IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 17/2014

IND 79/13

BEFORE

Hon Elliott Mottley, Justice of Appeal
Hon Dennis Morrison, Justice of Appeal
Hon Sir Richard Field, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

HER MAJESTY THE QUEEN

Respondent

and

CHAD ANGLIN

Appellant

Mr Jonathan Rees QC and Ms Fiona Robertson of Samson & McGrath appeared for the Appellant
Mr Simon Russell Flint QC and Mr Alexander Upton instructed by the Director of Public Prosecutions appeared for the Crown

Hearing: 8 July 2015
Judgment: 24 July 2015

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JUDGMENT

…….....

Sir Richard Field, JA

Introduction

1. Between 5th and the 20th of May 2014, the appellant, Chad Anglin, stood trial for the murder of Frederic René Bise before Mr Justice Henderson and a jury

at the Grand Court. He was found guilty as charged by the jury on 20 May 2014 and was sentenced to life imprisonment.

2. The deceased was a Swiss national who had come to Grand Cayman in 2001 to work in the Bank Espirito Santo. He was an active homosexual. In the morning of 8 February 2008, his body was found in the back of his burning Mitsubishi car parked beside his residence at 2 Avoca Lane, Mount Pleasant, West Bay. His body was wrapped in a blanket taken from his home. His trousers were unzipped and pulled approximately halfway down his thighs. He had been savagely beaten by multiple blows to his head and face with a blunt object such as a cinder block and had been strangled or had suffered severe blows to his neck. The lack of smoke in his lungs indicated that he had died before he was placed in the car and the pathologist was of the opinion that undigested food in the deceased's stomach pointed to his having been alive at 5.00 am on 8 February 2008.

3. A postmortem examination revealed that a man had recently had had sex with Mr Bise. His anal sphincter was moderately dilated and blood and seminal fluid were found in his rectum. A Y-DNA profile was obtained from the rectal swabs indicating one male contributor who could not have been the appellant. The profile was checked against the DNA database, but no matches were found.

4. During the evening of 7 February 2008, Mr Bise received a text message from one Chet Ebanks who had been an occasional sexual partner of his since 2006. In this text Chet Ebanks asked if the two men could meet up for sex and they arranged by text for Mr Bise to pick up Chet Ebanks in his car and then head for Mr Bise's home where the sexual encounter would take place. Mr Ebanks dozed off, however, and did not respond to Mr Bise's subsequent texts, the last of which was timed at 02:25:50 on Friday 8 February 2008.

5. At the appellant's trial the prosecution called live evidence and adduced CCTV footage that cumulatively demonstrated that shortly before 1.00 am on 8 February 2008, both the appellant and Mr Bise were at Undra's Jerk

Chicken stand opposite Kelly's Bar which is close to where Mr Bise resided. Mr Bise had been drinking at Kelly's Bar that night from at least 00.42 am. The appellant was wearing a dark coloured shirt emblazoned with the number "21" in white on the front and the back; he was also wearing ¾ length dark coloured jeans. A friend of the appellant's at the Jerk Chicken stand heard somebody say to the appellant, "Chad, what you doing with a "batty man" which seemed to vex the appellant who replied "Nah that brother, nuh like that." The appellant also said to another friend of his that he did not like the "tall white man" – meaning Mr Bise – "because he was gay". Later, the appellant touched Mr Bise on the shoulder and started to talk to him and then moved away, followed by Mr Bise and the two men then left together in Mr Bise's Mitsubishi SUV.

6. The prosecution also adduced DNA evidence. A cigarette butt found on the ground behind Mr Bise's partially burnt-out Mitsubishi had on it a DNA profile that matched the appellant's DNA profile with a probability of 1 in 7.4 quadrillion that the DNA found on the cigarette was that of the appellant. Also, a cigarette butt recovered from underneath a porch table near the pool at Mr Bise's residence had on it a mixture of DNA from at least two people and neither Mr Bise nor the appellant could be excluded as donors to this mixed profile, with a probability of 1 in 3.3 million that it was their DNA found on the cigarette. The appellant also formally admitted that there was no evidence that he had met the deceased prior to 7 February 2008 and Justice Henderson directed the jury that, given the DNA evidence and that admission, it was open to them to infer that the appellant was present at Mr Bise's home on the morning of his death.

7. The prosecution also relied on what it submitted was evidence of a confession made by the appellant to a Ms Yanique Connolly. Ms Connolly gave evidence from behind a screen. In chief she testified that, having gone missing from home, she was in the appellant's company for several days in early April 2008, during which time the appellant said to her that he was going to burn her in a car like what he and a friend did to the gay man. He was bragging about it, laughing. In cross-examination, her first statement made to the police (PC

Levy) that the appellant had told her he was accused of the murder of the man who was burnt in his car was put to her. She agreed that that record of what she had said was the truth. All the appellant had said to her was that he was accused of the murder of the man burnt in his car. In re-examination, the witness was shown part of a statement she had made a day later to another police officer and confirmed that this was accurate. This read: "Chad then took me to his friend's house across from his grandmother's. While we were there, Chad was talking to me and telling me how he was involved in the murder of a gay man; they had killed him and burnt him in a car."

8. The prosecution also relied on statements made by the appellant when he was spoken to in the afternoon of 14 February 2008 at his grandmother's house at 224 Birch Tree Hill Road by two police officers who did not caution him. On this occasion the appellant said that in the evening of 7 February 2008 he had been in Kelly's Bar between 9.30 pm to 11 pm where he had seen a fair-skinned, effeminate man but had not spoken to him and did not get into a vehicle with him. He had then walked home arriving before 11.00 pm. The appellant described what he was wearing that night and then produced to the officers clothes that fitted this description – a red T-shirt, a pair of long blue jean pants and a pair of sneakers, telling the police the clothing could be tested and if a piece of evidence was found on them, to return and arrest him. It was the prosecution's case that these statements were lies that were probative of the appellant's guilt. In a *voir dire*, the appellant applied to have this evidence excluded under section 40 of the Evidence Law on the ground that under Rule II of the Judges' Rules he should have been cautioned by the police officers before being interviewed. The judge ruled that whilst, as was conceded by the prosecution, the caution called for in Rule II should have been administered, it would not be unfair for the evidence to be admitted.

9. To assist in proving that the uncautioned statements made in the afternoon of 14 February 2014 were lies, the prosecution relied on a series of prepared statements made by the appellant when he was re-arrested over five years later and interviewed under caution in respect of phased disclosure of material in the hands of the police. On 8 April 2013, the appellant was told that the police

had statements from witnesses that he had left Kelly's Bar with Mr Bise in Mr Bise's car. The appellant then produced his first prepared statement, in which he accepted that he was at Kelly's Bar on 7 February 2008 and stated that Mr Bise approached him there with a request to buy weed; they left in Mr Bise's car and drove to the appellant's house where he supplied weed to Mr Bise who then drove off. The appellant was home by 10.00 pm and did not go out again that night. He had not told the police about this before because he was worried about admitting he had sold drugs.

10. A few days later, the appellant was told that the police had CCTV footage that showed that he was not wearing the clothing at Kelly's Bar on the evening of 7 February 2008 that he had said he was wearing when he spoke to the police on 14 February 2008. The appellant was shown the footage in question and answered "no comment" when asked about what the footage showed; he made no prepared statement in response to this disclosure.

11. Further phased disclosure was given to the appellant about the evidence of Yanique Connolly and the DNA on the cigarette butt found to the rear of Mr Bise's car. In a subsequent prepared statement, the appellant admitted for the first time that he had been at 2 Avoca Road because Mr Bise had needed to go there to pick up some money for the weed. Whilst at that address, he smoked a cigarette. He accepted that he did not treat Ms Connolly well but denied making any confession to her of the murder of Mr Bise. He could only think that she had made her statements to the police in revenge as a woman scorned. When asked in interview whether Ms Connolly was lying, he replied "no comment". In a later statement, he said that it was possible that he and Mr Bise had shared a cigarette.

12. The appellant was jointly charged for Mr Bise's murder with his cousin, Leonard Ebanks, but the two co-accused were tried separately. It was the prosecution's case that when the appellant left Undra's Jerk Chicken stand with Mr Bise he had some ulterior criminal motive in mind, perhaps robbery. When they got to Mr Bise's house the two men smoked together in the front porch and at some point the appellant recruited his cousin, Leonard Ebanks,

who had homosexual tendencies, to have sex with Mr Bise. Mr Bise texted Chet Ebanks at 2.25 am because he was interested in having a threesome encounter with him and Leonard Ebanks. When Chet Ebanks did not respond, the appellant, Mr Bise and Leonard Ebanks drove to a location away from 2 Avoca Lane where Leonard Ebanks had sex with Mr Bise. Thereafter, the appellant and his co-accused fatally assaulted Mr Bise and stole his computer, a credit card and a mobile phone.

13. Juliet Facey, with whom Leonard Ebanks enjoyed a fitful relationship, gave evidence that at 5.00 am on 8 February 2008 Leonard Ebanks came into her house holding a can of Heineken lager and smelling strongly of smoke. This was before Mr Bise's car was set alight but the prosecution suggested that the smoke had come from Leonard Ebanks having burned the clothes he had been wearing when he attacked Mr Bise. Ms Facey also testified that sometime after 10 February 2008 she noticed a black travel bag that Leonard Ebanks had put in her closet that contained a black computer pouch, a Cayman National Bank card with the name scratched out, and a mobile phone.

Ground of appeal 1: the trial judge erred in ruling that the appellant's statements made on 14 February 2008 at 224 Birch Tree Hill Road were admissible notwithstanding the failure to caution him as required by the Judges Rules.

14. The Judges' Rules apply in the Cayman Islands by virtue of section 23 of the Evidence Law. At the relevant date Rules I and II of the Rules provided (in relevant part):

I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

The caution shall be in the following terms:

> "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence."

15. Section 40 of the Evidence Law provides:

> Nothing in this Law derogates from the power of a court in any criminal proceedings to disallow evidence otherwise admissible which, in the opinion of such court, would, if allowed, operate unfairly against an accused person.

16. Important guidance as to how a court should approach the question whether evidence obtained in breach of the Judges' Rules was admissible was provided by the Privy Council in *Peart v The Queen* [2006] 1 WLR 970. There, the trial judge had admitted into evidence the appellant's answers to questions he was asked by police officers the day after he had been charged with capital murder. The appellant was then aged 18 and had not had the services of a lawyer before the interview at which the questions were asked. In the course of giving the opinion of the Board, Lord Carswell said:

> 22. Their Lordships acknowledge the importance of the principle of voluntariness, but are unable to accept that it is the only applicable criterion, as Mr Guthrie attempted to argue. If it were the sole criterion, there would be no room for the operation of the principle whereby the judge may refuse in the exercise of his discretion to allow the admission of evidence which is otherwise legally admissible, as ex hypothesi confessions made voluntarily must be. One need only point to the remark of Lord Diplock in *R v Sang* [1980] AC 402 at 436: "…. there is discretion to exclude evidence which the accused has been induced to produce voluntarily if the method of inducement was unfair." The same sentiment was expressed by Lord Devlin (*The Criminal Prosecution in England*, pp 38-9):
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> > "The essence of the thing is that a judge must be satisfied that some unfair or oppressive use has been made of police power. If he is so satisfied, he will reject the evidence notwithstanding that there is no rule which specifically prohibits it; if he is not so satisfied, he will admit the evidence even though there may have been some technical breach of one of the Rules. It must never be forgotten that the Judges' Rules were made for the guidance of the police and not for the circumscription of the judicial power."
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> 23. In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be

admitted in evidence. There may be cases, as Lord Diplock observed in the passage quoted from *R v Sang*, where an admission has been voluntarily made but it would be unfair to admit it. An analogy may be found in the case-law relating to statements obtained by means of torture: other reliable evidence may demonstrate the truth of those statements, but the courts will nevertheless reject them, on the ground that reliance on statements so obtained shocks the conscience, abuses or degrades judicial proceedings and involves the state in moral defilement: see *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2005] 3 WLR 1249, paras 17, 39, per Lord Bingham of Cornhill. It was submitted on behalf of the appellant in the present case that his youth (he was 18 years of age at the time of his arrest) and the fact that he had not thitherto had the advice of an attorney constituted factors which demonstrated unfairness. Their Lordships agree that factors of this nature have to be taken into account by a trial judge in determining whether to admit an accused's statement in evidence.

24. From the foregoing discussion it is possible to distil four brief propositions:

(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.
(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.
(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.

17. The facts relating to the Justice Henderson's finding that there had been a breach of the Judges' Rules are as follows. By 9 of February 2008, the Senior

Investigating Officer ("SIO"), Superintendent Marlon Bodden, was aware that witnesses present at Undra's Jerk Chicken stand had stated that the appellant was there in the company of Mr Bise and was seen to get into the passenger side of Mr Bise's vehicle as he drove away from the locality. There was also evidence suggesting that a Brian Rankine was one of the last persons to have been seen with Mr Bise. It is important to note that at this stage the police had not seen the CCTV footage of events outside Kelly's Bar on the night in question and the DNA analysis of the cigarette butts and Ms Conolly's evidence was not available until some months later.

18. Officers under the command of Mr Bodden were given the task of tracing, interviewing and eliminating ("TIEing") potential witnesses and on 13 February 2008 Brian Rankine accepted DC Dave Morrison's invitation to come to the police station where he made a statement and was eliminated from the enquiry.

19. At 5.00 pm on 13 February 2008, Mr Bodden wrote policy no. 22 in the policy book, namely, that the appellant was to be brought in and spoken to about his whereabouts on 7-8 February 2008 and being in Mr Bise's company when he (Mr Bise) left the Jerk stand. The appellant was not to be arrested unless he refused to attend the police station. If he were arrested it would be on suspicion of murder, but this would be the last resort. If arrested, the usual processing and residence search was to be carried out under warrant. The justification for this policy was: "Statements from witnesses put Chad in the passenger seat of the deceased's vehicle when he left Kelly's. This was around 1:30 – 1:45am 8/02/08. We need to establish Chad's whereabouts after leaving Kelly's jerk to stand with Frederic Bise: critical outstanding written statement was awaited."

20. In the afternoon of 14 February 2008, DC Morrison and DS Burton went to the appellant's grandmother's address at 224 Birch Tree Hill Road in the hope of finding the appellant there. They arrived at about 2:45 pm and told the grandmother they wanted to speak to Chad. Chad was lying on a couch in the front room. The grandmother called Chad who came outside to speak to DC

Morrison who explained to him that the officers wished to speak to him in relation to the investigation into the death of Mr Bise. They invited him to come to the police station where he could be spoken to in a confidential manner. The appellant said that he was comfortable with staying at his yard and saw no reason to go to the police station. He was asked by DC Morrison to give his account of what he knew of the events of 7 and 8 February 2008 and whether or not he saw the deceased. He said that he was not going to give any statement or sign to anything because he did not want to be involved. He was informed by DS Burton that since he was not going to give a statement or to sign anything, notes would be made of whatever he said, and he agreed.

21. The appellant then gave the account that is set out in paragraph 7 above. Whilst he did so there was a point when DS Burton excused himself to speak on his cell phone and the conversation continued with DC Morrison. When DS Burton returned, DC Morrison related what the appellant had said in DS Burton's absence. After the appellant had given his account he declined DS Burton's invitation to read the notes of what he had said and sign them as true and accurate. The appellant said there were enough witnesses, including his grandmother, DC Morrison and DC Best, a SOCO officer who by then had arrived at the scene.

22. At 16:35 hrs on 14 February 2008, DS Burton telephoned Mr Bodden and a short while later was telephoned back by Mr Bodden. The officers then arrested the appellant on suspicion of murder. During the gap in these telephone calls, Mr Bodden took legal advice.

23. At 16:40 hrs the same day, Mr Bodden wrote policy no.30 in the policy file reporting that, having been told by DS Burton that the appellant had refused to attend the police station, he had given the instruction to arrest the appellant on suspicion of murder. In the justification section of this entry, Mr Bodden wrote that the SG, having been informed that a number of statements had put the appellant in the passenger seat of the deceased vehicle and the appellant had declined to cooperate in giving a statement, agreed that more than sufficient grounds existed for an arrest on suspicion of murder.

24. Meanwhile, at 15:10 hrs Mr Bodden began a forensic strategy meeting in his office with DI Kim Evans (the Deputy SIO) and Ms Louise Thornley, the lead civilian SOCO assigned to the investigation. Ms Thornley's notes contain three relevant entries: (i) 15:20 hrs – Chad Anglin Arrest. Morrison & Barton Birch Tree Hill, West Bay. (ii) 15:30 hrs – brief Stephen Best (a Detective Constable who had been appointed to act as SOCO at 224 Birch Tree Hill Road and who arrived at that address whilst the appellant was being interviewed by DS Burton and DC Morrison). (iii) 1545 – SB [Stephen Best] left for scene.

25. At 1645 hrs the appellant was arrested and cautioned at 224 Birch Tree Hill Road, to which he replied he wanted to speak to Superintendent Bodden.

26. At 1715 hrs, DI Kim Evans arrived at 224 Birch Tree Hill Road, in possession of a search warrant he had been instructed to obtain by Mr Bodden at 1635 hrs.

27. The appellant applied to exclude the evidence of the interview conducted at 224 Birch Tree Hill Road and on the ensuing *voir dire* the prosecution conceded that the appellant should have been cautioned at the start of the interview. This concession was made in light of Mr Bodden's policy no. 22, without it being accepted that there existed at that time reasonable grounds to suspect the appellant of the murder of Mr Bise.

28. Mr Bodden, DC Morrison and DS Burton each gave evidence and was cross-examined by Mr Rees QC, the appellant's counsel. It was Mr Rees' case that there had been a deliberate breach of Rule II and he put to the witnesses that they had each known before or during the interview that the appellant would be arrested if he refused to give a statement at the police station whether or not he had already given an account of his movements on the night in question. No evidence was called on the part of the appellant.

29. In giving his ruling on the *voir dire*, Justice Henderson stated that two issues presented themselves: had the Crown proved beyond reasonable doubt that the statement was voluntary and should the statement be excluded because its admission would make the trial unfair. He then set out the facts along the lines of what is stated in paragraphs 18 – 26 above and continued:

> I turn to the question of voluntariness. The Crown must satisfy me that the statement was not made as a result of any threat promise or inducement made or held out by a person in authority and that it was not the result of oppression. The standard is proof beyond a reasonable doubt. I am satisfied of those requirements. I have heard the evidence of both officers who were present. The defendant has not called evidence on the *voir dire*. There is no evidence of anything having been said or done which might amount to a threat, promise or inducement. There is no suggestion of an atmosphere of oppression.

30. Justice Henderson then considered whether the failure to caution was an act of bad faith. He said that his consideration of this issue was governed by the decision in *Peart v The Queen* and referred to the paragraphs of the judgment in that case that are set out in paragraph 16 above. He referred to policy no. 22 written at 5:00 pm on 13 February 2008 and observed that if Mr Bodden's opinion was correct, the appellant should have been cautioned.

31. He went on to decline to accept the oral evidence of Mr Bodden and the other two police officers that policy no. 22 was not communicated to them in any form until the interview of the appellant had ended and that as far as they were concerned the appellant was simply one of potential witnesses to the interviewed. In the judge's view, the notes made by Ms Thorley in the afternoon of 14 February 2008, particularly the notes at 15:20 hrs -- "Chad Anglin arrest. Morrison and Burton, Birch Tree Hill West Bay"; 15:30 hrs – "brief Stephen Best"; 15:45 hrs – SB left for scene", contradicted the evidence of the officers; as did the arrival of DC Best at 224 Birch Tree Hill Road in the course of the interview. He found that it was more probable than not that

> "Marlon Bodden had decided to arrest the defendant and had in some manner communicated his opinion and his intention to the officers conducting the interview … at the latest, just before 3:20 pm. Therefore, the failure to administer a caution was not accidental but the result of a deliberate decision, most likely by the lead investigator. To this extent, the failure can be stigmatized as the product of bad faith."

32. The judge then dealt with the question whether the admission of the statement would result in an unfair trial.

> Obviously my finding that the failure to caution was not an innocent error but a deliberate stratagem has a significant bearing on this question. However there are a number of other factors which must be considered.
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> First, the statement was voluntary as I have already found.
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> Second, some things in the statement were actually volunteered by the defendant. It appears to have been his own idea to produce the clothing he was wearing on the night in question.
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> Third, the statement was exculpatory. On its face, it exonerates the defendant. He made no admission or confession. Its significance now lies only in the fact that the Crown says some parts of the statement were untrue. The defendant wanted to make his lack of involvement clear to the police so that he would be removed from the list of possible suspects. He wanted the police to hear what he had to say.
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> Fourth the defendant can be assumed to have been relatively sophisticated about his rights. He has been arrested at least 43 previous occasions for a variety of offences of varying degrees of seriousness. It is likely that he was cautioned on many of those occasions. He was not in the position of the young or vulnerable suspect. He had been in a similar situation on many prior occasions.
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> Fifth, the defendant did not display any nervousness or apprehension while speaking to the officers. He was in his own residence. He had the presence of mind to refuse to go to the police station. He had the presence of mind to refuse to sign the officer's notes. He was in full control, not simply swept along by events.
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> When I weigh all of these varying factors, I conclude that this is not one of those cases where, although the statement was made voluntarily, it would nevertheless be unfair to admit it. The defendant wanted his statement to be taken into account and it would not be unfair now to do so.

33. It was submitted on behalf of the appellant that on the facts as found by the judge there was only one way in which he could have reasonably exercised his discretion and that was to exclude the statements made by the appellant during

the interview. There had been a significant breach of the privilege against self-incrimination and the right to silence. The decision to defer arrest was deliberate and the product of bad faith. Although the statements were made voluntarily, the appellant had been deprived of making an informed choice whether to make them or not. He had been deprived of the right to a fair hearing as guaranteed by section 7 (1) of the Caymans Islands Bill of Rights. If he had been told that he did not have to say anything and what he did say could be used in evidence against him he might have declined to make any statement at all. Although he had been arrested many times, he might have thought that statements made when no caution was administered had a different status from statements made after caution and could not be relied in evidence against him.

34. In our judgment, the approach of Justice Henderson to the question whether the interview was admissible is not to be faulted. He correctly held that the fact that the statement was made voluntarily did not mean that it was *ipso facto* admissible and proceeded to give careful consideration to whether its admission would be unfair, given that the failure to caution was a deliberate stratagem, which he rightly said had a significant bearing on the question. The factors he took into account in the weighing exercise he conducted were all relevant matters and he was entitled to conclude that, in the light of these considerations, it would not be unfair to admit the interview. This conclusion was not outwith the applicable margin of appreciation. As Justice Henderson observed, the appellant, a mature adult who had been arrested many times, wanted the police officers to have his account of his movements on the night in question and he gave that account entirely voluntarily in the full knowledge that the officers were taking a careful note of what he said.

35. Mr Rees QC for the appellant drew our attention to *R v Itzel Anderson* [Ind. No. 15 of 2014]. In this case Justice Henderson excluded evidence of the defendant's post arrest interview under section 40 of the Evidence Law on the ground that to admit the evidence would be unfair. The defendant had a right to legal advice which had been breached because she could not afford to pay

for a lawyer and there was no entitlement to legal aid before she had been charged.

36. Whether the admission of evidence should be excluded under section 40 of the Evidence will depend on the facts of each particular case and we can see nothing in *Anderson* which compels us to conclude that the admission by Justice Henderson of the interview at 224 Birch Tree Hill Road rendered the trial of the appellant unfair.

37. For the reasons given above, we reject Ground 1 of the appeal.

Grounds 2 – 4: Failures in the summing up.

Ground 2: The learned judge failed to direct the jury that the appellant's decision not to answer the majority of the questions asked of him during the interviews under caution conducted on 16th and 17th February 2008, did not provide any support for the Crown's case.

38. The appellant was interviewed following his arrest on 14 February 2008 and had read over to him the "old" caution: "You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence." He gave "no comment" responses to almost all the questions he was asked. When the appellant was re-arrested in 2013 he was again interviewed and this time the "new" caution was administered: "You do not have to say anything. But it may harm your defence if you do not mention, when questioned, something which you rely on in court. Anything you say can be given in evidence."

39. The account the jury was given of the post arrest interviews in 2008 was contained in paragraphs 42 and 43 of the Admissions which stated in relevant part:

> 42. Chad Anglian was interviewed about the death of Frederic Bise in the presence of his attorney Lloyd Sampson, on 16 February 2008 between 16:25 and 20:35 hours at George Town Police Station by DC Morrison and DS Burton. At the outset of the interview he was advised of his right to silence. He gave "no comment" to all relevant questions asked, save that he confirmed that the clothing and footwear … recovered from 224 Birch Tree

> Hill Road were seized from that location and sealed in his presence, and that he signed the seals.
> 43. Chad Anglin was further interviewed on 17 February 2008 between 16:25 and 20:50 hours at George Town Police Station by DC Morrison and DS Burton. At the outset of the interview he was advised of his right to silence. He gave "no comment" to all relevant questions asked.

42. The jury heard about the 2013 interviews and the caution then administered as part of the evidence of the trial.

43. In the course of the closing defence speech the jury was told that it was anticipated that the judge would direct them that no inference adverse to the defendant could be drawn from the fact that he declined to answer questions during the 2008 interviews. In the event, the judge made no mention of the 2008 interviews in his summing up and did not give the anticipated direction. The absence of such a direction was raised at the end of the summing up and the judge explained that it was a deliberate omission.

44. It was submitted by Mr Rees QC that the failure to give such a direction was a significant defect because it gave rise to a danger that the jury might conclude that the appellant's failure to answer questions in the 2008 interviews was because he had not by that stage settled on the account he was to give in 2013 which was tailored to fit the evidence. Yet such an inference would not be open to the jury given the terms of the caution administered in 2008.

45. In our opinion the failure of the judge to direct the jury not to draw an adverse inference from the appellant's "no comment" answers in the 2008 interviews was not a material misdirection. The jury were in possession of the Admissions when considering their verdict from which it could be seen how the appellant was cautioned during the 2008 interviews, and, consistently with that caution, they had not been invited to draw an adverse inference from the appellant's silence in 2008 by the prosecution.

Ground 3. The learned judge failed to direct the jury about the circumstances in which it might be appropriate to draw an adverse inference against the applicant from his failure to mention in his 2013 interviews a fact that he relied on in his defence

46. In his closing speech, Counsel for the prosecution, Mr Russell Flint QC, contended that the jury were entitled to draw an adverse inference from the fact that the applicant had failed to mention when interviewed in 2013 about Ms Connolly's evidence that he had told her only that he was accused of the murder of Mr Bise. It was the submission of the Crown that the appellant had tailored this aspect of his defence to fit with the evidence of what Ms Connolly told PC Levy, the first police officer to whom she spoke after leaving the company of the appellant in April 2008. In contrast, the defence submitted to the jury that it would be unfair to draw that inference for a variety of reasons, including the fact that there was a five year gap between the interview and the events he was being asked about. However, despite these competing submissions, when the judge summed up the case three days after closing speeches he failed to direct them either (a) as to the circumstances in which it might be proper to draw the adverse inference contended for by the Crown, or (b) that no adverse inference was open to them.
47. Mr Rees submitted that in these circumstances there was a danger that the jury might have drawn such an adverse inference against the defendant when, had they been properly directed, they might have felt such an inference was not open to them.
48. In our judgment it would have been better if Justice Henderson had directed the jury not to accept the Crown's invitation to draw an adverse inference from the appellant's failure to tell the police that he had told Ms Connolly only that he was accused of Mr Bise's murder. However, in our view, this failure did not amount to a misdirection that renders the appellant's conviction unsafe.
49. Ms Connolly's evidence was of great importance. The central issue for the jury was whether they were sure that the appellant had told Ms Connolly

that he was involved in the murder of a gay man and had burnt him in a car. The suggestion in the cross-examination of Ms Connolly that the appellant had only told her that he had been accused of Mr Bise's murder was not made on the say-so of the appellant but was fairly and squarely based on PC Levy's evidence as to what she was told by Ms Connolly. As recorded above, the judge directed the jury in considerable detail about Ms Connolly's evidence reading to them the transcript of what she had said in the witness box. Given these circumstances, we are of the firm opinion that the jury would not have been concerned about any failure of the appellant to say in interview that he had only told Ms Connolly that he had been accused of Mr Bise's murder and had not told her that he was one of the murderers. Instead, they would have been concerned to decide whether, notwithstanding PC Levy's uncontested evidence of what Ms Connolly said to her, Ms Connolly's evidence that the appellant had confessed to the murder of Mr Bise (reinforced as it was by her subsequent statement to the police) was truthful and reliable.

Ground 4: the judge failed adequately to remind the jury of important aspects of the evidence that the defence relied upon to undermine the Crown's case.

50. The prosecution's closing speech occupied the morning session and the defence speech occupied the whole of an extended afternoon on 14 May 2014. The summing-up (delivered three days later after a weekend and a public holiday) took just over an hour. At the start of his review of the evidence the judge told the jury he was going to review "the most prominent aspects of the evidence" and would only sum up "what seemed to me the most important elements". Thereafter, his summary of the evidence dealt with the testimony of Yanique Connolly; the pre-arrest account given by the appellant on 14th February 2008; the DNA evidence and the admission that there was no evidence the appellant had been to Mr Bise's home before 8 February 2008; the appellant's response to the

phased disclosure; the appellant's alleged lies; and the appellant's failure to give evidence.

51. It was the appellant's case that he was not involved in the killing. In his prepared statements he claimed that he had left the jerk stand with the deceased in order to sell him some cannabis. They first drove to 2 Avoca Lane where the deceased collected some cash and then they drove to 224 Birch Tree Hill where the applicant sold the deceased the cannabis. That concluded his contact with the deceased that night. It followed that, when Mr Bise drove away from the applicant's address, he was fine, and thus it must have been someone else who killed him later that morning. And that person may well have been the same person that Mr Bise had sex with shortly before he died.

52. Amongst the aspects of the evidence Mr Rees highlighted when addressing the jury (and the reasons he did so) were:

    (a) If the deceased was still alive at 02.25am, it meant that whatever ulterior motive the applicant had for befriending the deceased, he had not taken advantage of the deceased despite arriving at 2 Avoca Lane at about 1.15am.

    (b) In order to explain why Mr Bise had sex with someone before being killed by the applicant, the Crown alleged that the applicant had recruited Leonard Ebanks to have sex with Frederic Bise as part and parcel of his overall scheme. However, there was very little, if any, cogent evidence that Leonard Ebanks was involved in the killing. Thus, even though his clothes may have smelled of burning when he came to Juliet Facey's house at 5 am, this was before the car had been set alight and the Crown's suggestion that Leonard Ebanks had burned the clothes he was wearing when he attacked Mr Bise was pure speculation. Further, there was no evidence that the bag containing the computer pouch, credit card and phone were items that had belonged to Mr Bise; whereas there was evidence that Mr Bise carried his computer around in a brown Luis Vuitton bag and his mobile phone was recovered from his burnt-out car.

(c) The evidence was that when Mr Bise made the penultimate call at 02.24 am to Chet Ebanks, he had left a voicemail message which merely bore the background noise of his environment. If Mr Bise had been looking for a threesome, as alleged by the Crown, one would have expected a more specific message to have been left. Indeed, this phone call was more consistent with Mr Bise having concluded his dealings with the applicant and resuming his efforts to contact Chet Ebanks.

(d) Contrary to the Crown's suggestion that Mr Bise had had sexual activity with Leonard Ebanks at some outside location, the evidence pointed to sexual activity taking place near the pool at 2 Avoca Lane. On a table near to the pool were discovered the signs of recent activity including smoked cigarettes, an opened can of lubricant and a beaker containing liquid which had Mr Bise's DNA on it.

(e) The Crown's contention that it was Leonard Ebanks who had engaged in sexual activity with Mr Bise shortly before he was killed was not supported by any scientific evidence and the DNA evidence was equally consistent with Mr Bise having found someone to have sex with after he had concluded his business with the applicant and had failed to get in touch with Chet Ebanks. There was DNA on one of the rectal swabs taken from the deceased that could not have come from either the deceased or the applicant. There was no evidence as to whether it could have come from Leonard Ebanks. Recent testing on the other set of rectal swabs produced a Y-DNA profile that could not have come from the appellant's DNA. This Y-DNA profile was not compared against Mr Bise's Y-DNA profile or Leonard Ebanks' Y-DNA profile. Instead it was sent off for comparison against a database containing Y-DNA profiles but no 'hits' were achieved. Additionally, there was DNA from someone other than the deceased or the appellant on the waist band and fly of the jeans Mr Bise was wearing when he died. There was no evidence as to whether that DNA profile had been compared against the DNA profile of Leonard Ebanks and there was evidence from a variety of sources suggesting that it would

not have been surprising if Mr Bise had managed to find someone to have sex with after 2.25am notwithstanding he did not use his phone for that purpose.

(f) The Crown's case was that the appellant was jointly responsible with Leonard Ebanks for Mr Bise's murder yet the pathologist said in evidence that all of the injuries could have been inflicted by one person. And, whilst it would have been very difficult for one person to manoeuvre Mr Bise's dead body into the boot, the fact that two people might have done this did not necessarily mean that two people were involved in the fatal assault. One person may have carried out the fatal assault in the presence of another who then helped the killer to cover his tracks.

53. Mr Rees submitted that Justice Henderson failed adequately to cover these important features of the evidence in the course of his review and thus produced a skewed summary of the evidence that failed to do justice to the defence case. While the learned judge was not obliged to sum up every aspect of the evidence before the jury, his failure to draw their attention to weaknesses in the Crown's case or matters which assisted the defence case was unjustified.

54. In relevant part, the judge's summing up of Mr Rees' speech was as follows.

> In his summation Mr Rees argued that Mr Bise could have been killed by just one person. There is no need, he said, to conclude that it was two or more people. No weapon has ever been identified. He said Yanique Connolly's evidence is inconsistent with both of the witness statements she gave to the police. As for the images on the CCTV, he said the touching of Mr Bise by Chad Anglin was very brief and in entirely asexual. Do you really think Mr Anglin would make sexual advances towards Mr Bise in a place like Undra's Jerk Stand? He reminds you that Mr Bise was still trying to contact Chad (sic) Ebanks after he had left with Chad Anglin. Mr Rees says the interaction with Chad Anglin was just a drug deal … Mr Rees says that the defendant lied to the police simply because he did not want to get involved; a very common and understandable reaction. Mr Bise was known to be a drug

> user, he used poppers and amyl nitrite. Would it be surprising in light of his highly adventurous lifestyle to find him wanting to buy some weed? Chad Anglin may well have shared a cigarette with Mr Bise. But, says Mr Rees, so what? That is not evidence of sexual intimacy.
>
> The Crown's theory, Mr Rees argued, is speculative and based on guesswork, it's not upon solid inferences drawn from proven facts. He warns you, as I have earlier, that you are not to engage in speculation. The defendant argues that Frederic Bise phoned Chet Ebanks twice; at just the time you would have expected him to after arriving home. The evidence of a distended anus and the admission of fact about unknown DNA on the waistband of Mr Bise's jeans indicate that he had a sexual encounter with an unknown person. Mr Rees says that DNA did not belong to Mr Bise or to Mr Anglin and he argues the car fire must have started around 6:45 am but, notes Mr Rees, Julia Facey says Mr Leonard Ebanks came into her residence around 5:00 am, therefore the smell of smoke exuded by Leonard Ebanks could not have been caused by the car fire.
>
> Finally, Mr Rees reminds you of the standard of proof and you cannot convict Mr Anglin unless you are sure of his guilt.

55. The judge gave the jury the usual direction that, if in his review of the evidence he did not mention something they thought important, they should have regard to it and give it such weight as they thought fit and, in our judgment, his decision to summarise succinctly the thrust of Mr Rees's closing speech, rather than rehearsing its content in the detail contended for, was not a material misdirection. We say this because the jury would have been well aware of: (i) the timings of Mr Bise's phone calls to Chet Ebanks; (ii) the DNA evidence referred to in Mr Rees' speech; and (iii) the details as to what was found next to Mr Bise's swimming pool, including an open can of "Wet Gel body glide" lubricant, all of which matters were set out in the Admissions they had with them during their deliberations. Further, the case was not a lengthy one. It was over in 15 days and the thrust of Mr Rees' speech must have been reasonably fresh in the jury's minds when the judge summed up the case. We also note that, although Mr Rees raised with the judge his failure to direct the jury not to draw an adverse inference from the appellant's "no comment" answers in 2008, he did not ask the judge to remind the jury of any of the

matters it is now submitted should have been mentioned in the summing up.

Conclusion

56. For the reasons given above, we reject the grounds of appeal advanced on behalf of appellant and dismiss this appeal. The appellant's conviction is not unsafe and should be upheld.

Mottley JA

Morrison JA

Field JA