TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2009/001

BETWEEN:

DAMIAN HODGE

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards — Justice of Appeal
The Hon. Mde.. Janice George-Creque — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal

Appearances:

Mr. Paul Webster, QC for the appellant
Ms. Grace Henry-McKenzie, Director of Public Prosecutions, [Ag.]
and Ms. Christilyn Benjamin, Senior Crown Counsel for the respondent

---

2010: May 18;
November 10.

Criminal appeal – Appeal against conviction – Forensic evidence – DNA evidence – Attempted robbery – Aggravated burglary – Assault occasioning actual bodily harm – Buccal swabs taken from cheek – Break in the chain of custody – Safety of verdicts and lurking doubt – Failure to direct on evidence of expert witness – Appellant's defence not put adequately and fairly to jury – Defendant not asked whether he objected to evidence – Section 63(1) of the Evidence Act of the Virgin Islands (No. 15 of 2006).

The appellant, Damian Hodge, appealed against his conviction on counts of attempted robbery, aggravated burglary and assault occasioning actual bodily harm. The prosecution relied on forensic evidence in the form of DNA to link the appellant to the crime. The appellant denied committing the offences and also denied that buccal swabs were used to take DNA samples from his cheek. The prosecution's case is that, on the night of 17th March 2007, the appellant along with another boarded the yacht Spindrift II, in which Mr. Stephen Martinez was asleep in a lower cabin. One of the assailants struck Mr. Martinez on his right cheek and demanded money, claiming that he had a gun in his possession.

He then held Mr. Martinez in a choke hold, while the other assailant held on to Mr. Martinez's feet. Although Mr. Martinez was injured, he did not bleed. In the ensuing struggle, Mr. Martinez struck the assailant who had held him around the neck with a winch handle which connected to the side of his head. The assailants fled and escaped into a waiting dinghy. A blood trail led from where Mr. Martinez had struck the assailant to where he had exited the boat. The appellant appealed on the following grounds: (1) that the learned judge erred in admitting into evidence the evidence bag containing the box with the buccal swabs; (2) that the appellant's defence was not fairly or adequately put to the jury; (3) that the learned judge erred in allowing the evidence of acting Sergeant George James as it was prejudicial and of no probative value; (4) that the verdict of the jury cannot be supported having regard to the evidence and hence, the verdict is unsafe.

Held: dismissing the appeal against conviction and affirming the appellant's conviction:

1. That there was no break in the chain of custody leading to the DNA Laboratory and the testing of the DNA sample. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the prosecution's case unless they raise a reasonable doubt about the exhibit's integrity. In the absence of a specific requirement or necessity to call as witnesses all persons who may have had possession of an item during the chain of custody, it is a question of fact for the jury whether or not to doubt the accuracy of DNA results because of the possibility that security or continuity of items was not maintained. Further, the swab box bore sufficient information including the appellant's name and initials of witnesses which assisted them in making the identification. Also, it is not fatal to the admissibility of the evidence that the judge did not ask the unrepresented defendant whether he objected to it. Thus, the swab box was properly admitted into evidence and there was no error on the part of the learned judge in so admitting it.

   R v Larsen 2001 BCSC 597 applied; **R v Stafford** [2009] QCA 407 applied.

2. That the jury would have been left in no doubt as to the appellant's defence. The appellant's defence was two-fold: that is, he did not commit the offences and the police did not take buccal swabs from him. In light of the specific references made to the defence case in the learned judge's summation, the appellant's defence was carefully, fairly and adequately put to the jury. While a direction to the jury that they could only convict if they were sure that the police took swabs from the appellant and forwarded them to the analyst would have been desirable, its absence does not lead to the conclusion that the appellant's defence was not put fairly and adequately to the jury.

3. The evidence of Sergeant James was relevant as it was capable of leading to the conclusion that the appellant had a head injury which he was trying to conceal. Given the complaint of Mr. Martinez, coupled with the DNA evidence, the evidence of Sergeant James was more probative than prejudicial and any prejudicial effect is outweighed by its probative value.

4. It was for the jury to evaluate the evidence before them and none of the matters urged upon the court by counsel for the appellant provides any ground for thinking that the conviction is unsafe. Further, having assessed all the facts and circumstances, there is nothing from the general feel of the case as experienced by this court to engender a lurking doubt about the conviction or uneasiness about whether an injustice has been done.

   R v Criminal Cases Review Commission Ex p. Pearson [2000] 1 Cr. App. R. 141 followed; **Dookran v Trinidad and Tobago** [2007] UKPC 15 followed; **R v Litchfield** [1997] EWCA Crim 3290 followed.

5. The omission to give an expert direction and to direct the jury on how to treat the evidence of an absent witness did not render the trial unfair. The purpose of expert evidence of fact (e.g. observation, test, calculation) and opinion is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert has expressed an opinion remains one for the jury and not for the expert. It is always for the jury to decide the facts in light of the evidence as a whole. Whilst they must pay due regard to the expertise of an expert witness, they are neither obliged to agree with him, nor obliged to share doubts or reservations expressed by him. The directions on the defence were quite adequate. This was a strong case against the appellant and ample evidence on which the jury was entitled to convict him.

JUDGMENT

[1] **BAPTISTE, J.A.:** This is an appeal by Damian Hodge against his conviction on counts of attempted robbery, aggravated burglary and assault occasioning actual bodily harm. The prosecution relied on forensic evidence in the nature of DNA to link the appellant to the crime. The appellant denied committing these offences and denied that buccal swabs were taken from his cheek.

Background

[2] The prosecution's case is that on the night of 17th March 2007 two assailants boarded a yacht, the Spindrift II in which Mr. Stephen Martinez was asleep in a lower cabin while his female companion was on deck. One of the assailants struck Mr. Martinez on the right cheek and demanded money. The assailant claimed that he had a gun and also held Mr. Martinez around the neck in a choke hold. The other assailant tried to hold on to Mr. Martinez's feet. Though Mr.

Martinez was injured he did not bleed. In the ensuing struggle Mr. Martinez hit the assailant, who had held him around the neck, with a winch handle which connected to the side of his head. Both assailants escaped in a waiting dinghy.

[3] The police investigated the matter and Sergeant George Mason collected blood samples from the deck of the yacht, placed them in five swab boxes, sealed and labeled them and kept them in his possession. The five swab boxes were later handed over to Constable Tittle who took them to DNA Labs International in Miami on 2nd July 2007 to be tested. On 19th August 2007 Sergeant Mason received a parcel from Fedex Courier Services which contained the five swab boxes he had handed over to Constable Tittle. These were tendered in evidence as exhibits.

[4] On 17th September 2007 the appellant was arrested. He was told of the investigations and was invited to give samples for DNA testing to which he consented. Constable Mary Phillip took swabs from the appellant's cheek, placed them in a swab box, wrote the appellant's name on the box and initialed the box. She sealed the box in the appellant's presence and requested that he place his initials on the box which he did. Constable Mary Phillip wrote the appellant's name and date on the evidence bag, placed the swab box inside the bag and sealed it in his presence. She then handed the evidence bag and its content, to Sergeant Mason who secured it in an iron safe in the exhibit room at the Road Town Police Station.

[5] On 20th September 2007 Sergeant Mason handed over the sealed evidence bag containing the swab box to Constable Ballantyne who on that same day took them to the DNA Labs International. On 8th November 2007 Sergeant Mason received a sealed package from FedEx Courier Services which contained the same swab box he had handed over to Constable Ballantyne. This was tendered into evidence through Constable Mary Phillip as exhibit MP1.

[6] Mr. Kevin Noppinger, the Director of DNA Labs International conducted DNA testing on the swabs which were collected from the Spindrift II and determined that the stain on each swab was blood which came from a male individual. Mr. Noppinger testified that on 20th September 2007 a buccal sample bearing the name Damian Hodge was received by the lab in a sealed box. He assigned a case number and item number from the laboratory to it following which he cut a portion of the sample for DNA testing. He then sealed the remainder of the swab in the said box in which it was received and returned it to the police. He took a sample for DNA profiling. He then compared that sample with the samples he had previously received which were said to be from "Spindrift II" and found that they matched.

[7] Mr. Noppinger further testified that the two swabs contained in the swab box which were shown to him in Court, were the same two swabs he received in this case. He indicated where he had cut about half of one of the swabs for DNA testing. He was able to identify the swabs and swab boxes by the laboratory information. He also pointed out that the box bore the marking "MP1" and the name Damian Hodge.

Admissibility of evidence bag containing box with buccal swabs

[8] Several grounds of appeal were advanced by Mr. Webster, QC on behalf of the appellant. I will first consider the ground that the learned judge erred in admitting into evidence the evidence bag containing the box with the buccal swabs. Three matters are relied on in support of that ground. First, when the evidence bag with the buccal swabs was returned by FedEx Courier Services to the Virgin Islands police after the completion of DNA testing, there is no evidence as to who received it or how it came into the possession of Constable Mary Phillip through whom it was tendered. The point being made is that there was a break in the chain of custody. The second matter relied on was that the box containing the buccal swabs did not have the initials of the appellant contrary to the evidence of

Constable Mary Phillip. Thirdly, the unrepresented appellant was not asked whether he objected to the admission of the evidence.

[9] Mrs. Henry-McKenzie submitted for the respondent that the learned judge was correct in allowing the evidence to be tendered, it being relevant, highly probative and therefore admissible. Further there was no procedural irregularity arising on the evidence to prevent its admission. Mrs. Henry-McKenzie also argued that the law does not mandate that the learned judge should enquire of a defendant whether he objected to the tendering of an item into evidence. A failure to so do is therefore not fatal. The court has a duty to ensure that the criteria as set out by law are satisfied before any item can be tendered as an exhibit; there is nothing on the evidence to suggest that the criteria were not met.

Chain of custody

[10] With respect to the chain of custody Mrs. Henry-McKenzie contended that the ultimate question is whether there was sufficient evidence for the jury to find that the buccal swabs tested by the DNA expert Mr. Noppinger were the same buccal swabs taken from the appellant by Constable Mary Phillips. The respondent submitted that there was adequate evidence from which it could have been established that the buccal swabs collected by Constable Mary Phillip from the appellant were the same samples received and tested by the laboratory and which were returned and later exhibited in court. Further there was no evidence before the court to remotely suggest that there was any tampering of the exhibit whether before or after it got to the laboratory.

[11] Mrs. Henry-McKenzie pointed out that when the package containing the buccal swabs was dispatched via FedEx to the police, a sample had already been collected from the buccal swabs for DNA testing. The analyst did his test from that sample and the results were generated by way of a report. The overriding concern therefore ought to be whether the chain of custody leading to the testing of the sample was intact. In my judgment on the prosecution's case at trial, there was no break in the chain of custody leading up to the DNA laboratory and the testing of

the sample. The integrity of the chain of custody was not disturbed, hence, whether there was a gap in the chain of custody thereafter, is not material in this case.

[12] The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity[1]. There is no specific requirement, neither is it necessary, that every person who may have possession during the chain of transfer be called to give evidence of the handling of the sample while it was in their possession. It is a question of fact for the jury whether or not there is reason to doubt the accuracy of DNA results because of the possibility that security or continuity of samples was not maintained. See **R v Stafford**[2] at paragraph 116, where the case of **R v Butler**[3] is cited for that proposition.

[13] In **R v Larsen**[4], Romily J speaks to the chain of custody in a criminal matter by suggesting that:

> "…there is no specific requirement as to what evidence must be led or by whom to establish continuity. There is also no specific requirement that every person who may have possession during the chain of transfer should himself or herself give evidence. If there is a gap in continuity and if the trier of fact is not satisfied beyond a reasonable doubt that substances taken from the accused were substances analyzed, the evidence may still be admissible but the weight given to the exhibit and the evidence would be affected."

---

[1] R v Larsen 2001 BCSC 597 per Romilly J
[2] [2009] QCA 407
[3] [2009] QCA 111
[4] 2001 BCSC 597

In **Barry v NZ Police**[5] the Court cited with approval a passage from **Cameron v Police** HCWN CR1 2005-485-187, 14 March 2006, in which Mackenzie J stated:

> "… It is not necessary that every person involved in the chain of communication be called to give evidence of the handling of the sample while it was in their possession. There must be evidence from the officer administering the procedures to establish that he caused it to be conveyed by adopting a system which is sufficient to satisfy the judge dealing with the particular case that any opportunity for interfering with the sample is eliminated so far as that can humanly be done."

[14] The appellant here is not really questioning the integrity of the exhibit. He is saying that no buccal swabs were taken from him. The jury therefore had to decide as a question of fact whether or not swabs were so taken. The jury's task would necessarily have included an assessment of the veracity, reliability as well as the accuracy of the evidence of Constable Mary Phillip, a critical witness for the prosecution, who testified to taking buccal swabs from the appellant. Whether or not Constable Mary Phillip took buccal swabs from the appellant was eminently and exclusively a question for the jury. The jury as the judges of fact evidently accepted and believed the evidence of Constable Mary Phillip. Further the prosecution provided adequate evidence to establish that the buccal swabs taken from the appellant by Constable Mary Phillip were the same samples received and tested by the laboratory and which were returned and later exhibited in court. There is no evidence to suggest that there was any tampering with the exhibit whether before or after it got to the laboratory.

[15] There was no break in the chain of custody leading to the DNA Laboratory and the testing of the sample. The fact that a representative of FedEx did not testify to the delivery of the package to the Royal Virgin Islands Police Force is not fatal. The authorities are clear that proof of continuity is not a legal requirement and gaps in continuity are not fatal to the prosecution's case unless they raise a reasonable doubt about the exhibits integrity. Further, in the absence of a specific requirement or necessity to call as witnesses all persons who may have had possession of an item during the chain of custody, it is a question of fact for the

[5] [2008] NZHC 438 at para. 34

jury whether or not to doubt the accuracy of DNA results because of the possibility that security or continuity of items was not maintained.

Evidence Act

[16] Section 63(1) of the **Evidence Act**[6] provides that the evidence that is relevant in proceedings is evidence that, if it were accepted, could rationally affect, whether directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceedings. Section 64 provides that evidence that is relevant in proceedings is, admissible, and evidence that is not relevant is not admissible. The evidence bag containing the box with the swabs was relevant within the meaning of section 63(1) of the **Evidence Act** and was not subject to any of the excepting provisions of the Act. The evidence was highly probative and admissible.

Absence of initials

[17] The argument raised by Mr. Webster that the evidence bag should not be admitted as it did not bear the appellant's initials as purported by Constable Mary Phillip, is rather misconceived. The matter is really one of credibility, believability and weight, matters which are within the province of the jury, as opposed to admissibility. The absence of initials would not by itself provide a sufficient basis to exclude the evidence. Constable Mary Phillip's evidence is that the appellant placed his initials on the evidence tape of the box with the swab. Constable Mary Phillip identified the swab box as containing the swabs she took from the appellant. Sergeant Mason identified the swab box as the one he received from Constable Mary Phillip. Constable Ballantyne identified the swab box as the one he received from Sergeant Mason and took to the laboratory. Mr. Noppinger identified the swab box by the laboratory's reference number and by the appellant's name as being received into the laboratory and which contained the swab from which he removed a piece to carry out the DNA profiling. The box bore

[6] No. 15 of 2006 (The Virgin Islands)

sufficient information including the appellant's name and the initials of witnesses which assisted them in making the identification. The swab box was properly admitted into evidence and there was no error on the part of the learned judge in so admitting it.

Defendant not asked whether he objected to evidence

[18] Finally, it is not fatal to the admissibility of the evidence that the judge did not ask the unrepresented defendant whether he objected to it. Apart from the fact that the law does not mandate a judge to make such an enquiry, although it is invariably made, the judge has a duty to ensure that the criteria set out by the law and rules of evidence are met before any item can be tendered as an exhibit. The evidence does not suggest that the criteria were not met in this case.

[19] For all the reasons indicated, the ground of appeal that the learned judge erred in allowing the evidence bag containing the buccal swabs into evidence must fail.

Was defence put adequately and fairly?

[20] Another ground of appeal was that the appellant's defence was not fairly or adequately put to the jury. The appellant's defence was two-fold. It consisted of a denial of involvement "I did not do them things" and a denial that Constable Mary Phillip took buccal swabs from his cheek. In dealing with the denial of involvement, the learned judge told the jury that it was a denial of everything and that the appellant is saying "He knows nothing about that." In dealing with the other aspect of the defence, the judge told the jury:

> "He is saying they didn't take any swabs from him, but you heard what they are saying. He doesn't know anything about what they are saying here."

[21] Mr. Webster, QC complained that the above direction was neither fair nor adequate. Mr. Webster, QC stated that the judge should have explained to the jury that the appellant was saying that it was not his DNA that was sent to the

analyst, and that they could only convict him if they were sure that the police took swabs from him and forwarded those swabs to the analyst.

[22] Mr. Webster, QC relied on **David and Watkins v R**[7] where Fraser JA commented that in every summing-up it is the duty of the judge to put the defence to the jury, however weak it may appear to be. Fraser JA referred to **R v Tillman**[8] in which the Court of Criminal Appeal in England held that however weak a defence might be and even when it consisted almost entirely of denials, it was the duty of the judge in summing up to put before the jury the nature of the defence, reminding them very shortly what the evidence was.

Fraser JA stated:

> "In our judgment, then, no case can be said to have been put to a jury without telling, however briefly, of its true nature and purport. A judge may do so expansively or he may do so succinctly, but do so he must. Further, he will not have put it adequately if he omits to call the jury's attention to any of its essential features, and he will have failed to put it fairly if by word or implication he withdraws or may reasonably have been understood to withdraw any such feature from the consideration of the jury. Nor can it suffice merely to recite the evidence."

[23] Mrs. Henry-McKenzie submitted that the judge put the defence case and adequately stated the main points of the defence and did not omit any of its salient features. Further, no defence was offered to the allegations in terms of evidence to refute, qualify or explain them. In such a case it was not incumbent on the judge to remind the jury of the tenor of the suggested or so-called defence. The cases of **R v Briley**[9] and **R v Brian Hillier Vivian Frederick Farrar**[10] were cited in support of that proposition. The appellants in these cases did not give evidence but appealed on the ground that their defence was not properly put to the jury. Both appeals were dismissed.

---

[7] (1966) 11 WIR 37
[8] [1962] Crim. L.R. 261
[9] [1991] Crim. L.R. 444
[10] (1993) 97 Cr. App. R. 349

In **Briley** the court stated:

> "…whilst the judge's references to the defence case might have been sparse, it had to be observed that, in its true sense, no defence was offered to the allegations in terms of evidence to refute, qualify or explain them. It was incumbent on a judge to remind the jury of a defendant's answers to allegations when first confronted with them. But, not only had B not testified nor called a witness in defence, she had said nothing to the police officers who interviewed her. In such a case it was not incumbent on the judge to remind the jury of the tenor of the suggested or so called defence … there was no defence of which the judge could or should have reminded the jury."

In **Farrar** the court stated:

> "We must make this clear yet again, namely that it is no part of a judge's duty to build up a defence for someone who has not chosen to give the jury the benefit of his version of material circumstances and events. The judge's obligation is limited to reminding the jury, in summary form, of what the defendant is said to have stated as to those matters at some time or another pre-trial and what assistance, if any, the Crown's witnesses have provided."

[24] I now look to the summation of the learned judge to see how she dealt with the defence. The judge reminded the jury of what the appellant told the police when he was informed of the allegations. The appellant said: "I did not do them things." The judge told the jury:

> "So if you believe that, he said this to the officer, then that's a total denial of everything. So you bear that in mind, but it is for you to say whether you believe what Detective Constable Harford told you."

The learned judge also put the defence case when she referred to the evidence of Detective Constable Harford when he cautioned the appellant about the offence. The judge stated:

> "He cautioned the accused who said 'I did not do them things.' I told you very early in the summation if you believe Harford then that would have been a denial by the accused. He knows nothing about that."

With respect to the DNA evidence, the judge stated:

> "Members of the jury it is for you to say whether you accept the scientific evidence called by the prosecution which indicates that there is probably only about one male in a 2.2 quadrillion people from whom that DNA

> profile could have come from. The decision therefore you have to reach on all the evidence, that is taking it in its entirety, is whether you are sure that it is this accused man, Damian Hodge, who left these stains on the vessel Spindrift on the night of the 17th of March 2007."

[25] In putting the appellant's case the learned judge also made reference to his closing. The judge stated:

> "You will recall all he told you that you should consider when you go into the jury room to deliberate. He said you can't accept the Prosecution's case. They failed in routine investigation proceedings. It will be a matter for you, because we have gone through all the evidence and I have asked you, I have told you how to apply the law to the evidence … He said from him; they took the buccal swabs. He is saying they didn't take any swabs from him, but you heard what they are saying. He doesn't know anything about what they are saying here."

[26] In light of these specific references to the defence case in the summation, it is difficult to see how this ground of appeal can be sustained. I agree with the respondent's submission that the learned judge put the appellant's defence to the jury carefully, fairly and adequately. The appellant's defence was two-fold, "I did not do them things" that is he did not commit the offences and secondly the police did not take buccal swabs from him. The jury would have been left in no doubt as to the appellant's defence.

[27] Mr. Webster, QC argued that the learned judge should have explained to the jury that the appellant was saying that it was not his DNA that was sent to the analyst and that they could only commit him if they were sure that the police took swabs from him and forwarded those swabs to the analyst. I have no doubt that the jury very well understood from the direction of the trial judge that the appellant was saying that it was not his DNA that was sent for analysis. So I move to the second part of Mr. Webster's argument that the judge should have explained to the jury that they could only convict, if they were sure that the police took swabs from the appellant and forwarded them to the analyst. While such a direction would have been desirable its absence does not lead to the conclusion that the appellant's defence was not put fairly and adequately to the jury. In dealing with the DNA

evidence the judge directed the jury that the decision they have to reach on all the evidence, taking it in its entirety, is whether they are sure that it was the accused (appellant) who left the blood stains on the vessel Spindrift II. By their verdict the jury evidently felt sure that it was the appellant who left the blood stains on the vessel Spindrift II. It is axiomatic that the jury could only have reached that conclusion if they also felt sure that the police had taken buccal swabs from the appellant and forwarded the swabs to the analyst. In the circumstances this ground of appeal also fails.

Evidence of Sergeant George

[28] The appellant also complained that the learned judge erred in allowing the evidence of acting Sergeant George James as the evidence was prejudicial and of no probative value.

[29] Sergeant James testified that he knew the appellant for between 10-16 years and would see him on a regular basis about 2-3 times a week. Sergeant James stated that he was aware of a report of an alleged armed robbery on a boat in which the assailant had sustained a head injury. As a result he started to conduct observations with a view to identifying anyone with a head injury. Two days after the report he saw the appellant and found it strange that the appellant was wearing a tam on his head. A few days later he saw the appellant with no head gear but the appellant had his locks with the side hanging down and it appeared that something held up the front. He observed that the appellant touched his head in a soft manner and winced like he was in some pain.

[30] The appellant rightly contends that the respondent relied upon this evidence to cause the jury to infer that the appellant had a head injury which he wished to conceal. I regard this evidence as relevant as it was capable of leading to the conclusion that the appellant had a head injury which he was trying to conceal. Placed in context the evidence was more probative than prejudicial. There was the evidence of Mr. Martinez that he was attacked by two assailants who came on

to his boat. He struck one of them a blow to the head with a winch handle. The assailants escaped into a waiting dinghy. The police were called. A blood trail led from where Mr. Martinez struck the assailant to where the assailant exited the boat. This is the contextual and factual background from which Sergeant James was conducting general observations looking for persons with a head injury.

[31] In cross-examination the appellant did not suggest that he never had a head injury, neither did he suggest that he was not wearing a tam nor touch his head in a soft manner or deny being in the areas where Sergeant James saw him. Given the complaint of Mr. Martinez, coupled with the DNA evidence, the evidence of Sergeant James was more probative than prejudicial and any prejudicial effect is outweighed by its probative value. Accordingly this ground of appeal fails.

Safety of verdict and lurking doubt

[32] The final ground of appeal to be considered is that the verdict of the jury cannot be supported having regard to the evidence hence the verdict is unsafe.

[33] In advancing that ground Mr. Webster in his skeleton arguments referred to section 37 of the **Supreme Court Act** Cap 80 which invests the Court of Appeal with the statutory authority to allow an appeal against conviction if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory. Mr. Webster also cited **John v R**[11] in which this court considered the issue of an unsafe or unsatisfactory verdict. In **John** the appellant was convicted of murder on circumstantial evidence and evidence of a drug addict who admitted that on the occasion that he saw the deceased that night, he (the witness) was high on cocaine. There was expert evidence that cocaine can produce hallucinations. Sir Vincent Floissac CJ stated at page 127:

> "…the ultimate question to be decided in this case is whether this Court of Appeal has a subjective reasonable or lurking doubt that justice may not have been done by the verdict and has been left in doubt as a result of

[11] (1994) 47 WIR 122

> considering all the circumstances of the evidence, the summing up and the general feel of the case."

Sir Vincent Floissac entertained a subjective lurking doubt that justice may not have been done and hence concluded that the verdict was unsafe and unsatisfactory.

In support of the contention that the conviction was unsafe or unsatisfactory Mr. Webster stated in his skeleton arguments:

> "The Appellant denied that the buccal swabs were taken from him. The best evidence that the swabs were taken from him was his initials on the evidence tape sealing the box with the swabs. His initials were not found on the exhibit which raises the question whether the swabs that were sent to DNA International came from him. The Appellant was not given the benefit of a proper direction on this issue. Further, the cotton swabs should not have been admitted, and the evidence of Sergeant James about seeing the Appellant after the commission of the offences was highly prejudicial with no probative value. These matters should leave the Court of Appeal with a lurking doubt as to whether the conviction of the Appellant was safe or satisfactory."

[34] Mr. Webster also stated that the appellant's defence was not fairly and adequately put to the jury and the resulting conviction was unsafe and unsatisfactory.

[35] In **R v Criminal Cases Review Commission Ex p. Pearson**[12] Lord Bingham LCJ discussed the expression "unsafe" in the **1968 Criminal Appeal Act**, section 2 of which mandated the Court of Appeal to allow an appeal against conviction if the court thinks that the conviction is unsafe. His Lordship said:

> "The expression 'unsafe' in section 2(1)(a) of the 1968 Act [Criminal Appeal Act 1968] does not lend itself to precise definition. In some cases unsafety will be obvious as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, or where the jury verdict, in the context of other verdicts, defies any rational explanation. Cases however arise in which unsafety is much less obvious: cases in which the court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an

[12] [2000] 1 Cr. App. R. 141

injustice has been done. R v Cooper [1969] 1 QB 267 at 271. If on consideration of all the facts and circumstances of the case before it, the court entertains real doubt whether the appellant was guilty of the offence of which he has been convicted, the court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances."

In **Dookran v Trinidad and Tobago**[13], Lord Rodger said:

"Reference to lurking doubt is … one way in which an appeal court addresses the fundamental question: Is the conviction safe? In the vast majority of cases the answer to that question will be found simply by considering whether the rules of procedure and the rules of law, including the rules on the admissibility of evidence, have been applied properly. Very exceptionally, however, even where the rules have been properly applied, on the basis of the "general feel of the case as the Court experiences it", there may remain a lurking doubt in the minds of the appellate judges which makes them wonder whether justice has been done: *R v Cooper* [1969] 1QB 267 271, per Widgery LJ".

In **R v Litchfield**[14], Simon Brown LJ said:

"We come finally to the lurking doubt question … The basis of this Court's power to overturn a conviction on this ground is clear: the ultimate question for determination on any appeal is whether or not the conviction is to be regarded as unsafe and unsatisfactory. If, despite our conclusion that the trial has been impeccably conducted, and the jury fully, fairly and accurately directed both on law and fact, we are left with a lurking doubt in our minds which makes us wonder whether an injustice has been done – described by Widgery LJ in Cooper [1969] 1QB 267 at 271 as '… a reaction which may not be based strictly on the evidence as such: it is a reaction which can be produced by the general feel of the case as the court experiences it' we are not only entitled but are bound to interfere."

[36] The matters relied upon by Mr. Webster in support of the contention that the conviction is unsafe were fully explored by the Court when it considered the other grounds of appeal and for reasons already stated these grounds of appeal did not find favour with the Court. In so far as Mr. Webster relies on these matters in support of the unsafety of the conviction this ground of appeal must fail. It was for

[13] [2007] UKPC 15 at paragraph 28
[14] [1997] EWCA Crim. 3290

the jury to evaluate the evidence before them and none of the matters urged upon the court by Mr. Webster provides any ground for thinking that the conviction is unsafe. Further, having assessed all the facts and circumstances, there is nothing from the general feel of the case as experienced by this Court to engender a lurking doubt about the conviction or uneasiness whether an injustice has been done.

Failure to direct on evidence of expert witness

[37] Although not a ground of appeal the Court observed that the learned judge failed to direct the jury on how to treat the evidence of the DNA expert, Mr. Noppinger and the expert evidence of Dr. Bell. The learned judge also failed to direct the jury on how to treat the evidence of Dr. Bell as he was absent from the trial and his deposition was read in evidence. Dr. Bell's evidence established that the complainant had certain injuries. That evidence was already before the Court by virtue of the evidence of the virtual complainant. Mrs. Grace Mckenzie submitted that the omission to give an expert direction and to direct the jury on how to treat the evidence of an absent witness was not detrimental or fatal to the prosecution's case. I am of the view that these omissions did not render the trial unfair.

[38] The purpose of expert evidence of fact (e.g. observation, test, calculation) and opinion is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert has expressed an opinion remains one for the jury and not for the expert. It is always for the jury to decide the facts in light of the evidence as a whole. Whilst they must, of course, pay due regard to the expertise of an expert witness, they are neither obliged to agree with him, nor obliged to share doubts or reservations expressed by him.

[39] In this case the DNA evidence linking the appellant to the crime was critical to the prosecution's case. A direction as to how the jury should treat the expert evidence

of Mr. Noppinger would have been most desirable. What is the effect of the omission? The trial judge made it clear to the jury that the prosecution had to prove beyond a reasonable doubt on the totality of the evidence including the scientific evidence that the accused is guilty. Further she told the jury that they had to consider and weigh the scientific evidence and say whether or not they accepted what Mr. Noppinger told them. The judge also made it clear that it was for the jury to say whether or not they accept the scientific evidence called by the prosecution which indicates that there is probably only about one male in 2.2 quadrillion people from whom the DNA profile could have come from. She also gave the jury a detailed summing up of the DNA evidence and reminded them of the terms in which the evidence was given by the expert. Mr. Noppinger in substance testified that from the description of the samples that he received for testing, the DNA profiles of the crime scene and buccal swab samples were identical and in his opinion the appellant was not excluded. Consequently, the failure of the trial judge to give the jury the standard warning as to the manner in which they should approach the expert evidence would not be fatal.

[40] In view of the omission regarding the direction on expert testimony, Mrs. Henry-Mackenzie invited the court to apply the proviso. In the circumstances I agree that this is an appropriate case to apply the proviso. Mr. Webster, QC stated that it would not be proper to apply the proviso once the court finds that the directions on the defence were inadequate. It is the view of the court that the directions on the defence were quite adequate. This was a strong case against the appellant and ample evidence on which the jury was entitled to convict him.

[41] For all the reasons stated earlier the appeal against conviction is dismissed and the conviction is affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal