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

CICA (Crim.) No.17 /2011
Ind.70/2010

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Ian Forte, Justice of Appeal

BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

and

DEVON ANGLIN

Respondent

Mr Andrew Radcliffe QC and **Ms Elizabeth Lees** appeared for the Director of Public Prosecutions

Mr John Ryder QC and **Ms Lucy Organ** instructed by Samson & McGrath appeared for the Respondent, Devon Anglin

Hearing: 30 and 31 July 2013
Judgment: 6 November 2014

JUDGMENT

Sir John Chadwick, President:

1. This is the judgment of the Court.

2. On the evening of 15 February 2010 Jeremiah Barnes, who was then four years of age, was killed by a gunshot wound to the head. He was, at the time, sitting in the back seat of a car which had drawn into the Hell Service Station, West Bay. His parents, Andy Barnes and Dorlisa Barnes (then Dorlisa Ebanks), were sitting in the front seats of the car. It has

been common ground in these proceedings that it may be inferred that the gunman intended to kill Andy Barnes.

3. The Respondent to this appeal, Devon Anglin, was charged with the murder of Jeremiah Barnes. The indictment contained five counts, of which three related to the shooting on 15 February 2010: (1) murder, (2) attempted murder (of Andy Barnes), and (3) possession of an unlicensed firearm. The two further counts – (4) possession of an imitation firearm with intent commit an offence against Andy Barnes and (5) threatening violence with intent to alarm Andy Barnes – related to an earlier incident said to have occurred on 30 January 2010.

4. The Respondent was tried in August 2011 before Justice Cooke, sitting alone as a Judge of the Grand Court without a jury. On 31 August 2011 the judge acquitted the Respondent of the offences charged under each of the first three counts. He acquitted him, also, of the offences charged under counts (4) and (5).

5. It will be necessary, in subsequent paragraphs of this judgment, to examine the reasons which led the judge to the conclusion that the Respondent should be acquitted of the offences charged under counts (1), (2) and (3). At this stage it is sufficient to note that he took the view that the sole issue was as to the identity of the gunman; that, on that issue, the evidence of Andy Barnes and Dorlisa Barnes as to visual identification was of no probative value; and that, accordingly, it was impermissible to consider the supporting, or corroborative, evidence on which the Crown relied.

6. The Director of Public Prosecutions appeals to this Court, pursuant to section 28 of the Court of Appeal Law, against the judgment of the Grand Court in so far as that judgment acquitted the Respondent on counts (1), (2) and (3). There is no appeal from the judgment in relation to counts (4) and (5).

The grounds of appeal

7. The grounds of appeal advanced on behalf of the Director in her Notice of Appeal filed on 13 September 2011 were these:

> ". . . the decision of the Learned Trial Judge is erroneous on points of Law in that:
>
> 1. The Learned Trial Judge misdirected himself by failing to consider the cumulative cogency of the evidence as to visual identification given that he

disregarded and/or paid no attention to the evidence of Grant Fredericks, an expert in photographic video comparison.

2. The Learned Trial Judge misdirected himself in concluding that the evidence of visual identification was worthless and of no probative value.

3. The Learned Trial Judge failed to consider the totality of the evidence as to identification, visual and supporting evidence and misdirected himself as to identification principles when he having approached the matter in two stages concluded that the Crown had not adduced any visual identification evidence of any probative value which would permit him to go on to consider the supporting evidence."

The jurisdiction of this Court to entertain an appeal against an acquittal

8. Section 28 of the Court of Appeal Law is in these terms (so far as material):

> "28(1) Where an accused person tried on indictment is –
>
> (a) Discharged or acquitted by a trial judge sitting alone or by a jury (where such a jury has been directed to do so by the trial judge) . . .; or
>
> (b) . . . ,
>
> the Director of Public Prosecutions . . . may appeal to the Court of Appeal against the judgment of the Grand Court on any ground of appeal that the decision of the trial judge is erroneous on a point of law.
>
> (2) . . .
>
> (3) Upon the hearing of an appeal brought by the Director of Public Prosecutions . . . under subsection (1), the Court of Appeal may allow the appeal if it appears that the discharge or acquittal of the accused should be set aside on a ground of a wrong decision of law and, in any other case, shall dismiss the appeal.
>
> (4) Where the court allows an appeal under subsection (1), it shall set aside the discharge or acquittal of the accused person and remit the case to the court of original jurisdiction to be retried."

9. This appeal was listed for hearing in July 2012. Junior counsel for the Respondent sought an adjournment on the basis that an unforeseen overrun of a trial in which Mr Ryder QC was engaged in the United Kingdom would make it difficult or impossible for him to appear in this Court on the date fixed. The Court took the view that, before adjourning the appeal for substantive argument on the merits, it should hear argument on the question whether – in the light of its earlier decision in *Attorney General v Miller* [2009 CILR 162], following the decision of the Judicial Committee of the Privy Council in *Justis Raham Smith v The Queen* [2000] 1 WLR 1644 (an appeal from Bermuda) - this

was an appeal which could properly be brought under section 28(1) of the Court of Appeal Law on the grounds advanced.

10. After hearing argument on that point on 30 July 2012 – the Court was satisfied that it should not refuse to entertain the appeal, *in limine*, on jurisdictional grounds; but should proceed to a full hearing on the merits. It took the view that it would be better placed to determine the issue whether this was, on a true analysis, an appeal which fell within section 28(1) of the Court of Appeal Law after the arguments on the grounds advanced in the Director's Notice of Appeal had been fully developed in argument.

11. In reaching that conclusion the Court accepted that its earlier decision in *Attorney General v Miller* had been overtaken by the change in the law of the Cayman Islands effected by section 2 of the Court of Appeal (Amendment) Law 2010. Before that change – and as the law stood in 2009 (when *Miller* was decided) – section 28(1) of the Court of Appeal Law (2006 Revision) had restricted an appeal by the Crown (in the person of the Attorney General) from an acquittal by a trial judge sitting alone to cases in which the ground of appeal involved "a question of law alone". That, also, was the only ground upon which such an appeal could be brought under section 17(2) of the Court of Appeal Act 1984 in the legislation of Bermuda - the section under consideration in *Justis Smith* – at the time when the appeals in that case were before Court of Appeal in Bermuda and Privy Council. The change effected by the Court of Appeal (Amendment) Law 2010 – and subsequently incorporated in the Court of Appeal Law (2011 Revision) - was to replace the words "any ground of appeal which involves a question of law alone" in section 28(1) with the words "any ground of appeal that the decision of the trial judge is erroneous on a point of law". The omission by the legislature of the word "*alone"* – on which the Privy Council placed reliance in reaching its conclusion in *Justis Smith* (*ibid,* page 1652D-G) that no appeal lay under section 17(2) of the Bermudan Act on a question of mixed law and fact – is of obvious significance in this context.

12. This Court is satisfied that the correct approach to the phrase "erroneous in point of law" in section 28(1) of the Court of Appeal Law (following the amendment made in 2010) is found in the decision of the Privy Council in *The State v Brad Boyce* [2006] UKPC 1 (an appeal from Trinidad and Tobago). The phrase connotes any error by the judge on an issue which (had he been directing a jury) would have been the subject of such direction. It will include questions as to whether evidence of visual identification is capable of

having any probative value and the extent to which visual identification evidence of limited probative value is capable of being supported by other evidence.

13. The appeal was, again, listed for hearing in November 2012 and in April 2013; and, again, those hearing dates had to be vacated in order to accommodate the commitments of the Respondent's leading counsel. In the event, the substantive hearing came on in July 2013.

The facts found by the judge

14. The facts found by the judge in relation to the events on 15 February 2010 – against which there can be no appeal by the Crown unless, in making those findings, the judge adopted an approach which can be said to have been erroneous in law – may be summarized as follows:

    (1) Devon Anglin and Andy Barnes had been friends. They had lived in the same district in West Bay. About three years before the shooting on 15 February 2010, Andy Barnes had moved to live on Miss Daisy Lane. That move (as the judge found) "seemed to have been the genesis of the estrangement between these two very good friends".

    (2) At about 8.00pm on the evening of 15 February 2010 a Chevrolet Malibu motor car driven by Andy Barnes pulled into the Hell Service Station, West Bay. The vehicle being left-hand drive, Andy Barnes was in the left-hand front seat. His son Jeremiah was immediately behind him; on the left of the back seat. The right-hand front (or passenger) seat was occupied by Dorlisa Ebanks (Jeremiah's mother). Behind her, on the back, right-hand, seat was her other son.

    (3) Andy Barnes pulled up at the pump numbered one. He got out of the car and filled it with gasoline. He went into the retail section of the service station. It may be assumed that he did so in order to pay for the gasoline; but nothing turns on that. He returned to the car and resumed his place in the driver's seat.

    (4) On the right of the retail section of the service station there was an ice-making machine. Someone ("the gunman") came round the corner of the retail section by the ice-making machine and approached the car in which the Barnes family were seated. Shots were fired; one of which hit Jeremiah.

    (5) Andy Barnes, who – after some short delay - had managed to start his car, drove off. He turned right out of the exit, heading towards West Bay Police Station.

(6) Jeremiah was taken by ambulance from the Police Station to hospital; where he was confirmed dead. A bullet had passed through the lateral aspect of his right eye, traversing his brain and exiting through the left posterior scalp.

(7) On examination of the car it was found that the bullet which killed Jeremiah had passed through the headrest of the front (driver's) seat in which Andy Barnes was seated.

15. The judge found (transcript of Reasons for Judgment, page 5, lines 12-25) that:

> "From the circumstances, the uncontested inference is that the fatal bullet was meant or aimed for Andy Barnes. . . . The shooting was a deliberate act with the intention to kill or cause really serious bodily harm. The gunman did not achieve his objective, but by reason of transferred malice he would be as guilty as if he had. There is no issue that the evidence grounds attempted murder. And finally at this juncture I say that there is further no issue that the gunman was in possession of an unlicensed firearm.

And he went on to say this (*ibid*, page 6, lines 1-4):

> "So the legal requirements are all there, all there, save for the critical issue as to the identity of the gunman: was it Devon Anglin, the defendant?"

The evidence of visual identification

16. The judge directed himself (transcript of Reasons for Judgment, page 6, lines 5-8) that the relevant evidence in relation to visual identification was that of Andy Barnes, Dorlisa Ebanks (as she was at the time of the shooting) and Carlos Ebanks.

17. Carlos Ebanks was working as a gasoline attendant at the Hell Service Station. He saw the gunman fire the shot which killed Jeremiah. He did not know the identity of the gunman; but he was able to describe his (or her) appearance. The judge treated Carlos Ebanks as a reliable witness of truth. He said this (transcript, Reasons for Judgment, page 18, lines 12-17):

> "Then there is the evidence of Carlos Ebanks. I unreservedly accept him as a witness of truth. He had no interest to serve. There is no reason for him to colour his evidence. In my assessment, his evidence was completely unvarnished."

18. Each of Andy Barnes and Dorlisa Barnes gave evidence in which they did identify the Respondent as the gunman who had shot Jeremiah. But, before turning to the judge's summary of their evidence, it is convenient to refer to his summary of the evidence of

Carlos Ebanks, on which he placed much reliance. The judge said this (transcript, Reasons for Judgment, page 13, line 16 to page 15, line 7):

> "He [Carlos Ebanks] said that on the 15th of February 2010 he was working as a gas attendant at the Hell gas station. At the relevant time he was at pump number three. He saw Andy Barnes pulled up. He saw Andy go and operate the pump and then Andy went into the convenience store. He came back and sat in the car.
>
> He saw a person approaching the ice machine, maybe about eight to ten feet from the ice machine, but the person had not yet passed the ice machine. He was wearing a Halloween mask covering his face. He does not know if it was a male or female. The person was wearing a jacket and hood, greenish in colour. The person was moving towards the forecourt. He walked past the door to the convenience store towards pump number one, then he reached to his right side and drew what appeared to be a gun. Things happened rapidly. It was a tense situation. At least two shots were fired at the car. The car, in a matter of seconds, very quickly drove off. At least one shot was fired after the car hurriedly exited on its way to the police station. The individual, that is the gunman, after he fired went to the rear of the building, but he did not see the individual after that.
>
> Under cross-examination, he said it was a greenish jacket with a hood, it was a Halloween mask that covered his face, and no way would he be able to recognize anybody under that mask. He was pumping gas facing directly towards the ice machine. The man was walking in his direction and, as far as he was concerned, the man approached him – at last this was the suggestion from the court – at an angle of about twenty degrees. He did not notice the gunman doing anything with his hand. He was not fiddling with the mask. He thought it was a prank and there was no concern on his part. He pretty much watched him. That is Mr. Carlos Ebanks."

As appears from the judge's summary, the evidence of Carlos Ebanks was that the gunman was wearing a Halloween mask which covered his face; and was wearing a greenish jacket with a hood.

19. In relation to the evidence of Andy Barnes the judge said this (transcript, Reasons for Judgment, page 7, lines 3-12):

> "The inference that Andy Barnes would like me to draw is that when he pulled up at the gas station, a car in which there was Anglin drove past, behind him, going towards the direction of Miss Daisy Lane and Anglin was like a hunter who had espied his quarry, so he immediately brakes up, spun around, came into the Hell gas station through the normal exit area and went around to the back of the building which housed the gas station. . . ."

20. The judge summarised the evidence which Andy Barnes had given in chief. He explained that Andy Barnes had filled his car with gasoline, had gone into the retail section (to pay)

and had returned to driver's seat in the car. He went on (*ibid*, page 7, line 22, to page 8, line 19):

> ". . . and that was when the attention was drawn to what he described as the sound of a car going at a very rapid rate. He saw the car coming from his right to the left and he recognized it right away as the car belonging to Darrell Evans –'DJ' as he is known and referred to throughout the trial – and it was a grey Honda Accord. He knew the car. He had even been in it on at least two occasions. He used dramatic language: the car flew behind him towards Miss Daisy Lane. He did not see any brake lights, but he saw when the car entered through the exit. At this stage, he was shocked because of the people who he knew to be accustomed to drive in the car. The Honda pulled up and went to the back. All he could see in the car were the shadows of two people and he was not able to identify the shadows. He felt afraid that something was going to happen. Then he saw somebody come from the corner – that is, the corner right where there is an ice machine".

The judge accepted that "there were several lights posted"; and that Andy Barnes had a good visual opportunity, in that he could see clearly and that there was nothing to obstruct his view. He went on to say this (*ibid*, page 8, line 24 to page 10, line 1):

> ". . . the figure he [Andy Barnes] saw was male. The person had on a hood on top of the head. He had a handkerchief around his neck; he was trying to cover his face with it, using one hand while holding the gun in the other. When he first saw him, the handkerchief had not covered his face. He could see his eyes. He could see his nose. He could see his mouth. He could see his chin. He had 'cross eyes'. He, Anglin, managed to get the kerchief up on his face up to the bridge of the nose. He was holding a black firearm in his hand, a handgun. He, Barnes, was trying to get the car started but he could not because in his view the gas needed to build up. And he was trying to secure his family. The gunman moved towards him. He managed to get it started – the car started – and the gunman looked in the retail section and came two more feet closer to him and opened fire. He held the gun in both hands. About six to eight shots were fired. He drove off. As he drove out – well, what he did was to drive out, turn right, because he was heading to the West Bay Police Station. When he drove past the car, it was not more than about five feet away from him and shots pursued that car."

21. The judge then turned to the evidence which Andy Barnes had given in answer to questions put to him in cross-examination (*ibid*, page 11, lines 2-11, page 11, line 18 to page 13, line 14):

> "Barnes knew of no reason why the defendant would want to kill him. And then he went on to describe under cross-examination how before the incident this defendant at West Bay had shot at him one evening at Bridget's home when they were in the driveway having pizza. He himself did not know, see the person who was shooting, but he believed, because he was told so, that it was Anglin because Anglin had been boasting about it. . . .

> He [Andy Barnes] said at the preliminary inquiry he told the magistrate that when the car drove in he saw Anglin in the car. He told the magistrate – that is, the examining magistrate – that he could recognize Anglin in the car, but yesterday he said all he could recognize were shadows. He said he told the magistrate he saw Anglin in the car because he thought, because it was Anglin's car, Anglin would have been in it. He did not see nor recognize Anglin in the car. He said he told the magistrate that he saw Anglin because he thought it was he. He did not tell the magistrate he saw his face. That was not true. He was on oath. He did not know who was the driver. He told the police that DJ was driving because he knew his car and he assumed he was driving. And he refuted the suggestion that he assumed that the gunman was Devon Anglin.
>
> He goes on, he did not tell the police about the mask. That is the first statement on the 15th [February 2010]. He says the reasons for this is that he was unbelievably upset, trauma had overwhelmed his being. He told the police, he said, that he, Anglin, pulled the kerchief over his face. Yes, he agreed that that was not in his statement. In his statement, what he said was something like a red and black bandanna tied over his mouth, but he could see his eyes and the colour of his face.
>
> He says he did not duck during the firing. And he gave evidence that the gunman had the gun in his right hand. He agreed that he told the police that the person had on a black jacket with a hood. And he looked at the CCTV images, there it was that the gunman had on a green jacket. And then there is this aspect of the evidence where earlier in the evening he had seen Anglin in a black jacket with a red stripe down the sleeves, which is the description which he gave to the police in his statement. And he disagreed with the suggestion that it is because he had seen Anglin earlier with black jacket with red stripes down the sleeves that he dresses up the gunman now in that attire."

22. The judge found "disturbing and unexplained inconsistencies" in the evidence given by Andy Barnes. He said this (transcript, Reasons for Judgment, page17, line 6, to page 18, line 9):

> ". . . At the preliminary enquiry, he [Andy Barnes] told the magistrate he saw Anglin's face in the car. In evidence he saw shadows. And he, on oath, told the magistrate this, well knowing that this damning evidence was not true.
>
> In his first statement on the 15th of February no mention is made of the mask. I do not accept the proffered excuse for the omission was due to him being unbelievably upset. He was clear – well clear – about other parts of the description. In his second statement, there was nothing about putting on any mask. In his evidence, he told the court of how the mask was being put on. In his statement the person had something like a red and black bandanna over his mouth. These are some disturbing inconsistencies, unexplained inconsistencies.
>
> Then there is irrefutable contradictory evidence which I now go to. It is clear from the CCTV footage that the gunman held the gun in his left hand. He says the gunman held the gun in his right hand.

> Then the dress. He told the police, and I think in this court, that he had on a black jacket, and the CCTV image shows that the jacket of the gunman was green. . . ."

The judge described the evidence as to the colour of the jacket worn by the gunman as "this significant piece of evidence". He said that he would revert to it later in his judgment. When he did so (*ibid*, page 21, lines 8 to 12), he said this:

> "Earlier that day at Al Webster's home, he [Andy Barnes] had seen Anglin in a black jacket with red stripes, the very description which he gave to the police and which is flatly contradicted by the images of the CCTV."

23. The judge took the view that Andy Barnes was an unreliable witness because he had "a decided pre-disposition" that the Respondent intended him harm. He said this (transcript, Reasons for Judgment, page 20, line 21, to page 22, line 4):

> "It is sufficiently certain that as between Barnes and the defendant there was antecedent animosity. In my view Barnes nurtured within his breast – or harbored, preferably, within his breast the feeling that Anglin was out to get him, to harm him. In my view Barnes was possessed of a decided pre-disposition that if harm must befall him, it would be at the hands of Anglin. . ."

He observed (*ibid*, page 21, lines 13-14) that:

> "I have demonstrated that the evidence of Andy Barnes is unreliable."

And, in a later passage (*ibid*, page 23, lines 16-21), he said this:

> "I hold that for reasons I have already demonstrated in my analysis that his evidence is of no value. It is worthless."

24. It is important to keep in mind that the judge found that the Respondent was well known to Andy Barnes. Further, the judge accepted that the forecourt at the Service Station was well lit at the relevant time; and that Andy Barnes had what the judge described as "a good visual opportunity", in that he could see clearly and that there was nothing to obstruct his view. The judge did not, in terms, describe Andy Barnes' observation of the gunman as "a fleeting glance"; but he did find, on the basis of CCTV footage (transcript, Reasons for Judgment, page 17, lines 2-5) that the incident lasted only some eight seconds. What, then, were the factors which led the judge to the conclusion that the evidence of Andy Barnes was so unreliable as to be worthless and of no value? It can be seen from his judgment (the material passages of which have been set out) that the judge's conclusion was based on the following matters:

(1) that the evidence which Andy Barnes gave at the trial was contradicted by the evidence of the CCTV footage in two respects (the colour of the hooded jacket worn by the gunman and the hand in which the gunman was holding the gun);

(2) that the evidence which Andy Barnes gave at the trial was inconsistent with statements which he had made to the police on 15 February 2010;

(3) that he had given evidence to the magistrate at the preliminary inquiry (that he had seen the Respondent's face in the Honda car) which he did not support at the trial;

(4) that Andy Barnes had a "decided pre-disposition" that the Respondent intended him harm.

25. In relation to the evidence of Dorlisa Barnes (formerly Dorlisa Ebanks) the judge said this (transcript, Reasons for Judgment, page 15, line 8 to page 16, line 12):

> ". . . She said she was at this petrol station, this gas station. The windows were down. Andy was pumping gas. She heard a speeding car go by. She just heard it. Andy got back in the car and then Devon came round the corner. Tried to kill her entire family. She was looking in his direction. She looked in his face. She saw his entire face. The gunman had on a hooded sweater jacket. When she first saw him, the hood was up. The lights at that time were on. It was clear as day. Added is the fact that she knew Devon. There was nothing to obstruct her view. She saw Devon. She recognized Devon unaided. She alerted her husband. She calls him 'husband', by now she is married. Devon looked at her and he had eyes like that of the devil. Both eyes looked funny, mainly the right eye. And through the manoeuvres of her husband they managed to get away. She ducked under the dashboard for protection, heard more than one shot, at least six shots. And then she knew him, Anglin, for about 15 years.
>
> Under cross-examination, she said he had the gun in his right hand. She does not recall seeing the left hand doing anything to obstruct his face. She did not see the gunman at any time holding the gun with two hands. That basically is it."

26. In subsequent paragraphs of his judgment the judge said that he placed "absolutely no weight" on the evidence of Dorlisa Barnes in relation to identification.. He said this (transcript, Reasons for Judgment, page 23, line 23, to page 16):

> "In respect of the critical issue of visual identification I put absolutely no weight on her evidence. Admittedly she knew the defendant very well. His features must have been etched on her consciousness. There was an adequacy of lighting, but that she said she was terrified. She saw no mask. And I have already mentioned this, the impact of the evidence of Carlos Ebanks on that evidence. And then she saw a right-handed gunman. The gunman was left-handed. The impression I have is that she ducked at the first shot, a readily understandable human reaction. . . .
>
> So at best I would say that Dorlisa had a fleeting glance. And above all, more than anything else, her evidence is flatly contradicted by the evidence of Carlos Ebanks about the mask."

27. Again, it is important to keep in mind that the judge accepted that Dorlisa Barnes knew the Respondent very well and that there was an adequacy of lighting. He did not reject –

and had no reason to reject - her evidence that the forecourt lights were on so that "it was clear as day"; and that there was nothing to obstruct her view of the gunman. His "impression" – but not Dorlisa Barnes' evidence (transcript, 17 August 2011, page 98, lines 13-16) – was that "she ducked at the first shot" and so had no more than "a fleeting glance". So, again, it is necessary to ask what were the factors which led the judge to the conclusion that he could put "absolutely no weight" on her evidence; and that her evidence was of no value. It can be seen from his judgment (the material passages of which have been set out) that the judge's conclusion was based on the following matters:

(1) that her evidence was that she did not see the Halloween mask which, according to the evidence of Carlos Ebanks, the gunman had been wearing at the time of the shooting;

(2) that she saw a right-handed gunman; whereas the CCTV footage showed the gunman to be holding the gun in his left hand;

(3) that she had no more than a fleeting glance.

The judge's approach to the evidence of visual identification

28. As I have said, the judge stated (transcript, Reasons for Judgment, page 21, lines 13-14) that "I have demonstrated that the evidence of Andy Barnes is unreliable"; and (*ibid*, page 23, lines 16-18) that his evidence was of no value. And, as I have said, the judge stated (*ibid*, page 23, lines 23-25) that, in respect of the critical issue of visual identification, he "put absolutely no weight" on the evidence of Dorlisa Barnes. It was, he said of "no value". He concluded (*ibid*, page 24, line 25, to page 25, line 6) with the observation that:

> "So therefore, to sum up this aspect of the case, in respect of Andy Barnes and that of Dorlisa Ebanks, the Crown has not adduced any evidence of any probative value which will permit me to look at the supporting evidence. Therefore on counts one, two and three, I now pronounce that the defendant is acquitted."

29. In reaching that conclusion, the judge had referred (transcript, Reasons for Judgment, page 21, lines 20-24) to a question which he had put Mr Radcliffe QC, counsel for the Crown – "What would be the position if the visual identification is regarded as worthless" – and to Mr Radcliffe's answer – ". . . the consequence would be as if Barnes and Dorlisa had not given evidence and an acquittal would be inevitable". And he had referred (*ibid*, page 21, line 24, to page 22, line 11) to the submission advanced by Mr Ryder QC, on behalf of the Respondent that:

> "Unless the evidence of identification is sufficiently compelling to be worthy of some reliance, the supporting evidence cannot revise or revitalize it. The supporting evidence cannot establish for the evidence of identification a value which it does not have in itself."

He had gone on to say this (*ibid*, page 22, line 12 to page 23, line7):

> "Mr Radcliffe expressed the view that all that was necessary was that there should be a scintilla of visual identification evidence. If that was present, the court should have regard to the supporting evidence. I am not sure I agree with Mr Ryder's formulation when he says 'sufficiently compelling'. That is too high. He puts it too high. Perhaps it would be preferable if had said if it is sufficiently probative. Other than that, I agree with the sentiment expressed in his formulation.
>
> I am not sure what amounts to a 'scintilla', especially in identification cases. What I will say is that there must be evidence of some probative value – that is, the visual identification must be of some probative value. Mere assertions based on assumptions have no value. They are devoid of any probative value, especially as in this case as these assertions are entirely without any factual foundation.

30. In reaching his conclusion that neither the evidence of Andy Barnes nor the evidence of Dorlisa Barnes was of any probative value the judge relied (a) on the evidence of the CCTV footage in relation to (i) the colour of the hooded jacket worn by the gunman and (ii) the hand in which the gunman was holding the gun and (b) on the evidence of Carlos Ebanks in relation to the Halloween mask. In reaching that conclusion the judge did not consider any of the other evidence in the case.

31. Further, in reaching that conclusion, the judge did not consider whether the evidence of Andy Barnes was (or was capable of being) supported by the evidence of Dorlisa Barnes; or *vice versa.* He said this (Transcript, Reasons for Judgment, page 23, lines 9-15):

> "I have been cautioned by Mr Radcliffe about taking an unwarranted leap in coming to the conclusion that the evidence of identification is of no value. Rather, to me, the quality, or preferably lack of the quality of evidence of Barnes, dictates that I should take this step."

It is pertinent to have in mind that the judge made those observations before turning to examine the evidence of Dorlisa Barnes: he decided that the evidence of Andy Barnes was of no probative value without considering whether (and, if so, to what extent) it could be supported by the evidence of Dorlisa Barnes. The judge adopted the same approach in relation to the evidence of Dorlisa Barnes: he stated (*ibid*, page 23, lines 23-25) that:

> "In respect of the critical issue of visual identification I put absolutely no weight on her evidence. It has no value."

without considering whether (and, if so, to what extent) her evidence could be supported by the evidence of Andy Barnes.

32. Having reached the conclusion that neither the evidence of Andy Barnes nor the evidence of Dorlisa Barnes was of any probative value, the judge held that he was not permitted to consider any of the other evidence; and he did not do so. It is not submitted that, if he were correct to conclude (without considering the other evidence) that neither the evidence of Andy Barnes nor the evidence of Dorlisa Barnes was of any probative value, he was wrong to take the view that (given that conclusion) there was any need, thereafter, to go on to consider the other evidence. Given that conclusion, no purpose would have been served by doing so. The challenge, on this appeal, is to the judge's approach in considering whether the evidence of each of Andy Barnes and Dorlisa Barnes was of any probative value in isolation, both of the evidence of the other and of the other evidence adduced at the trial. As it was put by Mr Radcliffe QC in the course of argument in this Court, the question for determination by this Court is whether:

> "In circumstances where it is not alleged that the witnesses were lying and their opportunities for observation were, at least, adequate, did Justice Cooke err in law and misdirect himself by concluding that the evidence of Andy Barnes and/or Dorlisa Barnes was worthless and of no value without considering the totality of the evidence?"

The other evidence adduced at the trial

33. Before addressing that question it is convenient to refer to other evidence adduced at the trial. That evidence included (so far as material in the present context): (i) the evidence of Grant Fredericks, an expert in photographic video comparison; (ii) the evidence as to the owner and occupants of the grey Honda Accord; (iii) the evidence of the Respondent's conduct immediately after the shooting; and (iv) the evidence as to gunshot residue (GSR). There was also evidence (to which the judge did refer) as to enmity between the Respondent and Andy Barnes.

34. The Crown produced, without objection, a report, dated 20 July 2011, prepared by Grant Fredericks, a forensic video analyst. Mr Frederick's expertise lay in the interpretation of video recorded images and the comparison of those images with physical objects and still photographs. It was in these respects that his evidence was capable of assisting the judge in his understanding of the material (and, in particular, the CCTV footage) which was in evidence at the trial. Mr Frederick was asked to express his opinion, based on the

material provided to him (which included not only the CCTV footage recorded at the service station on 15 February 2010 but also CCTV footage of the Respondent recorded earlier on the same day, when the Respondent attended the courthouse in relation to matters unrelated to this case, some still photographs of the Respondent and certain items of his clothing), on a number of questions (set out at page 6 of his report). He did so (at pages 33 to 35 of his report); and he gave oral evidence at the trial (transcript, 19 August 2011, pages 734 to 899).

35. Mr Frederick's answers to the questions put to him (following his oral evidence) were summarised at paragraph 31 of the skeleton argument submitted for this appeal on behalf of the Director of Public Prosecutions. It is convenient to adopt that summary; which was not challenged on behalf of the Respondent in any material respect and which, in the view of the Court, is fair and accurate. Mr Frederick's principal conclusions were these:

(1) That photographs of the Respondent taken after his arrest show him to have had short dark hair, with a tuft of hair on the upper left side of his forehead near to the hairline. The gunman seen in the CCTV footage had a dark feature at the top of his forehead near to the hairline. The Respondent's hairline was indistinguishable from that of the gunman.

(2) That the gunman held or controlled the gun in a manner consistent with his being left-handed.

(3) That the jeans which the CCTV footage showed the gunman to be wearing at the time of the shooting could not be said not to be the jeans worn by the Respondent at the courthouse on the morning of the same day (as shown in the courthouse CCTV): crease patterns on both were in the same position and appeared similar in shape, length and direction; both were too long for the wearer and were bunched at the foot.

(4) That the gunman's shoes (shown in the CCTV footage) were indistinguishable from shoes taken from the Respondent; and indistinguishable from the shoes which the Respondent was wearing on the morning of the same day (as shown in the courthouse CCTV): the shoes were of the same colour and class and shared the feature of having a small reflective object in the same area above the crease area of the toes.

(5) That the CCTV footage showed that, as the gunman held the weapon in both hands, his hooded top rode up and revealed an undergarment with a vertical design of black and white lines. When photographed in his cell at George Town Police Station,

following his arrest, the Respondent was shown to be wearing boxer shorts with a similar pattern, indistinguishable from the gunman's undergarment.

(6) That the CCTV footage showed that the gunman's face covering appeared to extend above his eyes; but that this was, in fact, a distortion and a consequence of the compressed MPEG image used in the CCTV. The true position was that the face covering was confined to the gunman's face from the area of his chin to the bridge of his nose.

(7) That a comparison of the Honda Accord, shown on the CTV footage to be leaving the Hell Service station just after 8.00pm, with the vehicle owned by Daryl Evans, showed a number of similarities and no points of distinction

36. The CCTV footage showed that a grey Honda Accord, manufactured in or after 2008, left the service station at speed immediately after the shooting. It had come from the rear of the retail building. The vehicle had not refueled at the service station; and the CCTV footage did not show that anyone from the vehicle had entered the retail building. It was admitted (transcript, 25 August 2011, page 1331, lines 7-9, page 1336, line 10 to 1338, line 24 that there were only five vehicles of that make, model and colour on Grand Cayman at the time; one being owned by Darrell Evans. The whereabouts of the other four vehicles at the time of the shooting could be accounted for. The only one that could have been at the service station at the time of the shooting was that owned by Darrell Evans. Either very shortly before the shooting or (more likely) within five to 10 minutes thereafter, the Respondent was seen in the driver's seat of that vehicle in Bankers Road, Birch Tree Hill, West Bay, in the vicinity of the Hell Service Station by two girls, one of whom was his cousin, while they were out for a walk (transcript, 17 August 2011, page 481, line 23, to page 483, line 3, page 487, lines 10-14; 18 August 2011, page 549, line 22, to page 551, line 13, page 552, line 6 to page 554, line 6; 25 August 2011, page 1311, lines 1-12, page 1319, line 16 to page 1320, line 4). At the time he was not wearing a shirt: the top half of his body was bare.

37. Between the time of the shooting at 8.00pm and his arrest at 9.20pm on 15 February 2010 the Respondent took a shower at the house of his cousin, Beto Anglin: he then borrowed a polo shirt from his cousin (transcript, 17 August 2011, page 22, lines 18-25, page 27, lines 10-22). The Crown suggest that he did so in order to remove gunshot residue from the top that he was wearing at the time of the shooting.

38. Evidence as to gunshot residue (GSR) was given by Dr Christopher Moynehan, a forensic scientist. He found GSR on the jeans and shoes that had been taken from the Respondent at the time of his arrest shortly after the shooting; but not on the borrowed polo shirt (transcript, 18 August 2011, page 627, line11, to page 631, line 10, page 668, lines 14-25). He also found GSR in the grey Honda Accord, in the area of the driver's seat in which the Respondent had been seen sitting when the vehicle was in Bankers Road. The Crown accepted that there was a possibility that the Respondent's clothing might have been contaminated before it was examined by Dr Moynehan; and accepted that the possibility of contamination of the Honda Accord (although unlikely) could not be ruled out.

Whether the judge's decision was erroneous in point of law

39. We return, therefore, to the question for determination on this appeal: did the judge err in law in holding that he could decide, without considering the totality of the evidence, that the visual identification evidence of both Andy Barnes and Dorlisa Barnes was worthless and of no value. In our view, the answer to that question is "Yes".

40. The judge referred in the course of his judgment (transcript, Reasons for Judgment, page 6, lines 9-17) to "the Turnbull guidelines". He said this:

> "The evidence of visual identification adduced from Andy Barnes and Dorlisa Ebanks, who purport to identify the defendant, was done with scrupulous particularity and clearly show that what I may refer to compendiously as the *Turnbull* guidelines were ever present in Mr Radcliffe's mind and provided the framework within which he conducted the examination-in-chief."

But he did not explain what he understood to be the content or substance of those guidelines.

41. What are commonly referred to as the *Turnbull* guidelines are derived from observations in the judgment of Lord Widgery, Lord Chief Justice, sitting in the Court of Appeal of England and Wales, in *R v Turnbull* 63 Cr App R 132, 137-139; [1977] QB 224, 228, 229) He said this (so far as material in the present context):

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a

number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

. . .

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.

In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it: provided always, however, that an adequate warning has been given about the special need for caution. . . .

. . .

When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification: . . .

. . .

The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstances which the jury might think was supporting when it did not have this quality, the judge should say so. . . ."

42. It is submitted on behalf of the Director that the following (amongst other) propositions can be derived from those observations:

(1) That, where the case for the prosecution depends wholly or substantially on the correctness of one or more visual (or audio) identifications of the accused - which are said to by the accused to be mistaken – there is a special need for caution before convicting on the basis of that evidence.

(2) That, in such a case, it is necessary to examine closely the circumstances in which each identification came to be made; in order to form a view as to the quality of the identification evidence.

(3) That, in cases where the quality of the identification evidence is good, it may be safe to convict on that evidence alone; that is to say, notwithstanding the absence of any supporting evidence.

(4) That, in cases where the quality of the identification evidence is poor, it will not be safe to convict on that evidence alone: unless there is other evidence which is capable of supporting the correctness of the identification, the accused is entitled to be acquitted.

We do not understand those propositions to be in dispute. In our view they are correct.

43. The *Turnbull* guidelines are directed to cases in which the visual (or audio) identification evidence is of some probative value. In such cases it is necessary for the judge to determine whether the quality of the evidence is good – in which case (subject to a proper recognition of the need for caution) the accused may be convicted notwithstanding the absence of any supporting evidence – or poor – in which case the accused should not be convicted in the absence of supporting evidence. The guidelines are not directed to a case in which the visual (or audio) identification evidence is if no probative value at all. In such cases the accused cannot be convicted on the basis of the visual (or audio) identification evidence. Mr Radcliffe QC was correct to accept – in answer to the question put to him by the trial judge – that, in a case where the visual identification evidence is of no probative value at all, the position was as if the identification evidence had not been given. The accused must be acquitted unless there is other identification evidence – for example, forensic evidence from DNA or finger prints, or evidence of an admission – which was, of itself, sufficiently cogent to identify him or her as the person who had committed the crime.

44. Cases in which the visual identification evidence was of no probative value at all would include those in which the judge (if trying the case in the absence of a jury) was satisfied that the witness was lying – in the sense that he or she was giving evidence with the intention of deceiving the court. The judge did not make a finding of that nature against either Andy Barnes or Dorlisa Barnes. He did not treat either of them as lying witnesses; rather, as witnesses who were mistaken as to what they saw. Other cases in which the visual identification evidence was of no probative value at all would include those in which the judge was satisfied that the witness could not have seen what he or she claimed to have seen: for example, cases where it was so dark that visual identification was impossible; or cases where there was incontrovertible forensic evidence that the events which the witness claimed to see did not take occur at the place where the witness claimed to have seen them. But the present was not a case of that nature. The judge accepted that the forecourt of the filling station was well lit; and that both Andy Barnes and Dorlisa Barnes were in the car towards which the gunman was advancing. It is true that the judge described Dorlisa Barnes (but not Andy Barnes) as having no more than a "fleeting glance" – and that, on any view, the opportunity to view the gunman was very short because events moved very quickly – but evidence of a "fleeting glance" is not to be equated with evidence of no probative value at all, as the observations in *Turnbull* recognise.

45. It is, if we may say so, not at all clear from his judgment that the judge took the view that he was required, by anything said in *Turnbull*, to reach the conclusion that the evidence of Andy Barnes or of Dorlisa Barnes was of no probative value. On a true analysis of his judgment, as it seems to us, he never reached the point at which he needed to ask himself whether he could convict in the absence of evidence which supported the visual identification evidence which had been given by those witnesses. He never reached that point because – without addressing the evidence as a whole – he concluded that the evidence of neither of those witnesses was of any probative value at all. Having reached that conclusion, an acquittal was inevitable; no examination of supporting evidence could affect the outcome. But, if we are wrong in that analysis – and the judge did take the view that the *Turnbull* guidelines required him to conclude that the evidence of the two witnesses who identified the Respondent as the gunman was of no probative value - then we are in no doubt that he fell into error. There is nothing in the *Turnbull* guidelines which requires or supports the approach taken by the judge in this case.

46. The true question for determination on this appeal, as we have said, whether the judge erred in law in holding that he could decide, without considering the totality of the evidence, that the visual identification evidence of both Andy Barnes and Dorlisa Barnes was worthless and of no probative value. In relation to that question assistance is to be found in the judgments of the Supreme Court of Canada in *G.B., C.S., H.H., S.S., and A.B. v The Queen* [1990] 2 S.C.R. 57 ("*R v B*"). The issue on the appeal was whether the Court of Appeal for Saskatchewan had exceeded its jurisdiction under section 605(1)(a) of the Criminal Code in allowing an appeal against convictions in the trial court. That provision enabled the Attorney General to appeal against a judgment or verdict of acquittal of a trial court in proceedings by indictment on any ground of appeal that involved a question of law alone: that is to say, it was in terms which were substantially the same as those in section 28(1) of the Court of Appeal Law in this jurisdiction (as it stood before amendment in 2010). We were referred to the case in the context of the question as to jurisdiction to entertain this appeal (which we have addressed earlier in this judgment); but, given the amendment to the Court of Appeal Law, it is – in the event – of more assistance in the present context. That can be seen from the following extract from the headnote summary of the judgment of the majority (Justices Wilson, L'Heureux-Dubé and Cory):

> "The approach of the trial judge must be correct in law to ensure that the final step in the process, the weighing of the evidence, is not flawed. Individual pieces of evidence must not be examined in isolation, but must be considered in the context of all the evidence. In this case, the trial judge considered the evidence of the two key Crown witnesses separately, and failed to consider the evidence as a whole. He first considered the complainant's evidence in isolation, and rejected it as unreliable. He then moved on to Z's evidence, stating it was all he had left. He also failed to consider the corroborative aspects of Z's testimony and of the evidence relating to the complainant's broken glasses. This viewing of the evidence without the support of other evidence amounted to a serious misdirection according to this Court's decision in *R v Morin*. . . ."

Accordingly, in the view of the majority, there was an error of law alone sufficient to found jurisdiction under section 605(1)(a) of the Canadian statute; and the appeal should be dismissed. The other members of the Court (Justices Gonthier and McLachlin) agreed that the appeal must be dismissed on the more narrow ground that the trial judge had erred in concluding that the Crown had been obliged to establish the precise time when the offence had occurred. They agreed that it would be an error of law for the trial judge to direct that the reasonable doubt standard must be applied to individual pieces of

evidence; but found that it was far from certain that he had committed that error. As they said:

> "He never stated that any piece of evidence was to be considered with respect to reasonable doubt in isolation of the rest of the evidence, nor did he suggest that any piece of evidence should be completely disregarded for failing to meet such a standard."

47. The majority of the Supreme Court of Canada (in *R v B*) found support for its conclusion that the trial judge had erred in point of law in that case in its earlier decision in *R v Morin* [1988] 2 S.C.R. 345. They said this (at page 20):

> ". . . In *Morin* this Court had occasion to consider whether individual pieces of evidence should be examined in isolation and what the appropriate approach to weighing the evidence should be in the context of a Crown appeal from a jury acquittal of a charge of first degree murder. The Ontario Court of Appeal allowed the Crown's appeal and ordered a new trial on the basis that the trial judge had misdirected the jury when he invited them to apply the criminal burden of proof beyond a reasonable doubt to individual pieces of evidence. This Court unanimously upheld the decision of the Court of Appeal with respect to this ground of appeal, finding that the individual pieces of evidence should be examined in the context of all the evidence.
>
> Sopinka J., writing for the majority (Lamer and Wilson JJ concurring), first noted that there was ample authority for the proposition that it is a misdirection to instruct the jury to apply the standard of reasonable doubt to individual pieces of evidence. The accused did not dispute this but argued that the charge [to the jury] did not invite a piecemeal examination of the evidence. However, on this Court's view of the jury charge, the trial judge had indeed made a serious error. Sopinka J. concluded at p 358:
>
> > 'The effect of the misdirections referred to above may very well have been that the jury examined evidence that was crucial to the Crown's case in bits and pieces. Standing alone or pitted against the evidence of the accused without the support of other evidence, much of this evidence might have been discarded as not measuring up to the test. When the jury came to consider the Crown's case as a whole there may not have been very much left of it. We cannot know for certain, but this scenario is a very likely one and the charge therefore constituted a serious misdirection. [emphasis added by Sopinka J]"

The majority (in *R v B*) went on to say this (*ibid*, page 22):

> "I believe that *Morin* highlights the fact that the approach taken by the trial judge to the evidence must be correct in law so as to ensure that the final step in the process, the weighing of the evidence, is not flawed. In this case, even though the trial judge was sitting alone, he was wearing two 'hats' at different stages. He was both the trier of law and had to direct himself as to the proper approach to the evidence and then, having done so, he became the trier of fact in weighing it.

> A review of the trial judge's decision in this case makes it clear that he failed to consider the evidence in its totality. This was a misdirection and brought the matter within the jurisdiction of the Court of Appeal.
>
> While Chorneyko Prov. Ct. J did outline the evidence of both key Crown witnesses, he considered their evidence separately and failed to consider their evidence as a whole. He first considered the evidence of the complainant in isolation and rejected it as unreliable. He then moved on to the evidence of the accomplice, stating that, having found the evidence of the complainant unreliable, all he had left was the evidence of C.Z. Further, he looked only for discrepancies as to details in the evidence presented and did not consider the corroborative aspects of the evidence and the numerous elements of the alleged offence which were testified to by both witnesses capable of substantiating each other's story. The trial judge also did not consider the corroborative aspects of the evidence relating the complainant's broken glasses. There was evidence of a breakage at the time of the alleged assault and this evidence would have been capable of corroborating the child's testimony so as to enhance its reliability and should have been viewed together with the rest of the Crown's evidence. I do not believe that the trial judge considered the individual pieces of evidence 'in the context of all the evidence'. Rather the evidence was viewed 'without the support of other evidence'. According to *Morin* this amounts to a serious misdirection."

48. In our view the observations which we have set out – taken from the majority judgments of the Supreme Court of Canada in both *R v Morin* and *R v B* – provide ample authority for the proposition that the individual pieces of evidence are not to be evaluated individually and in isolation from the whole.

49. Examination of the judgment in the present case demonstrates that the trial judge approached his task as a finder of fact on a basis that was erroneous in law. In treating the evidence of Andy Barnes as having no probative value at all, he ignored the possibility that that evidence was capable of being supported by the evidence of Dorlisa Barnes; and, in stating that he could put absolutely no weight on the evidence of Dorlisa Barnes, he ignored the possibility that her evidence was capable of being supported by the evidence of Andy Barnes. Further, in evaluating the evidence of both Andy Barnes and Dorlisa Barnes, he ignored the evidence of Grant Fredericks; in particular he ignored the possibility that the CCTV footage recorded at the Hell Service Station showed that they might well have been correct when they said that they saw the gunman holding the gun in his right hand; and he ignored the possibility that the CCTV footage showed that they might well have been correct when they said that they could see the gunman's eyes. He accepted, without any critical analysis, the evidence of Carlos Ebanks; ignoring the respects in which that evidence was inconsistent with the CCTV footage. And he ignored

the evidence as to the grey Honda Accord, the evidence of GSR on the Respondent's clothing, the evidence of the two girls as to the encounter with the Respondent in Bankers Road, and the evidence that the Respondent showered and changed his shirt shortly after the shooting.

Conclusion

50. We emphasis that it is not for this Court, on an appeal by the Director under Section 28(1) of the Criminal Appeal Law, to reach any conclusion as to the guilt or innocence of the Respondent; and we do not do so. The task of this Court is to determine whether the decision of the trial judge is erroneous on a point of law. For the reasons which we have set out in this judgment, we are satisfied that the judge did fall into error; in that he approached his task as a finder of fact on a basis which was erroneous on a point of law.

51. Accordingly, this appeal should be allowed. The matter must be remitted to the Grand Court so that it may be retried. That is what section 28(4) of the Court of Appeal Law requires.

Chadwick P

Mottley JA

Forte JA