p.m. Thus, as the judge inferred, confirming that Brian Borden's Blackberry was active just before the murder took place and then turned off until 11:52.

The judge commented that the evidence suggested that Myra Ebanks had told David Ebanks, as she said, she was going out to meet Robert Bush on the road at 11:08, as was confirmed in her evidence. In fact, Myra’s Blackberry messages to David Ebanks

are not available in evidence – only David's to her. Her explanation for this was that she deleted her outgoing messages to David Ebanks to prevent Robert Bush, who may check her Blackberry, from seeing them.

The judge then described the events of the murder. While Myra Ebanks was talking on the telephone with Robert Bush, she saw Jordan Manderson and David Ebanks walk out of Firewood Close past her and Jordan Manderson nodded his head towards the residence, the yard of Tishara Webster, so as to indicate where he was going. Bush could be heard to start his car and on the telephone she heard him say that he was coming to pick her up. The music was turned up loud. Myra Ebanks said she heard him first, then saw his car, as he reached the junction and turned a short way into Captains Joe and Osbert Road. She walked around the back of the car to get into the passenger seat on the left-hand side. She then saw two men — the two men who shot Mr. Bush — run from Tishara's yard, or thereabouts. They came towards her. She noticed as she was getting by the door of Bush's car that one was carrying a shotgun. The two men then began running towards both her and Mr. Bush as she was getting into the car. Robert Bush reacted late and then the shots took place. Both men, the murderers, had covered their heads with shirts tied around. Robert Bush tried to escape but lost control of the car. She put her head down and heard three shots. She suffered some superficial injuries. The two men stood for a couple of seconds and then ran away toward a smaller road intersecting Birch Tree Hill Road. Myra Ebanks got out of the car and dialled 911. The call was received, and enabled the murder to be timed at 11:20, a time when Brian Borden was in the area and when he had switched off his Blackberry, and six minutes after David Ebanks, who knew where Robert Bush was coming to, had contacted Borden.

The evidence of Borden's alleged confession on which the prosecution placed central reliance consisted of evidence from Marlon Dillon of events over three months later. He said that he was associated with the Birch Tree Hill gang and, being a friend of David Tamasa, had met Brian Borden in 2011. He also knew Jordan Manderson. Marlon Dillon said he had no association with members of the Robert Bush Logwoods gang. He said in evidence that he had been driven to visit David Tamasa by a man called Naldo, who will figure in this judgment later, but whose name the judge found was Renaldo Sanchez Scott. When he got to the house Brian Borden asked David Tamasa to give him a ride home, and Mr. Dillon was asked to give him that lift. He, Tamasa and Mr. Dillon were in the car. When it passed the scene of the murder, according to Mr. Dillon Brian Borden tapped him on the shoulder and said: "You know where this is, this is Birch Tree Hill cemetery", and pointed it out. He then said that he and a friend of his named Keith Montague had 'mashed up' Robert Bush. Mr. Borden said that he used the Mossberg automatic shotgun 'to lick him with it'. He was laughing. He told Mr. Dillon that the shotgun holds five bullets and he demonstrated how he shot Mr. Bush. Mr. Dillon said

he had seen Mr. Borden with a Browning 9mm handgun on several occasions and he was used to, and was in the habit of, showing it off.

The judge then recites in more detail precisely what Dillon had said Borden had told him. "He told me that on Tuesday, 13th of September 2011, in the late evening he had been told by a cousin of his that was in Miss Daisy Lane that Robert Bush is leaving out from his — Robert Bush — address in Miss Daisy Lane. On his way 'round, he's coming around now to drop off his girlfriend Myra off Captains Joe and Osbert Road. Brian Borden told me him and Keith Montague fetched for the guns. Brian Borden told me he had borrowed a Browning 9mm handgun, holds 14 bullets in the cartridge, from a friend of his, Brian Borden, who is named Royce Cornwall. Brian Borden told me he shoots Robert Bush first, Keith Montague secondly shoots Robert Bush with a handgun, and after that both of them run all the way up to his Brian Borden's address in Firewood Close. Brian Borden told me he stashed off both guns and then quickly run into his house and locked himself in. Brian Borden told me he quickly took a shower with some H7 bleach liquid to avoid gunshot residue on his body in case he was visited and picked up by the police. Brian Borden told me the funeral rest home had to stuff Robert Bush face with cotton because Robert Bush facial part had been blown off by the shotgun."

The judge said, correctly in our view, that he was entitled to believe all, some or none of Dillon's evidence. As we have said, he directed himself that he should treat the evidence with caution and that it would be dangerous to accept it unless there is independent evidence supporting and confirming Dillon's testimony. It is important to recall the reasons that the judge gave for exercising that caution and reaching the view that it would be dangerous to accept it, Dillon's evidence, without independent evidence. The judge noted that Dillon was awaiting sentence for the crime of robbery and might well believe that he would receive a lighter sentence if he is instrumental in the conviction of Borden. The judge, went on to note that Dillon admitted to having been part of the Birch Tree Hill gang and to have taken part in two armed robberies. He was purporting to cooperate with the police against former gang colleagues and had lied about the extent of his role in the Weststar robbery. The judge amplified his views about those lies, finding that there were other lies that he had told in evidence that he had given for the first time when he was in front of the court. He had lied about some of the details in the confession, as the judge found, particularly the assertion that Borden had said he used H7 bleach liquid, and in his description of the treatment of the body of Robert Bush at the funeral home. He also noted in his judgment earlier that he had expressed in evidence that he was very concerned about the safety of his wife and child and believed Brian Borden would be the man who would execute an order given by Tamasa that his family be harmed in return for his cooperation with the police (See judgment para. 15).

Before even considering the independent evidence, therefore, the judge had found that the witness Dillon was not to be believed in respect of certain aspects of his evidence. But the judge did go onto consider what he described as independent evidence in support of the confession as described by Dillon. He found that there was independent evidence as to the threats uttered over a substantial period against Robert Bush by Brian Borden in the evidence of a Tracy Watler, and he contrasted that with the absence of any evidence of animosity of Dillon or threats against Brian Borden. He referred to the cell site evidence, emphasising that when Dillon recounted the confession which named the man Montague he could not possibly have known the cell site evidence would confirm contact between Montague and Borden shortly before the murder.

The judge then considered evidence against others who might have been implicated and rejected the suggestion that the evidence pointed to the fact that Manderson and David Ebanks were those who had actually shot Robert Bush. He drew no adverse inference from the fact that Borden proffered what he found to be a false alibi, nor from his lies at interview, but did draw an adverse inference from his failure to give evidence. Since he had not chosen to deny on oath the evidence of Dillon, of Tracy Watler, or the cell phone evidence, the judge drew the inference that Borden had no answer to that evidence, or none that would stand up to cross-examination, and he concluded: "This adverse inference combined with the evidence I have accepted as factual makes me sure that Marlon Dillon is telling the truth about the confession he attributes to Mr. Borden" and he found Borden guilty.

We turn to the ground of appeal which formed the most substantial part of the appeal argued before us — that is, the late disclosure by the prosecution. There was no dispute that the prosecution failed to disclose before trial a substantial number of documents which should have been disclosed. The failure was serious and inexcusable. Tactfully, counsel for the Crown, Mr. Andrew Radcliffe QC, did not seek to offer an explanation which would, as he acknowledged, have been irrelevant. This court's obligation in pursuance of section 9 of the Cayman Islands Law is to see whether the verdict was safe or unsatisfactory. If there was material irregularity in relation to the failure to disclose documents it seems to us the inevitable result would be that the verdict was unsafe and unsatisfactory. There is no room for the proviso in such a case.

Fairness requires full disclosure of relevant evidence which might help an accused throughout the criminal proceedings. The principles derived from jurisprudence in England and Wales were fully set out by the Chief Justice in Eurobank Corporation CILR 15 and 20 CILB 32.

The question for this court is whether the evidence which was not disclosed is material. If it was then it is likely to have caused a material irregularity; but, conversely, if it was

not material and is relatively insignificant then failure to disclose it will not amount to a material irregularity (See R. v Ward, Judith ‹ [1993] 1 WLR 619, 642 B-E).

The test for this court is whether as a result of the evidence contained in the documents that were not disclosed there was a real possibility of a different outcome, or to put it another way, the defense can be shown to have lost a real possibility of acquittal (see McKinnes v. Her Majesty's Advocate UKSC 7, per Lord Hope at paragraph 24, and per Lord Brown at paragraph 34-35).

The dispute in the appeal under this ground centred on the extent to which the undisclosed material added to the weight of material which casts doubt on Dillon's credibility and to show and provide him with an inducement to lie about Borden's alleged confession. In order to assess that issue, it is necessary to compare that which was disclosed before trial and available to be deployed in cross-examination of Dillon, and that which emerged later. We accept Mr. Radcliffe's suggestion on behalf of the Crown that in order to undertake that comparison it is helpful to look at categories of evidence which could be deployed at trial to undermine the credibility of Dillon.

First, there was evidence as to Dillon's motivation for making up evidence against Borden. Generally, any criminal associate, including but not restricted to accomplices, who assists the prosecution is acting in his own self-interest. He wishes to ingratiate himself with the authorities for what he perceived to be his own advantage. If authorities were needed for so obvious a proposition, they can be found in Benedetto v The Queen [2003] 1 WLR 1545, not cited before us. Dillon, as the judge acknowledged, was no exception. When he gave his evidence he was waiting to be sentenced for two robberies. He wanted a lenient sentence in return for helping the prosecution.

The second motive for lying canvassed at trial was that while Borden was at large Dillon believed he posed a risk to Dillon's family. The judge was aware of that alleged motive, although he did not think that it was of particular force as he said any member of the Birch Tree Hill gang could pose a danger to the family of someone who has incriminated the alleged leader of the gang.

The Appellant now says that the freshly disclosed material exposes further motives for Dillon to give false evidence and demonstrates further evidence that Dillon was a liar.

It is necessary to bear in mind the chronology of disclosure and the connection with all the trials relating to Dillon. The murder of Robert Bush was on 13 September 2011. The date of the robbery at Weststar, in which Dillon was involved, was 24 May 2012. Dillon admitted eventually to have taken part in it. The date of another robbery at the Cayman National Bank was 28 June 2012, in respect of which Dillon pleaded guilty on 23 August

2012, and being in possession of a firearm one month later. All the defendants in the Cayman National robbery were convicted in May 2013. On 6 August 2014 this Appellant was convicted of the murder in the instant appeal. On 6 November 2014 Dillon was sentenced for his part in both robberies to three years' imprisonment, permitting his immediate release, though he remained in protective custody. On 21 November 2014 this court allowed the appeal, save for one appellant, in the Cayman National Bank robbery and ordered a retrial. At the retrial on 16 February 2015 Justice Mangatal made a ruling ordering disclosure of documents which ought to have been disclosed in the Borden trial.

Following that ruling, and in response to requests — and persistent requests — from those instructed by this Appellant, the Crown served unredacted notes from Detective Constable Devereux covering the period 28 June - 2 September 2012 which had previously been redacted. In response to yet further requests, a disclosure schedule was produced disclosing further documents relating to Dillon.

It is necessary to compare that which was disclosed in relation to the issues we have identified with what has now emerged in the later post-trial discovery.

In his written argument, following the ruling of Justice Mangatal, the Appellant says it is now disclosed that Dillon was seeking the help of the police and the authorities to serve his sentence abroad, relocate his wife and child, provide him and his family with financial assistance and be provided with a new identity and be permanently relocated.

It is clear to us that documents revealing all those points, save for the question of a new identity, were disclosed to the defense well before the trial, some 17 months before it started. It is apparent, as Mr. Burke QC frankly in his forceful submissions told us, that he had not taken on board the full detail of those, but, as he, we think, would readily accept, that cannot be the fault of the prosecution.

By letter dated 8 February 2013, the Office of the Director of Public Prosecutions disclosed a schedule of documents relevant to the trial concerning the Cayman National Bank to the attorney who was also acting for Brian Borden and referred to those documents as being relevant and constituting disclosure to Dillon in relation to the Borden trial. Those documents included handwritten notes of an officer, Detective Constable Rachel Johnson, and her interaction with Dillon. Those notes show clearly that on 3 July 2012 she records that Marlon was told by a solicitor that they could not act for him. Then she records Dillon "repeatedly said how frightened he was that his wife and baby would be killed." She records that "he was tearful and begged to be moved to a UK prison and for his wife and baby to be relocated. I [that is, DC Johnson] told him I would make representations to Legal for him."

Those notes demonstrate to us that the defense had available all they needed to make the point in cross-examination that this witness was anxious to serve his sentence abroad and relocate his wife and child.

Further, by an e-mail served the day before Dillon started to give evidence at the trial of Borden on 22 July 2014 the Crown disclosed the details of financial assistance offered to Dillon's family. It recorded the amount as an allowance for rent for a three-month period in the sum of over CI $10,770 odd, a relocation allowance of $1,738 odd, and travel and airfare checks were going to be made, and subsequently a figure was inserted of just under CI $4,000.

Thus, contrary to the appellant's assertions in the written argument, the defense did have material to show Dillon's fears and wishes. The only remaining point under this heading being the question of a new identity, which was not raised in the disclosed documents or Officer Johnson's notebook. But in the context of the evidence that was disclosed of Dillon's fears, his anxieties and his wishes, that adds nothing, in our view.

We should add that it must, in any event, have been obvious that Dillon would want to be relocated since no one, least of all this Appellant, could have expected that Dillon would be accommodated in the one prison on the island and this Appellant would have been aware that Dillon was on remand in the George Town Police Station.

The Crown accepts that an e-mail from DC Rachel Johnson, dated 4 July 2012, recording Dillon's concerns and desire to ensure the safety of his family off the island was not disclosed at the trial and was disclosed much later, but it does no more than show that which had been previously disclosed in the notebook dated the day before the e-mail, and it is clear to us that that e-mail is based on the disclosed entry in the officer's notebook.

Those documents, in our view, disclose nothing that had not been previously disclosed before or at trial.

In the Appellant’s written argument, the Appellant argues a number of facts that should have been disclosed earlier were disclosed in the “Devereux” notes (notes taken by DC Devereux”) which, it will be recalled, had finally been disclosed following the ruling of the judge, but before the disclosure schedule. They are identified on behalf of the Appellant as a wish for assistance to be relocated, the provision of financial assistance, and a meeting with Deputy Commissioner Brougham to discuss his welfare and demands. The meeting with the Deputy Commissioner was recorded in DC Rachel Johnson's

notebook, and indeed the notes do not suggest that Dillon was there at the time. So it was either not disclosable at all or in any event was disclosed.

There was, however, one other matter disclosed in the Devereux notes that it is convenient for us to deal with at this time. Those late-disclosed notes show that a Devaney Ferguson, who was apparently in touch with Dillon while he was in custody, had stated to Dillon that "Brian is the one who killed Robert." Devaney was Dillon's sister-in-law. The entry records that as having taken place on 19 August 2012. It was, however, six weeks earlier that Dillon had already revealed what he said was Borden's confession in a statement dated 10 July 2012. We do not think, therefore, that that notebook record in relation to a conversation the sister-in-law had had with Dillon was a relevant or disclosable piece of information. It could not have influenced Dillon in the light of his earlier revelation six weeks before.

The Appellant then asked us further to consider the disclosure schedule which, it will be recalled, contained documents disclosed after the Devereux notebook records. He said that the disclosure schedule contains correspondence from police indicating the belief that Dillon should be relocated and sentenced outside the Cayman Islands; correspondence from attorneys relating to promises made by police in exchange for his cooperation and testimony relevant to his relocation and being reunited with his family; correspondence from the Office of the Director of Public Prosecutions that no promises or inducements or rewards had been offered by the police; correspondence from attorneys requesting disclosure relating to those matters; and correspondence suggesting that Dillon was prepared to give evidence stipulating the dates of visits when specific promises were made by named police officers in exchange for his cooperation; and statements from police officers named by his attorneys denying that any promises were made to him.

In our judgment, those documents contained in that schedule do not add to the documentary evidence that was disclosed at the appropriate time contained in Johnson's notebook. In those circumstances, we do not think, for the reasons we have already given, that that which was contained in the disclosure schedule, to the extent that it was relevant and disclosable, added to what was already known.

Apart from evidence as to motivation and inducement for Dillon to ingratiate himself with the authorities by lying about the confession, there was evidence that he was a liar, to which the judge referred. We have already referred to his false minimisation of his part in the Weststar robbery. He asserted that he was a mere handler and only 12 months later confessed to having taken a full part. He had embellished, as we have already recalled, his account of the Borden confession, and he had been cross-examined about

accusations that he made that the police had falsified his statements, an assertion the prosecution was bound to reject.

As we have said, thus far we do not think the evidence in the documents disclosed subsequent to the trial raised a real possibility that the judge would have reached a different view about Dillon's credibility.

But Mr. Burke said that he had very recently been shown documents of a new and different category. These were revealed very shortly before or, even more deplorably, at the start of this appeal. They were documents upon which the Appellant placed particular relevance revealing what was said to be a fresh example of Dillon's dishonesty which founded a real possibility that the judge would have rejected his evidence as a whole as being incapable of belief in every material respect.

By letter dated 28 November 2013, Stenning & Associates, on behalf of Dillon, wrote to senior prosecuting counsel a letter complaining that in the past 18 months Dillon and his family's relocation had not been resolved. The letter accused the authorities of being in breach of promise and, although it is not wholly clear what type of proceedings was contemplated, it was asserted that during visits to his cell promises were made about relocation to the United Kingdom. The letter went so far as to say that there was a visit prior to those promises being made on 13 September when the Commissioner and the Governor went to see him, although it appears that the Governor was merely making an initial and routine inspection of the police station. Again, there is recorded a further visit, not recorded on the custody records, by the Commissioner and a Foreign and Commonwealth Office Minister on 5 September 2013. Two days before this appeal further correspondence from English solicitors, the well-known firm of Bindmans LLP was served, again referring to arrangements to be made by the authorities with Dillon for him to serve, so it was suggested, his sentence in the United Kingdom. On the very day of this appeal a further letter from them disclosed, recalling that Dillon was, what the letter described, a "super informant", and therefore deserving of special treatment in relation to his protection and relocation, and asserting in that letter "the state would be frustrating their legitimate expectation that it would honour its agreement that he would serve his sentence in the United Kingdom free of risk of being killed or injured. As you will be aware, breach of a legitimate expectation would form a separate ground of judicial review if it is necessary to proceed with a claim. Given the extraordinary assistance which our client has provided to the state, at great risk to his person and family, it is incumbent on the state to honour its promise and comply with its legal obligations towards him and his family".

Mr. Burke contends that this now and lately revealed assertion by Dillon that he was promised relocation and that those promises were broken by the authorities had not

been revealed before and amounted to a new and important piece of evidence that could not be deployed at his trial. He continues that such an assertion would be bound to have been disputed by the Crown. Mr. Radcliffe QC accepted that it would have been disputed. Mr. Burke says that Justice Henderson would have had to hear evidence, and on the assumption that Dillon was disbelieved that any promise had been made let alone broken, there would have been a further dramatic example of his deliberate lies. That, he submitted, could have had a powerful impact on the judge's views as to Dillon's credibility, and certainly founds a real possibility that the judge would have reached a different conclusion and dismissed the crucial evidence from Dillon as to the confession.

We do not agree. The evidence of precisely what Dillon was saying, either to his lawyers here or in the United Kingdom, is not clear, but does suggest that he believed or feared that his wish for protection and relocation off the island for him and his family would not be met. But to put it at its highest, even if he was to say when cross-examined about those documents that they arose out of a broken promise which the prosecution was to say was false, we do not think that would have made any material difference. There was, as we have said, ample evidence of Dillon's unreliability and that he was prepared to lie. There was already ample evidence of the wish for him and his family to be relocated. A false allegation that promises were being broken adds little, if anything. And if it was true, or Dillon genuinely believed it to be true, it would not help the defense at trial. Any belief by him that the authorities were going back on their word to him would have reduced his inducement to help.

We are sure that the documents disclosed after the trial, despite their number, do not materially add to the evidence deployed before the judge undermining Dillon's credibility, whether relating to inducements or Dillon's dishonesty. For these reasons, we dismiss this ground of appeal.

By the second ground of appeal the Appellant contends that the judge failed to apply the burden and standard of proof correctly in relation to his consideration as to whether two other men, David Ebanks and Jordan Manderson, had used the shotgun and handgun to kill Robert Bush. These two, it will be recalled, had seen Bush's show of strength, as the judge called it, the day before, and the judge recalled that there had appeared to be a friendly conversation between Bush and Manderson on that evening and concluded that there was no motive shown in the evidence except a possible reference to a romantic attraction that Manderson had formed. But the judge concluded that he did not think that that would have led Manderson to kill Borden, certainly not shooting him with a gun or a shotgun while the lady to whom he had some romantic attraction was in the car and the gun was fired close to her head. There was, the judge concluded, no evidence of threats or motive on the part of David Ebanks.

The judge said that the two men had the opportunity to commit the murder and had walked past Myra Ebanks shortly before the murder to the yard from which the killers subsequently ran out. Myra Ebanks had purported to identify the clothing of the killers in what must on any view have been very unpromising circumstances for such identification. The clothing did not fully match the clothing that apparently was shown thereafter to have been worn by Jordan Manderson and David Ebanks, although camouflage clothing was seen on one of the assailants and on Jordan Manderson's trousers; the judge commented that it is a popular type of clothing. Mr. Burke remarks that the clothing description given by the witness Myra Ebanks may not have been accurate, but that hardly helps him.

There was further evidence that David Ebanks had placed within his sock — proved to be his sock by a matching DNA — a cartridge which matched that which was found at the scene to have been expelled by the shotgun used in the murder. The judge commented that whilst that was so it would be unlikely that the murderer would have kept an incriminating cartridge in his sock at his home and said in conclusion that he disagreed with the argument of Mr. Burke "that the evidence implicating Mr. Manderson and Mr. Ebanks is as cogent as the case against Mr. Borden. Examined carefully and taken as a whole I do not believe it points to their guilt. My consideration of it does not provide a reason for rejecting the evidence of Mr. Dillon.

The argument advanced by Mr. Burke is the judge treated the issue of whether the murderers were Borden and someone else or Ebanks and Manderson as an alternative, whereas the correct view was to consider whether there was a realistic possibility that the two, Ebanks and Manderson, were those who shot Bush. If the prosecution had not satisfied the judge so that he was sure that they were not the shooters then he could not have accepted Dillon's account of the confession of the Appellant as being true.

We agree that the judge did not at this point of the judgment remind himself that the prosecution had to prove that Ebanks and Manderson were not those who actually shot at Bush, whether or not they were implicated in some other way as lookouts. Unless they did so, the judge could not be sure that Dillon's account of the confession that Borden and the other man were those who shot Bush was truthful. But the judge's conclusion that the evidence as a whole did not point to the guilt of Ebanks and Manderson must be read in the context of his consideration of the case as a whole and his earlier reminder of the burden and standard of proof, and we do not think his treatment of this aspect of the case reveals any misdirection or imposed a greater burden or standard on defense than the law requires.

The judge's consideration of the evidence as to Dillon being a reliable source founds the third ground of appeal that the judge failed properly to assess the reliability and

credibility of Dillon. This is a difficult submission to maintain. In the Privy Council judgment in The Queen and Crawford, a decision from this court, UKPC 44, the Privy Council emphasised the role of an appeal court when considering challenges to a trial judge's assessment of the credibility and reliability of witnesses whom the trial judge has seen and heard (see paragraph 9). Lord Hughes said "The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone".

The judge in our view made a careful analysis of the credibility of Dillon, rejecting his evidence in part, but looking at his evidence as a whole, and in particular evidence which independently supported the truth of Borden's confession to Dillon. He had to assess Dillon in the light of all the evidence in accordance with the principle that individual pieces of evidence are not to be evaluated individually and in isolation from the whole (see DPP and Anglin, judgment of this court and the President, 6 November 2014 CICA (Crim) 17/2011). The judge properly identified the need for caution and the danger in using Dillon as a source of reliable evidence.

The Appellant drew attention to his treatment of a witness called by the defense to suggest that there was striking contrast between the way the judge treated the Crown's witnesses and a witness called by the defense.

That witness was Renaldo Scott. The police had taken a statement from him. He was, as we have recalled, a friend of Borden whom Dillon had claimed had driven him to David Tamasa's house, calling him Naldo, after which there was the drive home at which the alleged confession took place. Scott gave evidence that he had not ever driven anyone to Tamasa's address and this evidence was dismissed by the judge. The judge said that Scott had said that he had no criminal record, but admitted in cross-examination he had been convicted of an offence of taking and driving away without authority in 2003, and had said he was a minor at the time, although he was in fact 21. The judge continued that that offence was a form of theft, punishable by imprisonment for up to two years, and that the witness had misled the court when he swore he had no criminal convictions, and when he said he was a minor. He said “it is not reliable evidence and does not have the intended effect of proving Mr. Dillon to be a liar (see paragraph 92). Mr. Burke powerfully challenged such reasons for dismissing that evidence, saying it is quite an insufficient basis for him to dismiss the evidence — it was only his mother's car, it was an offence over 11 years before, and he was only 21. We might ourselves have agreed with Mr. Burke that his previous conviction and his failure to reveal it were insufficient to show that he was not reliable or was inadequate to prove that Dillon was a liar. But that is not the test. The judge saw and heard the witness in the context of all the evidence and the nuances of the case. It is not open to us to substitute

our own opinion as to the credibility of a witness that the judge saw, on the basis that we would have given the factors the judge relied upon less weight. We will not do so.

We have carefully considered all the material in relation to the judge's conclusion as to Dillon's credibility and reliability. We conclude that the verdict is safe and satisfactory and we dismiss this appeal.

Moses, JA

Field, JA

CHADWICK, President: So the appeal is dismissed. The conviction of the Appellant of the murder of Robert Bush on 13 September 2011 is confirmed. The sentence of life imprisonment, which was the only sentence which the judge could impose, is affirmed.