IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA (Crim.) No.4 /2012
Ind.4/2008

BEFORE

Rt.Hon Sir John Chadwick, President
Hon.Elliott Mottley, Justice of Appeal
Rt. Hon. Sir Anthony Campbell, Justice of Appeal

ON APPEAL FROM THE GRAND COURT

BETWEEN

HER MAJESTY THE QUEEN

Respondent

and

DEVON ANGLIN

Appellant

Mr. Dorian Lovell-Pank Q.C. and Ms.Lucy Organ of Samson and McGrath appeared for the Appellant.

Mr David Perry Q.C. and Ms.Elizabeth Lees instructed by the Director of Public Prosecutions appeared for the Crown.

Hearing 3 and 4 December 2012
Judgment 7 December 2012
Reasons released 19 February 2013

REASONS FOR JUDGMENT

Campbell J.A.

1. At around 1.30 am on 10 September 2009 three shots were discharged at close range in the Next Level Night Club on West Bay Road in George Town, Grand Cayman. Carlo Webster, a customer in the Club was killed and a friend who was with him, Christopher Solomon, was wounded.

2. There were around three hundred people in the Club at the time. One of them, the appellant Devon Jermaine Anglin, was subsequently arrested and charged with the murder of Carlo Webster, the attempted murder of Christopher Solomon and possession of an unlicensed firearm.

3. He elected to be tried by judge alone, and following a trial before Smellie C.J. he was convicted of all three offences on 20 January 2012 and sentenced to imprisonment for life. At the trial the evidence was admitted of two witnesses whose identity was not disclosed to the appellant, under the provisions of the Criminal Evidence (Witness Anonymity) Law, 2010.

4. The appellant, with the leave of the court, appealed against his convictions and advanced four grounds on which his appeal should be allowed. First, because of the poor quality of the identification evidence against him; second, that the application by the prosecution for witness anonymity orders ought not to have been granted; third, that the trial judge was wrong when he refused to discharge the orders after he had heard all the evidence; and fourth, that the conviction for attempted murder was wrong in law.

5 On 7 December 2012, shortly after the conclusion of the oral hearing of the appeal, the Court dismissed the appeal for the reasons that are now given.

The facts

6 It is not disputed that Carlo Webster was shot three times. One shot was to his head at near point-blank range, another to his left chest and a third, to his right forearm. At the post-mortem examination a bullet was recovered from his head and another from inside his clothing near to his shoulder. The wound to his head would, according to the pathologist, have resulted in immediate unconsciousness and death.

7 A ballistics expert said that the two bullets, together with a third recovered from the torso of Christopher Solomon, matched three spent cartridge cases found in the area of the Club outside the restroom. He said that all three bullets could have been fired from the same weapon and that the three spent cartridge cases were fired from the same weapon.

8 A police officer, on arrival at the scene shortly after the shooting, found Christopher Solomon in a highly intoxicated state. Solomon, who claimed to have no recollection of having been shot, remembered being outside the restroom in the same area where Webster was shot, and feeling dizzy. He was taken to hospital and there an examination revealed a gun shot entry wound in his right lower abdomen but no exit wound. During further surgery a bullet was removed from under the skin of his right buttock. He has made a full recovery from his injury.

9 The main issue of fact at the trial was the identity of the person who fired the shots that killed Carlo Webster and wounded Christopher Solomon. Although the shooting took place in the presence of such a large number, the investigation conducted by the police produced only two people who said that they could give evidence that might assist in establishing the identity of the gunman. B who made a witness statement to the police on 24 September 2009, explained the delay in reporting to the police as being due to fear and shock at what had happened and an awareness of the appellant's reputation for violence. E was picked out by the police, from CCTV footage from the club, as someone who might be able to assist their inquiries. B and E did not know each other and both said that they were only prepared to give evidence if their identity was not revealed.

10 Before the trial took place an application was made on behalf of the Royal Cayman Islands Police Service under s.11(1) of the Criminal Evidence (Witness Anonymity) Law, 2010 for a witness anonymity order in respect of each of these witnesses, and for them to be given the pseudonyms B and E. Justice Quin, who heard the application, on being satisfied that the conditions were met, made orders on 31 August 2011 in respect of each of the two witnesses. The orders provided that the name of the witness and other identifying details be withheld from the appellant and his legal representative; that the name and other details be removed from materials disclosed to any party to the proceedings; that the witnesses be permitted to use the pseudonyms that had been requested; that they were not to be asked questions of any specified description that might lead to their identification; that they were to be screened from

everyone in the court room except for the judge; that the witnesses' voices were to be subjected to modulation.

11.. Section 17(1) of the Criminal Evidence (Witness Anonymity), Law 2010 makes provision for the Court to discharge, vary or further vary a witness anonymity order if it appears to the court to be appropriate to do so in view of the relevant conditions and considerations for making an order under the Law. This may occur where there has been a material change of circumstances since the relevant time and on the court's own initiative (s.17(2)).

12. An application for the discharge of the orders was made to the trial judge at the conclusion of the case for the prosecution. He considered the detailed information as to the background of both witnesses, which had been before Justice Quin, and found nothing in it to suggest that either witness had a motive to lie in order to inculpate the defendant. Furthermore, he found nothing in the inconsistencies or contradictions in their evidence that should lead him to the conclusion that either of them had deliberately lied to the court. He was satisfied that a fair trial remained eminently achievable without the identity of the witnesses being disclosed.

13.. During the hearing of the appeal Mr. Lovell-Pank Q.C. (who appeared for the appellant with Ms. Organ) invited the court to examine the undisclosed material, in order to be satisfied if the appellant had, when viewed in retrospect, received a fair trial. The court agreed to do so, and the examination was carried out in the presence of counsel for the respondent and in the absence of the appellant and his legal advisers. Having considered the detailed background information about each of the witnesses, seen earlier by Justice Quin

and the trial judge, the court was satisfied that there was nothing in it to indicate that either witness may have had a motive to give false evidence in order to incriminate the appellant.

*The reliability and accuracy of the evidence given by the witnesses B and E.*14. The reliability of the evidence of B and E as witnesses is relevant to two issues. One is the weight, if any, to be attached to their evidence given the inconsistencies between their evidence and other evidence including CCTV footage. The other is whether these inconsistencies indicate that they may have had an improper motive in giving evidence against the appellant, which could only be explored properly under cross-examination if their identity was revealed. It is convenient to begin by considering the first of these issues.

15. As described by witness B at the trial, the events leading up to the shooting of Carlo Webster in the early hours of 10 September 2009, began with a fight involving the appellant and a man named Chadwick Boden. B had known the appellant for over 10 years and described him as wearing on that evening a polo shirt with blue horizontal stripes. The witness saw the appellant punch Chadwick Boden, who fell to the ground, and then kick him while he was on the ground. Security staff rushed in and removed Boden from the club. After a short space of time B saw Carlo Webster (who was also known to the witness) walk up to the appellant and punch him in the face and the appellant then went to the restroom. Webster began to move slowly in the same direction until stopped by a woman, named Ophia Smith.

16. While Webster was speaking to Ophia Smith, who was described by other witnesses as being the appellant's girlfriend, the appellant emerged from restroom where he had been for approximately two minutes. The appellant took a gun out of his waistband, pointed it at Webster and started shooting. Witness B saw Webster grab his side and fall to the ground. There was a second gunshot and this was followed by a third shot when the appellant, who had walked up to Webster as he lay on the ground, pointed the gun at him and shot him.

17. After the shooting everyone started running and, according to B, the appellant walked to an exit door that was identified by the witness as the one that faces North.

18.. Witness B saw all this from lounge 1 and claimed to have had an unobstructed view of the appellant from there, at a distance of about fifteen feet.

19. Witness E did not know either the appellant or Webster and had been near the bar when two men began to punch each other. One was wearing a shirt with stripes across it (either green on white or blue on white) and the other an orange coloured shirt. The security staff separated them and five or eight minutes later another fight broke out involving different people, two of whom were removed from the club. Following this the witness saw the man wearing the orange shirt, who had been involved in the first fight, standing near the restroom room. The witness observed the man wearing the striped shirt, who had been involved in the first fight, standing in front of this man. They were standing face to face and about 20 centimetres apart. Three seconds later, the witness who had turned away, heard two shots but was unable to remember if there were more. After this, the man who was dressed in the striped shirt, walked from the

bathroom area towards the main exit area of the club with a gun in his hand, passing within 50 centimetres of the witness as he did so. The witness noticed him putting the gun, that he had been holding in his hand, into the waistband of his trousers. The lights then came up and the witness saw the man wearing the orange shirt lying on the floor with blood around him.

20.. Detective Sergeant Joseph Wright made a note during an interview with witness E on 22 September 2009, some three days before E made a written statement. In this note the witness describes a fight in which Carlo Webster (who as stated earlier was unknown to the witness) was involved. The sergeant recorded E as having said:

> " …I saw Carlo at the bathroom. He was there with another guy who was dressed in a dark shirt. I saw like Carlo was up in the guys face. I watched them for a few seconds then I turned from them again. A few seconds after that I heard four shots and people started to run then I saw a guy dressed in a jeans pants, a stripe polo shirt. I think the color may be green & white or blue and white…He walked across me and I saw a gun in his hand as he walked pass me and I saw him put it in his waist ".

In the written statement E said:

> "About eight or ten minutes after the second fight I looked round and I saw the guy who died at the entrance of the bathroom standing. There was also another guy there and he was directly in the face of the guy who died."

21.. Both in this note and in the written statement the witness is recorded as having described the man involved in the

earlier fight and the man who walked out of the club carrying a gun after the shooting, as wearing a striped shirt. However, the witness did not refer to the person who came face to face with Webster at the time of the shooting as wearing a striped shirt. Further, the witness referred to that person as another guy. At the trial the witness said that it was the same man in the striped shirt and on being asked why the man in the striped shirt was not mentioned earlier the witness responded, “Because I was afraid,” and at a later stage “ I cannot answer that question because I’m in panic.”

22.In addition to B and E the Crown called Grant Fredericks, an expert in forensic CCTV analysis. He had examined the CCTV recordings from the eleven cameras in use in the club at the time. Using images in still photographs that had been developed in colour from a copy of the CCTV footage he made an ‘ensemble’ of details of the clothing and physical features of individuals. This allowed him to use images from the cameras, including those from an infra-red camera in which colour is lost, to track the movements of these individuals as they moved around. The trial judge said Mr Frederick’s findings were to be regarded from the prosecutions’ point of view at best as aiding in the identification of the man whom witness E says is the gun man and whose image is shown on the footage. That person, said to be the appellant as he is leaving the club, is seen wearing a shirt with a distinctive striped pattern.

The apparent inconsistencies

23. Witness B knew Webster very well and claimed to have been watching him all of the time, without having any particular

reason for doing so. The witness did not at anytime see him enter the restroom. The CCTV record indicates that Webster entered the restroom at 01:23:18, and left it and the vestibule area at the entrance to it at 01:28:14. This means he was in the restroom for about 5 minutes. In addition, Chadwick Boden is shown being removed from the club at 1:25:30 and the CCTV record shows that at that time Webster had been in the restroom for 2 minutes and 23 seconds. As stated earlier, B described the removal of Boden as having taken place prior to Webster striking the appellant.

24. Michael Omar Samuels, a security guard in the club, described seeing the appellant in the restroom and noticing that he had a cut above his eye. The appellant was washing his face and there appeared to have been an argument in the restroom. The witness could not say for sure who was involved in the argument. He saw Webster, as the trial judge said in his judgment [198], "pointing inside towards the back of the bathroom – and thus towards Anglin- in an angry manner (the witness indicating)." The judge went on to describe [199] how, "'The witness intervened and with the assistance of his colleague DC, managed to extract Carlo Webster from the restroom. The crowd, including Devon Anglin, followed from inside the restroom and as the witness was speaking with DC inside the restroom…he heard two shots fired".

25.Witness E said that the gunman left, with a gun in his hand, through an exit beside the main entrance which is not the exit door described by witness B and at a different side of the building. It is confirmed by the CCTV footage that he left through the exit described by E.

26.In his judgment the trial judge considered the inconsistencies in the evidence. Witness E impressed him

throughout as seeking to be truthful. He attributed the failure on the part of the witness to mention the man in the striped shirt in the incident outside the restroom room to inadvertence, that could well have been due to being unsettled and afraid because of the frightening experience of events on the night of the 9 and 10 September 2009.

27.Witness B impressed the trial judge also as being a witness of truth with no motive to implicate the appellant falsely. When observing the fight between Chadwick Boden and the appellant and later Carlos Webster the witness had no reason to be fearful for his or her own personal safety. The witness was not aware that there was about to be a shooting. Later the witness moved to lounge 1 which has a raised floor and is open to the rest of the public area of the club. There the witness was dancing and the trial judge concluded that it was only logical to think could not “have kept a steadfast eye throughout upon Carlo Webster”. He noted that witness B described seeing Webster standing outside the restroom for a period of about two minutes after the appellant entered it, and that this is almost exactly the same length of time as elapsed between Webster leaving the restroom and the first shot being fired. He concluded that the failure on the part of the witness to account for the five minutes that Webster was either at or in the restroom could hardly suggest that the witness was unreliable. It was accepted by the Crown that other evidence demonstrated that witness B was wrong in describing the door through which the appellant exited the club. Taking into account the atmosphere that prevailed in the club after the shooting and the panicked reaction of the crowd, as seen on the CCTV recording, the judge concluded that the witness must have been mistaken as to the identity of the person who exited through that particular door.

28.Although there were these inconsistencies as to some of the events of that evening when it came to the shooting the evidence of witness B was clear. The witness knew the appellant and the description the witness gave as to the number of shots fired is confirmed by the bullets and cases recovered. The sequence of the shots and the attitude of the shooter was confirmed by the evidence of the pathologist. The trial judge concluded “only a witness who actually saw the shooting could have described it in such detail.”

29.There is no misdirection in the detailed judgment of the Chief Justice nor did he fail to have regard to any relevant factor when assessing the quality of the evidence. He had the advantage, as is often said but is nonetheless important, of both seeing and hearing the witnesses, unlike this court which must rely on a transcript of their evidence. We are satisfied that he was justified in concluding that the evidence was sufficiently reliable for him to hold to the requisite standard of proof that the appellant fired the shots that killed Carlo Webster and injured Christopher Solomon

The Criminal Evidence (Witness Anonymity) Law, 2010

30.In *Al-Khawaja and Tahery v United Kingdom* (2012) 54 EHRR 807, the Grand Chamber held that a conviction based on ‘sole or decisive’ hearsay evidence would not necessarily lead to a violation of article 6 of the European Convention on Human Rights. The Court observed that in those cases, it was not concerned with testimony given at trial by witnesses whose identity was concealed from the accused (anonymous testimony). However, it went on to say that while the problems raised by anonymous and absent witnesses are not identical, the two situations are not different in principle, since, as the

Supreme Court has acknowledged, each results in a potential disadvantage for the defendant.

31.The Grand Chamber said that the underlying principle is that the defendant in a criminal trial should have an effective opportunity to challenge the evidence against him. This principle requires not merely that a defendant should know the identity of his accusers so that he is in a position to challenge their probity and credibility but that he should be able to test the truthfulness and reliability of their evidence, by having them orally examined in his presence, either at the time the witness was making the statement or at some later stage of the proceedings. The Court concluded (at para. 147):

> "…where a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time where a conviction is based solely or decisively on the evidence of absent witnesses, the Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales, to use the words of Lord Mance in *R. v. Davis* (see paragraph 50 above), and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counterbalancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case".

32.The conditions for making a witness anonymity order are contained in section 13 of the Criminal Evidence (Witness Anonymity) Law 2010 and the relevant considerations to which the court must have regard in deciding if these conditions are met are found in section 14. They are almost identical in terms to those contained in sections 88 and 89 of the Coroners and Justice Act 2009 (which re-enacts, with some modifications, the Criminal Evidence (Witness Anonymity) Act 2008).

33.The Act of 2008 was passed following the decision of the House of Lords in *R v Davis* [2008] AC 1128. In *Regina v Mayers* [2009] 1W.L.R. 1915 at para.[5] Lord Judge C.J. said of the change brought about by the legislation:

> "Notwithstanding the abolition of the common law rules, it is abundantly clear from the provisions of the Act as a whole that, save in the exceptional circumstances permitted by the Act, the ancient principle that the defendant is entitled to know the identity of witnesses who incriminate him is maintained."

34.Lord Judge went on to provide guidance on the application of the 2008 Act making it clear that the three conditions for making an order must be satisfied to the highest standard of proof and that probability is insufficient. In *The Queen v Roger Bush, Jose Sanchez and Robert Crawford* CICA Nos. 17 and 18, 2010 this court said that where a witness anonymity order was sought in this jurisdiction the guidance given by Lord Judge in *Mayers* is to be adopted.

35.With the trial in prospect Justice Quin made the witness anonymity orders and set out his reasons in a ruling of 31 August 2011. Having referred to the guidance in *Mayers* he went on to hold that each of the conditions for making an order

had been satisfied. The judge found that the importance of the testimony of both B and E was such that it was clearly in the interest of justice that they should testify and, furthermore, that they would not do so if their identity were to be revealed. The person who fired the shots, in the presence of a large number of people, did not conceal his identity and this together with the reputation of the appellant and his associates, based on the investigations of the police and disclosed material, satisfied the judge that it was reasonable for the witnesses to believe that testifying could lead to serious injury or death and the threat to their safety was real. He rejected the alternative of relocating the witnesses as impractical. The issue that the judge regarded as the appellant's primary and most serious objection to the witnesses being granted anonymity, was whether the measures that were proposed would be consistent with a fair trial. He was satisfied that despite the witnesses being given anonymity this could be achieved. In making the order the judge was aware of inconsistencies in the evidence of both witnesses but he said that there would be a full opportunity to examine the circumstances in which they made their observations.

36.Witness B was the only witness who named the appellant as the person who shot the deceased. In the ruling the judge referred to the concern, on the part of the defence, that Witness B provided what it said was the sole and decisive evidence against the appellant. This is a consideration to which a court is required to have regard under section 14(2) (c) of the Criminal Evidence (Witness Anonymity) Law, 2010. In his ruling the judge referred to the observation of Lord Phillips of Worth Matravers in *R v Horncastle and another* [2010] 2 AC 373 at para.[56]:

> "Thus Parliament has decreed that the question of whether evidence is or is likely to be sole or decisive is

> relevant to the question of whether the court should permit it to be given anonymously but there is no mandatory rule prohibiting the admission of such evidence."

37.As Lord Judge said in R v *Mayers* para. [24]:

> "It follows that the court should also examine whether the anonymous evidence is supported extraneously, or whether there are a number of anonymous witnesses who incriminate the defendant… as a matter of common sense, the more facts independent of the witness, which tend to support him, the safer it would be to admit the evidence.

38.In the course of his review of the evidence Justice Quin referred to the evidence of witness B as being corroborated by other evidence including the CCTV and also that of witness E.

39.On the hearing of the appeal it was submitted on behalf of the prosecution that the evidence of E and of Mr Fredericks would have been sufficient to prove the case. The witnesses B and E supported each other and since they did not know each other and had not seen the CCTV when they made statements to the police, there was no opportunity for them to have conspired.

40..This was not a case such as *The Queen v Bush* where the witness Cruise had previous convictions or *The Queen v Aston Bola* (unreported: 18 June 2003) where there was a single witness with a dubious background. It is apparent from his ruling that Justice Quin took proper account of all relevant matters as required by the legislation and that he followed the guidance of Lord Judge C.J. in *Mayers* when making the orders of 31 August 2011.

41.The trial judge as required, by section 17(1) of the Law, kept the question of anonymity under review throughout the trial. At the conclusion of the case for the prosecution an application was made on behalf of the appellant for the witness anonymity orders to be discharged. The application was made on the basis that there had been a material change of circumstances as the “reliability and credibility of the witnesses had been so glaringly brought into doubt that the appellant must now be regarded as entitled to know the identity of his accusers.” This was said to be necessary in order to explore the concern that the witnesses may be lying against the appellant and have a motive for inculpating him.

42.The prosecution, while accepting that there were inconsistencies or contradictions in the evidence of the witnesses both in their own evidence and between their own evidence and other factual evidence, submitted that at their highest these went to the reliability of the witnesses and not to their credibility. It was credibility and not reliability that would have raised a concern that they were deliberately lying.

43. The trial judge took account of the background circumstances of each witness and was satisfied that neither of them had a motive to lie in order to inculpate the appellant. He did not regard the inconsistencies or contradictions in the evidence as leading him to conclude that they had lied. He was satisfied that a fair trial remained achievable without the need for the identity of the witnesses to be disclosed.

44. Although this court is satisfied that the judge was entitled to conclude on the evidence before him that the appellant was the person who fired the shots in the night club it must be further satisfied that this conclusion was reached after a fair trial. What matters in the present context is the overall fairness of the

proceedings. As Lord Bingham of Cornhill said in *Grant v The Queen* [2007] 1 AC 1 at para. [17(2)], where the unsworn evidence of an absent witness was admitted:

> "While, therefore, the Strasbourg jurisprudence very strongly favours the calling of live witnesses, available for cross-examination by the defence, the focus of its inquiry in any given case is not on whether there has been a deviation from the strict letter of article 6(3) but on whether any deviation there may have been has operated unfairly to the defendant in the context of the proceedings as a whole

45. There is nothing to suggest, in such of the detailed background information about the witnesses as was not disclosed to the defence, that either of them had any cause to give false evidence against the appellant. It is beyond dispute that they were both in the club at the material time as was the appellant and this is all recorded in the CCTV footage. It was therefore the reliability of B and E as to what they had seen that required to be tested. As the trial judge said in his ruling on the anonymity orders, this was carried out by "an effective cross-examination of both witnesses as to the view that they had of the events that they described and whether either of them had been tainted or contaminated by rumour, suggestion or discussion". The Judge asked himself the correct questions and this court has no reason to differ from the conclusions that he reached. It is satisfied that the appellant was able to test the reliability of the witness and that he received a fair trial.

Attempted murder

46. It is an unusual feature, in this case, that the bullet which wounded Christopher Solomon had passed through Carlos Webster. The appellant appeals against his conviction for the

attempted murder of Christopher Solomon on the ground that the conviction is wrong in law.

47. It was accepted that the person who fired the bullet that passed through Webster and went on to wound Christopher Solomon, must have intended to kill Webster.

48. The Chief Justice said at para.[302] of his judgment:

> "I am satisfied so that I am sure that Christopher Solomon was shot during the shooting of Carlo Webster by the defendant, the defendant thereby attempting to murder him being reckless as to whether, but foreseeing none the less, that Solomon could be shot. I convict the defendant for the offence of the attempted murder of Christopher Solomon, accordingly."

49. Counsel for the appellant submitted that the conviction was wrong in law. The relevant question, it is said, is whether the person who fired the shot was attempting to kill Solomon. The fact that he intended to kill Webster is no evidence that he was attempting, also, to kill Solomon. Recklessness does not arise. Further, if a person who is attempting to kill A, but not attempting to kill B, causes injury to B, he may be guilty of wounding B;. But, by firing the shot he does not recklessly attempt to kill B.

50. The Crown submits that the true analysis is turns on the doctrine of "transferred malice". The Court was referred to *The Queen v Latimer* (1886) 17 QBD 359. In that case the defendant, in striking at a man with his belt, struck and injured a woman standing beside him. The Court for Crown Cases reserved upheld the conviction. Lord Coleridge, C.J. said:

> "We are of opinion that this conviction must be sustained. It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured, because the offender is doing an unlawful act, and has that which the judges call general malice, and that is enough."

51. The doctrine of transferred malice was examined by the House of Lords in *Attorney- General's Reference (No 3 of 1994)* [1998] AC 245. Lord Mustill expressed the doctrine in these words(at p.253):

> "If the defendant does an act with the intention of causing a particular kind of harm to B, and unintentionally does that kind of harm to V, then the intent to harm B may be added to the harm actually done to V in deciding whether the defendant has committed a crime towards V."

He went on to say that the doctrine was "one that is too firmly entrenched to be discarded"; although (at p 261) he expressed agreement with Dr. Glanville Williams statement (*Criminal Law: The General Part*, 2nd ed. (1961), p184) that the doctrine is "rather an arbitrary exception to general principles".. He said this:

> "The effect of transferred malice, as I understand it, is that the intended victim and the actual victim are treated as if they were one, so that what was intended to happen to the first person (but did not happen) is added to what actually did happen to the second person (but was not intended to happen), with the result that what was intended and what happened are married to make a notionally intended and actually

> consummated crime. The cases are treated as if the actual victim had been the intended victim from the start. To make any sense of this process there must, as it seems to me, be some compatibility between the original intention and the actual occurrence, and this is, indeed, what one finds in the cases."

And that:

> "Like many of its kind this [doctrine] is useful enough to yield rough justice, in particular cases, and it can sensibly be retained notwithstanding its lack of any sound intellectual basis.".

52. In the instant case the gun was aimed and fired at Webster with the intent to kill him. Adopting the doctrine of transferred malice it can be said that, in relation to Solomon the *mens rea* and *actus reus* of the offence of attempted murder were both present. The fact that Solomon, who was standing nearby, was an unintended victim of the crime is irrelevant. We do not understand it to be disputed on behalf of the appellant that, if Solomon had been killed, the person who fired the shot would have been guilty of his murder. Accordingly, but with some hesitation, we consider that the trial judge was correct to hold the appellant guilty of the attempted murder of Solomon.

53. For these reasons we affirmed the convictions of the appellant on each of the three counts and dismissed the appeal, being satisfied that they are neither unsafe nor unsatisfactory and that there has been no wrong decision on a question of law.

Chadwick P

Mottley JA

Campbell JA