

IN THE GRAND COURT OF THE CAYMAN ISLANDS

IND. NO. 77 OF 2012

BETWEEN

HER MAJESTY THE QUEEN

AND

BRIAN EMMANUEL BORDEN

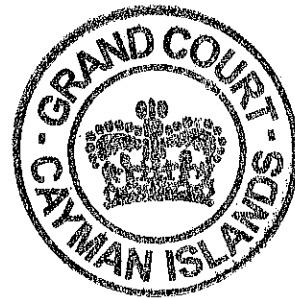
Defendant

Appearances: Ms. Tricia Hutchison for the Crown instructing Mr. Andrew Radcliffe, QC for the Plaintiff
Mr. Nick Hoffman of Priestleys instructing Mr. Trevor Burke, QC for the Defendant

Henderson, J.

Hearing: July 14 to July 29, 2014

Judgment: August 6, 2014



JUDGMENT

1. Robert Bush was murdered on September 13, 2011 around 11:15 PM near the intersection of Birch Tree Hill Road and Capt. Joe and Osbert Road. He died of two

gunshot wounds to the head: one caused by a shot gun blast and one by a .38 calibre or 9 mm bullet. There were two assailants.



ISSUE

2. The sole issue is the question of identity. The Crown says Mr. Borden was one of the two men who killed Robert Bush. The burden of proof rests upon the Crown and does not shift. I may only find Mr. Borden guilty if the evidence has made me sure of his guilt. The Defence says that the evidence is incapable of reaching that standard. In addition, Mr. Burke alleges that the evidence leads to a reasonable conclusion that the actual killers were Jordan Manderson and David Ebanks. I must give serious consideration to that hypothesis.

3. The crux of the Crown's case is in the direct evidence of Marlon Dillon. Mr. Radcliffe concedes that I cannot convict Brian Borden unless I am sure that Mr. Dillon is telling the truth in his essential assertion that Mr. Borden confessed the crime to him. If I believe Marlon Dillon to be lying or if I am not sure that he is telling the truth, I must find Mr. Borden not guilty.



EXPERTS

4. There is expert evidence from Joann Delaney concerning cell site analysis. I remind myself that while I may accept the opinions of an expert, I am not bound to do so. Indeed, I am not obliged to accept even the unchallenged evidence of an expert.

MARLON DILLON

5. Mr. Dillon is presently in custody awaiting sentencing for the robbery of the Cayman National Bank and for the robbery of the West Star premises. He is married with one child.
6. Before his arrest, Mr. Dillon says that he associated with the Birch Tree Hill gang. He says he was friendly with David Tamasa and through him met Brian Borden in 2011. He also knew Jordan Manderson, whom he says was part of the same Birch Tree Hill group. Mr. Dillon said that "whenever I'm hanging out with Brian Borden" I always saw Robert Bush driving his navy blue four-door Honda Civic car. Robert Bush did not associate with the Birch Tree Hill gang because he was from the Logwoods gang. Marlon Dillon had no association with members of the Logwoods gang.
7. Mr. Dillon says that on January 4, 2012 he visited David Tamasa at his address on Glidden Lane. A friend of Brian Borden's named "Naldo" arrived while Mr. Dillon was

there. Naldo was driving a black four-door Subaru vehicle. Mr. Dillon said he always saw Naldo associating with Brian Borden. Naldo said he worked at Kirks Supermarket. When Naldo drove up to Mr. Tamasa's house Brian Borden got out and then Naldo drove off. Renaldo Sanchez Scott, presumably the man called "Naldo", was the sole defense witness. I deal with his evidence later.

8. Mr. Dillon said he did not have Brian Borden's phone number and Mr. Borden did not have his. He said that "they", meaning Mr. Borden and Mr. Tamasa, speak frankly in my presence.



9. On January 4th Brian Borden asked David Tamasa to give him a ride home. Tamasa's request, Mr. Dillon said he would drive Brian Borden home. The three men got into the car; Mr. Borden was sitting in the rear. As Mr. Dillon was driving Mr. Borden home, he took a right turn from Birch Tree Hill Road onto Captain Joe and Osbert Road.

10. As they passed the scene of the murder, Brian Borden tapped Mr. Dillon on the shoulder and said "you know where this is? This is Birch Tree Hill Cemetery." Mr. Borden pointed out the left side of the car to the brown wall at the entrance to the road. Mr. Borden then said that he and a friend of his named Keith Montague "mashed up Robert Bush". Mr. Dillon says that Mr. Borden used both the name Robbie and the name Robert Bush. Mr. Borden said he used a Mossberg automatic shotgun to "lick him with". He said

Brian Borden was laughing at this point. Brian Borden had told Mr. Dillon that the shotgun holds 5 "bullets". Mr. Dillon says that Mr. Borden used his arms to demonstrate how he used the shotgun when he shot Mr. Bush. Mr. Dillon also said that he had seen Mr. Borden with the Browning 9 millimetre handgun on several occasions: "he always took it out of his pocket showing it off to us". "Brian Borden told me he gave Keith Montague the hand gun to assist him (Brian Borden) in the shooting."



11. Mr. Dillon also said the following, which I quote from the transcript:

- 1) *He told me that on September, Tuesday the 13th 2011 in the late evening he have been told by a cousin of his that was in Miss Daisy Lane that Robert Bush is leaving out from his Robert Bush address in Miss Daisy Lane - on his way around he is coming around now to drop off his girlfriend Mayra off Captain Joe and Osbert Road;*
- 2) *Brian Borden told me him and Keith Montague fetch for the guns. Brian Borden told he had borrowed a Browning 9 millimetre handgun that holds fourteen bullets in the cartridge from a friend of his (Brian Borden) whose name Royce Cornwall.*
- 3) *Brian Borden told me he shoots Robert Bush first, Keith Montague secondly shoots Robert Bush with the handgun, and after that both of them run all the way up to his (Brian Borden) address in his Firewood Close;*
- 4) *Brian Borden told me he stashed off both guns and then quickly run into his house and locked himself in;*
- 5) *Brian Borden told me he quickly took a shower with some H7 Bleach Liquid to avoid gunshot residue on his body in case he was visited and picked up by the police at his address;*
- 6) *Brian Borden told me the funeral dressing home had to stuff Robert Bush face with cotton because Robert Bush facial part has been blown off by the shotgun that he used to shoot Robert Bush in the face. In cross-*

examination Mr. Dillon added that Brian Borden had told him during the same conversation that " we give him a closed casket.

12. Mr. Dillon explained that after he received this confession from Mr. Borden (and a subsequent alleged confession from David Tamasa) he decided to quit the Birch Tree Hill gang.

13. In cross-examination, Mr. Dillon agreed that he had taken an active role in the Cayman National Bank robbery. He admitted that he had concocted a lie when first interviewed. He said he then "came to grips with the truth", pleaded guilty to the robbery, and testified against his co-conspirators in it. He was pressed about his understanding that giving evidence favourable to the Crown on the Cayman National Bank robbery and on the West Star robbery as well as against Brian Borden would have the effect of gaining him a more lenient sentence. He agreed that that was a "possibility" but insisted that his real motivation to assist the police was that he felt "truly betrayed by my friends". This appears to be a reference to the other persons who were prosecuted for the Cayman National Bank robbery.

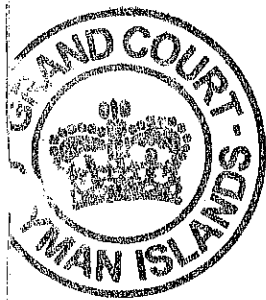
14. As for the West Star robbery, Mr. Dillon initially told the police that he only became aware of it after the fact when he agreed to drive the actual robbers somewhere. They gave him \$400 and so he pleaded guilty to handling stolen goods. However, he was later confronted with closed circuit television footage which showed him acting as the getaway driver from the robbery scene, which contradicts what he said to the police



earlier. Mr. Dillon characterized this as a “mistake” and an “error” which he “corrected” subsequently.

15. After implicating some of his former friends and acquaintances in the Cayman National Bank robbery Mr. Dillon began to give statements to the police about other matters. He agreed that by this time he was very concerned about the safety of his wife and child. He said that David Tamasa told him repeatedly that the head of the Birch Tree Hill gang was Brian Borden. He accepted that he was fearful that Mr. Tamasa could give an order that Mr. Dillon’s family was to be harmed for his co-operation with the police. He acknowledged that he believed Brian Borden would be the man who would execute that order. He agreed that if Mr. Borden was “on the street” (i.e. not in custody) he posed a threat to Mr. Dillon’s wife and son. He told the police that. When he gave this information to the police he did not, however, tell them that Brian Borden had admitted killing Robert Bush to him.

16. Roughly a week later Mr. Dillon did give a statement to the police describing the confession by Brian Borden to the killing of Robert Bush. He told the police that he thought the conversation was “around February or March 2012”. It was only during his interview with Crown counsel shortly before the commencement of this trial that Mr. Dillon identified the specific date of January 4, 2012 as the date of the conversation. When asked about this, he said “while sitting in jail gathering my thoughts it came back to me”.



17. He said that Mr. Borden identified Keith Montague by that name and also by his nickname "Bush Bosh". He agreed with the suggestion that Brian Borden had said to him that on the day of the murder that he heard Robert Bush's car coming because Robert always played loud music in his car. He also quoted Mr. Borden as saying that someone had told him that Robert was on his way. In a statement to the police which he adopted in cross-examination, Mr. Dillon said that Borden had told him the someone was "a cousin of his that was in Miss Daisy Lane on the same day September 13, 2011 in the late evening".

18. Mr. Dillon's evidence that Borden told him about fleeing the scene on foot to Firewood Close, hiding both guns, using H7 Bleach Liquid to remove gunshot residue from his body, and the remark about the funeral home stuffing Robert Bush's face with cotton were all things he disclosed for the first time during this trial. He accepted that in his statements to the police and in his interview with Crown counsel he had never mentioned these additional matters. When asked why, he said "while sitting in jail I kept gathering my thoughts and additional things came back to me". He was referring to a period of approximately one week immediately before he gave evidence.

DILLON's CREDIBILITY

19. I emphasize that my findings about the credibility of Marlon Dillon are and must be confined to the evidence and issues in this trial; they should not be taken as an



indication of my view of his credibility when he gave evidence in the earlier Cayman National Bank trial.

20. There are several cogent reasons to treat Mr. Dillon's evidence with caution. He is awaiting sentencing for the crime of robbery and may well believe, whether he admits it or not, that he will receive a lighter sentence if he is instrumental in the conviction of Mr. Borden. He admits to having been a part of the Birch Tree Hill gang and admits having taken part in two armed robberies. At a time when he was purporting to cooperate with the police against his former gang colleagues, he lied about the extent of his role in the Westar robbery. In my view, it would be dangerous to accept Mr. Dillon's evidence about Brian Borden's confession unless there is independent evidence supporting and confirming Mr. Dillon's testimony.

21. I am entitled to believe all, some or none of Mr. Dillon's evidence. There are parts I can reject even before considering the independent supporting testimony adduced by the Crown. Mr. Dillon's evidence that Borden told him about fleeing the scene on foot to Firewood Close, hiding both guns, using H7 Bleach Liquid to remove gunshot residue from his body, and the remark about the funeral home stuffing Robert Bush's face with cotton are not credible because these are all things he disclosed for the first time during this trial. Undoubtedly, the investigators would have asked him at a much earlier stage to tell them everything Brian Borden said to him. I do not take these additional statements into account. In addition, I do not accept Mr. Dillon's testimony, in

contradiction of his earlier statement to the police, that the conversation took place on Jan. 4, 2012. If it occurred at all, it took place sometime in February or March, 2012.

22. I will now examine the evidence which the Crown says supports and confirms Mr. Dillon's evidence.



MYRA EBANKS

23. In September 2011, Myra Ebanks was living in the Birch Tree Hill area of West Bay at no. 37 Cinder Lane which is just off Captain Joe and Osbert Road. Before that, she had lived on Daisy Lane in the Logwoods area. While in that area, she met Robert Bush and had what she described as an occasional but intimate relationship with him. It began shortly after he came out of prison in 2011. Bush also lived in Daisy Lane. Ms. Ebanks said she would sleep over at Mr. Bush's house three or four times per month. Myra Ebanks accepted in cross-examination that Brian Borden had been told about her relationship with Robert Bush and he made it plain to her that he "had no difficulty at all with it".

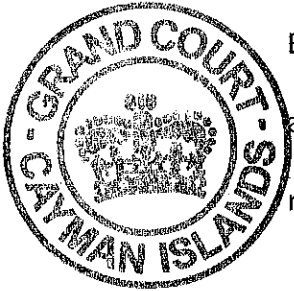
24. After she moved to the Birch Tree Hill area, she continued her occasional relationship with Mr. Bush. He would come to pick her up in his blue Honda Civic motor vehicle. Because of the "problem" between the Logwood and Birch Tree Hill gangs, Mr. Bush was not in the habit of lingering in the area of Myra Ebanks' residence. She would walk

out from Cinder Lane to Captain Joe and Osbert Road and then up that road to its intersection with Birch Tree Hill Road. Robert Bush would pick her up there in his car.

25. Myra Ebanks had a friend, Tishara Webster, who lived at 177 Birch Tree Hill Road just across from the intersection with Captain Joe and Osbert Road. Miss Ebanks used to go to Tishara's residence "pretty often". Before the murder she was there almost every night before leaving to go with Robert Bush to his residence.

26. On the night before the murder Miss Ebanks was in Tishara Webster's yard together with other people, including Jordan Manderson and David Ebanks. On this night Myra Ebanks was unhappy with Robert Bush because he had been spending time with another woman. She had told him it would be better if they split up although she did not want that.

27. As the group at Tishara Webster's yard was listening to music Jordan Manderson suggested they have some drinks. Someone went off to get some rum and Miss Ebanks had a conversation with Jordan Manderson. He told her that he wanted to speak to Robert Bush and that she was to let Bush know that. She said that Manderson said "Robert showed him a vibe and he wanted to show Robert a vibe back". When asked what this meant, she said Jordan wanted to let Robert know something. She said it could refer to a friendly exchange or a hostile exchange. She believed Jordan was saying this to her because he knew that she saw Robert every night. Jordan Manderson also



said to her that “these boys”, presumably members of the Birch Tree Hill gang, “want to hurt Robert”. She then said she could not remember whether the word used was “hurt” or “kill”. She went on to quote him as saying that they wanted to hurt him but as long as he was around that wouldn’t happen “because they have to come to me for their things.” She said that by “things” she understood guns or weapons.

28. Robert Bush called her later that night and asked where she was. She said that she was at Tishara’s and he said “start walking out, I coming for you now”. Miss Ebanks, who was still annoyed with Mr. Bush, said she would not do that “because me and him didn’t have anything”. Bush replied that “if you don’t come out, I coming in the yard, I not afraid of going into the yard”. Miss Ebanks then relented and said she would walk out.

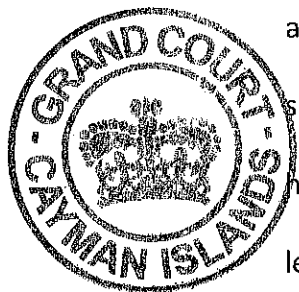
29. She walked out of the property to Birch Tree Hill Road, Mr. Bush drove up and she got into his car. He then said that he needs a rizzla, meaning a cigarette. He drove into the Tishara Webster yard where members of the Birch Tree Hill gang had congregated. He stopped in the yard and got out. Jordan Manderson walked up to the car and said “what is this?” This was a query to Robert Bush and meant to ask why he came into the yard. Myra Ebanks intervened to say “it wasn’t nothing, I just getting a rizzla.” Jordan Manderson then walked up to Robert Bush and the two of them had a private conversation which lasted an estimated two to four minutes. Miss Ebanks said that it appeared that Robert Bush and Jordan Manderson were talking in a friendly manner. She did not overhear them as they were talking in low voices. Then, as Mr. Bush and



Miss Ebanks were in the act of leaving, Mr. Bush said to her "oh they have liquor". He then drove back into the yard a second time. He asked her to get some alcohol for him, which she did.

30. Miss Ebanks agreed with suggestions put in cross-examination that Jordan Manderson and others in Tishara Webster's yard would see Mr. Bush's request for a rizzla and for liquor as "very disrespectful". She accepted the suggestion that he was "showing his strength". She agreed that Mr. Manderson had "backed down" "in front of all his friends".

31. On the evening of the murder Myra Ebanks was at her mother's house just off Captain Joe and Osbert Road. Her mother was at a church meeting and Myra was alone with her young child. Around 7:20 p.m. Jordan Manderson called her and asked her what she was doing. He was at his mother's house which was nearby. Myra Ebanks told him she was at her mother's house and Manderson replied that he would be going to his father's house (which was also nearby) and "he would come cross to look for me". He did so and they began to talk. He asked her if she was going to Tishara Webster's later on and she replied that she did not know. She was unsure because she did not know how long her mother would be out and she had to stay to look after the baby. Jordan Manderson left but then returned for a second visit later.

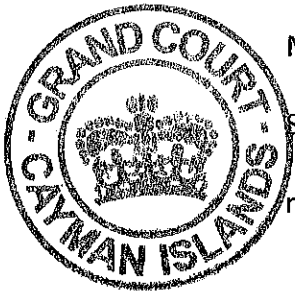


32. She accepted in cross-examination that Jordan Manderson appeared to want to have a relationship with her but also said “we were friends, and we hang out, but he never really come on to me like that. If he come on to me, like three times was all.” “I let him know that he was too young for me. Not because of Robert but because I did not see him like that.” She agreed that Robert Bush did not know that Jordan Manderson had expressed an interest in her. He did complain about Myra Ebanks “hanging out” with members of the Birch Tree Hill gang.

33. Robert Bush called Myra Ebanks and asked her to walk out to the intersection so he could pick her up. She said she could not because she was still looking after her daughter. This, she said, made him angry. This first conversation with Mr. Bush occurred between two conversations with Jordan Manderson.

34. When Mr. Manderson returned he noticed that Miss Ebanks was upset. She told him that Robert Bush was angry with her because she was not ready when he called. Mr. Manderson replied that she should go to Tishara’s instead of becoming upset herself. She replied that she would let him know what she would be doing later by sending a message to the phone of David Ebanks.

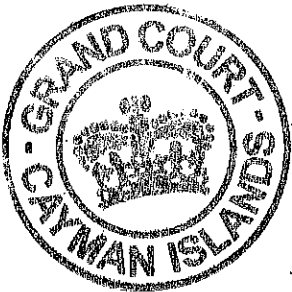
35. Mr. Manderson had a telephone with him and he received a call. The voice on the other end of the line was loud enough that Myra Ebanks could hear what that person said. The voice said “get the things ready, we coming for them”. When asked if she



recognized the voice at the other end of this conversation she said “to me it sounded like Brian Borden”. She said she has known Brian for years and knows him well. She met him in high school which would have been around 2004. She said that she became “close” to Brian Borden in 2010. She described this as an occasional intimate relationship which lasted for a month or a month and a half around December 2010 and January 2011. She said it “just kind of ended on its own” “because it wasn’t anything serious”. They did not separate on bad terms. In reference to the voice identification, she agreed in cross-examination with the suggestion that she was “never sure it was Brian, but just thought it might be”. She confirmed that at the point when Jordan Manderson received the phone call she had no plans to see Mr. Bush that night; those plans developed later.

36. An identification by voice recognition is subject to the same sorts of dangers and difficulties as those posed by eyewitness identification. There is reason to think the dangers are even greater with voice recognition: see *R v Roberts* [2000] Crim L R 183 (CA). In light of her admission that she was unsure, I do not accept that the person talking to Mr. Manderson on the phone was Brian Borden.

37. After the phone call Jordan Manderson asked Myra Ebanks to call him or to message him to let him know what it was she was doing later in the evening, because if she was going to go to Tishara’s yard he would be there and he would meet her there. Jordan Manderson did not have his own Blackberry, so to send a message to him Myra Ebanks



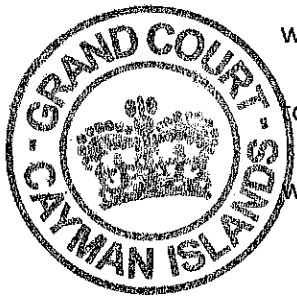
said she would have to send it to the Blackberry of David Ebanks, who would presumably pass it on.

38. Robert Bush called Myra Ebanks again and asked if she was ready. Again, she said she was unable to leave. He again became angry and said something like “I know what you up to”. The calls from Robert Bush were about twenty or thirty minutes apart.

39. Finally, Myra Ebanks’ mother arrived home. Miss Ebanks then sent a message to Robert Bush telling him so. He called her and asked her to walk out to the intersection where he was in the habit of picking her up. She did so.

40. As she walked out of Cinder Lane towards Birch Tree Hill Road, she sent a message to the Blackberry of David Ebanks asking him to let Jordan Manderson know that she would not be home that evening. David Ebanks asked her where she was going. She told him to tell Jordan that she would not be home and that “he already knew where I would have been or where I was going”. David Ebanks replied “OK”.

41. After sending her BBM message to David Ebanks, Myra Ebanks deleted the message from her phone. When asked why she did this, she said “because Robert used to search my phone and I didn’t want him to see the message.”

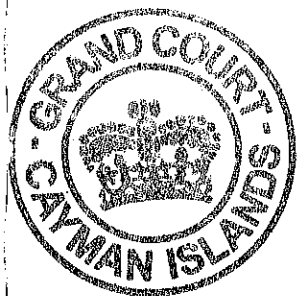


42. When she got to the junction of Captain Joe and Osbert Road and Birch Tree Hill Road she found that Robert Bush was not there yet. She sent a message to him asking where he was. He called her; from the noise in the background, she could tell that he was still at home. At this point, Myra Ebanks said "you know what, if you home, let me go back home and you can stay home". Robert Bush became angry.

43. During this conversation on the telephone with Robert Bush, Myra Ebanks saw Jordan Manderson and David Ebanks walk out of Firewood Close. The two men walked past her and Jordan Manderson nodded his head towards the residence of Tishara Webster, letting her know that that is where he was going.

44. On the telephone, Bush could be heard to start his car and say that he was coming to pick up Myra Ebanks now. Bush always drove with the music in his car turned up loud. Myra Ebanks said she heard him first and then saw his car. He came up the hill on Birch Tree Hill Road, reached the junction, and turned a little ways into Captain Joe and Osbert Road. Miss Ebanks walked around the back of the car to get into the passenger seat. This was a right hand drive car so she was going towards the left side.

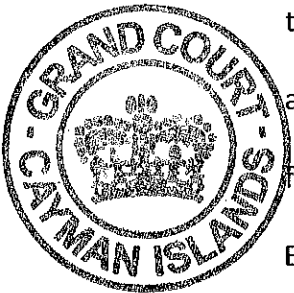
45. When she reached the back door of the car she saw two people crossing the road. When she first saw them they were almost in front of the road to Tishara Webster's yard. She agreed with the suggestion in cross-examination that the two men who had shot Mr. Bush had run "from Tishara's yard or thereabouts". She accepted in cross-



examination that she had told Tishara Ebanks that the two gun men had come from Tishara's yard (and that Tishara denied it). They were walking towards her. When she got to the door of Bush's car she noticed that one man was carrying a shotgun. At this time they were at the entrance to the church yard which is just south of where Myra Ebanks was. The two men began to run towards Miss Ebanks and Mr. Bush. As they did so, she was getting into the car.

46. She yelled to Robert Bush they he should drive away quickly but he had (as she put it) "a late reaction". When she got into the car he was in the process of cleaning a CD in order to put it into the CD player. Then he looked towards the back of the car and thus towards Birch Tree Hill Road. The front of the car was pointing towards the Government Scheme houses. The two men were running towards the rear of the car. Myra Ebanks now saw that the man without the shotgun had a handgun in his hand and that both men had their faces covered with shirts tied around their heads. Robert Bush attempted to drive forward but lost control of the car. He may have been struck by the first shot at this point. The car drove into a wall and then Robert Bush tried to back up. By that time the two men were right in front of Bush's window on the right side of the car. Myra Ebanks put her head down and heard three shots. She suffered some superficial injuries.

47. The two men stood for a couple of seconds and then ran away towards a smaller road which intersects with Birch Tree Hill Road right across from Captain Joe and Captain



Osbert Road. This location, also, is near Tishara Webster's yard and probably would allow access to it.

48. Myra Ebanks got out of the car and called 911. This call was received by the police dispatcher at 11:20 PM.
49. She agreed that Jordan Manderson and David Ebanks did not appear on the scene after the shooting. She agreed that she told the police when interviewed that she believed one of the gunmen to be a man by the name of Andrew Baptiste.

EBANKS' CREDIBILITY



50. There is good reason to be cautious about the evidence of Myra Ebanks. She has obviously associated in an intimate manner for several years with gang members and criminals. Three of her former boyfriends have been murdered in acts of gang violence. She appears to have an easy familiarity with firearms.
51. Despite these red flags, I am satisfied that she has attempted to tell the truth according to the best of her recollection. Her loyalties do not appear to lie with either the Birch Tree Hill gang or the Logwoods gang. She lived in Birch Tree Hill and associated with its gang members but she also had an intimate relationship with a member of the Logwoods gang. She now lives in another country. She did not, in giving her evidence,

appear to me to display any bias for or against Mr. Borden. The cell site analysis evidence to which I will refer later is independent evidence which supports and confirms portions of her testimony. I accept her evidence.

SUMMARY OF CLOTHING EVIDENCE

Jordan Manderson



52. In cross-examination Miss Ebanks said that when she saw Jordan Manderson walking past her on the way to Tishara's he was wearing green camouflage pants, a white marina (a type of t-shirt), and a red cap (p. 88 l. 7, p. 8 l. 5 and p. 12 l. 24).
53. A pair of camouflage pants, together with a camouflage shirt, a cap and a second pair of trousers, were found by police on February 12, 2012 in the loft area of an unoccupied house owned by Jordan Manderson's grandmother. His DNA was found on the cap and on the second pair of trousers; DNA on the camouflage pants and on the shirt may also be his – the results were inconclusive. In any event, Brian Borden's DNA was not found on any of these items.
54. A camouflage shirt and jacket were seized by police from the residence of Mr. Manderson's mother 7 days after the shooting on Captain Joe and Osbert Road. These do not appear to have been examined for DNA.

David Ebanks

55. Miss Ebanks said that David Ebanks was wearing a red jacket with long sleeves (p. 88 l. 23 and p. 8 l. 11). She said in RR that this red jacket had “like a zipper looking design on the front” (p. 9 l. 13). It ran from the bottom of the jacket up to the middle of the jacket. The design was white (p. 8 l. 20-25). When asked what kind of pants David Ebanks was wearing she said she was not sure. She was then referred to her witness statement on the subject. In it, she had said that David Ebanks was wearing short blue jeans pants, and “a red jacket with some white words or emblem on the front” (p. 13 l. 1). She adopted that part of her statement.

56. On February 23, 2012 the police searched the residence of David Ebanks and found three live shotgun cartridges wrapped in a sock which was in a pocket of a pair of jeans. His DNA was found on these items of clothing.

First Gunman



57. In direct examination, Myra Ebanks said that the first gunman had a red long-sleeve shirt or jacket and camouflage pants (p. 78 l. 19 and p. 8 l. 25). In cross-examination, she agreed that the shirt or jacket was similar in colour to what she had seen David Ebanks wearing three or four minutes earlier (p. 92 l. 17). She then added immediately, “but it had things on the front” (p. 92 l. 19). In re-examination, she agreed that one of

the gunmen had a red top but denied that it had any white design or emblem on it. She said it was different from the red top worn by David Ebanks. She described the gunman's jacket as "plain, just red" (p. 10 l. 4 – 13). She said the same gunman was wearing camouflage pants (p. 10 l. 17).

"Second" Gunman

58. In direct examination, Myra Ebanks said that the "second" gunman was wearing a camouflage jacket (p. 78 l. 10 and p. 2 l. 14). Apparently, she told the police when giving a witness statement that the gunman wearing the camouflage jacket was also wearing a white marina under it (p. 94 l. 10). She said at trial she did not remember that. In cross-examination she was shown exhibit 2, a photograph of a camouflage jacket, but could not identify it as "the type of colour" of jacket that one of the gunmen was wearing (p. 2 l. 11).



SUMMARY RE CLOTHING

59. In summary, Myra Ebanks said Jordan Manderson wore green camouflage pants, a white marina and a red cap. This description does not accurately match either gunman. The first gunman did wear camouflage pants but he had a red long sleeve shirt not a white marina. The second gunman did wear a white marina but Ms. Ebanks said he was wearing a camouflage jacket, not camouflage pants.

60. Myra Ebanks' description of David Ebanks' clothing was not matched by either gunman either. She said David Ebanks wore a red jacket with long sleeves bearing a zipper looking design with some words or an emblem in white on the front. The colour matches her description of the first gunman's red top but it differed in that the gunman's top bore no white words, design or emblem on the front. She said David Ebanks was wearing blue jeans pants, but the first gunman was wearing camouflage pants. Her description of David Ebanks does not match the second gunman, who was wearing a camouflage jacket.



Cartridges

61. The three cartridges recovered from the sock were examined. DNA found on one shotgun round could not be matched to David Ebanks but Brian Borden is excluded as a contributor.
62. An unfired 12-gauge shotgun cartridge was found at the scene of the shooting. Microscopic markings on this cartridge match similar markings found on one of the three cartridges in the sock in the opinion of the Crown's firearms expert. It is his opinion that both of these cartridges had been loaded into the same shotgun but then ejected instead of fired.

TRACEY WATLER



63. Tracey Watler said she has known Brian Borden since she was 14 or 15. She is now aged 24. She was dating one of his cousins and was just a friend of Brian Borden's at first. Eventually, she began a sexual relationship with Brian Borden.
64. Mr. Borden went to prison on August 1st, 2008 and was released on October 5th, 2010. Robert Bush had also been imprisoned in Northward; he was released on May 17, 2011.
65. According to Ms. Watler, she visited Mr. Borden "almost every Sunday or Saturday". After his release from prison the relationship continued for three or four weeks but then ended. She said she did not agree with the life he wanted and in any event he was in another relationship. Ms. Watler said she had known Robert Bush since the time she was 15 years old. She described him as a friend.
66. Ms. Watler said she used to visit Brian Borden in prison and they spoke on the phone. He asked her about the whereabouts of Robert Bush. He asked if she would help him to "set up Robert Bush". By this Ms. Watler understood that Brian Borden was asking her to help him kill Mr. Bush. She says that Mr. Borden said that three or four times. He did not ask her to help set up anybody else. She did not ask Mr. Borden why; the conversation frightened her. On one occasion Mr. Borden asked her if she had feelings for Robert Bush and she said no.

67. She said that about one month before Mr. Bush was killed, Mr. Borden became “consistent about the conversation”. In reference to the earlier threat made while Mr. Borden was still in prison, she quoted him as saying “tell him when I get out I will kill him”. Ms. Watler did report the threat to Robert Bush but he did not take it seriously.
68. She also said that Brian Borden asked on one or two occasions if he could sleep at her residence. He said he knew that Robert Bush used to sleep there and he asked if he could sleep there one night when Robert Bush was there. Mr. Borden said it would be easier for him to kill Mr. Bush that way. Ms. Watler said no to these suggestions.
69. Ms. Watler said that “anytime Robert Bush was there [Mr. Borden] called to let him know when Robert Bush would leave”. These sorts of conversations occurred in the period of July and August 2011.
70. On one occasion Ms. Watler went out of her residence late at night to discard the garbage. Mr. Borden called and asked her why she had gone out so late to throw away the garbage, thus leaving the impression he had been watching her from somewhere nearby. In the same call he asked if Robert Bush was at her residence and Ms. Watler said “yes he is”. Mr. Borden then asked if she could let him know when Robert Bush was leaving. She said she would, but did not do so. Mr. Borden phoned the next

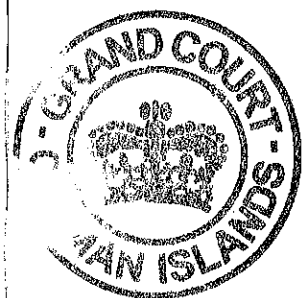


morning and said "you made mosquitos bite me up", indicating he had spent some considerable time outside her residence.

71. On another occasion Brian Borden called her and said "in a joking way" would you open the window where Robert Bush is laying down so I can shoot him?

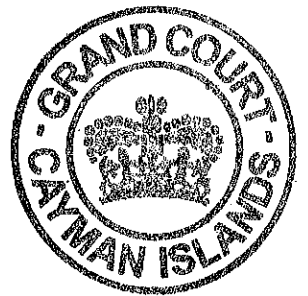
72. On yet another occasion Ms. Watler was at the Jet Nightclub when Brian Borden called her and asked if Robert Bush was drinking by her apartment. She said she didn't know and he then said "I'm telling you, not asking you". He asked if she could let him know when she got home if Mr. Bush was still there. She said she was not going to be sleeping at her residence that night and then turned off her telephone. In the morning she noticed several missed calls from Brian Borden. He called and asked her why she had not called him; she responded that Mr. Bush was not at her residence (which was untrue).

73. In cross-examination she accepted that while Mr. Borden was in jail Ms. Watler did not speak to him or visit him for a period of five or six months, but she repeated that for the rest of the time he was in jail she visited him every Saturday or Sunday. Then, inconsistently, she said "at first we talked on the phone", and then "every two weeks for a year I visited him". In fact she was listed at number 22 on his visitors list and the prison records show that she visited him just 13 times. The first such visit was eight months into his sentence.



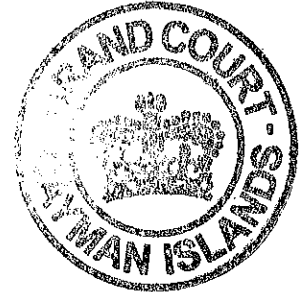
74. Ms. Watler insisted that she broke up with Mr. Borden; it was not Mr. Borden who broke up with her. She said he asked her to "set up" Robert Bush on three occasions. On one such occasion she was engaged in an argument with Robert Bush when Brian Borden called her and said "tell him I'll kill him when I get out". She agreed that she did not take this threat seriously. She said whenever Borden asked her to set up Robert Bush she always said "OK". It was then brought to her attention that in her witness statement she claimed she always said no. She then responded that she did not say yes or no to these proposals.
75. On the night that Brian Borden wanted to shoot Robert Bush through the window, Ms. Watler walked with Robert Bush through her yard when he left. She said she never thought Mr. Borden would stay in the vicinity all night long.

WATLER CREDIBILITY



76. For the most part, I accept Ms. Watler as a witness of truth. I do not believe that she is incriminating Mr. Borden with her testimony out of revenge because he broke up with her. I accept that she has exaggerated the number of times she spoke with Mr. Borden in prison but the rest of her evidence is reliable.

77. Tracy Watler's evidence establishes that Mr. Borden made repeated threats to kill Robert Bush in the months and years before the shooting. In July and August, 2011, Mr. Borden engaged in behavior which can be described without exaggeration as stalking Mr. Bush when the latter was believed to be associating with Ms. Watler. Overall, the evidence of Tracy Watler is reliable independent supporting and confirming evidence for the essential assertion made by Mr. Dillon.



TISHARA WEBSTER

78. Tishara Webster lived at 177 Birch Tree Hill Road with her baby father and her children. Her residence was something of a gathering spot for people in the neighbourhood. Myra Ebanks was one of those who would come around, together with Jordan Manderson and David Ebanks. Sometimes there would be ten to fifteen people in the yard, sometimes less. She described Robert Bush as her cousin.

79. On the night of the shooting there were people in Tishara Webster's yard. Some were drinking and some were listening to music. Some were smoking. She said in evidence that she did not recall who was there that particular evening. She heard the gunshots, saw Mr. Bush's car, ran out to the car and heard Myra Ebanks screaming. She took the phone from Myra Ebanks and dialed 911.

80. She agreed in cross-examination that almost every night Myra would be collected by Robert Bush in his car and that Bush was in the habit of playing his music very loud. The night of the murder was no exception.
81. Tishara Webster agreed that Myra Ebanks had told her immediately after the murder that the man or men had run from Ms. Webster's house or yard and that Ms. Webster had run out behind them. Ms. Webster replied to Ms. Ebanks (and said in her evidence) that the men could have come from the direction of her yard but "no one came from my yard".
82. There is nothing in the evidence of Tishara Webster which confirms or supports the credibility of Marlon Dillon.

POLICE CONSTABLE HORNER



83. Police Constable Horner observed Andrew Baptiste at Kelly's Bar at a time less than six minutes before the murder. He also saw Baptiste very shortly after the murder still at Kelly's Bar, thus confirming that Andrew Baptiste could not have been one of the killers. This contradicts the assertion by Myra Ebanks shortly after the shooting that he was one of the shooters.

ERICKA COPELAND



84. Ericka Copeland described herself as a cousin of Robert Bush. Early in the morning of September 14, 2011, shortly after the murder, Ericka Copeland heard about it and went with three other people to the area of the shooting. The car drove into the area and then turned around to drive back out. As it did so it passed the entrance to Firewood Close, travelling at ten to 15 miles per hour. Ms. Copeland said she saw Brian Borden standing in the shadow of a house about 40 to 50 feet away. He looked like he was speaking on the telephone. He was wearing a white T shirt and basketball shorts.
85. Ms. Copeland said the area was well lit from street lighting and she was in no doubt about recognizing Mr. Borden. She said she knew him very well because she went to school with him although he was two years above her in grade. She said she has known him since age 13; she is 24 now. She wears glasses and had them on at the time she recognized him on the street.
86. Ms. Copeland has never been asked by the police to identify Brian Borden in an identification parade or from photographs. She agreed that when looking at Mr. Borden she was looking across the driver of the car and said that the driver did not block her view. She accepted that she has not spoken with Mr. Borden in a decade. She agreed that she had last seen Mr. Borden about one year before September 2011. When she

last saw him he had plaits in his hair. On the night in question she did not see Mr. Borden's hairstyle.

87. She only volunteered her information to the police on October 24th, 2011, almost six weeks after the shooting. She accepts that she knew that Brian Borden lived on Firewood Close. A video of the entrance of Firewood Close taken at night was shown to Ms. Copeland and she agreed that the lighting in the video appeared "almost the same" but said the video is darker.

COPELAND's CREDIBILITY



88. I remind myself of the special need for caution before convicting the Defendant in reliance upon evidence of identification. A witness who is convinced in her own mind may as a result be a convincing witness, but may nevertheless be mistaken. Mistakes can also be made in the recognition of someone known to a witness, even of a close friend or relative. I must therefore examine carefully the circumstances in which the identification was made.

89. A car travelling at 15 miles per hour past the entrance to Firewood Close would give an occupant just two or, at the most, three seconds to observe someone standing in the area 40 or 50 feet away. I accept that the street lighting provided enough illumination for an accurate identification. I am troubled, however, by Ms. Copeland's assertion that

she knew Mr. Borden well. She accepted that she has not spoken with Mr. Borden in a decade. She agreed that she had last seen Mr. Borden about one year before September 2011. When she last saw him he had plaits in his hair. On the night in question she did not see Mr. Borden's hairstyle. When she volunteered her evidence to the police, no identification parade or photo lineup was conducted. Overall, I consider the risk of a misidentification sufficiently high that I cannot rely upon the identification evidence of Erica Copeland.



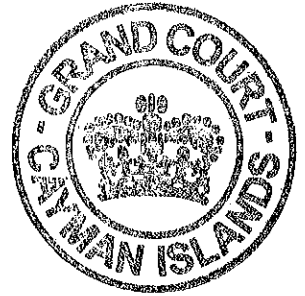
RENALDO SANCHEZ SCOTT

90. Mr. Sanchez is a Caymanian from West Bay who said in direct examination that he has no criminal record. He knows David Tamasa and Brian Borden. During the investigation Detective Constable Morrison appeared unannounced at Mr. Sanchez's residence and took him to Mr. Tamasa's residence. Mr. Sanchez testified that he had never been there before and, in particular, had never driven any person to that address, thus contradicting Marlon Dillon's testimony.

91. Although Mr. Sanchez was presented to the Court as a man with no criminal record, he admitted in cross-examination that he has been convicted of the offence of taking a vehicle without the owner's authority. He said the conviction was in 2003. He claimed he was a minor at the time, but then said in cross-examination that his date of birth is March 1st, 1982. That means he must have been 21 at the time of his conviction.

SANCHEZ's CREDIBILITY

92. Taking a vehicle without the owner's authority is a form of theft and is contrary to section 246 of the *Penal Code*. It is punishable by imprisonment for up to two years. Mr. Sanchez misled the Court when he swore that he has no criminal convictions. In addition, he cannot, as he said, have been a minor at the time of the offence; he was about 21. I do not believe Mr. Sanchez's evidence; it is not reliable and does not have the intended effect of proving Mr. Dillon to be a liar.



ALIBI

93. On September 16, 2011 Mr. Borden gave a witness statement to the police. At the time, he gave his address as Apt. 4, Neville Levy Apartments, North West Point Road, West Bay. In his statement he said [I take this from the handwritten version, not the partly inaccurate typed version]:

"I am living at the above mentioned address [meaning Apt. 4 at the Neville Levy Apartments] with my girlfriend Patrice Limonta.

On Tuesday the 13th of September 2011 I woke up sometime about 10 a.m. I started to beat the Bacardi rum. It was just me alone drinking but my girlfriend was there. I believe some time around 2:00 p.m. my girlfriend drop me in Birch Tree Hill at 14 Firewood Drive at my Grandmother house. My Grandmother died about two months ago. I went next door by Jerry's to see if I see my boy there but I did not see them. My girlfriend return for me like about 5 pm and me and her went back to my yard.

About close to 8 pm I believe me and my girlfriend went by Cuban's Restaurant to get food. I believe after that we went cross Ronnie's "Pink Shop" and get drinks to drink with the food and went home after that. I don't believe I was there for the night; as far as I can remember still.

Late in the night I believe it was my mother call me from number 939-2643 and tell me that she hear Robert get kill somewhere in Birch Tree, I was like in halfway in my sleep and she call me and ask me if I am all right too. I was in for the night, I did not go to Birch Tree, I do not know where he got shot.

Robert and I do not have any problems and no one that I know about have anything with him.

I can't remember what clothing I was wearing but more than likely is something quite simple probably just a "T" Shirt or a jeans. I do not remember what my girlfriend was wearing either probably something simple like a shorts. She only have one vehicle and it is her black 2010 Explorer.

I don't remember talking to my friend that night not that I can remember."

94. I infer that when Mr. Borden says "I don't believe I was there for the night" he is referring to his grandmother's house or, at least, to the Birch Tree Hill area. I also infer that when he says his mother called and woke him up he intends to convey that he was at home, asleep, with Patrice Limonta, in Apt. 4 at the Neville Levy Apartments. Overall, his statement was intended as an assertion that he was not in the area of the shooting, but at home with Patrice Limonta, when Robert Bush was killed.

95. As a result, the Defence is one of alibi. The Defendant says that he was not at the scene of the crime when it was committed. The prosecution has to prove his guilt so that I am sure of it. He does not have to prove he was elsewhere at the time. On the contrary, the



prosecution must disprove the alibi. Even if I conclude that the alibi was false, that does not by itself entitle me to convict the Defendant. It is a matter which I may take into account, but I should bear in mind that an alibi is sometimes invented to bolster a genuine Defence.



CELL SITE EVIDENCE

96. There is an admission of fact that a telephone using the number 321-6666 was, on September 13, 2011, registered by Digicel in the name of Brian Borden, the Defendant. The expert evidence of Joann Delaney, which I accept in its entirety as reliable, establishes that the scene of the murder is serviced by 2 Digicel cell site masts: they are known as the "Mount Pleasant" and the "West Bay Police Station" masts. On the other hand, the Neville Levy Apartments is serviced by the Digicel "Hell" mast.
97. The call records produced by Ms. Delaney demonstrate the location of the phone at various times during September 13 and 14, 2011. They do not, directly, prove the location of the Defendant because there is no direct evidence that he had physical possession of the phone during the material time. However, it is a reasonable inference that a phone registered in the name of a particular individual remains, in the absence of evidence to the contrary, in the possession of that individual. There is no evidence before me that anyone other than Mr. Borden had possession of his phone on September 13 and 14. Moreover, several of the calls made at the material time are to

numbers stored in Mr. Borden's phone, which is consistent with his being in personal possession of it. I therefore conclude that the phone remained in his possession and that the cell site records demonstrate not just the location of the phone but, more significantly, the location of the Defendant.

98. The call records for Mr. Borden's telephone show that it was using the Hell mast from 9:49 AM on September 13 until 2:06 PM at periodic intervals. That is consistent with Mr. Borden being at his apartment. From 3:10 PM until 4:02 PM the phone is in the Mount Pleasant coverage area. Mr. Borden and his phone appear to have been in the Birch Tree Hill area during at least part of the afternoon. From at least 6:42 PM until 7:16 PM Mr. Borden was in the area of George Town. By 7:38 PM he was back in the area of his apartment and took a call from Keith Montague. Mr. Borden was still in the coverage area for the Hell mast, and thus probably in or near his residence, at 10:19 PM.

99. The next telephone call on his number is made at 11:03 PM to Keith Montague. This call is made by Mr. Borden in the West Bay Police Station coverage area. I infer that he was not at his apartment in the Neville Levy Apartments, but in the area of Birch Tree Hill and the approximate location of the murder by 11:03 PM. There are 4 calls to and from Mr. Borden between midnight and 1 AM which place him in the West Bay Police Station and Mount Pleasant coverage areas, not at home.



100. There is an admission of fact that the Blackberry cell phone registered in the name of David Ebanks was seized from the residence of Jordan Manderson by the police. That, combined with the evidence of Myra Ebanks, satisfies me that Jordan Manderson, who did not have his own Blackberry, used the Blackberry of David Ebanks to receive and possibly to send messages.

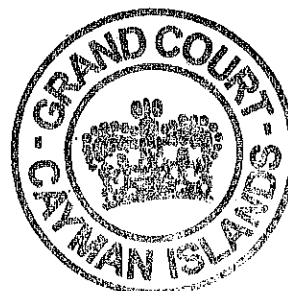
101. The telephone records show that Myra Ebanks sent a Blackberry message to Robert Bush at 10:54 p.m. saying, in reference to Ms. Ebanks' mother, "she jus get here". Just before 11:00 p.m. Mr. Bush and Ms. Ebanks spoke by telephone for 86 seconds. At 11:02 p.m. David Ebanks sent a message to Myra Ebanks saying "way you goin?" At 11:03 p.m. Mr. Borden called Mr. Montague. At 11:04 p.m. David Ebanks sent a message to Myra Ebanks saying "he dun kno". At 11:06 p.m. Ms. Ebanks sent a Blackberry message to Robert Bush asking where he was. At 11:07 p.m. David Ebanks sent another Blackberry message to Myra Ebanks saying "jus tell him da". At 11:08 p.m. David Ebanks sent a Blackberry message saying "O.J.", probably meaning "OK". Robert Bush and Myra Ebanks then exchanged three Blackberry messages in which she said she was waiting for him to arrive.

102. At 11:14 p.m. David Ebanks sent a Blackberry text message to Brian Borden, the content of which is unknown. That is because David Ebanks deleted Brian Borden as a contact, thereby removing the evidence of the contents of the message. When a contact is deleted, a message to that effect is sent to the contact's Blackberry. The message



confirming David Ebanks' action in deleting Brian Borden as a contact was sent by David Ebanks at 11:25 p.m., about 5 minutes after the murder, but only received by Brian Borden's Blackberry at 11:52 p.m. The most likely explanation for this gap is that Mr. Borden's Blackberry was turned off from before 11:25 p.m. until 11:52 p.m. In other words, although he was active on his Blackberry until just minutes before the murder, he then turned it off.

103. There is no actual record of Myra Ebanks telephoning to David Ebanks (or sending a Blackberry message) to tell him she would be meeting Robert Bush on the road. The content of those messages which do exist suggest that she conveyed this information to David Ebanks around 11:08 p.m. Six minutes after that she sent a Blackberry message to Brian Borden and then erased Borden as a contact. Six minutes after that message was sent, Myra Ebanks called 911 to report that Robert Bush had been shot.
104. The only phone call from Mr. Borden's mother, Lorajane Borden, was received by him at 7:22 AM. By this time he was awake, having made and received telephone calls a few minutes earlier. He was still in the West Bay Police Station coverage area at the time and remained there at least until about 9 AM. There are five calls between Brian Borden and a phone registered in the name of Keith Montague on September 13 before the murder and one on September 14.



105. The cell site evidence and the relevant admissions of fact make me sure that Brian Borden's alibi is not true. He did not remain home from shortly after 8 PM until the next morning; on the contrary, he was in the coverage area where the shooting occurred from at least 11:03 PM until 9 AM. His mother did not awaken him in the middle of the night to tell him the news; she phoned in the morning, after he was already awake. In any event, he was not at home when she phoned. I reject his alibi.

LUCAS WARNING



106. I must decide whether the Defendant did in fact deliberately tell a lie in providing his alibi. If I am not sure he did, I must not draw any inference against him from its falsity.

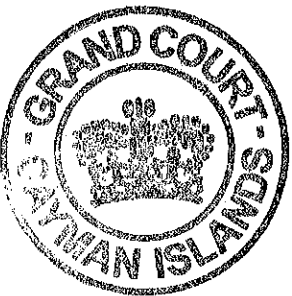
107. Much of the statement may be true, but towards the end he says "I was in for the night. I did not go to Birch Tree ..." That part is clearly untrue. The statement was given on September 16, just three days after the date he was asked about. At this point in his statement he expresses no uncertainty about his state of recollection, as he did elsewhere. I am satisfied this was a deliberate lie.

108. I must now consider this: why did the Defendant lie? The mere fact that a defendant tells a lie is not in itself evidence of guilt. A defendant may lie for many reasons, and they may possibly be 'innocent' ones in the sense that they do not denote guilt. If I think that there is, or may be, an innocent explanation for his lie then I should take no notice

of it. It is only if I am sure that he did not lie for an innocent reason that his lie can be regarded by me as evidence supporting the prosecution case.

109. By the time he made his statement, Mr. Borden knew that Robert Bush had been murdered. He may well have known, or at least concluded, that Mr. Bush was killed by one or more members of the Birch Tree Hill gang. Mr. Borden was a member of that gang. Assuming for present purposes that Mr. Borden did not participate in the shooting, his natural reaction would be to avoid saying anything at all which might have the effect of unwittingly incriminating other gang members. The best way to do that would be to simply deny, as he did, that he was in the Birch Tree Hill area at the time of the shooting. In short, he would not want to get involved. To a gang member, that would be second nature. This is, within the rule regarding an inference drawn from lies to the police, an explanation that is plausible but not consistent with guilt. This explanation may be true. As a consequence, I can draw no inference from the false alibi, although I do accept, as I have said, that Brian Borden was in the Birch Tree Hill area at the time of the shooting.

110. Nor can I draw any adverse inference from Mr. Borden's denial that a photograph of someone holding a firearm was a photo of himself, or from his denial of having had a relationship with Myra Ebanks. Both denials were untrue. The overall impression left by his police interviews is that he would deny pretty much anything suggested to him, whether or not he was guilty of the offence under investigation.



111. The photograph of Mr. Borden pointing a handgun at the camera demonstrates that he had access to firearms. That, however, is hardly unusual for a gang member in West Bay. I am satisfied that any member of the Birch Tree Hill gang, including Jordan Manderson and David Ebanks, had access to firearms also.

SUMMARY OF EVIDENCE SUPPORTING DILLON



112. In summary, the evidence of Tracy Watler establishes that Mr. Borden made repeated threats to kill Robert Bush in the months and years before the shooting. In July and August, 2011, Mr. Borden engaged in behaviour resembling the stalking of Mr. Bush when the latter was believed to be associating with Ms. Watler. I regard this as strong and independent evidence tending to support and confirm Mr. Dillon's evidence of Mr. Borden's confession.

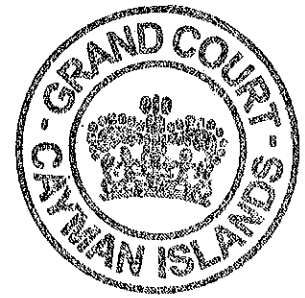
113. In contrast, there is no evidence of threats or even animosity on the part of Marlon Dillon against Brian Borden. Why would he choose to attribute a false confession to murder to Mr. Borden? The suggestion is that by ensuring Mr. Borden's incarceration he would thereby protect his wife and child. I do not believe that Marlon Dillon would believe that his wife and child could be protected by the simple expedient of taking

Brian Borden off the street. Any member of the Birch Tree Hill Gang could pose a danger to the family of someone who has incriminated the alleged leader of the gang.

114. The cell site evidence shows that Brian Borden was in the Digicel coverage area where the shooting occurred from at least 11:03 PM until 9 AM. He was in contact with Keith Montague minutes before the shooting. David Ebanks sent him a Blackberry message at 11:14 PM which may well have been advice that Myra Ebanks was going out onto the road to meet Robert Bush, although the message has been lost. Mr. Dillon could not have known, when he first alleged to the police that Mr. Borden had confessed to the shooting, that such evidence would demonstrate Mr. Borden's contact with Keith Montague and his presence in the area at the material time. This evidence, also, is strong independent evidence tending to confirm or support Mr. Dillon's essential allegation.

115. It is open to me to accept Mr. Dillon's evidence of the confession as credible, but first I must consider the Defense hypothesis that the killers were Jordan Manderson and David Ebanks.





SUMMARY OF CASE AGAINST MANDERSON & EBANKS

116. Both Mr. Manderson and Mr. Ebanks were present in Tishara Webster's yard on the night before the murder. Those present witnessed what has been called a "show of strength" by Robert Bush of the Logwoods gang that night. Myra Ebanks agreed that it appeared to her as if Jordan Manderson had "backed down" while his friends were watching. On the other hand, Ms. Ebanks also said that Mr. Manderson and Mr. Bush spoke in low tones in a friendly manner for two to four minutes during the incident. Earlier, Mr. Manderson had told her, in effect, that he would not allow another gang member to hurt or kill Mr. Bush. I do not believe that this so-called "show of strength" gave Jordan Manderson a motive to kill Robert Bush.
117. There is no evidence of David Ebanks' reaction to the visit by Mr. Bush. There is no evidence from which I can determine whether Mr. Borden was present in the yard also.
118. There is some evidence that Mr. Manderson had a romantic interest in Myra Ebanks, which she says she did not reciprocate. The Defense suggests that this gave Mr. Manderson a motive to kill Mr. Bush. If he did have a romantic attraction to her, I doubt he would discharge a 12-gauge shotgun in close proximity to her head as one of the killers did. Gang members are notoriously protective of women in which they take an interest.



119. Overall, the evidence does not suggest to me that Mr. Manderson had any motive or intent to kill Mr. Bush.

120. There is no evidence of any threats by David Ebanks or of any motive he may have had to kill Mr. Bush.

121. David Ebanks was told by BBM message that Myra Ebanks would shortly be meeting Robert Bush. He probably passed the message on to Jordan Manderson, as Ms. Ebanks wanted. It is likely that David Ebanks passed the message to Brian Borden also, by BBM at 11:14 PM. In any event, all members of the Birch Tree Hill gang would have known of Mr. Bush's habit of picking Myra Ebanks up in the same spot almost every night.

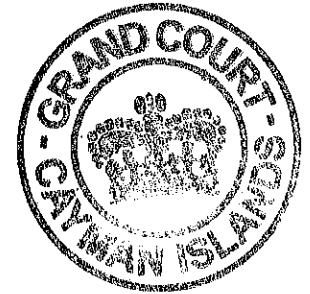
122. Jordan Manderson and David Ebanks walked past Myra Ebanks very shortly before the shooting, probably on their way to Tishara Webster's yard. Manderson motioned to her as he passed. The 2 killers were first noticed by Ms. Ebanks not too far from that yard and appeared to have come from the "yard or thereabouts". Clearly, these 2 men had the opportunity to commit the murder but Mr. Borden and Mr. Montague, also, could have been present in Tishara Webster's yard that night. Ms. Webster claimed not to recall who had been present. Mr. Borden was certainly in the cell site coverage area at the time.

123. Myra Ebanks' description of the clothing worn by Jordan Manderson and by David Ebanks does not accurately match either gunman. Some of the individual clothing items are matched. One gunman wore camouflage pants, as did Jordan Manderson, and a red top, which matched the colour of David Ebanks top. But overall, her descriptions of the clothing she observed tend more to refute the Defense hypothesis than to support it. I also observe that the discovery by the police of some camouflage clothing linked through DNA to Mr. Manderson is unremarkable; camouflage clothing is a popular fashion among those who are attracted to firearms and gang activity and red is a popular colour for shirts.

124. Finally, I should mention the 12-gauge shotgun cartridge found in the sock. It is admitted that it must at some time have been loaded into and ejected from the same shotgun as the cartridge found at the scene. There is nothing from which I might infer when the cartridge in the sock was loaded and ejected. It is a commonplace that gang members frequently share the use of firearms, and probable that the shotgun (which has never been recovered) has been loaded and used many times before and after the murder. If the cartridge in the sock was loaded and then ejected by David Ebanks during or immediately after the shooting, it seems unlikely he would have kept it in his residence wrapped in his own clothing. I infer the clothing was his because his DNA was found on it.



125. In conclusion, I disagree with Mr. Burke's argument that the evidence implicating Mr. Manderson and Mr. Ebanks is as cogent as the case against Mr. Borden. Examined carefully and taken as a whole, I do not believe it points to their guilt. My consideration of it does not provide a reason for rejecting the evidence of Mr. Dillon. 4



ADVERSE INFERENCE

126. Mr. Borden has chosen not to give evidence. That is his right. There is nothing about his physical or mental condition which makes it undesirable for him to give evidence. Mr. Dillon's evidence about Mr. Borden's confession, taken with the independent supporting and confirming evidence I have described above, amounts to a prima facie case. The case presented by the Crown clearly calls for an answer. In these circumstances, I am entitled to draw an inference adverse to the Defendant from his silence. Of course, I am not entitled to find him guilty wholly or mainly on the strength of an adverse inference.

127. Mr. Borden has been well represented and well advised. I am satisfied that his silence in the face of the evidence of Marlon Dillon, Tracy Watler and Joann Delaney can only sensibly be attributed to his having no answer or none that would stand up to cross-examination. I consider it fair and proper to draw an adverse inference from his silence, which I do.

128. This adverse inference, combined with the evidence I have accepted as factual, makes me sure that Marlon Dillon is telling the truth about the confession he attributes to Mr.

Borden.



DISPOSITION

129. For these reasons, I find the Defendant guilty. Mr. Borden, I impose upon you the only penalty prescribed by law for this offence: I sentence you to imprisonment for life.

Henderson, J.

**HENDERSON, J.
JUDGE OF THE GRAND COURT**