

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA # 25/2007
(Indictment #91/06 A&B)
C#7710/06

TREVINO BODDEN

Appellant

-AND-

HER MAJESTY THE QUEEN

Respondent



BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE CONTEH, J.A.

Appearances: Howard Hamilton Q.C., instructed by Ms. Facey-Clarke for the appellant and Ms. Cheryll Richards Hon. Solicitor General for the Crown.

Heard on 26th & 27th March 2009.

Judgment delivered: 27th March, 2009. Reasons delivered: 28th August, 2009

Forte, J.A.

1. The appellant was convicted on the 6th November 2007 on both counts of an indictment which charged him with the murders of Brenard Scott, (Chicken Bone), and Ronald Pearson (Pearson). On the 23rd January 2008, he was sentenced to life imprisonment on each count. He now appeals his convictions.
2. Having heard submissions from counsel on the 26th and 27th March, 2009, we dismissed the appeals and affirmed the convictions and sentences. We promised then to put our reasons in writing. These reasons are set down hereunder.
3. Before addressing the grounds of appeal argued by Mr. Howard Hamilton Q.C., it is necessary to set down, in summary form the evidence advanced at the trial.
4. The Crown's Case:

Several eye witnesses testified to seeing the appellant shoot Chicken Bone and Pearson on the night of the 1st November, 2006.

The appellant who is called TJ was at Brezley's Bar also known as Pirates Cove Bar, and situate at East End. Chicken Bone was also there. Also there was Iesha Scott who left there at 11 p.m. in the company of the appellant and Chicken Bone as also a gentleman by the name of Gary. They walked together "down the road" where there were other people. Iesha then sat on a chair by a chain-linked fence.

There was then a physical fight between the appellant and Chicken Bone, who was having the better of the fight when they were parted. Pearson came out of his house just as the fight ended. Some witnesses said that it was Pearson who parted the appellant and Chicken Bone.

Iesha Scott also testified that after the fight had ended, the appellant took off his shirt and hung it on the fence just in the area where she was sitting. He also left his slippers beside the fence. The appellant then left saying before he did so, "Chicken Bone don't go nowhere. I coming back." After the appellant left, Chicken Bone went into his house. Within five to six minutes, the appellant came running back saying, "Who the bad man is?" When he said so Chicken Bone came out. The appellant then had a gun in his hand. Pearson said to the appellant, "Don't go in my old lady's yard with the gun." The appellant went towards the gate and started shooting at Chicken Bone. Iesha Scott heard four shots at first and then some others totaling seven or eight.

After the first four shots, Pearson shouted to the appellant "What you do my brother?" He started to run in the appellant's direction. The appellant turned and shot Pearson saying, "You too pussy hole". He then ran off in the direction from which he had come. Chicken Bone's body was lying right outside his gate. Pearson laid halfway inside his mother's back door. Shekeisha O' Connor, Pearson's daughter, asked him what happened. He replied "Baby, TJ shoot us". She asked him, "For what?" He replied, "For nothing".

Other witnesses, Donovan Dixon, Crosby Watler, and James Hezekiah Williams, testified to the fight taking place, to the appellant saying before he left, "Stay here until I come back" and to his return and his firing shots at Chicken Bone and Pearson, both of whom subsequently died.

Verdi Mae Scott, Sheldon Scott and Shekeisha O'Connor testified to Pearson's statements before he died.

To Verdi Mae Scott, Pearson is alleged to have said while lying on the ground, "I am not going to make it. TJ shot me and Chicken Bone".

Sheldon Scott heard Pearson say, "TJ shoot us. I don't think I am going to make it. Call the ambulance."

As noted earlier, Pearson told his daughter Shekeisha that TJ had shot Chicken Bone and himself for no reason. She also heard him say that he was not going to make it.

5. The Defence:

In his sworn testimony in his defence, the appellant testified that on the 1st November it was his uncle's birthday. They went to Pirates Cove Bar for karaoke. He sang and drank Red Stripe beer. He also drank shooters of Hennessy and Grand Marnier. He had about five bottles of beer and quite a few shots of Hennessy. Chicken Bone was also there drinking. He and Chicken Bone left the bar together and walked towards Fiddlers Way. They had a fight by the chain-linked fence. They had been arguing about, who goes on worse when they get "charged up".

Chicken Bone grabbed him in a headlock. He tried to get away. They fell on the ground and Chicken Bone still had him in a headlock, choking him. Pearson came and parted them. The appellant said he got up and said, "I'll get you back". He was not laughing when he left as Ilesha Scott had said.

He denied receiving any injury of real significance during the fight. He had cut his hair on the previous night, which was Halloween and so his hair was short during the fight. It had been long but he had to cut it so he could wear a mask on Halloween night. He had taken off his shirt on Halloween night and hung it on the fence. He did not wear that shirt on the night of the fight.

He testified that after the fight he went home and into his bed and went to sleep. He was not wearing the slippers found by the fence on the night of the fight. The morning after, he was

awakened by his grandparents who told him the police were coming. He replied, "They can come because I know nothing about that."

He had not returned to the scene that night nor had he shot either Chicken Bone or Pearson.

6. One other aspect of the evidence that should be recorded. Chief Inspector Martin Bodden went to the appellant's residence on the morning of the 2nd November, 2006. At that time the appellant was handcuffed and in police custody. Chief Inspector Bodden asked him if he knew why they were there. The appellant replied, "Yes. They said about murder but I was at home all night. I was on the computer." The Chief Inspector said to him, "I tried calling the residence all night but got no answer. To which the appellant replied, "That's because I was on the computer." Evidence tendered with the agreement of the appellant revealed that no person

used the computer between 3.55 p.m. on November 1st, and 8.24 a.m. on November 2nd.

7. In his evidence the appellant denied telling the Chief Inspector that he was on the computer. In fact he asserted that he was not. The computer was in his grandmother's room, and he would not disturb her sleep by going into the room and using the computer.
8. The Chief Inspector also testified to a conversation that he had with the appellant, at the police station in which the appellant gave him a narrative of what occurred on the night of the incident. According to Inspector Bodden the appellant told him about the fight and the fact that Chicken Bone pinned him to the ground and wouldn't release him and the other persons there did nothing. He related to the Inspector that he did tell Chicken Bone to stay until he returned but he had no intention of doing him any harm. Importantly, the Inspector said that the appellant told him that when he returned, he was suddenly approached by Chicken Bone's brother and he feared that both brothers would harm him. The Inspector said that the conversation ended at this point because an Attorney arrived at the police station and asked to speak with appellant.
9. The appellant denied making these statements, particularly that he returned to the scene, and maintained that that it was the Inspector who was putting these suggestions to him, but he never accepted or agreed with them.
10. There was expert evidence relating to the finding of D.N.A. and gunshot residue on items of clothing and on the hands of Chicken Bone but that will be dealt with later in dealing with the appellant's contentions in relation to that evidence.
11. Before addressing the specific grounds of appeal, Mr. Hamilton Q.C. made the following general submissions, which explains, he submitted, the complaints which the appellant contends, deprived him of a fair hearing. He submitted that the learned trial judge's summing up contained numerous instances where the court failed to:
 - (a) correctly instruct the jury on the relevant law,
 - (b) highlight the areas of weakness in the prosecution's case in juxtaposition to the defence, and
 - (c) failed to give the appellant's case, the balanced treatment and consideration which was its due.

Mr. Hamilton Q.C. while conceding that each of these "deficiencies" by themselves may not be sufficient to render the verdicts unsafe, it was the

cumulative effect of all which contributed to depriving the appellant of a fair hearing.

12. On this background, he raised the following issues, which are gleaned from the grounds of appeal. It should be noted that during the course of his arguments, counsel for the appellant applied and was granted leave to file and argue a ground of appeal alleging that the convictions were unsafe and unsatisfactory. These are the issues:

- (a) The learned trial judge was incorrect in ruling that there was a case to be left with the jury

During the course of his submissions, counsel conceded that there was no merit in this contention and did not pursue it any further. We agreed with this course.

- (b) Challenges raised in Grounds 1 and 2 of the additional grounds of appeal which read as follows:

Ground 1 The learned trial judge failed to adequately assist and /or direct the jury as to how to treat the numerous discrepancies which existed in the prosecution's case and this non- direction amounted to a misdirection.

As counsel requested and was granted leave to argue grounds 1 and 2 of the additional grounds of appeal together, ground 2 is set out hereunder:

Ground 2. In light of ground 1 above, the learned trial judge failed to assist and/or direct the jury as to how to adequately treat the uncontested evidence from Crown witnesses:

- (a) that gunshot residue was found on both hands of the deceased Brenard Scott;
- (b) that no gun shot residue was found on the hands of the appellant; and
- (c) that there was evidence that two firearms could have been fired on the scene, in circumstances where the evidence impacts on the credibility of the eye witnesses on whom the prosecution relied.

13. Mr. Hamilton Q.C. first addressed the complaint in relation to the learned trial judge's treatment of the discrepancies in the evidence of the eye witnesses

There were in fact several discrepancies that existed in the evidence of the several witnesses who testified for the prosecution. The complaint was, however, directed at the treatment by the learned trial judge of these discrepancies, in his summing up to the jury. We have examined in detail the content of the learned trial judge's directions to the jury in this regard and have difficulty in finding fault, or in coming to the conclusion that it was inadequate and unhelpful to the defence.

14. In order to demonstrate that this complaint is without merit, we find it necessary to cite some passages in which the learned trial judge dealt with the credibility of the witnesses, as regards the inconsistencies and discrepancies in the evidence.

(1) [Pg. 20]. " Mr. Dixon agrees that TJ had long hair at the time of the fight and that Chicken Bone held him by that hair when punching him. When TJ came back up the road several minutes later, he had no shirt on but his hair was the same as it had been earlier, according to Dixon. In other words he still had long hair. You will note that conflicts with the recollections of Iesha Scott"; and

(2) Pgs 21—22. Continuing to deal with the evidence of Donovan Dixon the learned judge directed the jury thus:

" As I have indicated, there were contradictions between the evidence of Iesha Scott and Donovan Dixon. Mr. Dixon said that no one caught Chicken Bone before he fell on his face. Ms. Scott remembers someone doing so. Mr. Dixon also said that no one parted the fight between Chicken Bone and TJ, although Ms. Scott remembers several people parting the fight. In Mr. Dixon's statement to the police, he said that he saw Renold Pearson and someone else trying to stop the fight, and he agreed that he may have made a mistake on that particular point when giving his evidence. Mr. Dixon remembers seeing Chicken Bone holding the defendant by the hair and kneeing him in his face.

Ladies and Gentlemen, the credibility of Donovan Dixon as with that of the other eye witnesses, is an issue for your consideration.-----

With respect to the contradictions between his evidence and that of Iesha Scott and that of the other witnesses, you must consider the extent and significance of these. You will know from your own experience of every day life that where two or more people witness an event which happens quickly and without warning, they are unlikely to remember the details of that event later in precisely the same way. That is a common sense, everyday observation of life. There will always be contradictions between the recollections of honest witnesses. However, if there are contradictions between witnesses on matters which you would expect them to remember

in the same way, that may suggest that one, or both of them are not telling the truth. Ask yourselves whether the contradictions between the accounts of the eye witnesses here are sufficiently significant as to cause you to doubt their veracity."

15. In respect of the testimony of the witness James Hezekiah Williams, this is what the learned judge told the jury, (pg.28):

"As with other eye witnesses, you must start by considering whether James Hezekiah Williams is being truthful in his evidence. Consider the contradictions between his evidence and that of other witnesses such as his assertion that TJ was wearing long pants and that Chicken Bone threw TJ on the ground four or five times, and ask yourselves if these contradictions are sufficiently significant to make you doubt the truth of his evidence."

16. In relation to the evidence of Iesha Scott's testimony, the learned judge directed the jury thus:

"Ladies and Gentlemen, with respect to the evidence of Iesha Scott and with respect to the evidence of each witness who testified to having been present at the time of the shootings, you must decide whether you are satisfied she or he is telling the truth. The defendant argues that these witnesses may be lying, perhaps to cover up the guilt of the person or persons who actually shot Scott and Pearson."

17. In these passages the jury was informed of the approach they ought to take, in assessing the evidence and the credibility of the witnesses, given the contradictions and discrepancies in the evidence. In the end, the jury would have brought that knowledge into their assessment of the witnesses, and in that regard there is no basis for interfering with their conclusions on the evidence.

18. I turn now to the complaint in respect of Ground 2 that is to say, the effect of the expert evidence, on the conclusions reached by the jury.

19. Expert Testimony:

(1) D.N.A. Evidence

Kevin Noppinger, a DNA expert, testified that he found no DNA belonging to the deceased Scott, (Chicken Bone) on the polo shirt he was given for analysis. He agreed that it is possible for a person's DNA to be transferred to an opponent's shirt during a physical fight. In addition, he found none of the appellant's DNA on the slippers even though he would expect to find someone's DNA on slippers worn by them. He agreed that dirt on the slippers would make it difficult to find DNA there.

(2) Firearm Expert.

- (a) Mr. Bret Mills a FBI firearm's expert testified for the Crown. Having examined the four bullets that were recovered, (3 from the body of Chicken Bone), concluded that they had all been fired by the same gun. All the bullets were from the .38 calibre family which includes nine millimetre calibre bullets but also includes other bullets of similar calibre.

He also examined the eight cartridge cases submitted to him, (which were found on the scene), and determined that they were all fired from the same barrel. They were all nine millimeter casings and therefore were all from the .38 calibre family. He was not able to say that the four bullets were fired from the same gun as the eight cartridge cases. He opined that it was not scientifically possible to draw such a conclusion unless he was presented with the gun which fired both the bullets and the casings.

- (b) Major Trevor Martin, a former weapon's officer in the Jamaica Defence Force gave evidence for the defence. He agreed with the report of Mr. Mills that in the absence of the gun which fired the bullets and the casings, it is not possible to say that both bullets and casings were fired from one gun.

These opinions left it open to the appellant to raise the proposition that there were two guns on the scene of the incident. Indeed together with other scientific evidence it has formed the basis for the appellant's second ground of appeal.

20. Other Scientific Evidence:

Mr. Michael Martinez is a former forensic scientist and gunshot residue expert at the State of Texas Crime Lab. in San Antonio in the U.S.A. He did not give oral testimony, but his evidence was read to the Court and jury. His report disclosed that :

- a. he found gunshot residue on the shorts and on the shirt worn by the deceased Scott (Chicken Bone), at the time of his death and also on samples taken from Scott's left and right hands. He concluded that the shorts "may have been in close proximity to a discharged firearm or in contact with a discharged firearm." He also concluded that, " the left hand of Brenard Scott may have discharged a firearm, handled a discharged firearm or was in close proximity to a discharged firearm."
- b. He examined samples taken from both hands of the appellant at the time of his arrest i.e. around 7 a.m. on the 2nd November, about six and one half hours after the incident.

Mr. Martinez's report that he found gunshot residue on the shorts, shirt and hands of Chicken Bone raised the question whether Chicken Bone was armed with a firearm at the time he was shot. All the eye witnesses maintained that neither Chicken Bone nor Pearson was armed at the time of the incident. The lack of gun shot residue on the hands of the appellant could be explained by the lapse of time between the shooting and the time the samples were taken from the appellant because during that time the appellant could have washed it from his hands. However, this still left the contradiction between the eye witnesses and the scientific evidence. This, together with the inability of the Crown to establish that the recovered bullets and the recovered casings were fired from the same gun, begs the question whether there was another gun present at the scene. This of course was a question entirely for the jury, after an assessment of all the evidence, and given their power to accept or reject the evidence of any witness, expert or otherwise. No doubt the jury would have been mindful of the report of Mr. Martinez that the proximity of the deceased Scott to a discharged firearm could have resulted in the gun shot residue being on his clothing and on his hands against the evidence that the appellant and Scott got to approximately four to five feet from each other, at the time the appellant shot Scott.

The jury would no doubt be also mindful of the evidence of Mr. Mills, rehearsed for them by the learned trial judge. Mr. Mills explained that when a gun is fired, it produces a cloud of gas which can drape over the hands of the person firing it. This is called gun shot residue or GSR for short. You can get rid of it by simply washing your hands with soap and water, and you can remove it from your clothing by washing the clothing. He testified that GSR is fragile and can be knocked off clothing or brushed off.

21. Mr. Hamilton Q.C. did not rely solely on the state of the evidence, but complained that, "----- The learned trial judge failed to assist and/or direct the jury as to how to adequately treat the uncontested evidence from the Crown witnesses."

22. In this regard we now look at the directions by the learned trial judge in respect of this aspect of the case.

Firstly, he explained to the jury how to treat the testimony of an expert witness. He said (pg. 43):

" Expert evidence is permitted in a criminal case to provide you with scientific information and opinion which is within the expertise of the witness but which is likely to be outside your own experience or knowledge. It is by no means unusual for evidence of this nature to be called, and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist

you with regard to particular aspects of the evidence in this case, DNA analysis, the gunshot wounds, gunshot residue, and firearms.

A witness called as an expert is entitled to express an opinion in respect of his findings on the matters which are put to him, and you are entitled and would no doubt wish to have regard to this evidence and to the opinion expressed by the experts when coming to your own conclusion about these aspects of the case. You should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the experts, you do not have to act upon them. Indeed, you do not have to accept even the unchallenged evidence of an expert. It is for you to decide whose evidence and whose opinion you accept, if any. You should remember that this evidence relates only to parts of the case and that while it may be of assistance to you in reaching a verdict, you must reach your verdict, having considered all of the evidence."

23. Later, in an obvious effort to assist the jury, the learned trial judge directed them as follows:

"There is no evidence, ladies and gentlemen, as to how Brenard Scott got gunshot residue on his hands. One possible explanation for that would be, as Mr. Hamilton suggests, that Mr. Scott fired a handgun during the shooting. There is no evidence that he did. No eye witness says that he did. If he held a hand gun in both hands, as the defence suggests, that would indeed, account for the gunshot residue on his hands. Another possible explanation is that Mr. Scott was advancing towards the barrel of the gun as he was shot and was trying to either grasp the gun with his hands or deflect the gun barrel with them. However, none of the eye witnesses described Mr. Scott using his hands in this way, although the evidence of Donovan Dixon is that Chicken Bone was advancing towards the gun as he was shot four times.

Consequently, ladies and gentlemen, if the witnesses are telling the truth, the evidence contain no full explanation for the presence of gunshot residue on Mr. Scott's hands. When deciding whether you accept the evidence of the Crown witnesses, you should take into account that nothing said by them provides a full explanation for the presence of the gunshot residue."

24. In our view these were directions that clearly informed the jury, how to approach their assessment of the evidence, given the apparent contradictions between the expert evidence and that of the eye witnesses. In addition, throughout the summing up, the learned trial judge gave clear directions to the jury that they should consider carefully the discrepancies and inconsistencies in the evidence of the eye witnesses before accepting them as truthful and reliable witnesses. In all the circumstances, we cannot agree that he failed to assist the jury in how

to treat with the evidence of the expert witnesses. Consequently, these grounds of appeal fail.

25. There are, however, two other aspects of this appeal that must be addressed:

EVIDENCE OF CHIEF INSPECTOR BODDEN

A challenge was made to the manner in which the learned trial judge dealt with the evidence of Chief Inspector Bodden whose testimony has already been referred. This is how Mr. Hamilton Q.C. dealt with the complaint:

" Chief Inspector Bodden's evidence contained one of the most damning pieces of evidence against the appellant. The appellant's case is that after the fight with Brenard Scott, he went home, went to sleep and never returned that night. Chief Inspector Bodden testified that in a conversation with the appellant at the station, the appellant admitted to him that he returned to the scene and was only stopped from going further by the arrival of his attorney. Chief Inspector in an attempt to bolster his testimony averred that he called the appellant's residence at about 4.00 a.m. and got no answer, and that the appellant explained that he was on the computer. The prosecution, in the highest traditions, later admitted a document, (Ex 33), which revealed that, no person used the computer between 3.55 p.m. on Nov. 1st and 8.24 a.m. on Nov. 2nd. The learned trial judge left that issue to the jury as to " why did the appellant lie?". Yet with not one word of query as to the possibility that it was Chief Inspector Bodden who may have lied."

An examination of the directions by the learned trial judge to the jury on the issue does not support the allegation of the appellant. The directions in respect to the jury finding that the appellant told a lie was clearly dependent on whose evidence they accepted. This is how the learned trial judge addressed the jury:

" Now, the defendant denies saying anything to Chief Inspector Bodden which suggested that the defendant was on the computer that night. He denies saying to the Chief Inspector what the Chief Inspector attributes to him.

In light of the admission of fact, (i.e. the non-use of the computer during the relevant hours), if the defendant did say to Bodden what is attributed to him, in other words, if he did say, " I was here all night, I was on the computer.", it would appear that the defendant was lying. It is alleged that the defendant lied to the police in saying that he was at home on the computer all night, and you are entitled to consider whether this supports the case against him.

In this respect, you must consider two questions: First, you must decide whether the defendant did in fact deliberately tell this lie. If you are not sure he did, ignore the whole question. And I remind you again, that he has sworn under oath that he did not say that to Chief Inspector Bodden."

26. In these words, the learned trial judge also put the credibility of Chief Inspector Bodden in issue and left it to the jury to determine where the truth laid. There is therefore no merit in the contention that the learned judge assumed the credibility of Chief Inspector Bodden as opposed to that of the appellant.

27. DISCHARGE OF JUROR.

During the course of the trial , and when the appellant was being cross-examined, the Court addressed Counsel, as follows:(Vol. 3 Tab. 9 Pg.1)

" I want to raise something [else] which I consider [more] pressing. It has been reported to me that one of the jurors was walking into this building, -- I believe it happened yesterday---- and the defendant walking immediately behind her. That shouldn't happen, but that's not my concern. She reports that he made a threatening remark to her. I don't have the exact words at hand, but I can get them. In addition, the juror has now conveyed that information to some of the other jurors on the panel, and I am going to hear from each counsel before I determine what to do about this.-----However, what do you suggest I do about this."

Ms. Richards, Solicitor General, and counsel for the Crown, in response said:

" My Lord, firstly, it is a question of the impact upon the juror and the other jurors whether or not they can still return a fair verdict."

The learned judge then expressed concern that if they couldn't return a fair verdict, then that would be the result of " a unilateral act by the defendant" and pondered whether if for those reasons the jury was discharged," you simply acknowledge that a defendant can always bring about a mistrial by doing something of this sort."

28. Mr. Hamilton Q.C. in face of a suggestion by Ms. Richards that the learned judge should consider whether directions to the jury were enough to deal with "the situation" invited the court to have an inquiry of that juror by herself as the appellant had denied the allegation. After a fairly lengthy discussion, the learned judge decided that he was " not going to conduct a trial as to whether this happened or not." However he agreed to call her in for the sole purpose of determining what she says happened. He thereafter decided that he was going to proceed "on the assumption that it happened because that is the course of caution."

29. However, the Court was informed by the Clerk of the Court, that the juror expressed reluctance to come into the court room, and in spite of a suggestion to "screen" her while she related what happened, the final decision was not to proceed in that way, but to discharge that juror and allow the trial to proceed with the eleven remaining jurors.

30. Before coming to his final conclusion, the learned judge addressed Mr. Hamilton Q.C. counsel for the appellant:

" Do you want me to discharge the juror out of an abundance of caution just in case your instructions, are, shall we say, inaccurate?"

Mr. Hamilton replied:

" I think that would be the safest thing."

The Court, after further discussions, ruled:-

" Yes, I consider that the best course of action is the one we have recently identified. I am going to discharge this juror and provide a warning to the rest of the jury, to put out of their minds anything that that juror may have said to them about any interaction she may have had with this defendant."

31. Later, Mr. Hamilton asked if any other juror heard it viva voce and the learned judge replied:

" The way its been reported to me, no other juror heard the alleged threat. But all the jurors have been told about it."

Mr. Hamilton replied:

" Yes. That's all right, that's okay, my Lord. I can live with that."

32. The jury was thereafter brought back into the court, and the particular juror was then discharged from the jury. In doing so, the learned judge said :

" Members of the jury, it has been reported to me that one of you overheard a remark by this defendant which has caused some concern. I do not think it is helpful at this juncture in the trial, to enquire into that incident. I am going to follow a course of action, which is the usual one in circumstances of this sort. I am going to continue this trial with just eleven jurors and excuse the juror in question from any further service on the jury. This is not meant to be a reflection on either the defendant or, for that matter, the juror. It is simply a precaution that we routinely take in cases where this sort of thing is reported to the court."

33. The learned judge, having excused the juror in question, addressed the remaining jurors as follows:

" Now ladies and gentlemen of the jury, I address the eleven of you who remain. It has also been reported to me that the juror we have excused may have given you a description of what she believes was said to her by the defendant. If that is so, you must put that firmly out of your mind. In considering this case and in reaching your verdict on these most serious charges, you must take into account only the evidence you have heard given to you by the witnesses who testified under oath in the witness box and the evidence which is read to you and the admissions of fact and the exhibits, but nothing said to you about the departed-----by the departed juror about any interaction she may have had with the defendant can be considered by you in any way, put it out of your minds."

34. In the absence of the jury, the learned judge again asked defence counsel if he had any comment or objection. He replied, " No my Lord." The Court then said:

"Okay. So you are content, are you, to continue this trial in these circumstances?"

Mr. Hamilton replied, " Yes, it continues, yes."

35. The trial continued. Counsel specifically asked, and the appellant denied saying any words in the presence of the juror who had been excused. The defence also called the Security Guards who had escorted the appellant to the court. They testified that they had not heard the appellant say anything to the juror.

36. On this background, the appellant, through his counsel makes the following complaint in Ground 2:

"The learned Trial Judge erred on hearing of a complaint from a female juror that the accused had threatened her and that she had communicated this fact to the other jurors, assumed that he did it without conducting any inquiry involving both parties before discharging the juror from further service, even after being requested to do so by the Defence."

37. In developing this ground, Mr. Hamilton contended that there was no conclusive finding that the juror was, in fact, threatened as no inquiry was conducted. He, however, conceded that the defence was allowed to call three Prison Guards who would have been in the appellant's company when any such threats could have occurred and who denied any such occurrence. He maintained that "compounded the need for the learned trial judge to exercise meticulous care in advancing the case of the appellant and failure on the part of the learned trial judge to do so,

especially in the light of the inconsistencies and contradictions in the Crown's case has rendered the verdicts unsafe."

38. Firstly, we do not accept that the learned judge failed to put the case for the appellant fairly and adequately to the jury.
39. Secondly, it is obvious that the learned judge was faced with a very difficult situation as to how to proceed with the trial and at the same time ensuring that the appellant received a fair trial. Of significance also is the judge's attempt to get counsel's agreement as to the correct way to proceed, which concluded with the acquiescence of defence counsel in the process adopted by the learned judge.
40. In the circumstances we find that the learned judge came to the correct decision in excusing the juror and continuing the trial with the remaining jurors. It would not have been correct to have held an inquiry into the credibility of the juror as that could have created greater prejudice against the appellant. In any event, as the learned judge tried to convey to counsel, no matter what conclusion he came to in respect to the veracity of the juror, the trial could not proceed with that juror without creating some apparent bias. In so far as the other jurors were concerned, the warning given to them by the learned judge was sufficient, in our view, to ensure that the incident would not be a part of their deliberations when considering the verdict. It should be remembered also, that the jury had the benefit of hearing from the prison guards and the appellant, all of whom denied that any threat was issued by the appellant.
41. There was some mention also, of the fact that the learned judge did not return to this episode during his summing up. We agree with this course, as had he done so, it would have done nothing more than bring freshly to the minds of the jurors, the unfortunate incident and at a time when they were about to deliberate. His earlier directions were sufficient in the circumstances to ensure that the incident would not influence in any way, the jury's analysis and assessment of the evidence they had heard.

42. We reiterate for the purposes of this complaint, that the learned judge dealt adequately, and to use the words of defence counsel, "with meticulous care", with the issues, in leaving the case of the appellant to the jury.
43. In the event, we cannot say that the verdicts were unsafe and unsatisfactory. The appeals were therefore dismissed and the convictions and sentences affirmed.

Chadwick, P.

Forte, J.A.

Conteh, J.A.

