IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CRIMINAL APPEAL No. 6 OF 2014
IND 60/10
C#04772/10

Before :

HON ELLIOTT MOTTLEY, JA
RT HON SIR BERNARD RIX, JA
HON SIR GEORGE NEWMAN, JA

Between :

RAZIEL OMAR JEFFERS **Appellant**

- and –

REGINA **Respondent**

- -
- -

Mr Brian O'Neill QC instructed by Fiona Robertson of Samson & McGrath appeared for the Appellant and Mr Andrew Radcliffe QC instructed by Tricia Hutchinson appeared for the Respondent.

Hearing dates: 7 and 8 May 2015
Judgment delivered: 24 July 2015

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JUDGMENT

Hon Sir George Newman, JA

1. On 3 April 2014, following a trial by the Honourable Justice Swift and a jury, the Appellant, Raziel Omar Jeffers, was convicted by the jury of the murder of Damion Ming. Jeffers was sentenced to life imprisonment.

2. On 11 April 2014 a Notice of Appeal was filed on his behalf against conviction and sentence. The grounds, which have been fully developed in Perfected Grounds and a Skeleton Argument fall under three general headings:

   (1) The judge failed to give a balanced summing up.

   (2) The judge misdirected the jury on a number of matters.

   (3) The judge erred in speculating on important matters and thereby invited the jury to reach conclusions based on speculation.

   A fourth ground, alleging the wrongful admission of bad character evidence, was withdrawn before the hearing in this Court.

   However, a further ground was put before this Court by way of amendment alleging that there had been material non-disclosure by the Crown.

3. Before turning to consider the detailed submissions which have been made, I shall set out a summary of the salient features of the case and, where convenient, their place in the argument on this appeal.

4. During the course of the afternoon and into the evening of 25 March 2010, Damion Ming, in company with others, was replacing the engine of a boat, which was mounted on a trailer in the yard of 177 Birch Tree Hill Road, West Bay. Photographs taken by the police of the scene were provided to the jury.

The detail shown is material to some of the issues which have been raised in this court.

5. Shortly after 9.30 pm, a man armed with a hand gun emerged from the rear of No. 177 and, at close range, fired 8 or 9 shots at Damion Ming. Two shots, among a number which were fired, penetrated him and he died shortly afterwards at the scene. The evidence as to the precise order in which the two shots which hit him were fired and the judge's summing up on the issue have been the subject of controversy in this Court.

6. There was evidence that the assailant left the scene on a bicycle. There was evidence of a vehicle being seen in the road nearby and two men being seen in the immediate vicinity shortly before and after the murder. There was no evidence identifying the men. The significance of the evidence of the man on a bicycle and the car and the two men have been the subject of argument and have given rise to a ground of appeal in connection with a specific part of the summing up.

7. The prosecution alleged that the Appellant was the murderer. The Appellant denied being at the scene and the suggestion was made on his behalf that the two men at the scene could have been the killers. In support of the allegation that it was the Appellant who killed Damion Ming a considerable volume of evidence and material was placed before the jury. It included exhibit JW/13, namely several pages comprising a schedule of 1,058 pieces of telephone data attributed to two telephones belonging to the Appellant, a telephone attributed to Meagan Martinez, the principal witness for the prosecution, and a further telephone attributed to David Lance Barnett, another witness in the case.

8. The Crown alleged that the Appellant knew Ming and had a motive to kill him or cause him serious bodily injury. For some time prior to January 2010, when they separated, the Appellant and the principal prosecution witness in the case, Meagan Martinez (for convenience, I will refer to her as "Meagan"), had been in a turbulent relationship. A child of the relationship had been born on 24th March 2009. Shortly after the separation, Meagan began associating with Ming. The Appellant learned of this and it angered him, causing him to see Ming as an enemy. In the first part of March 2010 there was an attempted reconciliation between them whilst they lived together at an address, 134 Fairbanks Road. But there were arguments, the Appellant accusing Meagan of having had a sexual relationship with Ming. The arguments led to a fight between them on the evening of the murder, 25 March 2010. They assaulted each other. Meagan injured the Appellant with a pen. The Appellant left the house and it was alleged later that night, in anger and out of revenge, he shot Ming.

9. The Crown's case was that the movements of the Appellant after he left the house were reliably depicted by the cell site data and telephone calls made by and to him. The weight and reliability of this evidence has been the subject of argument in this court.

10. The Crown relied on the detail in the photographs of the scene of the murder. The album, which this Court has seen, includes photographs of spent shells from a 9mm Luger pistol, and a cell phone (identified as Ming's cell phone) lying on the ground close to the trailer and boat.

11. At the time of the murder one of the men working on the boat was Earl Ebanks, a man in his mid-60s who had lived at No. 177 almost all his life, working from there as a mechanic. The work had gone on in daylight, but by the time of the killing was being carried out under electric light. Earl was inside the boat and Damion Ming was at the rear of the boat by the back of the house.

12. The gunfire was sudden. Earl Ebanks took cover in the boat and when the gunfire ceased, he saw a man moving off down the road on a bicycle and apparently trying to push something into his waistband. There was no identification made of this man. The shots were heard by those inside the house and a call was made to the police. They arrived within minutes. Using a flashlight, one of the policemen saw the motionless body of Ming lying underneath the trailer and boat. He was dead. A number of 9mm shell casings were found. The next day a total of eight were found and a copper jacket was found close to the side of the house. The house was slightly damaged by gunshots. Each of the fired shells had been fired from the same gun.

13. A post mortem was carried out on 27 March 2010. The pathologist concluded that Ming had died of two separate gunshot wounds to the chest, one through the heart, entering by his left nipple, tracking through the left plural cavity, the ventricles, the right lung and passing through the eighth rib, into and then out of his right arm. The other shot was to Ming's back entering through the back of the left shoulder, fracturing a rib and exiting the body at the base of the neck. The wound through the heart was a fatal injury, but would not have immediately incapacitated him.

14. The Crown's evidence disclosed that between the date of the murder and the 10 May 2010 Meagan and the Appellant were involved in a number of incidents including contact between the Appellant and the police which led to the Appellant being arrested on 10 May 2010 for threatening behaviour. He was taken into and held in custody. Out of this circumstance the central evidential foundation for the prosecution's case against the Appellant came into being. The fact that the Appellant was in custody was, the prosecution maintained, important because by a witness statement dated two days later on 12th May 2010 and by her sworn statement to the same effect which given at the preliminary Enquiry on 6 July 2010, Meagan recounted details of conversations with the Appellant and, most importantly, the terms of a confession to the killing which she said the Appellant had made to her. She repeated her account before the jury and she was cross-examined upon it. The confession was to the following effect. At a weekend shortly after the killing, a meeting took place at the Ocean Club between the Appellant and Meagan in the course of which he gave her an account of the killing. The essential admissions to which she spoke can be summarised as follows:

(1) That the Appellant had used a 9mm handgun in the shooting.

(2) That he had been told on 25 March 2010, the day of the murder, by one Johnny Bodden that Ming was repairing a boat at 177 Birch Tree Road. He, the Appellant, then made arrangements to go to the vicinity of 177 Birch Tree Road.

(3) That he went to the area and riding on a bicycle down to the back of No. 177 Birch Tree Road, approached the rear of the house and watched Ming.

(4) That he shot Ming in the shoulder causing him to swing round, that he then shot him in the back and Ming then began to crawl under the boat. That he fired further shots at Ming and then cycled away.

15. The prosecution relied upon the detail and accuracy of this account because their investigations, the post mortem and the ballistics evidence confirmed the account in material respects. Further it was said that the account which had been given was confirmed in highly material respects by pieces of evidence which could not have been known to Meagan unless the details had been provided to her by the killer. There was a suggestion by the Defence that another person could have given this detail to Meagan, namely the witness Tischara. She lived at No. 177 and it was said could have been the person who gave the detail to Meagan.

The Telephone Evidence

16. The prosecution relied on cell site data from the telephones of a number of people including numbers attributed to the Appellant. A detailed schedule of calls was provided to the jury. There was a PowerPoint presentation as well. From this evidence the prosecution drew up a time sequence of the movement of the Appellant's handset and its position on the night of the killing. It is unnecessary at present to recite the detail. If the reliability of the evidence was accepted by the jury it was capable of being relied upon as disclosing the detailed movements of the Appellant during the evening of the murder. The

inferences as to his whereabouts, if drawn, could be taken as confirming the accuracy of parts of Meagan's evidence. If accepted, it showed the Appellant was in contact with Tischara Webster at 177 Birch Tree Hill Road, 10 minutes before the murder, from a location within the section of a cell site covering the area where the murder took place. The phone was used in that area again, immediately after the time of the murder and the phone travelled back down the Island. There have been complaints that the judge misrepresented the evidence and therefore misdirected the jury about the weight which should be attached to it.

The Defence Case

17. The defence was alibi. It was said that the evidence of Meagan was fabricated, borne of malice on her part and because of the rewards given to her under the Witness Protection Scheme. The Defendant gave evidence. He admitted knowing Ming since high school. He denied any animosity existed between them and suggested that Ming was victim of a "tit-for-tat" killing in revenge for a murder of another man. The Appellant gave an account of his movements on the evening of 25 March 2010, leaving 134 Fairbanks in a silver Honda owned and driven by Lance Barnett, in company with Jordan Ebanks. It was his account they travelled to West Bay and it was the Appellant's explanation for being there with them that he simply went along for the ride. He called in to his mother to borrow $25 and then went to 15 Vibes Lane, and he then left the area. This account was consistent with the evidence drawn from the cell site data which was relied upon by the prosecution. The defence also involved, as one would expect, putting the

evidence of the prosecution to proof and identifying its weaknesses. Some of these aspects of the case are at the heart of this appeal.

The Grounds

(1) Complaints about the way the judge summarised the evidence in relation to the order in which the shots were fired.

18. The starting point for the complaint is that there was an absence of direct evidence as to whether it was the first two shots which struck Ming or not, but, it was submitted that nevertheless the judge deliberately summed up as though it was the first two shots which hit him and caused him to take cover under the boat. In the normal course one might wonder why it mattered since two shots injured Ming and caused his death within a very short time. The Appellant's argument in this court is that the judge unfairly and deliberately set out to interpret the evidence so as to bolster the accuracy and reliability of Meagan's evidence and account of the confession made to her by the Appellant. Alternatively, it is said, if not acting deliberately, the judge unfairly strengthened the case against the Appellant.

19. The first reference to be considered is at page 67 of the summing up. We quote the passage relied upon:

> "Murder is defined as follows: a person, who of malice aforethought express or implied, causes the death of another person by an unlawful act or omission is guilty of the offence of murder."

The judge then gave the traditional classic ingredient of "malice aforethought" and went on to add:

> "That's all a bit of a mouthful" and there is no need for me even to go any further than to read out those words to you,

> because in this case there can be no doubt that Damion Ming was murdered by someone. About that there is no question.
>
> You may conclude that he was shot through the heart, and then as he tried fatally wounded to flee his killer, he was shot in the back. However, he was still moving as he crawled under the boat, and his killer may not have been sure whether he had succeeded in shooting him dead. Other shots were therefore fired in an attempt to finish him off. But by then he was probably far enough away and under the boat for his killer to miss as we know the killer, in all likelihood, fired all his shots from a single location, near to where the shell casings were found. Those are matters for you to decide."

Next, this passage:

> "Next, the Crown also rely on inferences to be drawn from the circumstances of the murder itself – in other words, all the details of the case that Miss Martinez could not, they say, possibly have learned other than from the mouth of the killer.
>
> The gun used to kill Damion Ming was a 9mm handgun. Not public knowledge, so how could she know, says the Crown? How could Tischara Webster have known or anyone else unless they saw the cartridge cases and recognised them for what they were, which the Crown says is unlikely and did not happen?
>
> Next that Ming was shot in the shoulder, the left shoulder area and therefore through the heart and was shot in the back, as confirmed by the pathologist, Dr Hyma. The Crown says that the likely order of shots, bearing in mind where he ended up, is likely to be as she related. How could she have known the sequence of events she described would be consistent with those findings? No one could have known until the pathologist reported."

20. The next passage relied upon under this complaint was at page 48, line 20, of the summing up when the judge dealt with the evidence of Earl Ebanks:

> "Earl Ebanks told us that he heard the 8 shots – two one after the other – the heart and the back, you may think, and then six in rapid succession as the killer emptied his magazine at Damion Ming who was no doubt, with a few breaths left to him, in survival mode trying to hide under the boat."

And finally in this respect page 50, line 7:

> "Although the first wound that I have described was fatal, Damion would have been able to walk or crawl for a brief period before he died, and this may explain how Mr Ming was able to end up in the position where he was found clearly trying to hide under the boat.
>
> The reason for describing the bullet wounds as A and B is because the order of the shots cannot be ascertained by medical means. All that can be said is that the description of the shots given by the defendant to Meagan Martinez would be consistent with the findings of the pathologist."

21. The material parts of Meagan's evidence of the terms of the confession were drawn to the attention of the jury in these terms:

> "He then said he had obtained a 9mm handgun (he had prior permission from an unnamed person at Northward) she said, which two men had already collected for him (called Swiss and Hillary) and stored at the home of the Manderson brothers, Captain Joe and Osbert Lane. That's where Lance dropped him. He put on, she said, his Ninja suit, which is a nickname she had given to it apparently. He said he "suited up" was the expression he used, she said, and rode a bicycle to the scene. There he waited by the rear corner of No. 177 until Ming emerged from where the boat was. When he saw the defendant, Ming threw up his hands to cover his face for protection. Then the defendant shot him in the left shoulder – clearly the shot, you may think, the pathologist confirms passed through the heart. The force of the bullet spun him round. He hit the boat so the defendant shot him in the back – again confirmed by the pathologist. Ming fell and crawled under the boat and then, when he was well under, the defendant carried out firing (confirmed by the fire arm evidence and the witnesses at the scene that further shots took place)."

22. The judge, in these passages, undoubtedly drew all the evidence together and presented a clear and coherent narrative but we are not persuaded that in so doing he usurped the function of the jury. It was made clear to the jury that the facts were for them to decide. In order to make the argument and shape it as a ground for complaint counsel was forced to put the point too highly. He was driven to allege that the judge deliberately structured his narrative of the evidence so as to bolster the prosecution and thus, in effect, invited the court

to hold that he had rendered his direction to the jury that the facts were for them well nigh meaningless. Judges in a criminal case are not mere ciphers. They are not bound to follow and recite the emphasis or the format of the cases presented by respective counsel. It is a judge's obligation to draw together all the evidence which has been advanced in a case. This is a vital function. Juries cannot be expected to have full recall from the days over which evidence has been given, nor, where they have recalled it can it be assumed that they will be able to draw it together, examine it and reflect on it coherently without assistance. The judge's drawing together of the case must be balanced. To be balanced it must take account of all the evidence in the case including any account which the defendant himself has given. The judge must not misrepresent the evidence. But a judge's skill in being able to articulate a case, sometimes perhaps with arguably greater clarity than either counsel have achieved, will not be unfair unless it is not supported by the evidence in the case. The judge is entitled to present all the evidence in accordance with such logic and coherence as he believes it can bear so long as the jury understand that they are the judges of fact.

23. We are unable to accept the suggestion of bias, namely that the judge deliberately set out to bolster the prosecution's case or was speculating or misrepresenting the position. He drew the jury's attention to all the evidence which the jury might conclude pointed to the first two shots being fired when Ming was standing and following those shots that he then fell to the ground and crawled under the boat. Apart from the evidence of the pathologist as to the wounds, the circumstances of the killing, which were not really in dispute from any direct evidence, were that the assailant came up on Ming and fired at

point-blank range. On the evidence, Ming was standing near the boat when the attack commenced and at some stage the evidence pointed to him being under the boat. His phone was on the ground in the vicinity of the boat and the spent shells were near the underside of the boat. Injury to the front and then an injury to the back are plainly consistent with them being the first two shots and the spent cases being those which came from bullets which did not find their target because he was under the boat. As the Crown have submitted in their Skeleton Argument, it is very difficult to see how Ming could have received either wound whilst under the boat. The Appellant was not putting forward any positive case to advance in this regard. He could not do so because he said he was not present at the time. Bullet A, described by the pathologist as tracking from front to back, could not have been inflicted whilst Ming was crawling away from the gunman. Bullet B had an upward trajectory, entering his body from behind centrally from just below the neck and exiting at the base of the neck. His head and shoulders would necessarily have been vertical or nearly so at the time. The jury were able to see from the photograph of the boat on the low trailer that an upright position of that nature for anybody underneath it was impossible.

24. The judge did not take over this issue and determine it for the jury; he drew together what, in our judgment, was properly admissible evidence relevant to the question as to the order in which the shots had been fired and he left it to the jury in the classic terms: "*You may think*" or "*You may conclude*". It follows that we reject the submission that the judge deliberately or otherwise tailored the evidence going to the order in which the shots were fired in order to fit it in with Meagan's evidence as to what the Appellant had admitted to

her. We reject the suggestion that the order of shots as related by the judge amounted to speculation. It was, as the judge pointed out, consistent with Meagan's evidence, the pathologist, Earl Ebanks, and the location of the cases. It was not speculation. It provided the jury with a framework which was logical and clear and it was put to them in clear and articulate language. It was not unfair.

(2) The evidence about the bicycle

25. The defence suggested that there was some evidence from a neighbour which pointed to a real possibility that two men seen to be in the yard of a neighbouring property and two men travelling in a white car, which was seen parked somewhere off Swallow Lane shortly after the shots were fired, and two men being seen to run off, could have come to the scene and committed the murder. The police did not pursue this line of enquiry, but in interview put it to the Appellant that he was one of the men in question. At the commencement of the appeal this aspect of the case received what could be described as relatively light treatment by counsel for the Appellant. It received some attention in the Grounds of Appeal but most attention was given to it in Mr O'Neill's reply and then along lines which had not been foreshadowed in the Grounds of Appeal or Skeleton Argument. We shall come to that argument later. For the moment we can set out the argument as it appeared from the Skeleton Argument and such oral argument as there was. The complaint was made that the judge had played down this aspect of the case, namely the evidence about two men being seen in the vicinity of the

killing at or about or shortly before the killing and a car being seen in Swallow Lane.

26. The judge referred the jury in these terms to the way in which the prosecution had handled it:

> "I would remind you, of course, in the course of the police interviews with the defendant conducted on 21st April 2010 (that is the interview when, on his lawyer's advice, he made no comment to the questions asked) the police put to him what is no more than a suggestion based on information that had come into their possession that the defendant had committed the murder in the company of another man and that the two of them had escaped in a car parked in Swallow Lane. That may or may not have been based on what Delvin said. In the same way that questions put in court are not evidence (the answers, of course, are), questions from police officers in interviews are not evidence either.
>
> It is not entirely clear who, apart from Delvin Ebanks, gave statements about two men and who did not. Who was willing to co-operate and who was not. Who said some things but were not committed to writing or who point blank refused to help the police at all."

27. The above direction was impeccable in a case where it must have been obvious to the jury that they had not heard evidence from a number of people who were said to have been at 177 Birch Hill Road and others, who were said , without them being identified ,to be present in the area. It was important that the jury whilst taking the evidence into account did not speculate. No witness was called by the prosecution on this issue, but the defence did call Delvin Ebanks. Mr Wolkind QC, who appeared for the defendant, took the witness to his statement:

> "Question: What was the statement about? What sort of events was it about?
>
> Answer: Do you mean concerning about the two guys walking across the yard?

Question: Exactly.

Answer: All right.

Question: Thank you. Thank you for saying that when you say across the yard, were they going from your home towards 177 or away?

Answer: Which one's 177. It is my yard or the next yard.

The court intervened: Can you just say that again for my benefit?

Witness: Which one is 177, my yard or the next yard.

Mr Wolkind: Its actually the one where something happened. Not yours, where something happened.

Answer: All right. Now I understand where you are talking about.

Question: And actually there is an admission from the gentleman here so we can work out direction but you saw two men. What did they do?

Answer: They just walked straight across my yard and that's all.

Question: Straight across? What were they dressed in, best as you can remember?

Answer: Dark clothes.

Question: Dark clothes. Thank you. How long after they walked across your yard was the next thing that happened that you told the police about?

Answer: I heard three gun shots.

Question: Yes. How long after they walked across did you hear those gun shots?

Answer: About 5 minutes after.

Question: All right. And how many shots you say you heard, I'm sorry?

Answer: I heard, first three?

Question: First, three? Thank you and thinking back then what did they sound like? What did you think they were then?

Answer: I thought it was fire rockets."

And then, a little later, he said he heard about six more shots.

28. In summary, the witness then went on to say that after he had heard the shots he called the police. He was cross-examined and his previous witness statement was put to him as being inconsistent with his evidence. The judge took this witness's evidence as an example of a situation which can arise where a witness has his statement put to him on the basis that his evidence in court is inconsistent with his previous written statement. The fact that the judge chose this witness was said to be a deliberate and unfair tactic on the part of the judge because he was an important witness for the case of the defence and the judge was highlighting and emphasising that he was a witness who had made an inconsistent statement in order to undermine the defence. It is said the judge almost suggested or could be taken to have suggested that he was the only witness in the case to have made an inconsistent statement.

29. The Crown submitted that the judge was perfectly correct to identify Delvin Ebanks as an example of someone whose evidence was contradicted by his police statement. It submitted that he was not unfairly singled out as the only witness in the case to have given inconsistent evidence in court. The judge, it was pointed out, drew attention to the inconsistency in Meagan's statement dated 12 May 2010 and her evidence in court as to the date of the confession, also to her failure to tell the police that Tischara had been accusing the Appellant of the murder. The judge also drew attention to the defence argument that she had been caught out by the phone records in a series of lies. Mr O'Neill drew our attention to detailed points which he said arose from the evidence including the cell site data. He submitted, no doubt as it had been submitted below, that Meagan's account was unreliable. In so far as it was suggested, but not particularly strongly argued in this court, that Delvin

Ebank's evidence was not marked by inconsistencies, the Crown have submitted otherwise. His evidence at the trial was to the effect that two men walked across his yard. He heard three gun shots and then six more which sounded a little different. Next he heard two footsteps running across his back yard and saw two guys running across Swallow Lane, heard two car doors slam and a car drive off. It was, as he recollected, a light coloured car that could have been silver. His witness statement made before the trial was put to him in cross-examination and, as a result of the cross-examination, he agreed and disagreed about the extent of his memory and whether or not his memory would have been better at the time of the statement. In particular, he agreed that in his witness statement he had made no reference to seeing two men run back but had only heard footsteps.

30. The quality and reliability of the evidence given by Delvin Ebanks, which it was for the jury to assess, was commented upon by the judge. The Appellant relies upon the judge's statement that he was "a somewhat dogmatic witness" as an example of the judge attempting to undermine the defence. The criticism is that the judge was describing him as "dogmatic" in order to lead the jury to conclude that he was a stubborn witness. The judge could have used the phrase "You may think, members of the jury, that he was a somewhat dogmatic witness" and another judge may have felt that it was unnecessary to express a view at all. One can be confident that a Cayman Island jury were well able to consider the demeanour of a Caymanian and knew well that their view of him was a matter for them. It must have been obvious to the jury that this was the judge expressing a perception of the witness's demeanour whose reliability was matter for them to decide. It is impossible in this court to

conclude that by using the word "dogmatic" the judge was either unfairly criticising the witness or saving the witness from being criticised in the minds of the jury or being criticised by the jury for the way in which he gave his evidence. Comments such as this generally reflect the atmosphere of a particular moment which prevailed at the trial. We are unable to conclude that the judge's treatment of Delvin Ebank's evidence has rendered the trial unfair.

31. We return to the issue about the two men. As we indicated earlier, counsel for the Appellant raised a fresh line of attack upon the judge's treatment of the evidence in connection with the two men. The passage in the summing up, at page 52 commencing at line 6, which was subjected to particular argument is as follows:

> "The two men may have been connected to the killer or they may not. The evidence is capable of bearing either interpretation. It is possible they just happened to be in the area or the two men in the white or silver car may have been the accomplices of the defendant waiting to assist if the killing did not go as planned or, the defence would suggest, they may themselves have been the killers – so that Earl Ebanks has either made up a story about a man on a bike for reasons not entirely clear and he is trying to protect the real killers, whose identity he has deliberately concealed. You saw Earl's reaction to that suggestion.
>
> The Crown says that this is the defence clutching at straws or indeed using the presence near the murder scene of the defendant's backup team as an attempt to distract you from the truth. You give that evidence such weight as you consider it deserves.
>
> I would remind you, of course, in the course of the police interviews with the defendant (when, on his lawyer's advice, he made no comment to the questions asked) the police put to him what is no more than a suggestion based on information that had come into their possession that the defendant had committed the murder in the company of another man and that

the two of them had escaped in a car parked in Swallow Lane. That may or may not have been based on what Delvin said."

32. The passage followed directly upon the judge's summary to the jury of the evidence of Delvin Ebanks and the inconsistencies between his evidence in court and his witness statement. Mr O'Neill QC put the argument in this way. He submitted that Mr Justice Swift had gone too far. He submitted that the judge had placed before the jury an alternative way whereby a conviction could be secured which had never been the prosecution's case. Under questioning from the court as to what he meant by the submission, he ultimately accepted that what he was putting forward was not that the judge had suggested an alternative route to conviction in the legal sense but " in a factual sense." He submitted that by the passage set out above the judge advanced a new factual case theory. Mr O'Neill may have hoped that the use by the judge of the word "accomplices " could support a conclusion by this court that the judge had acted contrary to established principle and gone so close to advancing a legal route to conviction which had not been raised by the prosecution that the conviction should be regarded as being unsafe. It is clear on established principle that it is unfair for a judge to advance a legal route to conviction which has not been raised in the case. If it occurs it is a ground upon which the Court of Appeal will normally intervene. As the argument was developed it became clear that counsel was suggesting that the factual sense in which the judge deviated from the evidence in the case was by suggesting that: "The two men may have been the accomplices of the defendant waiting to assist if the killing did not go as planned…". Mr O'Neill submitted that the judge was suggesting that the two men in Delvin Ebank's yard could have been the two men, Lance Barnett and Jordan Ebanks. By this suggestion it

was submitted, the judge had taken away the defence line of argument that the two men may have been responsible for the murder and put the case on the basis that they were implicated in assisting him in some way. In our judgment the passage cannot bear that interpretation. The judge carefully listed the interpretations which could be put upon the evidence. He reminded the jury that the defence had suggested they were the killers and he reminded the jury of the questions put to the appellant in interview. At the end of the summing up Mr Wolkind QC raised this part of the judge's summary in the presence of the jury. He said: "The idea that two men in the car raise support, in effect, for the man on a bicycle is not what we've heard even from the prosecution before, but it remains a comment which the jury can ignore if they wish." The judge replied "Exactly".

33. We are unable to accept that there is any force in this line of attack. Mr Radcliffe cross-examined the Appellant about his movements on the evening of the murder. The Appellant stated that he had had a serious argument with Meagan which had involved violence and that he had left her to join company with Lance Barnett and Jordan Ebanks. Mr Radcliffe asked him (transcript page 134, line18):

> "Question: "You left, didn't you, because Lance Barnett and Jordan Ebanks picked you up in Lance's car, is that right?
>
> Answer: Yes sir.
>
> Question: What sort of car is it?
>
> Answer: A silver Honda Sabre.
>
> Question: What sort of colour does it look like in the dark?
>
> Answer: I am not too sure. Like probably dark grey or something.

Question: Whiteish. Could be confused, couldn't it?

Answer: I don't think so.

Question: You don't think that a silver coloured car in the dark might be confused for white?

Answer: No, sir."

A little later in cross-examination, having confirmed that it was the defendant's case that he could not have committed the murder because he was present in the company of Lance and Jordan Ebanks all evening, Mr Radcliffe asked him: "So on the one hand, one way of looking at this is that you say you could not have shot Ming because you were with them all night. But the other way of looking of looking at it is if you did shoot Ming then they would have been party to this because they were your drivers. Yes? Two different ways of looking at the same thing." The defendant answered: "I guess you could look at it in that way." Mr Wolkind's comment to the jury that the point had not been heard "even from the prosecution" was inaccurate, but more than that the judge had confirmed that the jury could ignore it if they wished.

34. The prosecution's case was that these two men had brought the Appellant to the vicinity of No. 177 Birch Tree Hill Rise, and the prosecution's case was that when he was in the vicinity of that address he used a bicycle to ride to the address and to carry out the shooting in the way which other evidence in the case suggested the shooting took place. The Appellant's case did not contradict the evidence which came from the cell site data that he was somewhere not too far away from 177 Birch Tree Hill Rise. His own evidence placed him in the company of the other two men. His case was that he was at an address not too far distant and that was his alibi address. In our judgment, it was always open to the suggestion by the prosecution and indeed the

suggestion was expressly put by the police and pursued to the extent that it was proper for the prosecution to pursue it in cross-examination, that he was in the company of the two men who were named and that they were the ones who had brought the Appellant to the vicinity and, although he had on the prosecution's case come to the scene on a bicycle, were nevertheless in a position, had they so wished, to be complicit in the murder and to assist him by being in the vicinity. Just as the evidence permitted the prosecution to leave the jury to consider the evidence of Delvin Ebanks as pointing to two men who were not the killers but whose presence could be explained as being persons assisting the Appellant, so too it was open to the Appellant and he took the opportunity of so suggesting through counsel, that it was the two men who had in fact committed the murder. This part of the case is noteworthy for the lack of clear evidence on the issue and it was for the jury to make what they chose to make of this part of the case. It frequently occurs in criminal cases that there are strands of evidence which are essentially too fragile to lead to a firm conclusion on their own. They are relevant only so far as other reliable evidence in the case is available on the same topic. The judge was entitled to make clear the different ways in which the evidence about the two men could be interpreted in the light of other evidence. He did not advance a new way of considering the factual evidence. He articulated obvious ways in which the evidence could be viewed and drew attention to the ambiguities which surrounded it.

The judge's erroneous summary of the phone evidence

35. The terms of the alleged confession made to Meagan included a reference to the fact that Johnny Bodden had given him the information that Ming was working on the boat at the address at 177 Birch Tree Hill Road. Complaint is made that the judge misdirected the jury by suggesting that the telephone evidence was consistent with this. All the cell site data (exhibit JW/13) was before the jury. It would have been gone through by both counsel. It was addressed by the judge in some detail and the jury had the advantage of being able to go through the very clearly presented series of columns in relation to each piece of data. The total number was 1,058. In addition to the schedule, there had been a PowerPoint presentation and witness evidence from Joanne Woods. Mr O'Neill attempted to rehearse a series of jury points in this court. The point for this court was whether the cell site data could sustain the conclusions which the jury were invited to reach. It was possible for the jury, if they were prepared to accept the reliability of the cell site data, to plot the Appellant's movements that evening and night from West Bay to his home at 134 Fairbanks Road where he arrived at 7.00 pm. The cell site evidence also confirmed that he was in the company of Lance Barnett and that they were connected in a pattern of travel going back up the island and arriving in West Bay, namely the vicinity where the murder took place, at about 21:00 hours. The prosecution suggested that the Appellant needed to confirm where Damion Ming was and that he called Johnny Boden at 21:16 hours which locates the appellant in the sector of the cell site covering the address where he admitted to Megan he collected the gun. It also covers the crime scene at 177 Birch Tree Hill Road. The call went to voicemail and 17 seconds later the Appellant rang

another number associated with Johnny Bodden's girlfriend. Joanne Woods had stated that there was no two-way communication or contact between the Appellant and Johnny Bodden that day, but the prosecution's case was that the Appellant spoke to Johnny Boden's girlfriend who was present at 177 Birch Tree Hill Road at the time. Both Lance Barnett and the Appellant called that number respectively at 22:00 hours and 23:00 hours. The cell site evidence showed that at 21:33 hours, 10 minutes before the murder, the Appellant called Travis Bodden who lived and who was also at the time present at 177 Birch Tree Hill Road. It was not disputed by the Appellant that at that time he phoned Travis Bodden. He called Travis Bodden again at 21:56 hours, namely 23 minutes after the previous call and those calls being on each side of the murder.

36. Mr O'Neill spent some time in reply seeking the counteract the cogency of the weight of the telephone data by concentrating upon an account given by Earl Ebanks that Earl Ebanks overheard someone say on the telephone "he has already called to find out if he was dead". This was said to be Travis Bodden ringing through to 177 Birch Tree Hill Road and recounting what must have been a call from the Appellant. Mr O'Neill endeavoured by reference to the cell site data and the evidence in the case as to when the police arrived to argue in this court that the evidence was in some way fatally flawed and sufficiently misrepresented to justify the Court of Appeal intervening. All these arguments we have no doubt were ventilated so far as they could possibly be ventilated before the jury. The response of the defence to the evidence from the prosecution must have been directed and we are satisfied was directed towards finding loopholes and weaknesses in the way in which

the prosecution deployed the factual material. It is not for this court to speculate as to what may or may not have impressed the jury about this voluminous evidence. It is beyond argument that the cell phone evidence associated the Appellant as he made and received numerous calls whilst he travelled up the island, arriving less than half an hour before the shooting in the exact sector of the cell site that covered first where he told Meagan the gun to be used was hidden and secondly the location of the murder itself. There could be no dispute about that. There could be no dispute that ten minutes before the murder his cell phone called the phone of the girlfriend of Travis Bodden who lived at 177 Birch Tree Hill Road. Both of them were present at the address where Ming was at that time working. The cell site evidence showed that after the time when the murder took place, the Appellant's phone can be seen leaving the immediate area and then within 20 minutes beginning a journey back down the island when his phone was not used again. It was 15 hours later, but using a different phone and a different handset, that his position and usage could be traced.

Wrongful speculation

37. Under this heading it had originally been argued that the judge's survey of the evidence in connection with the two men involved a speculation of a case which had not been raised.

38. It was suggested that the judge also speculated on the telephone evidence. In this regard, complaint was made that the judge had failed to mention the defence suggestion that Tischara Webster could have given details of the murder to Meagan. There was no dispute on the evidence that Tischara

Webster's cell phone was one which was also used by Travis Bodden. The Appellant himself admitted that he called Travis Bodden at 21:33 hours on that telephone. Whilst there was evidence that there were other people present at 177 Birch Tree Hill Road at the time the murder took place outside, I have no doubt the jury would have had in mind the extent to which Tischara Webster might have been able to give an account of what took place. They would have been speculating if they had taken that part of their deliberations too far and there was sufficient direct evidence to point to the detail provided in the confession relied upon by the prosecution as being from its content available only from the killer himself.

Burden of Proof

39. Mr O'Neill submitted that the judge had misdirected the jury in respect of the burden of proof. One passage in the summing up was relied upon.

> "In the end, the question you will ask yourselves will be whether all the evidence you have heard taken as a whole, makes you sure of guilt, and if you accept the conclusions the Crown ask you to reach in respect of the circumstantial evidence, that is the verdict that you may be driven to reach. If you don't you may be driven to reach a different verdict."

The complaint is that it was wrong that the jury should be told that if the evidence as a whole does not make them sure of guilt they "may" reach a different verdict. It is submitted that they should have been told in clear terms that they must find the Appellant not guilty. The argument as deployed emphasised the use of the word "may" as being a misdirection on the burden of proof and that the reference to a "different verdict", rather than "not guilty", as simply confusing. In support of this a further part of the summing up was relied upon as compounding this error where the judge said: "You must be

sure of guilt before you should convict." It is said in relation to that that this choice of words is potentially confusing in that it directs the jury that they should convict as opposed to saying that they "can" convict.

40. The judge, when making these observations and giving these directions, was not giving directions on the burden and standard of proof. He had already done that in the course of his summing up on more than one occasion when it was appropriate to give clear and specific directions to the jury on those fundamental aspects of a criminal prosecution. The section of the summing up and the observations which were made by the judge and relied upon by counsel in this court were part and parcel of a lengthy direction in relation to circumstantial evidence and the proper approach to be taken to circumstantial evidence. This was an impeccable direction following the JSB specimen direction in the Crown Court Bench Book (see page 37 of the Crown Court Bench Book). The judge tailored it to the facts of the case. It is unrealistic to suggest that by the use of the word "may" the judge was misdirecting the jury. Having directed them correctly on circumstantial evidence it was legitimate for the judge to express the optional choice that the jury had according to the conclusion they reached by the use of the word "may". We agree that, so far as the phrase "a different verdict" was employed as opposed to "not guilty", the judge did not spell out explicitly the verdict which they would be bound then to bring in. But there was no other verdict which the jury could bring in other than not guilty if they were not satisfied, so that they were sure of guilt. Again, the later reference "You must be sure of guilt before you should convict" is a proper direction. It is sometimes employed by judges because the word "should " conveys a sense of obligation and they wish to heighten the

protection of the law given to a defendant, by stating that he should not be convicted unless the jury are satisfied of guilt. In support of the contention that it was an unbalanced and unfair summing up, it was submitted that the judge had made a series of comments which were apparently or could be seen to be directed towards undermining the credibility of the defence witnesses. It was said that they were comments which were not justified. Delvin Ebanks is taken as an example and the judge's description of him as a "dogmatic witness". We have indicated earlier in this judgment that we find the criticism made of the judge for having used the description "dogmatic" as groundless. A witness can be dogmatically right as well as dogmatically wrong, but it cannot be said to be immaterial for a jury, when considering whether they find his evidence reliable, that he had been dogmatic in his expression of his account. For the reasons that we have set out above, in our judgment, there were sufficient grounds for the jury to conclude, in any event, that Delvin Ebanks was an unreliable witness, including the content of his previous written statement.

Bonnie Anglin

41. Bonnie Anglin was called by the defence to support the allegation that Meagan had made up the confession. The evidence of Bonnie Anglin was that Meagan had made a threat against the defendant which had been uttered to Bonnie Anglin "[T]o put the defendant away for life". Bonnie Anglin failed to tell the police that Meagan had an unnamed friend in the area known as Prospect which might explain the cell site evidence that was otherwise consistent with Meagan having been at her apartment at the Ocean Club. The judge was

making an observation about her failure to assist the police and observed "It must be said that Bonnie Anglin's attitude towards giving evidence to the police left a great deal to be desired". It cannot be said that it was an observation which was unjustified, but the thrust of the argument is that since it was the defence's case that Meagan had made the threat and it was the prosecution's suggestion that Bonnie Anglin had made up this evidence it led to a requirement for the judge to avoid criticism of the civic responsibility of Bonnie Anglin. For our part, I cannot see that the judge's observation can be regarded as a substantial error of fact or fairness. Meagan accepted that she had made a threat, but examination of the evidence she gave does not make it entirely clear when she says the threat was made. So far as Bonnie Anglin was concerned, it was accepted by her that she had not gone to the police after the threat had been made, whenever it was made. The evidence is incapable of supporting a clear finding as to what the position was and it may be for this reason that the ambiguity of the conclusion which the evidence could clearly be taken as giving rise to, led to the defence, at the conclusion of the summing up, making no reference to this point. The case for unfairness on the part of the judge in this area is that it was open to him to make similar questions about the failure of prosecution witnesses to inform the police when it could be said they should have done and it is submitted that the judge deliberately did not comment on the failure of any prosecution witness to report matters to the police because he was acting so as to bolster the credibility of prosecution witnesses.

42. For example, it is said Earl Ebanks failed to tell the police about a phone call he had overhead until 4 years after the event. Further, it is said the judge went

so far as to support Earl Ebanks' evidence by reference to the cross-examination of the defendant. Also that the judge attempted to excuse weaknesses in Meagan's evidence. We find it difficult to follow the contention about Earl Ebanks' evidence. He had not implicated the Appellant and there was justification for the judge referring the jury to the fact that he made his statement within "1 hour 15 minutes of the murder". In truth, the attack on Earl Ebanks by the defence amounted to a collateral attack to undermine the content of Meagan's evidence. The jury could not have been in any doubt that they needed to be satisfied that Meagan's evidence of the confession made by the Appellant was reliable.

An unbalanced summing up

43. The first submission is that the degree of attention to the prosecution's case far exceeded the amount of time devoted to the defence case. It cannot simply be that a summing up is susceptible of being substantially criticised upon a count of the number of minutes which have been devoted to the prosecution and the defence respectively. The defence case was that the Appellant was not at the scene of the murder at the time. As we observed at the beginning of this judgment, it is inevitable that when a defence of alibi is put before a jury much of the attention of the defence will be directed to undermining, finding holes in and questioning the prosecution's evidence which seeks to place him as the assailant at the scene of the murder. The evidence that the prosecution produced for the jury in this case could be fairly described as extensive. According to the degree to which it was accepted by the jury as reliable, it had the potential for being a very strong case. Where the defence had advanced

criticism or sought to find a gap or hole in the evidence of the prosecution, the judge gave it attention. In our judgment, the judge placed the competing contentions of the prosecution and the defence before the jury. On an appeal the matter is not determined by reference to whether each and every possible point which could have been made appears in the summing up. Where competent leading counsel appear for a defendant, it is not to be assumed that because it does not appear in the summing up that the case for the suggested holes and deficiencies in the prosecution evidence were not fully examined in the course of the speech to the jury. That is the point of having defence counsel who can address the jury and, by advocacy and content, persuade the jury to a conclusion that they cannot be sure on the prosecution's evidence. Perhaps conscious of the lack of cogency on an appeal of piecing together different criticisms of points where the judge could be said not to have followed every single suggestion of the defence in detail is the situation that, in our judgment, has arisen here that counsel has suggested, for example, that the criticism of the telephone evidence which was elaborated upon in this court demolished the evidence given by Meagan of the confession. The telephone evidence was obviously open to detailed scrutiny and the detailed scrutiny of the data was as likely to give rise to inconsistencies between it and other evidence in the case as will always arise in a criminal trial. Indeed whilst cell site data can assist a jury in reaching a conclusion on the truth and reliability in connection with a prosecution, it can, by the extent of its coverage and its apparent precision, show up apparent inconsistencies with other evidence in the case. In his developed argument in reply in relation to the schedule, Mr O'Neill endeavoured to persuade this court that the cell site

data contradicted the prosecution's case to such a degree that the conviction was unsafe. The argument failed. It demonstrated with great force the advantages of these facts and these issues being canvassed before the jury and being left to the jury to decide when reaching their verdict.

Non disclosure

44. Mr O'Neill advanced the non disclosure argument with what was clearly a light touch. The disclosure regime in the Cayman Islands has no statutory basis. It is governed by the common law. The obligation to make disclosure of all unused material arises:-

(1) If it is relevant or possibly relevant to an issue in the case, or

(2) Raises or possibly raises a new issue, the existence of which is not apparent from the prosecution evidence, or

(3) Holds out a real as opposed to a fanciful prospect of providing a lead on the evidence relevant to (1) or (2).

The details of the material can be listed as follows:

1. Notes made by Detective Sergeant Jeffries, an investigating officer who had conversations with Megan Martinez were not disclosed. Those parts of the notes which are identified as being relevant are attempts made to release her supervision order, immunity, cash and obtaining a birth certificate for her son.

2. Meagan Martinez's arrest and interview in connection with the murder of a man called Marcos Duran.

3. Disclosure of Meagan Martinez's medical records relating to her psychiatric state.

4. DCFS records detailing interaction between Meagan Martinez, Raziel Jeffers and social worker, Jasmine Power

5. Notes of witness protection officers. These included references to Megan Martinez threatening to quit the programme and significant dishonesty which may have impacted how the judge assessed her credibility at trial.

It is difficult to understand how the notes in relation to the attempts to release her from a supervision order could have any bearing on the issues in the trial. Immunity was never offered to Meagan. All details of cash payments to her were disclosed. Raziel's birth certificate was in the hands of the defence by way of disclosure. Meagan was not arrested in relation to the separate murder of Marcos Duran. Some of the medical records post-dated the trial and those which did not had already been disclosed to the defence. An edited version of the DCFS records was disclosed and the witness protection records were disclosed in a redacted form.

45. We are satisfied that the disclosure complaint constitutes less than a makeweight in the argument which has been advanced.

Conclusion

46. It is manifest that the judge's summing up comprises a meticulous, very articulate and skilful survey of all the evidence in the case and of the relevant law. The case advanced by the defence depended upon establishing an alibi.

A consequence of an alibi defence will be that the details, such as they may be, as to the circumstances in which the offence took place are outside the knowledge of a defendant. It is clear that the judge in this instance skilfully marshalled all the areas of the prosecution's case which had been subjected to attack. He skilfully articulated the attacks which had been made and, by his summing up, gave the case a structure and comprehensive format which the respective cases for the prosecution and the defence may not have achieved. We are satisfied having heard detailed argument that in no area of the case can it be demonstrated that the judge acted so unfairly as to deny justice to this Appellant. He brought to bear an incisive analytical approach to all the material which it was proper for him to address. Clarity of exposition on the part of a judge in a criminal case is a hallmark of a proper summing up. According to the strength and weaknesses of the respective cases, clarity will inevitably enlighten the jury in respect of those respective cases. However, if the clarity reflects fairly the quality of the evidence and the material for the jury's consideration but, taken together it points to a verdict of guilty, in our judgment, it cannot be said that the clarity has brought about injustice and unfairness. The appeal is dismissed.

Rix JA

Newman JA