EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCRAP 2009/006

BETWEEN:

ANDREW MILTON

Appellant

and

THE QUEEN

Respondent

HCRAP 2009/007

BETWEEN:

DENNIS CAMPBELL

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]
The Hon. Mr. Justice Mario Michel	Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for the Appellants
Ms. Tiffany Scatliffe, Principal Crown Counsel and
Mr. Valston Graham, Senior Crown Counsel for the Respondent

2012: January 20;
November 12.

Criminal appeal – Murder – Conspiracy to commit murder – Identification evidence – Accomplice warning – Whether trial judge's misdirection to the jury can result in trial being unfair and the conviction rendered unsafe and unsatisfactory

Andrew Milton and Dennis Campbell were tried and convicted of the murder of Dorcas Rhule and conspiracy to murder Keriann Ebanks. The prosecution's case was that Milton, upon his visit to Tortola, devised a plan to kill Keriann, his sister, as he held her responsible for the incarceration of both his uncle and his brother. At around that time, Campbell visited Tortola. Hubert "Ottis" McLeod, accompanied by Marlon Bailey, drove Milton to the airport to collect Campbell. On the journey back from the airport, Campbell was briefed of his plan and was invited to kill Keriann. Campbell, though initially opposed to the idea, changed his position after Keriann threatened to report both Milton and himself to the authorities for working illegally in Tortola. Dorcas, Keriann's roommate had to be killed to prevent any eyewitness to the murder.

The prosecution's prime witnesses were Keriann, Shawana Kay Wilson (Milton's girlfriend) and McLeod, an accomplice. The prosecution led evidence to the effect that on 3rd October 2006 Shawana overheard a conversation between the appellants detailing their plan to kill Keriann and harm Dorcas. Later, the appellants and Marlon equipped with duct tape, glove and a black firearm set out for Keriann's house in a vehicle driven by McLeod. On arriving at the house, the appellants did not meet Keriann but Dorcas was at home. When Keriann arrived home she saw Dorcas alone on the balcony. When she entered the house Milton was there and he pointed a gun at her. At the same time someone rushed past Milton. She pivoted and ran to a neighbour's house. Dorcas was strangled, rendering her unconscious or dead, before being thrown from a balcony four storeys down to the ground.

Some of the evidence the prosecution relied on included but was not limited to evidence given by Shawana which told of the plan devised by the appellants to kill both Keriann and Dorcas, the identification evidence by Keriann of Milton and evidence given by McLeod who recounted the events of 3rd October 2006 which involved his participation both before and after the incident.

Both Milton and Campbell elected not to give evidence. They were interviewed by the police and those statements were admitted into evidence. Milton told the police that he went to Keriann's apartment with Marlon on the day in question. He denied throwing Dorcas off the balcony and trying to murder Keriann. He said when he saw Keriann he went up to her and she started screaming murder and ran away. He then left the apartment and was going down the stairs when he saw Dorcas fall from the apartment. At trial, Milton brought a Dr. June Samuel to testify on his behalf who indicated that Shawana was diagnosed with psychosis.

Campbell's defence was one of alibi. He stated that he was not on the scene when the crime was committed but was under a tree for several hours awaiting the return of Milton.

The jury accepted the prosecution's case and found the appellants guilty of the murder of Dorcas and guilty of conspiracy to murder Keriann. The trial judge sentenced them both to life imprisonment for the murder of Dorcas with eligibility for parole after 35 years and 10 years imprisonment for conspiracy to murder Keriann to run concurrently with the sentence for murder. They appealed the conviction on various grounds which included that the trial judge had various misdirections and inadequate directions in (1) dealing with the evidence

of an accomplice (2) dealing with identification evidence of Campbell (2) giving a Lucas direction when none was required (3) directing the jury on how to treat the DNA evidence (4) failure to give an unreliability warning pertaining to Shawana and McLeod. They appealed the sentence alleging that the trial judge imposed a sentence that was too severe in all the circumstances.

Held: dismissing the appellants' appeal against conviction and sentence and affirming the appellants' conviction and sentence, that:

1. The trial judge effectively indicated to the jury the factors which might indicate that McLeod may have had an improper motive which could have tainted his evidence and the risk and danger in acting on his evidence. The learned trial judge warned the jury of the danger of convicting the appellants on McLeod's evidence unless it was corroborated and informed the jury of the reasons for that. The trial judge clearly brought home to the jury that McLeod's evidence may be unreliable, the matters that may cause it to be unreliable and the need for caution in determining whether to accept the evidence.

   Section 146 of the Evidence Act, 2006 applied; R v Makanjuola [1995] 1 WLR 1348 applied.

2. Given Shawana's medical diagnosis of psychosis, the trial judge ought to have warned the jury that her evidence may be unreliable, the matters which may make it unreliable and the need for caution in determining whether to accept her evidence and the weight to be given to it. However, failure to give such a warning does not inexorably lead to the conclusion that a resulting conviction is unsafe. The evidence presented by the prosecution was of a formidable nature. Shawana's evidence was supported in material particulars by the equally powerful evidence of Keriann and McLeod, whose evidence related to the formation of the plan to kill, the reasons for the plan and the execution of the plan. In the circumstances, the trial judge's failure to give an unreliability warning with respect to Shawana's evidence does not render the conviction unsafe.

   Section 146 of the Evidence Act, 2006 applied.

3. Although, the learned judge should have made the jury aware of the inherent limitations of the DNA evidence and should have given them a sufficient explanation to enable a proper evaluation of that evidence, the circumstances of the case must be assessed. The significance of DNA evidence depends to a large extent on the other evidence in the case. In the present case, the DNA evidence did not stand alone. The prosecution relied on other strong evidence which linked the appellants with the crimes. In view of the strength of the prosecution's case a jury properly directed would inevitably have convicted the appellants.

4. Where there is a risk that a jury may use the rejection of an alibi as confirmatory of guilt then the Lucas direction should be given. Consequently, the trial judge cannot be faulted for giving such a direction.

R v Sean Gary Burge and R v David Graham Reginald Pegg [1996] 1 Cr App R 163 applied.

5. The learned trial judge erred in directing the jury on identification evidence in respect of Campbell as no eyewitness identified him at the scene of murder. Notwithstanding, there was other evidence against Campbell from which the jury could have properly rejected his alibi and which led to the strong inference that he was present at the scene of the crime. Given the formidable nature of the evidence against Campbell it cannot be said that his conviction was unsafe or unsatisfactory. In the circumstances of the case, Campbell was not deprived of a fair trial. A jury properly directed would have inevitably convicted Campbell.

6. A trial judge ought to consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty. Full regard must be had to the features of the individual case so that the sentence truly reflects the seriousness of the particular offence. The trial judge considered all the salient facts before determining a sentence and imposed a sentence that reflected the seriousness of the crime paying due regard to the aggravating factors. It therefore cannot be said that the sentence imposed was too severe in all the circumstances.

JUDGMENT

[1] BAPTISTE JA: On 5th October 2009, Andrew Milton and Dennis Campbell ("the appellants") were convicted of the murder of Dorcas Rhule and conspiracy to murder Keriann Ebanks. They were each sentenced to life imprisonment for the murder of Dorcas with eligibility for parole after 35 years and 10 years imprisonment for conspiracy to murder Keriann to run concurrently with the sentence for murder. The appellants have appealed their conviction and sentence alleging misdirections and inadequate directions on the part of the trial judge and complaining that the sentence is too severe.

Background and case for the parties

[2] Keriann and Dorcas were roommates. They lived at East End Tortola. Milton is Keriann's brother. Milton, who lived in Jamaica, visited Keriann in Tortola and resided with her for some time. Milton and Keriann paid a visit to Her Majesty's Prison in Tortola where their brother and uncle were incarcerated. This visit triggered the events which eventually led to the appellants' conviction. On the

prosecution's case Milton devised the plan to kill Keriann because he held her responsible for the incarceration of their uncle and brother. Dorcas had to be killed to prevent any eyewitness to the murder. Milton enlisted the support of his friend Campbell, from Jamaica. Hubert "Ottis" McLeod, accompanied by Marlon Bailey, drove Milton to the airport to collect Campbell. During the journey from the airport Milton apprised Campbell of his plan to kill Keriann and the reasons for it. Milton stated that Keriann was a wicked girl and was responsible for the imprisonment of their brother. Milton invited Campbell to kill Keriann. Campbell declined the invitation citing the familial nature of the relationship between Milton and Keriann. Though initially averse to the idea of killing Keriann, Campbell's position subsequently changed after Keriann threatened to report both Milton and himself to the authorities for working illegally in Tortola.

[3] On 3rd October 2006 Shawana Kay Wilson, (Milton's then girlfriend) overheard the appellants discussing the plan to kill Keriann and to harm Dorcas. They planned to go to Keriann's apartment at East End, tie Dorcas, lay in wait for Keriann and kill her when she came home. Pursuant to the plan, the appellants and Marlon, who is now deceased, equipped with duct tape, glove and a black firearm set out for Keriann's house in East End in a car driven by McLeod. Keriann was not at home at the time but Dorcas was there. Keriann subsequently arrived. While driving into the driveway she saw Dorcas alone on the balcony. Keriann hastened to enter the house. On entering the house she was accosted by Milton who was armed with a gun. Milton pointed the gun at her. At the same time someone rushed past Milton. Keriann escaped from the house. Dorcas was strangled, rendering her unconscious or dead, before being thrown from a balcony four storeys down to the ground. There were bruises on her neck consistent with manual strangulation. The pathologist's evidence is that when Dorcas hit the ground she was either unconscious or dead.

[4] Milton denied planning to kill Keriann or being part of a plan to kill her. He also denied killing Dorcas or being involved with Campbell 's whether to kill Keriann and or with respect to harming Dorcas. Milton admitted being present at the

bottom of the apartment when he saw Dorcas jump but denied throwing her off the balcony; he stated that no one threw Dorcas off. Milton also stated that Keriann might have been mistaken in her identification of him because he was not armed with a gun the night in question. Campbell raised the defence of alibi, stating that he was not on the scene when the crime was committed but was under a tree for several hours awaiting the return of Milton. Campbell's case is also that there is nothing to say that he wore the glove that was found at the crime scene the night of the murder.

The evidence

[5] The prosecution's case depended primarily on the direct evidence of Keriann, Shawana and McLeod. Keriann's evidence gives a background of the events leading to the crimes; it provides a motive for the crime and places Milton at the scene of the crime. Keriann gave evidence of the familial dispute between her uncle in prison, her brother Milton and herself. The problem started when Milton visited Keriann in Tortola in August 2006. Milton and Keriann paid a visit to the prison in Tortola where their uncle and brother were incarcerated. Their uncle came out and accused Keriann of sending him to prison and an argument ensued between them. On leaving the prison, Milton stated that he did not like to see their brother Kirk in that situation. In September 2006 Keriann went to Jamaica for a week and on returning, found that Milton was acting strange. Keriann asked Milton to leave her apartment. A day after Milton left, he returned and had an argument with Keriann over a tee shirt. Milton told Keriann that she was responsible for Kirk being in prison and that he was going to kill her for that. Keriann reported the matter to the Road Town Police Station.

[6] Keriann also testified that on 3rd October 2006 she went to Fish Bay to have a technician attend to a problem with her vehicle. She got out of the vehicle and spoke to someone, saying, "You see those boys, me going to let Immigration send them home because my brother came to my home and threaten to kill me Saturday." About 8:00 p.m. that evening Keriann came home. Dorcas was not working that day as it was her day off. Upon arriving in her driveway she saw

Dorcas alone on the balcony. Keriann quickly entered the apartment through the unlocked door and called out to Dorcas. She believed she heard a faint reply. While searching her bag Keriann looked up and saw Milton pointing a black gun at her. At the same time someone who Keriann initially identified as Marlon (but later resiled from that position) rushed past Milton. Keriann fled the apartment and sought refuge in a neighbour's house.

[7] Shawana (Milton's former girlfriend) also gave formidable evidence of the planning of the crime. Shawana testified that between 11:00 a.m. and 12 noon on 3rd October, she overheard a conversation between Milton, Campbell and Marlon, in which Milton said that Keriann wants to send him home but he cannot allow this as he had not achieved what he wanted to do in Tortola. Milton then said that he was going to Keriann's apartment and he was "going to hold on to the lady that with the sister and when the sister come he'll let she open the door and he will take his sister in the room, put some tape on his sister and he would call his mom and tell his mom she got mixed up in certain things and she died." Campbell did not agree with this plan and told Milton not to call any parents, just kill her. They said that they should just kill Keriann because she already told Immigration that they were working illegally. Shawana came out from where she was and asked Milton, "How would you want to hurt your own sister?" In response, Milton threatened to kill her. Shawana left to attend an interview and later returned. About 6:00 p.m. that same evening, McLeod arrived driving a car and Milton, Campbell and Marlon left with him in the car. Later that night, around 9:30 p.m. they returned. Milton looked very upset. He said nothing went as planned and he had to kill the girl. Milton took out a black tee shirt and asked her to wash it for him and then left. She did not see him after that.

[8] McLeod, who was undoubtedly an accomplice, also provided important evidence supportive of the Crown's case. McLeod testified that during the night of 29th September, Milton called him and said that he and Keriann were having problems and Keriann asked him to move out of the apartment. As a result, Milton requested him to pick up some items from the apartment. Milton took out some

cushions from a settee in the apartment. As they were driving out of the apartment, Keriann was driving in. On the night of the 30th September, he and Milton returned to the apartment and a quarrel ensued between Milton and Keriann, during which Milton threatened to kill Keriann and Keriann said that she was going to make Immigration send him home. Later that evening Milton asked McLeod to pick up Campbell at the airport. McLeod drove to the airport with Milton to pick up Campbell. On the way from the airport, Milton discussed with Campbell his plan to kill Keriann and the reason for it. Milton asked Campbell to kill Keriann but Campbell refused stating that it was a family matter.

[9] McLeod further testified that on 3rd October he responded to a call from Milton and drove to East End where he met the appellants at a house. From East End he drove the appellants to Baugher's Bay. Milton stated that earlier in the day, "Keriann called Immigration on them and they are on the run." When asked by one O'Connor what he was going to do, Milton said he was going to kill Keriann and asked O'Connor for a pair of gloves. McLeod drove the appellants to O'Connor's house to get the gloves. Milton collected a pair of black gloves there. McLeod and Milton went back to Baugher's Bay and collected a roll of duct tape. McLeod then drove back to East End with the appellants and Marlon and dropped them all in front of a church close to Keriann's apartment.

[10] Later that night at about 10:00 p.m., McLeod drove to East End to meet Milton after receiving a call from him. McLeod inquired what had happened, to which Campbell replied that Milton is a fool because he made the girl get away. McLeod said that Campbell told him that they went to Keriann's apartment but she was not there. They met Dorcas and strangled her and waited for Keriann to come. When Keriann came Milton grabbed the gun out of his hand and stuck up Keriann. Keriann ran off. Campbell was upset because Milton could have shot Keriann in the head while she was running off. McLeod stated that when he asked what happened to Dorcas, Campbell replied that they threw her off the balcony and ran.

[11] In cross-examination, McLeod admitted that he gave several statements to the police but did not come clean until his statement of 12th December 2006. McLeod admitted that there were omissions from his pre December statements. The omissions included statements that Milton said he wanted to kill Keriann and Milton telling Campbell he wanted him to kill Keriann.

Appellants' Interviews

[12] The appellants did not give evidence but their interviews with the police were tendered into evidence. In summary, Milton told the police that he and Keriann got into arguments and she threw him out of her apartment on 30th September 2006. He took some cushions that Keriann had and she threatened to call immigration because he had overstayed his time in the British Virgin Islands. On 3rd October 2006 he was at work at Desmond Alphonso's house when he saw Keriann speaking to the foreman. The foreman told him that Keriann said she was going to get Immigration to send him (Milton) home. Milton also stated that on 3rd October 2006 he went to Keriann's apartment with Marlon. Dorcas was sitting on the balcony. Keriann called out to Dorcas but Dorcas refused to answer. When Keriann came upstairs he went to her and asked her why she did not leave him alone and she started screaming murder and ran away. He left the apartment and was going down the stairs when he saw Dorcas fall from the apartment building. Milton said that he ran past a rubbish truck at the gate and ran all the way to East End and sat under a tree. While there he heard someone say that a girl had just died up the road. Milton denied throwing Dorcas off the building and trying to murder Keriann.

Grounds of Appeal

Common grounds of appeal – Accomplice and unreliability warning

[13] The prosecution undoubtedly presented a formidable case against the appellants. In their quest to overturn their conviction, the appellants have advanced several grounds of appeal. Some of the grounds are common to both appellants. It would be appropriate to consider the common grounds together as they raise the same

issues. The first common ground concerns accomplice and unreliability warning and is primarily concerned with McLeod's evidence. It was common ground that McLeod was an accomplice. The tenor of McLeod's evidence is that he rendered assistance to the appellants both before and after the murder. Given his status as an accomplice, Mr. Thompson (the appellants' counsel) posits that it was incumbent on the trial judge to properly direct the jury as to how to treat his evidence and to give the unreliability warning contemplated by section 146 of the Evidence Act, 2006[1] of the Virgin Islands. Mr. Thompson asserts that the trial judge should have properly explained to the jury the risks and the dangers in accepting McLeod's evidence and should have warned the jury to be careful or to act with caution before convicting the appellants. Mr. Thompson submits that the failure of the judge to so do was a material misdirection rendering the conviction unsafe and unsatisfactory.

[14] With respect to the unreliability warning, Mr. Thompson argues that given McLeod's admitted role as an accomplice, it was incumbent on the trial judge to warn the jury in accordance with section 146 of the Evidence Act, 2006 that: (a) McLeod's evidence may be unreliable; (b) inform the jury of the matters that may cause the evidence to be unreliable; and (c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it. Mr. Thompson asserts that such a warning was warranted in view of McLeod's previous conviction for robbery, his undoubted participation in the offence and the circumstances under which he came to give evidence. McLeod decided to come clean to the police in his statement dated 12th December 2006, after he had been in prison for two months and had previously made four statements.

[15] Mr. Thompson contends that McLeod's evidence called for special caution particularly as at the time of his "come clean" statement, he was an untried prisoner who was giving a statement implicating fellow untried prisoners. It was therefore advantageous to him to give statements implicating the appellants. Mr. Thompson argues that the trial judge was obliged to direct the jury that it was not

[1] No. 15, Laws of the Virgin Islands.

unknown for persons in the position of McLeod to wish to ingratiate themselves with the police; accordingly, the trial judge ought to have drawn to the jury's attention the factors which might indicate that McLeod had an improper motive which could have tainted his evidence. Mr. Thompson contends that such factors would be his undisputed participation in the crime compounded by a desire to minimize his own role since he was a prosecution witness.

[16] In support of his submissions Mr. Thompson cites the cases of R v Vincent et al,[2] R v Alfred William Riley,[3] Labrador and Benedetto v R[4] and Michael Pringle v R.[5] In R v Vincent et al it was held that the warning must be brought home to the jury in plain and simple language and that the expressions such as "looking at the evidence with the utmost care" or "you need to consider his evidence with a great deal of care indeed" were not sufficiently strong to constitute a warning. In Riley, the trial judge had directed the jury to treat the evidence with the utmost care, regard the evidence with caution and look to see where it can be supported. The court found that the judge's direction on accomplice evidence was inadequate and quashed the conviction. Mr. Thompson contends that the judge's directions in the instant case fell far short of the impugned directions in Riley.

[17] In Riley, the court stated that once the judge took the view that there was a possibility that the jury would consider a witness to be an accomplice, it was necessary to give a clear direction in accordance with Davies v Director of Public Prosecutions,[6] of the danger of acting on his evidence, unless it is corroborated. In Davies Lord Simonds said:

> "In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated."[7]

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[2] [1983] Crim LR 173.
[3] (1980) 70 Cr App R 1.
[4] (2003) 62 WIR 63; [2003] UKPC 27.
[5] (2003) 64 WIR 159; [2003] UKPC 9.
[6] [1954] AC 378.
[7] Ibid, p. 399.

[18] Counsel for the respondent submits that the trial judge gave an adequate and clear direction to the jury on accomplice evidence and at several times during the summation directed the jury as to how to deal with McLeod's evidence. If any deficiencies existed they would be minor and would not affect the safety of the conviction.

Discussion

[20] As an accomplice, McLeod's evidence would be susceptible to the vices ordinarily associated with such evidence, such as: improper motive, self interest and unreliability. Although corroboration in the strict sense is not required to support the evidence of an accomplice, the circumstances of the case may require the judge to warn the jury about the need for caution in the absence of supporting evidence. In R v Makanjuola,[8] Lord Taylor gave guidance as to the circumstances in which, as a matter of discretion, a judge ought to, in summing–up to a jury, urge caution in regard to a particular witness. After recognizing that the circumstances and evidence in criminal cases are infinitely variable and the impossibility of categorizing how a judge should deal with them, Lord Taylor stated:

> "Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence."[9]

[21] Lord Taylor stressed that these observations were merely illustrative of some of the factors which judges may take into account in measuring where a witness stood in the scale of reliability and what response they should make at that level in

[8] [1995] 1 WLR 1348.
[9] Ibid, p. 1351.

their directions to the jury. Lord Taylor observed that judges were not required to conform to any formula and the court would be slow to interfere with the exercise of discretion by a trial judge who had the advantage of assessing the manner of a witness's evidence as well as its content. Lord Taylor stated that where the judge decides to give some warning in respect of a witness, it would be appropriate to do so as part of the review of the evidence and his comments as to how the jury should evaluate it rather than a set piece of legal direction.

[22] In Pringle, at paragraph 31, the Privy Council recognized the need for a judge to be alert to the possibility that the evidence of one prisoner against another may be tainted by an improper motive. Lord Hope stated that the indications that the evidence of one prisoner against another might be tainted by an improper motive must be found in the evidence even though it is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, it is the duty of the judge to draw them to the jury's attention as well as their possible significance. Lord Hope also noted that a prisoner may wish to ingratiate himself with the authorities hoping to receive favorable treatment from them. The judge should then advise the jury to be cautious before accepting the evidence.

[23] Mr. Thompson's criticisms about the judge's directions have to be viewed in light of Lord Taylor's instructive guidance in Makanjuola as well as the learning in Pringle. In reviewing McLeod's evidence, the trial judge told the jury that the defence is saying that he is not believable, he has an axe to grind and he changed his story only to protect himself. The judge asked:

> "Was he a truthful witness? He is an accomplice, but is he telling the truth? Is his evidence being supported or is his evidence supported by other evidence for example, the evidence as to time and the evidence that Shakira Skelton presented to you. So all of these help you to decide whether you can believe Otis [McLeod], change-mouth Otis as he is called, and he tells you in no uncertain terms that, yes. I changed my story on the 12th of December. I have decided now to come clean."[10]

[10] See Record of Appeal, Volume 5 p. 68 of the Summation and Verdict, lines 9-18.

Here, the judge is asking the jury to decide whether McLeod is a witness they can believe and whether his evidence is supported by independent evidence. The learned judge then reminded the jury that they have to consider the line of cross-examination that McLeod was a self-serving witness. The judge asked:

> "Did he change his story to protect himself that he will not be sitting in that dock there? Did he tell the truth? ... does his evidence corroborate in any material way with any other witnesses' evidence?"[11]

Again, the judge is asking the jury to consider whether McLeod is a truthful witness and whether his evidence is corroborated by the evidence of any other witness. The judge is also inviting the jury to consider the reason for McLeod changing his story. Was it a matter of self-interest?

[24] The judge reminded the jury that McLeod was cross-examined extensively, as the defence view was that his purpose was to implicate the defendants. The judge told the jury:

> "There may be all kinds of reasons for accomplices to tell lies and to implicate other persons and so for that reason it is dangerous for any jury to act on the evidence of an accomplice unless the evidence is corroborated in some way."[12]

Here the judge is clearly alerting the jury to the danger in convicting the appellants on McLeod's evidence in the absence of corroboration and the reason for that: accomplices tell lies for all kinds of reasons and they also implicate other persons. Later, the trial judge explained the meaning of corroboration and directed the jury that at the end of the day they had to decide whether McLeod's evidence corroborated in a material particular the evidence of the other two eyewitnesses, in particular Keriann and Shawana as well as other witnesses, John Shirley and Mrs. Syfox-Foster, as the prosecution is alleging. The trial judge went on to say that, "… the Prosecution is saying to you that you should believe McLeod because his

[11] See Record of Appeal, Volume 5 p. 68 of the Summation and Verdict, lines 21-25.
[12] See Record of Appeal, Volume 5 p. 73 of the Summation and Verdict, lines 8-12.

evidence corroborates in a material particular, the evidence of Shawana and Keriann."[13]

[25] The trial judge then referred to evidence which the jury may consider as capable of constituting support of McLeod's evidence. The judge reminded the jury of Shawana's evidence that on the morning of 3rd October 2006 she was hiding behind a wall and overheard the appellants in a conversation concerning the killing of Keriann. The judge mentioned McLeod's evidence that on the evening of 3rd October he dropped off the appellants and Marlon by the Church in East End; they were heading to Keriann's house. The judge stated that Mrs. Foster said she saw three men running away. The judge also referred to Mr. Shirley's evidence that he saw three men by Keriann's jeep and three men running in the direction of the garbage bin. The judge referred to the evidence of Keriann that on the night in question Milton pointed a black gun at her and Shawana's evidence of having seen the gun earlier. The judge reminded the jury that McLeod also spoke about a black gun he had seen on the night that O'Connor showed it to Campbell and the evidence that about three weeks after the incident Campbell was apprehended with a black gun.

[26] In my judgment, the trial judge clearly brought home to the jury the factors which might indicate that McLeod may have had an improper motive which could have tainted his evidence and the risks and dangers in acting on his evidence. The judge reminded the jury of the need to look for independent evidence which might support McLeod's evidence. The judge told the jury that it is dangerous to act on the evidence of McLeod unless it was corroborated. The trial judge could not be faulted in her approach of giving the warning as part of her review of the evidence coupled with questions and comments as to how the jury should evaluate it, rather than a set piece of legal direction. Section 146 of the Evidence Act, 2006 of the Virgin Islands applies to evidence, the reliability of which may be affected by self-interest, age or ill-health. The trial judge brought home to the jury that McLeod's evidence may be unreliable, the matters that may cause it to be unreliable and the

[13] See Record of Appeal, Volume 5 p. 74 of the Summation and Verdict, lines 6-9.

need for caution in determining whether to accept the evidence. These are the matters germane to a section 146 direction. In my judgment, the complaints made against the learned judge are not well founded and this ground of appeal is accordingly dismissed.

Non direction on unreliability of Shawana Kay Wilson

[27] Another common ground of appeal is that the learned judge failed to warn the jury pursuant to section 146 of the Evidence Act, 2006 that Shawana's evidence might be unreliable, remind them of the reasons why her evidence might be unreliable in view of the unchallenged medical diagnosis of psychosis and to warn the jury for the need for caution in determining whether to accept her evidence in view of that diagnosis.

[28] I have already referred to the formidable nature of Shawana's evidence. In his skeleton arguments Mr. Thompson states, quite correctly, that if Shawana's evidence were believed, it would be powerful evidence against the appellants. Milton called Dr. June Samuels as a witness. Dr. Samuels testified that in December 2006 Shawana was treated for major depression with psychosis and a conversion reaction and that she had been a victim of a traumatic incident. Dr. Samuel described psychosis as "a psychiatric condition where individuals may have experiences which are outside of normal reality and the experiences that they are having may not be experienced by other persons at the time. And so it may, they may have abnormal reality as it relates to any of the senses of the body. So in terms of hearing they may hear voices. In terms of seeing they may see things that other people don't see etc". Mr. Thompson submits that in view of the unchallenged diagnosis of psychosis, the reliability of Shawana's evidence may have been affected by mental ill-health making it incumbent for the trial judge to warn the jury in terms of section 146 of the Evidence Act, 2006. The trial judge gave no section 146 warning or any warning on the possible unreliability of Shawana's evidence and proferred no reason for not so doing. Mr. Thompson concludes that the absence of a warning was a material misdirection which rendered the conviction unsafe.

[29] The respondent contends that Shawana's period of depression or psychosis occurred as a result of the incident involving the appellants and she was not suffering from any mental condition at the time of the incident she spoke of. In that regard they make reference to Dr. Samuel's evidence in cross-examination where she stated:

> "It was in relation to, one; she was being held by the police because she was a key witness in an incident that occurred and her relationship to the individuals that were involved. And it was also related to the fact that since she was in protective custody at the time I saw her she was unable to speak to her daughter."

Dr. Samuel also confirmed that Shawana was treated and once treated she was able to function properly. When she gave evidence at the trial she was functioning properly.

[30] The respondent contends that the trial judge complied with the requirements of section 146(2) of the Evidence Act, 2006, by stating the following when putting the defence case:

> "Also he brought Dr. Samuels here. She was deemed an expert in the field of psychology. Look at her statement, what she said about the state of mind of Shawana Wilson. You will remember that Shawana went to see Dr. Samuels and the allegation is that she is not speaking the truth because she is not a person of that state of mind at the time to speak the truth. And she was hearing and seeing things, speaking about this imaginary person who was giving her information. I believe she used the word psychotic."[14]

Based on the above, the respondent submits that the learned judge explained to the jury that Shawana's evidence may have been unreliable as she may not have been of sound mind. The respondent argues that the trial judge gave an adequate warning and left the evidence for the jury to consider whether it was truthful or not. The trial judge also indicated to the jury instances where Shawana's evidence was corroborated. Finally, the respondent's position is that even if the court finds deficiencies in the directions it would have to determine whether they are of such a nature as to render the trial unfair.

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[14] See Record of Appeal, Volume 5 pp. 93, 94 of the Summation and Verdict, lines 20-25 and lines 1-4 respectively.

[31] Shawana's diagnosis of psychosis or depression brings into play section 146 of the Evidence Act, 2006 in so far as it applies to evidence, the reliability of which may be affected by ill health whether physical or mental. In that regard the judge was required to warn the jury that Shawana's evidence may be unreliable, the matters which may make it unreliable and the need for caution in determining whether to accept her evidence and the weight to be given to it. The learned judge merely invited the jury to look at Dr. Samuel's statement and what she said about Shawana's state of mind. What the learned judge told the jury cannot be construed as a section 146 warning. If the trial judge were of the view that no section 146 warning was required, reasons ought to be given.

[32] The question is what is the effect of the failure to give a section 146 warning? Does the absence of a section 146 warning render the conviction unsafe? The failure to give a section146 warning does not inexorably lead to the conclusion that a resulting conviction is unsafe. Much may depend on the circumstances of the case, including the nature of the evidence in question, the strength of the evidence against the appellant, and whether the evidence of the witness in respect of which the warning was not given, is supported by other evidence in the case. In looking at the circumstances of this case I note that Shawana's diagnosis of psychosis was related to the incident involving the appellants; and at the time she gave her evidence she was functioning properly. It is also a weighty factor that Shawana's evidence against the appellants does not stand in isolation. It is supported in material particulars by the equally powerful evidence of Keriann and McLeod. Their evidence relate to the formation of the plan to kill, the reasons for the plan and the execution of the plan.

[33] Keriann and McLeod testified that Milton threatened to kill her (Keriann). Keriann stated that Milton held her responsible for their brother and uncle being incarcerated and threatened to kill her for that. Keriann also gave evidence that she threatened to report the appellants to Immigration because Milton threatened to kill her. McLeod gave evidence that Milton said they were on the run because Keriann had reported them to Immigration and that they were going to kill her.

McLeod also stated that Milton had threatened to kill Keriann and Keriann threatened to report him to Immigration.

[34] Apart from Shawana's evidence regarding what she heard Milton say about taping Keriann, McLeod also gave evidence that he dropped Milton to Baugher's Bay and Milton collected a roll of duct tape. Shawana's evidence that when she saw Milton at about 9:30 p.m. on the night of 3rd October, he looked very upset and reported that nothing went as planned and that he had to kill the girl is supported by the evidence of McLeod. McLeod had stated that about 10:00 p.m. that night he went to East End in response to a call from Milton and when he asked Milton what had happened, Campbell replied that Milton is a fool because he made the girl get away. In the circumstances, in view of the compelling supportive evidence from Keriann and McLeod in respect of the critical evidence of Shawana, the trial judge's failure to give an unreliability warning with respect to Shawana's evidence does not render the conviction unsafe. This ground of appeal accordingly fails.

Directions on DNA evidence

[35] Another common ground of appeal alleges that the trial judge failed to adequately direct the jury on how to treat the DNA evidence of Dr. Beaumont. Mr. Thompson contends that this evidence went to a crucial factual issue and the trial judge failed to offer any or sufficient guidance on the conclusions and directions to be drawn from the evidence.

[36] Before delving into the directions of the trial judge, it is necessary to highlight some of the main aspects of Dr. Beaumont's evidence. Dr. Beaumont obtained a DNA profile for Milton and Dorcas. Dr. Beaumont also screened the outside of a glove received from the crime scene for the presence of saliva and identified three areas of possible saliva staining to the tips of the three middle fingers of the glove. This sample was submitted for DNA profiling. The result was a "complexed mixed profile which indicated the presence of DNA from at least three persons". Dr. Beaumont was unable to separate the DNA profile on the glove into its individual donors but found that all of Milton's DNA's components were represented in the

mixed profile. The complex nature of the DNA profile on the glove precluded Dr. Beaumont from giving any statistical evaluation of that potential match but he opined that Milton "could have contributed a significant or what we call a major amount of DNA to that sample". Dr. Beaumont cautioned that:

> "because we cannot statistically evaluate the result because of the complexity of the profile, we cannot give any indication as to the strength of that indication that he had contributed DNA sample. Although it is an indication that he could have contributed DNA, I can't say whether it is a strong or a weak indication."[15]

In cross-examination Dr. Beaumont affirmed that he was not able to attribute the DNA to three specific persons but rather two persons "could have contributed DNA to that sample". Dr. Beaumont confirmed that the presence of a person's DNA material on the finger tips of the glove does not necessarily mean that the individual was on the scene where the glove was found.

[37] In directing the jury on the DNA evidence, the trial judge said:

> "… all of Campbell's DNA components are represented in the mixed profile… this could be expected if Campbell had contributed a portion of the biological material to [t]his sample. However, given the uncertainty over the number of contributors of DNA to this sample, this possible match is not available for any statistical evaluation."[16]

The trial judge also stated that:

> "The second aspect of what the Prosecution is saying to you is that Campbell's DNA was found on the outside of the glove, as I have already stated to you."[17]

Mr. Thompson takes exception to those directions. He complains that the learned judge misdirected the jury on this issue by directing as a matter of fact that Campbell's DNA was found on the glove. No such evidence was adduced from Dr. Beaumont. Mr. Thompson contends that the trial judge failed to bring home to the jury the fact that Dr. Beaumont's expert opinion was that it was possible that Campbell could have contributed DNA to the mixed profile on the glove. Mr. Thompson argues that the learned judge's misdirection on this issue was

[15] See Record of Appeal, Volume 4, Tab 12 p. 22, lines 11-17.
[16] See Record of Appeal, Volume 5, Tab 15 p. 83, lines 16-22.
[17] See Record of Appeal, Volume 5, Tab 15 p. 99, lines 21-24.

fundamental since it was likely to lead jurors to find as a fact that the appellant's DNA was found on a glove at the murder scene, which was a question of fact for their determination. Mr. Thompson submits that this direction was highly prejudicial; it usurped the functions of the jury and rendered the conviction unsafe and unsatisfactory.

[38] Mr. Thompson criticises the learned judge for (a) failing to direct the jury that taking the DNA evidence at its highest, all that could be said was that the appellant could have contributed DNA to the DNA sample found on the glove; and (b) not reminding the jury that the DNA sample could have gotten on the glove in a manner that did not confirm the appellant's presence at the scene. This evidence should have been further juxtaposed with the fact that no match probability for statistical evaluation was possible. Mr. Thompson contends that the significance of these aspects of Dr. Beaumont's evidence was not brought to the attention of the jury.

[39] In support of his submissions, Mr. Thompson relies on the cases of R v Alan James Doheny and R v Adams[18] and Michael Pringle v R.[19] In Doheny, the Court of Appeal gave guidance as to how juries should be directed when dealing with DNA evidence. Pringle was a case of murder in which the prosecution's case was based mainly on a witness's evidence of a conversation he overheard between another cellmate and the appellant. The prosecution also relied on DNA evidence to connect the appellant with the murder. The judge told the jury that the reading on the test that was done "would indicate that the spermatozoa in the vaginal cavity of the deceased woman came from Pringle". The Privy Council stated that it was within the expert's province to say what the statistical likelihood was of the same sections or bands of DNA being found in the male fraction of the vaginal swab as was found in Pringle's blood sample. It was, however, not open to the expert to express an opinion as to the probability that it was Pringle's spermatozoa that were found in the deceased's vagina. By parity of reasoning,

[18] [1997] 1 Cr App R 369.
[19] (2003) 64 WIR 159; [2003] UKPC 9.

Mr. Thompson submits that the learned judge erred in telling the jury that Campbell's DNA was found on the glove. All that could be said was that there was a possibility that Campbell had contributed to the DNA sample found on the glove.

[40] Before analyzing the judge's treatment of the DNA evidence it would be appropriate to consider Mr. Thompson's criticisms of the trial judge regarding lack of directions on the absence of match probability and statistical indicators. In the present case, the nature of the evidence precluded statistical evaluation. This was a circumstance which the jury were entitled to consider. It was important, however, for the jury to understand the probative relevance and limitations of the evidence. In R v Nicholson,[20] the court stated:

> "DNA evidence is capable of being, together with other evidence in the case, such a potent source of identification that the prosecution is required to tender evidence of statistical probability (properly explained to the jury) so that it can be evaluated fairly. In some circumstances even the absence of statistical precision will not prevent the jury considering DNA evidence provided that they understand its probative relevance and its limitations (see, e.g. R. v Bates [2006] EWCA Crim 1395, particularly at paragraph [29]-[31])."

[41] In reviewing the evidence of Dr. Beaumont, the learned trial judge said:

> "And in short, what he said is that the outside of the glove was screened for the presence of saliva. Several areas of possible saliva staining were detected. A sample of the possible saliva staining on the tips of the three middle fingers was submitted for DNA profiling tests. The DNA profile obtained from this sample indicates the presence of DNA from at least three persons, some of which is at a low level. He said that whilst it is not possible to separate this profile into its constituent donors, all of Campbell's DNA components are represented in the mixed profile. He said that this could be expected if Campbell had contributed a portion of the biological material to his sample. However given the uncertainty over the number of contributors of DNA to this sample, this possible match is not suitable for any statistical evaluation."[21]

The learned judge told the jury that a sample taken from the surface of the inside of the glove was submitted for DNA profiling. Dr. Beaumont opined that there was no indication from the profile of the presence of biological material from Campbell

[20] [2012] EWCA Crim 1568, para. 43.
[21] See Record of Appeal, Volume 5, Tab 15 p. 83, lines 7-22.

or Milton. With respect to the presence of biological material that could come from Campbell on the outside of the glove, Dr. Beaumont opined that he had some contact with this glove and that it was consistent with someone using their teeth to pull out the glove. Dr. Beaumont also concluded that the explanation for the presence of biological material that could have come from Dorcas Rhule on the inside of the glove is that she had worn the glove. There is no indication that Campbell and/or Milton had worn the glove. Under cross-examination, Dr. Beaumont said that he excluded Campbell as wearing the glove. The judge stated that in essence, this is what the prosecution is relying upon, that although Campbell, is excluded from wearing the glove, there was the presence of biological material that could have come from him on the outside of the glove.

[43] There is much force in Mr. Thompson's submission that the trial judge did not adequately assist the jury with the DNA evidence. The trial judge merely reviewed Dr. Beaumont's evidence without giving the jury the necessary guidance as to its treatment. Dr. Beaumont's expert opinion was that Campbell could have contributed DNA to the mixed profile on the glove. The learned judge should have made the jury aware of the inherent limitations of the DNA evidence and should have given them a sufficient explanation to enable a proper evaluation of that evidence.[22] The learned judge further fell into error by telling the jury that "the second part of what the prosecution is saying to you is that Campbell's DNA was found on the outside of the glove as I have already stated to you". I agree with Mr. Thompson that on the authority of Pringle, all that could be said was that there was a possibility that Campbell had contributed to the DNA sample found on the glove. What then is the effect of these errors?

[43] In Doheny and Adams the court observed at page 373D, that the significance of DNA evidence depends to a large extent upon the other evidence in the case. By itself such evidence, particularly if based on a partial profile, may not take the matter far, but in conjunction with other evidence it may be of considerable significance. In Bates, the court noted at paragraph 31 that the fact that the jury

[22] R v Bates [2006] EWCA Crim 1395, para. 30.

could not assess with any statistical accuracy the chances that there might have been a "missing" allele which exculpated the appellant did not prevent them from making proper use of the evidence for what it could establish. The court also observed that this was not a case in which the DNA evidence stood alone; there was other evidence linking the appellant to the scene of the murder which provided the context the significance of the DNA evidence fell to be assessed.

[44] As stated earlier, the significance of the DNA evidence depends to a large extent on the other evidence in the case. In the present case, as has been seen, the DNA evidence did not stand alone. The prosecution relied on other evidence linking the appellants with the crimes. The evidence of Keriann, Shawana and McLeod provided the context within which the significance of the DNA evidence and the effect of the misdirection and omission of the trial judge have to be assessed. Without the DNA evidence the prosecution's case against the appellants was quite formidable. In view of the strength of the Crown's case, I am satisfied that a jury properly directed would inevitably have convicted the appellants.

Lucas Direction

[45] Both appellants complain that the trial judge erred in law in purporting to direct the jury on the issue of lies. The thrust of the complaint is that a Lucas direction was unnecessary and may have clouded the issues before the jury. The trial judge directed the jury that the Crown were asking them to find that the appellants deliberately told lies in their statements and invited them to see what lie if any the appellants had told. The judge reminded the jury that the mere fact that the appellants told a lie was not in itself evidence of guilt and that persons may lie for different reasons such as to bolster a true defence, to conceal disgraceful conduct or acting out of panic or distress. The trial judge gave the following as an example of a lie:

> "Here is Campbell saying to you I was fearful that I would be imprisoned for life. That is what Milton was telling him. So he ran into the bushes with

> them… He said he didn't know the laws of the BVI when Milton told him that."[23]

Mr. Thompson submits that the direction on lies was misguided since the example the judge relied on was not an example of a lie told by Campbell. It was open to the jury to accept or reject Milton's explanation for going into hiding with Campbell but this did not amount to a lie from which the jury could infer guilt. While I agree with that observation, looking at the evidence as a whole, I am not of the view that Campbell suffered any unfairness or prejudice as a result of the direction.

[46] The learned judge also directed the jury on lies with respect to Campbell's alibi defence. The judge directed the jury that a false alibi did not entitle them to convict the appellant and that:

> "It is a matter which you may take into account but you may bear in mind that some people say certain things to bolster up a genuine event. Sometimes people tell you anything, but they want to bolster up a genuine defence. So here I ask you even if you find that what he tells you is false, you are not to convict him on that. You are to fall back on the Prosecution's evidence."[24]

Mr. Thompson makes two points in relation to Campbell's alibi. Firstly, there was no need for the judge to give any direction on this issue since Campbell did not give evidence or call a witness in support of his statement in his interview that he was elsewhere when the murder occurred. In that regard Mr. Thompson relies on R v Maraj, Basdeo and Dookram[25] where it was held that in the absence of evidence supporting an alibi, the judge was not required to direct the jury on the consequences of rejecting the appellant's evidence. Secondly, Mr. Thompson contends that if the Crown's case were accepted, then Campbell's case would of necessity be rejected; consequently, there is no basis for rejecting the alibi save by virtue of accepting the Crown's case. In the circumstances there was no need for a Lucas direction. Mr. Thompson also relies on London (Junior) v The State[26] where the Court of Appeal confirmed that it is not in every case that the

[23] See Record of Appeal, Volume 5, Tab 15 p. 91, lines 6-12.
[24] See Record of Appeal, Volume 5, Tab 15 p. 99, lines 8-15.
[25] (1961) 4 WIR 277.
[26] (1999) 57 WIR 424.

express warning must be given. It is only where the existing circumstances create a risk that the jury may use the rejection of an alibi in an unwarranted way as confirmatory of guilt that the express warning must be given.

[48] In R v Sean Gary Burge and R v David Graham Reginald Pegg,[27] Kennedy LJ identified the circumstances in which a Lucas direction may be required:

1. Where the defence relies on an alibi.
2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told or allegedly told, by the defendant.
3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.
4. Where, although the prosecution have not adopted the approach in 3, the judge reasonably envisages that there is a real danger that the jury may do so.

[49] It is recognized that a Lucas direction would not be appropriate where the lies go to a central issue between the prosecution and the defence. It may be appropriate where the lie goes to a collateral issue. If the alleged lie, while not at the heart of the issue between the prosecution and the defendant, concerns an important collateral issue, example, an alibi defence, the lies direction should be given.[28]

[50] Campbell raised the defence of alibi. It was incumbent on the prosecution to disprove Campbell's alibi. He did not have to prove it. While it is true that no eyewitness identified Campbell at the scene of the crime, the jury evidently accepted that the prosecution had disproved Campbell's alibi defence. It was well

[27] [1996] 1 Cr App R 163, pp. 173-174.
[28] See the Judicial Studies Board Crown Bench Book.

within their province to do so based on the facts they would have found and the inferences they would have drawn from those facts. The rejection of the alibi would suggest that Campbell was at the scene of the crime. However, Campbell's presence at the crime scene would not, without more, prove that he committed the crime, but the danger existed that without guidance the jury might use the rejection of his alibi as confirmatory of guilt. In circumstances where there is a risk that a jury may use the rejection of an alibi as confirmatory of guilt then the Lucas direction should be given.[29] The judge, therefore, cannot be faulted for directing the jury on lies in respect of Campbell's alibi defence. This ground of appeal therefore fails.

Access to legal advice and admissibility of interview

[51] The appellants complain that their interviews with the police were wrongly admitted into evidence and in breach of their constitutional right to a fair trial since there was no evidence that they were advised of their right of access to a lawyer before or during the interview. This argument is premised on section 15 of the Virgin Islands Constitution Order 2007 which expressly provides for the right to legal advice. Section 15(3) provides that:

> "Any person who is arrested or detained shall have the right, at any stage and at his or her own expense, to retain and instruct without delay a legal practitioner of his or her own choice, which shall include the right to hold private communication with such legal practitioner and, in the case of a minor, to communicate with his or her parent or legal guardian."

Mr. Thompson relies on Attorney General of Trinidad and Tobago and Another v Wayne Whiteman,[30] in which a similar provision in the Constitution of Trinidad and Tobago was considered. The Privy Council confirmed that a person arrested or detained had a constitutional right to be informed of his right to communicate with a legal adviser as soon as possible and in any event before any 'in custody interrogation' takes place.

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[29] London (Junior) v The State (1999) 57 WIR 424.
[30] [1991] 2 A C 240.

[52] Counsel for the respondent submits that the absence of evidence or suggestion of oppression, deceit or impropriety and the contemporaneously recording of the interview point favorably towards its admissibility at the trial. Counsel also submits that the appellants never challenged the admissibility of the interview at the trial and in the absence of exceptional circumstances, were estopped from raising the issue now. Counsel relies on R v Ensor[31] and Mervin Tyrone Weekes v The Queen.[32]

[53] Mr. Thompson recognizes that the mere fact that the appellants may not have been advised of the right to legal advice did not necessarily deprive them of a fair trial sufficient to quash their conviction. He however submits that in the circumstances of the case, that failure, when considered in conjunction with the judge's direction on the appellants' interview amounted to a material irregularity and that this irregularity in conjunction with the judge's directions on lies, deprived the appellants of a fair trial.

[54] In support of his submission, Mr. Thompson takes issue with the trial judge reminding the jury of the Crown's contention that the interviews contained a number of lies and that the interview was not under oath nor was it tested by cross-examination and that they were to determine the truthfulness of the statements made therein and what weight to attach to them. I do not find anything remarkable about that direction. Mr. Thompson also takes exception to the judge reading extracts from the interview and inviting the jury to "see whether parts of his testimony corroborates part of the case for the Crown." Mr. Thompson points out that the appellants never gave evidence and the judge's reference to the appellant's testimony was unfortunate. I agree with Mr. Thompson, but in my view this was an innocuous slip by the learned judge without damning consequences. The trial judge had made it clear to the jury during the summation that the appellants opted to remain silent. Apart from that innocuous slip, the trial judge's directions, which Mr. Thompson takes exception to, are really unexceptional.

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[31] [1989] 2 All ER 586.
[32] Barbados Criminal Appeal No. 4 of 2000 (delivered 30th April 2004, unreported).

[55] I find no merit in Mr. Thompson's complaints that the judge's directions on the interviews could have had the effect of ridiculing the appellants' case. Mr. Thompson posits that the trial judge correctly told the jury that they were to determine what weight to attach to the appellants' interview, but complains that the judge invited the jury to consider that the interview contained a litany of lies. The trial judge was simply putting forward to the jury, the Crown's view that the appellants deliberately told lies in their statements. This was a conclusion the jury could reasonably come to on the evidence.

[56] I agree with Mr. Thompson's submission that Milton's interview amounted to a mixed statement and the jury should have been directed that they were to consider the whole of the mixed statement in deciding where the truth lay. What did the trial judge tell the jury? The trial judge told the jury that the interviews formed part of the admissible evidence in the court but were not done under oath, hence not tested by cross-examination. In the circumstances they would have to decide the truthfulness of the statements and what weight, if any, to attach to them. The trial judge also directed the jury that they should consider all the evidence whether or not she has relayed it to them. The trial judge cannot be faulted in giving those directions. The directions do not differ materially from what Mr. Thompson suggested.

[57] I do not agree with Mr. Thompson's contention that the judge's directions on the interview invited the jurors to consider the interview as though the appellants had given evidence. Although the judge invited the jury to see whether the interview was corroborated by the Crown's evidence, the invitation had as its context, Milton's statement (in his interview) that Keriann was mistaken in her identification of him because he was not armed with a gun the night in question. The judge therefore invited the jury to look at various parts of Milton's interview where he seems to have been saying the same thing as Keriann. In my view the judge was justified in so doing.

[58] It is not disputed that the appellants were not advised of their right to communicate with a legal adviser before they gave their interviews. We are therefore concerned with the effect of that failure. There is a difference in gravity and effect between a breach of the constitutional right to a fair trial and the breach of the constitutional right to consult a lawyer. A breach of the former right will result in the quashing of a conviction, while a breach of the latter, though of great importance, is a somewhat lesser right, a breach of which can vary greatly in gravity: Allie Mohammed v the State.[33] In Mohammed, the Privy Council stated:

> "… it is important to bear in mind the nature of a particular constitutional guarantee and the nature of a particular breach. For example, a breach of a defendant's constitutional right to a fair trial must inevitably result in the conviction being quashed. By contrast the constitutional provision requiring a suspect to be informed of his right to consult a lawyer, although of great importance, is a somewhat lesser right and potential breaches can vary greatly in gravity. In such a case not every breach will result in a confession being excluded. But their Lordships make clear that the fact that there has been a breach of a constitutional right is a cogent factor militating in favour of the exclusion of the confession. In this way the constitutional character of the infringed right is respected and accorded a high value. Nevertheless, the judge must perform a balancing exercise in the context of all the circumstances of the case. Except for one point their Lordships do not propose to speculate on the varying circumstances which may come before the courts. The qualification is that it would generally not be right to admit a confession where the police have deliberately flouted a suspect's constitutional rights."[34]

[59] It cannot be said here that the police deliberately flouted the appellants' constitutional right or acted in bad faith. Apart from that, the interviews the appellants gave were not confessions. In fact, the interviews contained the defence of the appellants albeit that in material parts their content coincided with critical parts of the evidence of the Crown witnesses. For the reasons indicated earlier, none of the matters relied on as constituting irregularities, individually or collectively, would render the trial unfair or the conviction unsafe. I say this in paying regard to the thrust of Mr. Thompson's submission that the failure to advise the appellants of their right to consult a lawyer though not by itself necessarily

[33] [1998] UKPC 49.
[34] Ibid, para. 29.

rendering the trial unfair but in conjunction with other irregularities had that effect. In the circumstances of this case, the failure did not have the effect Mr. Thompson contends for. This ground of appeal is accordingly dismissed.

Misdirection on Identification

[60] The ground of appeal dealing with identification concerns the appellant Campbell. No Crown witness identified Campbell as being present at the scene of the murder. It was the Crown's case that Campbell could be placed on the scene by McLeod's evidence and that Campbell fitted the description made by John Shirley. McLeod's evidence was that he drove the appellants and Marlon to East End and dropped them off by a church near to Keriann's apartment. Shirley testified that on the night of 3rd October 2006 he saw a lady running from the apartment next door but he thought she was going to the neighbour and when he was going back into his apartment he saw a person on the opposite landing. The person was about his height and weight, of fair complexion and their face was partially covered. In her evidence Keriann told the jury that when Milton held her up at gunpoint she was about to get down on her knees when another man rushed past him. She pivoted and jumped down the stairs. Keriann gave no description of the other man, as Campbell's counsel successfully objected to the Crown's attempt to have her make a dock identification of Campbell. It is noted that in an earlier statement to the police Keriann had indicated that the other man was Marlon. Some months later Keriann corrected her statement to indicate that it was not Marlon.

[61] The learned judge directed the jury that:

> "The Prosecution say that a third aspect of their case is the description given by Mr. Shirley, who saw a man fitting the description of Campbell and then the final aspect is the account given by McLeod which coincides in a material way to the account given by Keriann and Shawana."[35]

The learned judge also stated that:

> "It is another man who now fits the description given by Mr. Shirley and fits the description given by McLeod. The evidence, the description was given as the colour of a person. Mr. Shirley said the person is not as dark as

[35] See Record of Appeal, Volume 5, Tab 15 p. 100, lines 5-10.

> me… The Prosecution is saying only one person fits that description and that is Mr. Campbell."[36]

[62] Mr. Thompson complains that the trial judge wrongly directed the jury that (1) the case against Campbell depended on his identification by certain eyewitnesses and (2) "it is another man who now fits the description given by Mr. Shirley and fits the description given by McLeod". Mr. Thompson submits that the misdirection had the effect of inviting the jury to find that Shirley's identification of Campbell was corroborated by McLeod's identification in circumstances where Shirley had not identified Campbell. Mr. Thompson asserts that the misdirection elevated Shirley's description of a man to a positive identification of Campbell which was likely to prejudice the jurors against Campbell since there was no identification of him. The Crown responded that the learned judge did not tell the jury that Shirley's description matched what McLeod said in his evidence. The judge was merely putting the Crown's theory of the case to the jury.

[63] In further directing the jury, the learned judge said:

> "… there is one aspect, an important aspect of law that I believe I should draw to your attention. It is called identification evidence. Given what Milton has said and the defence put forward by Campbell the case against these Defendants, Campbell and Milton depends on identification of them by certain eyewitnesses."[37]

It is necessary to put that statement of the judge in its appropriate context. When the judge stated "Given what Milton has said" the reference was what he said in his interview that Keriann might have been mistaken in her identification of him because he was not armed with a gun that night. This however, does not hold for Campbell whose defence was one of alibi. The case against Campbell did not depend on his identification by any eye witness. As Mr. Thompson points out, no eyewitness identified Campbell. The learned judge clearly erred in suggesting to the jury that the case against Campbell depended on his identification by any eyewitness. I agree with Mr. Thompson that the learned judge's statement was likely to cause the jury to find that Campbell had been identified by Shirley. The

[36] See Record of Appeal, Volume 5, Tab 15 pp. 100-101, lines 20-25 and lines1-3 respectively.
[37] See Record of Appeal, Volume 5, Tab 15 p. 101, lines 5-10.

matter was not made better by the judge proceeding to direct the jury to act with caution before convicting Campbell on the basis of identification since an honest witness could be mistaken. Mr. Thompson submits that this Turnbull[38] direction was likely to confuse the jury since there was no evidence of identification of Campbell.

[64] Mr. Thompson also complains that the trial judge erred in permitting the Crown to adduce evidence of photographs of the appellants and also erred in telling the jury that Campbell fitted the description of the man seen by Shirley. Mr. Thompson submits that these were fundamental and material misdirections which rendered Campbell's conviction unsafe and unsatisfactory. The photographs in question were extracted from cellular phones seized from the appellants when they were arrested by the police. Mr. Thompson argues that the photographs were irrelevant to the issues before the court having been taken after 3rd October 2006 and were likely to confirm Shirley's identification of Campbell where there was no such evidence of Campbell's identification.

[65] Counsel for the Crown submits that the photographs were correctly admitted in evidence by the trial judge in the exercise of her discretion conferred by sections 123 and 124 of the Evidence Act, 2006. The photographs went to show that the appellants were together after the incident and there was a third man Bailey (Marlon). It was then left to the jury to determine if any of the men fitted the description given by Shirley. (Shirley's evidence was that he saw a man of fair complexion who shared his height and build.) Counsel contends that these were issues the Crown had to prove to the jury beyond reasonable doubt.

[66] It cannot be doubted that the purpose of showing the photographs was to invite the jury to find that the man with the lightest complexion was Campbell and he was the man seen by Shirley. Mr. Thompson submits, and I agree, that this reasoning was fallacious since there was no identification of Campbell. I agree with Mr. Thompson that the learned judge erred in permitting the Crown to tender the photographs since the jurors were asked to conclude that because Shirley saw a

[38] R v Turnbull and Another [1976] 3 WLR 445.

light skinned man and Campbell is the light skin man in the photographs then he must be the man that Shirley saw. What falls to be considered is the effect of these misdirections or errors on the safety of the conviction and fairness of the trial.

[67] A Turnbull direction in respect of Campbell was unwarranted in the circumstances of the case. As Mr. Thompson points out, the case against Campbell did not depend upon the correctness of any identification for the simple reason that he was not identified at the scene of the crime. While I agree with Mr. Thompson that the judge's direction was likely to cause the jury to infer that Campbell was at the scene of the crime, The fact remains however, that such an inference could be arrived at independently of any misdirection or unnecessary direction from the judge. In fact the inference that Campbell was at the scene of the crime is most compelling. The jury heard Shawana's evidence concerning the appellants' plan to go to Keriann's house at East End and kill her. The jury had before them McLeod's evidence concerning the appellants' plan to kill Keriann. The jury would have heard and accepted McLeod's direct evidence that on the night of the murder he drove the appellants to East End and dropped them off close to Keriann's apartment and returned for them after. There was McLeod's evidence that upon asking Milton what happened, Campbell replied that Milton is a fool because he made the girl get away. McLeod also stated what Campbell said transpired at Keriann's apartment that night. Given the formidable nature of the evidence, such evidence being quite independent of identification evidence, it cannot be said that Campbell's conviction was unsafe or unsatisfactory or he was deprived a fair trial by reason of the unwarranted Turnbull direction or by reason of the learned judge permitting the Crown to tender the photographs or by reason of any misdirection concerning identification. I am of the view that the jury would inevitably have convicted Campbell.

Pre- trial publicity

[68] The appellants had complained that they did not receive a fair trial as a result of pre-trial publicity. This ground was not pursued at the appeal. No submissions

were advanced in support thereof. In any case there was no evidential basis in support.

Defence not put

[69] Mr. Thompson complains that the trial judge failed to put Milton's case fairly or at all to the jury, thus rendering the summation unbalanced and unfair. This ground is without substance. The trial judge adequately and fairly put Milton's defence and the jury would have been quite clear that Milton's defence was that he did not throw Dorcas off the balcony neither was he involved in any plan to kill Keriann and that Keriann misidentified him as he did not have a gun that night.

Sentence

[70] The final ground of appeal concerns sentencing. This ground is common to both appellants. The complaint is that the sentence imposed is too severe in all the circumstances. While not taking issue with the trial judge's reliance on the United Kingdom Criminal Justice Act 2003 ("the Act") in imposing sentence, Mr. Thompson contends that the judge erred in applying the principles set out in the Act. The respondent submits that the learned judge was accurate in finding that the appropriate starting point was 30 years based on Schedule 21 of the Criminal Justice Act 2003. Further, the sentence of life imprisonment with parole after 35 years was appropriate.

[71] Schedule 21 to the Criminal Justice Act 2003 provides for the determination of minimum terms in relation to a mandatory life sentence. Paragraphs 4, 5 and 6 of the Schedule deal with the starting points. Paragraph 4(1)(a) provides that if the court considers that the seriousness of the offence and any associated offences to be exceptionally high and the offender was aged 21 or over when he committed the offence, the appropriate starting point would be a whole life order. Paragraph 5(1) deals with a 30 year minimum term. This would be the appropriate starting point in determining the minimum term where the case does not fall within paragraph 4(1) but in the court's assessment, the seriousness of the offence and any associated offence is particularly high.

[72] The terms "exceptionally high" and "particularly high" are not defined and as Lord Treacy said in R v Andrew Randall,[39] are open to a degree of subjective interpretation. Lord Treacy noted that paragraphs 4(2) and 5(2) respectively, assist the sentencing judge by providing examples of conduct which would normally bring about a particular starting point, subject to the aggravating and mitigating features referred to at paragraphs 8 to 11 of the Schedule. For example from paragraph 4(2) of the Schedule it is seen that cases that would normally fall within 4(1)(a) include –

(a) the murder of two or more persons, where each murder involves either:

(i) a substantial degree of premeditation or planning;

(ii) the abduction of the victim; or

(iii) sexual or sadistic conduct

(b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation;

(c) a murder done for the purpose of advancing a political, religious, racial, or ideological cause; or

(d) a murder by an offender previously convicted of murder

In such cases the appropriate starting point would be a whole life order.

[73] Paragraph 5(2) provides that cases (if not falling within paragraph 4(1)) would normally fall within sub-paragraph 5(1)(a) include the murder of a police officer or prison officer in the course of his duty, a murder involving the use of a firearm or explosive, a murder done for gain, a murder intended to obstruct or interfere with the course of justice, a murder involving sexual or sadistic conduct. In such cases the appropriate starting point in determining the minimum term, is 30 years.

[39] [2007] EWCA Crim 2257 at para. 22.

[74] Useful guidance regarding Schedule 21 to the Criminal Justice Act 2003 is obtained from the judgment of Lord Phillips in R v Neil Jones and Others:[40]

> "8. The starting points give the judge guidance as to the range within which the appropriate sentence is likely to fall having regard to the more salient features of the offence, but even then as para. 9 recognises, "detailed consideration of aggravating or mitigating factors may result in a minimum term of any length *(whatever the starting point)*, … or in the making of a whole life order". The starting points must not be used mechanistically so as to produce, in effect, three different categories of murder. Full regard must be had to the features of the individual case so that the sentence truly reflects the *seriousness* of the particular offence.
> …
>
> "10. The scheme of Sch. 21 is that the judge first determines the starting point and then considers whether it is appropriate to adjust the sentence upwards or downwards to take account of aggravating and mitigating factors."

[75] In her sentencing judgment, the judge found that the case fell within the exceptionally high category and warranted a 30 year starting point in view of the fact that Milton went to the apartment armed with a firearm. Mr. Thompson submits that the judge erred in justifying the higher starting point on that basis. In support of that submission Mr. Thompson asserts that Dorcas' murder did not involve the use of a firearm. The medical evidence was that she died of strangulation and a skull fracture caused by blunt force trauma. Further, the learned judge erred in using the mere fact of the presence of the firearm to justify a higher starting point when Milton had already been sentenced to 3 and 1/2 years for the firearm offence after pleading guilty to possession of firearm and ammunition.

[76] In passing sentence the judge undoubtedly had full regard to the features of the case and sought to ensure that the sentence imposed truly reflected the seriousness of the crime. This case did not attract a whole life order within the contemplation of Schedule 21. In keeping with the scheme of Schedule 21 the judge determined the starting point and adjusted the sentence upwards to take

[40] [2006] 2 Cr App R (S) 19, p. 130.

account of the aggravating factors. No mitigating factors were present. The learned judge outlined the aggravating factors that she considered when determining the appellants minimum tariff. These were: (i) planning between the appellants who showed some degree of premeditation, (ii) use of a firearm in the offence; although not fired, was present at the scene, (iii) the method by which Dorcas was killed showed some sadistic intent, and (iv) the appellants' previous convictions. While it is true that Dorcas died of strangulation and skull fracture, the fact that Milton was armed with a gun is not a matter the court should pay scant regard to. In assessing all the features of the case it was within the judge's discretion to consider what weight she would give to the fact that Milton had a firearm that night at the scene of the murder. In all the circumstances I am of the view that the seriousness of the murder and the associated offence was particularly high and properly attracted a 30 year minimum term. I pay regard to the planning and pre-meditation which attended its execution and the manner of its execution. The judge did not err in principle in starting at a 30 year minimum term.

[77] Mr. Thompson argues that the learned judge failed to give sufficient weight to the reasoning of the Court of Appeal in R v Neil Jones and Others that it was likely that a whole life order would be attracted by the presence of one or more of the section 4(2) criteria, example, the fact that the murder was premeditated and carefully planned. Mr. Thompson posits that implicit in this reasoning is the fact that a whole life order is very close to the 30 year starting point. Mr. Thompson contends that the 35 year sentence is essentially far greater than what was contemplated by the Criminal Justice Act 2003 and submits that if the judge were minded to impose a 35 year sentence she ought to have made a whole life order. I am not persuaded by that line of reasoning. To my mind the sentence truly mirrored the seriousness of the crime and is supported by the reasoning in R v Neil Jones and Others, where Lord Phillips said:

> "A whole life order should be imposed where the seriousness of the offending so exceptionally high that just punishment requires the offender to be kept in prison for the rest of his or her life… To be imprisoned for a finite period of 30 years or more is a very severe penalty. If the case includes one or more of the factors set out in para. 4(2) it is likely to be a

> case that calls for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term will not be a sufficiently severe penalty."[41]

The learned judge considered all the salient facts and by her judgment, rightly concluded that a very lengthy finite term was a sufficiently severe penalty. I also note that in R v Andrew Randall Mr. Justice Treacy stated at paragraph 27: "For many offenders the difference, even between a 30-year minimum term and a whole life sentence, is likely to be substantial." That would certainly be pertinent to the appellants' case given their relatively young age.

[78] In R v Andrew Randall the Court noted the very serious aggravating features and allowed for mitigation, the guilty plea – although not tendered at the earliest stage – and the fact that this was the appellant's first conviction. In the circumstances in Randall the Court did not hesitate in finding that the seriousness of the murder and associate offences was particularly high thus attracting a 30 year minimum term and noted that it would have imposed a fixed term in the region of 33 years upon a trial. In allowing for mitigation, the Court fixed a minimum term of 30 years to be served before the Parole Board could consider the appellant for release. This was substituted for the whole life order imposed by the judge in relation to the count of murder. The Court stressed that the 30 year term is a minimum and it would be for the Parole Board to assess at the end of that period whether the appellant can safely be released without danger to the public.

[79] Mr. Thompson quite properly contends that the issue of whether the prisoner meets the criteria for parole is one for the Parole Board after the minimum term fixed by the judge has been served. Mr. Thompson further contends that the minimum term is excessive compared to the maximum term for murder imposed by other decisions of the Court from the Virgin Islands. In support of that submission Mr. Thompson relies on the cases of R v Aaron George,[42] and Lorne

[41] Ibid, p. 131.
[42] Territory of the British Virgin Islands High Court Criminal Case No. 2 of 2009.

Parsons et al v The Queen.[43] In these cases the murder was committed with the use of a firearm with multiple gunshot wounds to the bodies of the victim. In Aaron George the killing was for gain. He pled guilty to murder and was sentenced to 22 years before being eligible for parole. Parsons, Hamm and Varlack were sentenced to a term of 25, 25 and 18 years before being eligible for parole. Mr. Thompson submits that the 25 year term appears to be the upper limit of the minimum tariff for murder and the judge gave no reason for departing so radically from that limit and for imposing a sentence in excess of the 30 year starting point. Mr. Thompson submits that the sentence was akin to a whole life order which was unwarranted by the facts of the case and the statutory criteria.

[80] The respondent sought to distinguish R v Aaron George and Lorne Parsons et al v The Queen from the appellants' case. The respondent noted that Varlack received a minimum term of 18 years while Hamm and Parsons got a minimum term of 25 years. Hamm had one mitigating factor which was his youth. Varlack and Parsons had two mitigating factors; they were of good character and were young at the time. The respondent also points out that Dorcas suffered a sadistic death worse than the victim in Hamm, Parsons and Varlack. The respondent submits that the judge took all the relevant factors into account and set a proper starting point and the minimum term is appropriate when looking at the severe aggravating factors. I agree.

[81] I would be most reluctant to discern from the cases cited the proposition that 25 years represent the upper limit of the minimum tariff for murder in the Virgin Islands. As stated by Lord Treacy in R v Andrew Randall "each case must be fitted into the correct place in the hierarchy of starting points by reference to a careful consideration of all the factors of the case in order to reflect the seriousness of the offence."[44] As Lord Phillips said in R v Neil Jones and Others, full regard must be had to the features of the individual case so that the sentence truly reflects the seriousness of the particular offence. The sentencing

[43] Territory of the British Virgin Islands High Court Criminal Appeal Nos. 2, 3 and 4 of 2006 (delivered 13th February 2007, unreported).
[44] [2007] EWCA Crim 2257, p. 564.

judge imposed a sentence that reflected the seriousness of the offence paying due regard to the aggravating and mitigating factors. Further, the judge did not err in principle in starting at a minimum term of 30 years. In the circumstances the appeal against sentence is dismissed.

[82] In conclusion, for all the reasons indicated, the appellants' appeal against conviction and sentence is dismissed and the sentence and conviction are accordingly affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]