IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCR2017/002
BB Criminal Appeal No. 2 of 2012

BETWEEN

JABARI SENSIMANIA NERVAIS **APPELLANT**

AND

THE QUEEN **RESPONDENT**

Before The Right Honourable and the Honourables

Sir Dennis Byron, President
Mr Justice Saunders
Mr Justice Wit
Mr Justice Hayton
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow

Appearances

Mr Douglas L Mendes SC, Mr. Andrew O G Pilgrim QC, Ms Naomi J E Lynton and Ms Kamisha Benjamin for the Appellant

Mr Anthony L Blackman, Deputy Director of Public Prosecutions (Ag), Ms Krystal C Delaney, Senior Crown Counsel and Neville Watson, Crown Counsel for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton, Anderson, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Barrow
on the day of 27th day of 2018

Introduction

[1] Jabari Sensimania Nervais ('Nervais') and Dwayne Omar Severin (Severin), were convicted of murder and the mandatory sentence of death by hanging was imposed on each of them on 21st February 2012 and 28th May 2014 respectively. Both sought leave to appeal their conviction and sentence on the grounds that their convictions were unsafe, and the mandatory sentence of death was unconstitutional. Nervais and Severin also sought leave to appeal as a poor person. We granted leave to appeal and leave to appeal as a poor person for both Appellants and also ordered that the appeals against conviction would be heard separately and the appeals against sentence consolidated. We now turn to Nervais' appeal against conviction.

Factual Background

[2] Nervais' appeal against his conviction for murder involved largely uncontroverted facts. The controversy in the trial was centred on the admissibility of the repudiated confession statements given by Nervais, which the trial judge admitted as voluntarily made, and on the last-minute defence of alibi.

[3] The Prosecution's case was that on 17th November 2006 at around 9:00 in the evening, Jason Burton, the deceased, was carrying on his business as a vendor from a booth in the area of Nazarene Gap, Jackson, St. Michael. There were other persons around. An alarm was raised that a group of men dressed in black were approaching, which caused the deceased and other persons to run away. A number of gun shots were fired. The Prosecution alleged that one person fired a single shot in the direction of the running men and the deceased was struck by the bullet. He ran a bit further, stopped, collapsed and died. The undisputed evidence of the pathologist, Dr Jones, was that death was caused by a single gunshot wound.

[4] Nervais was arrested on the 22nd August 2007 and charged that day with the murder of the deceased after he had made oral statements and a written confession to a police officer. At the trial, Nervais challenged the making and the voluntariness of the confessions and at the Court of Appeal, he argued that the judge erred in deciding to admit the oral and written confessions. However, he did not pursue that course before this Court.

[5] The confessions Nervais made to the police officer began with Nervais exclaiming after his arrest, that a named companion was the one "who talk" and that he, Nervais, would tell the police what happened. This was followed with the officer telling Nervais that the allegation against him was that a group of men went to Nazarene Gap and one of these men fired a gun shot at persons there. The officer then told Nervais he was suspected of being the person who was responsible for murdering Jason Burton. In response, the officer testified, Nervais said he and others "went in Jackson 'pon de block to bore a man. I end up shooting at some men and one get shoot. The next day I hear a man dead."

[6] In the confession that he signed after he made that statement, Nervais repeated the substance of that statement in terms that

> "I fire a shot in the men direction. All of the men run and disappear. I wasn't certain but one of the men that did running stumble like he get shoot… The next day I hear in the news 'pon the radio that a man was shot in Jackson and that the police investigating."

[7] In the written confession, Nervais also told the police that same night they went to St. Joseph to visit his friend "Tupac" and responded to the subsequent inquiry of the police officer that the proper name of Tupac was Jason Holder. Nervais also answered an inquiry from the police to say he didn't know about other shots being fired and that he fired one shot.

[8] The Prosecution called Jason Holder as a witness, and he testified that on a night in November 2006, Nervais in the company of "a couple fellows", visited his home in St. Joseph and asked him for money to put gas in the car. Holder testified that he gave Nervais ten dollars. He said he had not seen Nervais since that night.

[9] In his unsworn statement from the dock after the Prosecution closed its case, Nervais told of being arrested by the police in July 2007, being brutalized, asked about a gun and about the deceased, and then released. He then told of being arrested again by the police in August 2007 and being tortured at the police station and signing a statement and a police officer's note book. After so stating Nervais said, "that's it", and sat down. It was then that defence counsel prompted Nervais to speak about 17th November 2006.

In response, Nervais stated that on the day in question he woke up late, went to the beach with his girlfriend until 4:00pm, then went to karaoke from 8:00pm until 2:00 am the next day. It was a complete alibi he gave, with no notice of an alibi defence. He did not call his girlfriend or anyone else as witness to his alibi.

[10] One of the witnesses Nervais called, gave an account similar to Nervais' account of the two of them being arrested on 18th August 2007. He also stated that he heard Nervais being assaulted and beaten. The Prosecution asked the jury to disbelieve this testimony.

[11] Having been found guilty of murder, the mandatory sentence of death was imposed by the trial judge. Nervais appealed his conviction and sentence on the grounds that the verdict was unsafe and the sentence excessive, but the Court of Appeal dismissed the appeal and affirmed the conviction and sentence. Nervais further appeals to this court and advances five grounds against conviction.

Was the Confession Corroborated?

[12] Nervais' first ground of appeal was that the Court of Appeal erred in law when they found that the learned trial judge's "misstep" in telling the jury that the evidence of Jason Holder corroborated the disputed written statement was not so significant as to affect the safety of the conviction. This ground asserts it was a misdirection which amounted to a miscarriage of justice when the trial judge, after recalling to the jury that Holder testified that Nervais visited on a night in November 2006, directed the jury that Holder's "*... evidence is significant members of the jury, because it corroborates the written statement of the accused Nervais.*" At the trial, after completing her summation, the judge inquired of counsel whether there was anything she had said that needed correcting and Defence counsel identified the judge's direction as to corroboration as needing correction. Defence counsel said to the trial judge that Holder had not stated that Nervais came to his home on 17th November 2006, as defence counsel apprehended the judge had told the jury, but that he came on an unspecified night in November.

[13] To this court, counsel for Nervais submits that it was the obligation of the judge to have corrected this misdirection in the plainest terms and she should have done so in

accordance with the method outlined in *R v Moon*.[1] Namely, the court must: (1) repeat the direction given; (2) acknowledge that it was wrong; (3) tell the jury to put out of their minds all the misdirection they had heard from the court and; (4) direct the jury on the law in clear terms incapable of being misunderstood. In this regard, counsel for Nervais argues, the only step taken by the judge was to repeat the direction and this failed to undo the "misstep."

[14] Counsel further submits that the learned trial judge never accepted that there was no corroboration and failed to acknowledge that she had made an error. Counsel contended that the direction on corroboration misled the jury as to the weight to place on the written statement. This made the conviction unsafe, it was submitted, because there was really no other evidence but the confession and leaving the misdirection without the correction prescribed in *Moon* amounted to a miscarriage of justice.

[15] On a close examination of the words used by the judge in directing the jury, the objection taken by defence counsel to the judge, that the judge had erroneously directed the jury that Holder had testified that Nervais had come to his home in the night of 17th November 2006, was mistaken. The judge did not tell the jury Holder had specified the date. The judge directed the jury that Holder had said "one night in November 2006"; the judge did not supply the date. Therefore, the judge did not misdirect the jury.

[16] A further inquiry is whether the judge was wrong to tell the jury that Holder's testimony corroborated the statement made by Nervais in the confession, that he had visited Holder the fateful night. The submission that the judge erred in so stating raises issues of whether the law requires corroboration of a confession which is repudiated, what amounts to corroboration, and whether Holder's evidence could be so regarded. The judge's reference to corroboration may have come from the Australian case of *McKinney v R*[2] in which a narrow majority of the High Court determined to establish "a general rule of practice" that judges should warn juries to exercise caution when considering a disputed confession which was not corroborated. However, it was expressly decided in that case that corroboration of a confession is provided by the accused signing the confession, though in some cases this may not amount to sufficient

[1] [1969] 1 WLR
[2] [1991] LRC (Crim) 387

corroboration.[3] In this case, Nervais signed the confession at multiple places. More, he wrote at the end of the statement the certificate that he had given the statement of his free will and he signed that certificate, thereby corroborating that he had given the statement voluntarily. It is the case, therefore, that there was no need for the Prosecution to rely on Holder's testimony as corroboration, because the accused's signature satisfied that requirement.

[17] In addition, once it is accepted, as it must be, that in ordinary language to corroborate means 'to confirm or support', it must be accepted also that the judge was correct in saying that Holder's evidence confirmed that Nervais visited Holder's home in St. Joseph on a night in November 2006. Nervais told the police of visiting only one night; on 17th November 2006. Holder told the court of Nervais visiting only one night, an unspecified night in November 2006. Holder, therefore, confirmed, at a minimum, the fact of a visit and the month of the visit. This was evidence confirming what the accused said, as distinct from what a victim or another Prosecution witness said. The evidence was sufficient to confirm that visit. More to the point, the corroborative value of Holder's evidence was not simply that the visit occurred on the fatal night but to confirm the authenticity of the statement as having come from Nervais, because the fact of Nervais' visit to Holder was within the peculiar knowledge of Nervais (or an accomplice) and was not a detail that the police could have fabricated. We are satisfied that there was no need for the judge to correct herself on the corroboration direction and that Nervais suffered no unfairness or injustice from the direction.

Did the Judge Usurp the Jury's Function?

[18] Nervais submits that at the beginning of the summation the learned trial judge usurped the fact-finding function of the jury because she determined a fact in issue when she stated, *"you must not convict this accused of murder unless you are sure that when the accused fired those shots…"* he did so with the requisite intent. This amounted to the withdrawal of a material question of fact from the jury, on this submission, which undermined Nervais' defence of alibi, which was the main issue for the jury to decide. Instead of the judge directing in the terms she did, counsel submitted, the learned trial judge should have directed the jury that they must be satisfied beyond a reasonable

[3] Ibid pg. 392

doubt that, firstly, Nervais was present at the scene, secondly, he had a firearm and fired shots and thirdly, that he intended to cause death or grievous bodily harm. Relying on *R v Sheaf*[4], counsel also submitted that this determination of a material question of fact by the trial judge operated on the minds of the jury by influencing their views and resulted in a miscarriage of justice. The only basis on which an appellate court can conclude that there has been no miscarriage of justice, counsel urged on the strength of that authority, would be if the court decides that had the question been left to the jury, they would "necessarily have come to the conclusion that the appellant is guilty".

[19] The difficulty in the way of this ground is that it offers little traction in the context of this case, presented on the particular evidence, which came by way of the confession given by Nervais. In that confession, Nervais stated as the facts the very things on which, counsel submitted, the judge should have directed the jury that they must be satisfied beyond reasonable doubt: (1) that Nervais was present and (2) he fired a shot from a gun and he intended to cause death or grievous bodily harm. The simple question therefore left for the jury to decide was whether they believed Nervais said these things in the confession statement which he signed and that they were true; or whether he did not say these things and they were not true; and that the truth was as per his alibi defence.

[20] As a punctilio, the judge could certainly have inserted the word allegedly into the passage of which Nervais complains and could have said: *"you must not convict this accused of murder unless you are sure that when the accused* ***allegedly*** *fired those shots…"* he had the requisite intent. However, when the context of this passage is reviewed, it is easy to see why the judge did not make that insertion. The passage falls within the section of the summation on intent and the judge leads up to it in the standard and proper manner. She begins by telling the jury that before they can find the accused guilty of murder the Prosecution must make them satisfied that: it was the act of the accused that caused the death of the deceased, that it was a deliberate act and not an accident, that the act was intentionally done to cause harm, that there was no provocation, that there was no lawful justification or excuse, and the accused was sane when he did the act.

[4] (1925) 19 Cr. APP R 46

[21] The direction on intention continued on the premise that the jury must have first been satisfied by the Prosecution that it was the act of the accused which caused the death. Continuing, the judge quoted the oral statement of the accused that the police officer had recorded in his notebook, that the accused and others went to the location "*to bore a man. I mean he did gine get some shots in he ass straight.*" The judge directed the jury that if they accepted that these words were spoken, and they decided what the words obviously meant, then the words would be evidence of malice. The judge thereafter, again, told the jury that if they accepted that the accused spoke the words of the oral statement, and if they accepted he said the words in the written statement, they could discern malice from these. She went on to direct the jury as to the intent they could find from the action of a person pointing and firing a loaded gun at another. She then repeated to the jury they had to be satisfied as to specific intent and proceeded to direct them in the language of the passage reproduced above. In concluding on the matter of intention, the judge again told the jury they had to look closely and decide whether to accept the oral statements as having been made by the accused and the written statement as voluntarily made.

[22] Seen in context, we are satisfied the judge did not usurp the function of the jury in the passage identified and there was no error or misdirection.

Joint Enterprise

[23] Nervais contends the judge erred in failing to direct the jury on joint enterprise and this gap resulted in unfairness to him. Nervais contends that the evidence led by the Prosecution was sufficient to "trigger the necessity" of a direction on joint enterprise. Further, he argues, there was no evidence upon which the jury could be satisfied beyond a reasonable doubt he was the person responsible for the death of the deceased[5]. Without such direction on joint enterprise, counsel submits, the jury would have formed the view that on the night in question, it was a bullet from Nervais' firearm that caused the deceased's death but in this case no firearm was recovered and there was no conclusive evidence as to which firearm the bullet came from that killed the deceased.

[5] Brown v The State [2003] UKPC 10

[24] The evidence was clear that Nervais was one of a group of men who went to wreak revenge for the wounding of a friend, that one other member of Nervais' group had a firearm, that more than one shot was fired, and a fired bullet was recovered from a car that had been parked in the area where the shooting occurred. The bullet recovered from the car and the bullet recovered from the body of the deceased were both .32 calibre. As Nervais submits, the judge did not direct the jury to give any consideration to the fact of the two .32 calibre bullets and the multiple shots and specifically directed the jury to ignore the fact that other men had gone on the mission. In the circumstances of this case, Nervais contends, the judge had a duty to direct the jury that they must be satisfied beyond a reasonable doubt that it was Nervais who fired the shot that killed the deceased.

[25] This ground of appeal requires consideration of the theory of the case which was presented to the trial court. The multiple shots are mentioned in the Prosecution's opening, but the prosecutor gave no significance to this fact. The evidence of multiple shots comes from only one witness. And although the Prosecution produced two .32 calibre bullets, one recovered from the body and one from a motor car, and their expert testified that they were fired from different guns, neither counsel gave any significance to this fact and the judge gave it none.

[26] The theory or possibility that it was another shooter and not Nervais who shot the deceased was never even hinted at during the course of the trial. As a practical matter, that theory would have been in direct conflict with Prosecution's case, which was based on the clear statement in the written confession of Nervais that:

> "I fire a shot in the men direction. All of the men run and disappear. I wasn't certain but one of the men that did running stumble like he get shoot… The next day I hear in the news 'pon the radio that a man was shot in Jackson and that the police investigating."

[27] After Nervais gave the written confession Nervais responded to the question whether any other person fired shots saying *"I don't know about no other shots getting fired. I shoot once.*" This evidence, coming from the accused himself, was fully capable of amounting to proof beyond reasonable doubt that Nervais was responsible for the single gunshot wound that killed Jason Burton. This is especially so when it is recognized that there is no evidence that another member of Nervais' group fired any shot. It is pure

speculation that one of the group did so. No one testified that he did. No one testified how the other bullet got in the car. Where was the car? In which direction relative to Nervais and his group? In which direction relative to the deceased and those who fled?

[28] A close examination of the evidence from Carlisle Phillips, who testified that multiple shots were fired and that a bullet hit his car is intriguing for the possibilities it raises as to the source of the shots. The witness states that he heard gun shots, he ran and hid behind a tree and he heard more gun shots. That certainly suggests two sets of shots. He also testified that when he was hiding behind the tree and heard more gun shots he heard someone say *"I ain't got nothing more."* This suggests the speaker was a shooter who had run out of bullets but that would not have been Nervais, who says he fired only one shot. Phillips says he does not know who spoke. But it may be inferred the speaker was close to Phillips' location, which is how Phillips would have been able to hear what the speaker said. It may be further inferred that when Phillips heard the first gun shots the location where he ran to hide would not have been near to but away from the source of the first shot(s) – which presumably came from Nervais. These suggestions and inferences raise prime speculation that someone from the deceased's block also fired shots. Was it such a person who shot the car?

[29] The written submission to the CCJ by counsel for Nervais, that the judge should have directed on self-defence, heightens speculation that the other shots heard that night came not from Nervais' group but from the other side. Counsel's commendable decision not to 'hotly' pursue this ground, no doubt in recognition of its highly speculative premise, points the way to the treatment we must give to the speculation that Nervais' bullet went into the car and not into the body of the deceased. As noted, Nervais said in his confession that he fired "*in the men direction*". And he said what followed – "*one of the men that did running stumble like he get shoot.*" On Nervais' confession, he shot a man; not a car. Indeed, in an oral statement Nervais made to the police before he gave the written confession Nervais was quite forthright as to his action and the result, when he said *"Me, Andy and some more men went in Jackson 'pon de block to bore a man. I end up shooting at some men and one get shoot. The next day I hear a man dead."*

[30] From the outset, the police's case was that one man fired and it was a single shot. Nervais' statement contained no hint that Andy or any of the others he had just mentioned fired any shot. The material placed before the jury was more than sufficient to entitle them to conclude that Nervais shot and killed the deceased.

[31] Clearly, therefore, the Prosecution's theory of the case, which the jury accepted, was that Nervais alone was the shooter. The Prosecution openly presented their case on this basis and the defence clearly defended against that case, and never suggested that the alleged facts did not support that theory.

[32] The question of who did the shooting was raised a number of times, but it was consistently in the context of Nervais' denial of having been present. In the instance when the prosecutor raised this question in his address to the jury, it was purely in that context. Defence counsel mentioned the evidence as to the two different guns, but only to say this evidence does not connect Nervais with the crime. In response to the judge's request of counsel to identify particular matters on which the judge should direct the jury, neither side raised an issue as to the identity of the shooter of the fatal bullet.

[33] As counsel for Nervais submitted, in her summation the judge refers to the involvement of others in the crime, but this is only to tell the jury to entirely disregard these others. The judge directed the jury that the Prosecution's case was that Nervais fired the fatal shot, making no mention in this context of the other shots to which she had passingly referred earlier, leaving it clearly to the jury to decide whether Nervais was "the shooter".

[34] It follows from how the case was presented that there was no reason for the judge to direct the jury on joint enterprise and common design. The judge fully directed as to the specific intention of the accused as the shooter, as has been recounted. Once the jury accepted the truthfulness of the oral and written confession statements and, hence, that Nervais was the shooter; that he alone fired at the men; that he saw one of the men stumble as though he got shot, the deceased died on the spot from a single gunshot wound, the jury were entitled to ascribe to him the intent for murder. There was no question of making Nervais liable for the action of other persons, on the footing of joint enterprise, when the case against him was to make him liable for his own, personal act.

An Unbalanced Summing Up?

[35] The substance of Nervais' ground of appeal that the trial judge gave an unbalanced summing up is that the judge presented the Prosecution's case to the jury as a narrative and outlined that case to the jury as an accurate overview of what occurred on the night in question and throughout the police investigation. Nervais submits that the narrative's thrust is particularly strong when the judge recounted the evidence of the lead police investigator as the fact, despite the reality that the defence case disputed the officer's account. Nervais also submits the learned trial judge frequently repeated aspects of the Prosecution's case which disproportionately emphasised the Prosecution's case and as such tipped the balance in their favour.

[36] Nervais submits that the trial judge made minimal reference to his case and failed to indicate to the jury how to approach the disputed confession and orals. Counsel argues that the judge failed, on a number of occasions, to tell the jury what approach they should take if they did not accept that Nervais made the oral and written confession. Counsel also contends the judge provided explanations for the 'holes' in the Prosecution's case such as by asking them to infer that Holder's evidence was corroboratory without being invited to do so by the Prosecution.

[37] Further, Nervais contends that in relation to the disputed confessions and orals, the judge ought to have given the warning and directions laid down in *McKinney v R.*[6] As stated in that case, the warning is required because an accused in the position of the accused was specifically vulnerable to fabrication. In this case, counsel submitted, there was great need where Nervais was arrested some nine months after the homicide and the only evidence linking him to the crime was a disputed confession statement and disputed orals. The trial judge's failure to give such a warning contributed to the unbalanced nature of the summation and breeds the potential for a miscarriage of justice to have occurred.

[38] Nervais also contends that the learned trial judge made remarks that positively supported and bolstered the Prosecution's case and used words and phrases which were generally critical when referring to the case for the defence and cites instances. He

[6] (1991) HCA 6, [1990-1991] 1 CLAR 468

argues these statements undermined the case for the defence and conveyed clearly to the jury that the judge believed the case for the Prosecution. Counsel also pointed to instances of the trial judge saying that the defence 'made much' of certain things and argued that such an expression implies that the defence submission was insignificant and unfounded. The cumulative effect of these things, counsel submits, was to give unequal treatment to the defence case and weigh heavily in favour of the Prosecution, resulting in an unbalanced summation.

[39] This was a straight case of whether Nervais voluntarily made the written confession which he signed and whether he made the oral statements which the police officer recorded in his notebook which Nervais also signed. Once the judge ruled that the oral and written confessions had been voluntarily made the issue was reduced to what weight to give to these statements which included, of course, whether what he said in these statements was true. As counsel noted, the judge repeatedly told the jury they must decide whether they accepted it as true that Nervais made the statements but, contrary to the submission for Nervais, the judge went further and told the jury that if they did not believe Nervais made the statements they must reject the statements and find Nervais not guilty. There was, accordingly, no failure by the judge to tell the jury, in the clearest terms, what to do if they did not accept the statements.

[40] We have duly considered the other aspects of the complaint of imbalance in the summing up and looked at the particular passages and do not regard the complaint as having been made out. It is to be recalled that this was not a case where there were competing versions of occurrences and where there was room for a judge to favour, however unconsciously, one version over the other. This was a case in which the jury simply had to decide whether to believe the content of the confession which the judge had ruled Nervais gave voluntarily. Thus, where the judge directed the jury in narrative form as to the conduct of the investigation and recording of the oral and written statements this was apposite because there was only the police narrative to recall. The defence case was to deny the truth of what the police witnesses said and advance suggestions, but not to produce contrary, positive evidence as to the events narrated. Further, when the judge directed the jury that defence counsel made much of certain things when challenging the police testimony, the judge did not tell the jury that defence counsel made *too much* of these matters. Reviewed in context, the judge seemed to be

doing no more than saying counsel emphasized or highlighted these things and the judge went on to identify the things which were emphasized by counsel and to tell the jury how to deal with them.

[41] As to the submission that the jury should have been given a "McKinney warning", we see no need to add to our earlier discussion of such a requirement in the context of corroboration and in view of the decisions of this court in *Sealy v The Queen*[7] and *Edwards and Haynes v The Queen*.[8] We reject this ground of appeal.

Effect of Directing Jury to Be Fair to the Prosecution

[42] Another ground of appeal is that when the learned trial judge directed the jury "Y*ou must be fair to the accused and be fair to the prosecution as well*", the statement implied to the jury that the scales should be balanced. But, Nervais contends, this did not accord with section 134 (1) of the Evidence Act, which provides that the Prosecution must prove its case beyond a reasonable doubt and holds the Prosecution to a higher standard than the standard to which the accused is held.

[43] That statement without more, Nervais submits, does not accurately convey to the jury how to weigh the evidence and may have resulted in the jury weighing the evidence evenly. But, he submits, the law does not contemplate that the scales of justice should be balanced evenly. Fairness to the Prosecution arises only in specific situations such as when the judicial officer has to make a ruling on a point of law, as for example whether there has been an abuse of process. In those circumstances, there must be fairness to both sides, but a judicial officer knows the weight that must be placed when exercising his/her discretion as is demonstrated by cases such as *R v. Haywood & Ors* [2001] All ER 256*; DPP v Meakin* [2006] EWHC 1067**.**

[44] Nervais contends that in dismissing this complaint the Court of Appeal wrongly relied on the cases of *Allan Athelstan Woodall v R Criminal Appeal No. 14 of 2008 (unreported decision of 21 April 2011) and R v Nelson* [1996] EWCA Crim 707 to justify the statement made by the trial judge. Further, he argues, the quote relied on by

[7] [2016] CCJ 1 (AJ)
[8] [2017] CCJ 10 (AJ)

the learned Justices of Appeal supports his position, namely, that fairness to the Prosecution and the defence involves a discretion which must be exercised by a judicial officer and not the jury, which does not have the requisite training to deal with bald statements of fairness. The bald statement of fairness, he submits, implied that a balance must be struck between the Prosecution and the defence thereby reducing the standard of proof from beyond a reasonable doubt to the civil standard of a balance of probabilities.

[45] In considering this complaint, it must again be borne in mind that much depends on context, and in this instance, a consideration of the context is all that is necessary to decide on the merits of the complaint, with no need to discuss the authorities cited by both sides. The judge made the impugned statement in the context of directing the jury to hold the Prosecution to a higher standard of proof. She begins this treatment by remarking to the jury they would have all heard the phrase, *"the presumption of innocence"* and that it is a phrase that is well known to our criminal law, and it embodies the principle that every accused person is presumed to be innocent unless the contrary is proved.

[46] The judge goes on to say that an accused person therefore stands innocent in the eyes of the law, unless and until the jury find him otherwise and it is only if at the end of the day the jury were to find the accused guilty that the presumption of innocence goes. The significance of this, the judge continues is that in every criminal case such as this, the Prosecution has the responsibility in law to prove the case that they have alleged. She says:

> "The onus or burden rests upon the prosecution. It does not shift to the accused person. In other words, he does not have to prove anything, the prosecution must always prove their case because in our system of law, the person is presumed innocent until proven guilty. If the accused is to be found guilty of this offence, the prosecution must prove his guilt."

[47] The judge then directed the jury that the Prosecution can succeed in proving guilt by making the jury sure of the guilt of the accused and

> "that is the standard which the evidence in this case must attain and no lesser standard will do. The standard of proof which the prosecution must attain is proof beyond reasonable doubt. This is a high standard of proof, members of the jury, but no lesser standard will do in a criminal trial."

[48] The judge noted that the standard required is not absolute certainty, but it does require that the jury should be sure. She distinguished proof beyond reasonable doubt from proof beyond doubt, and proof beyond a shadow of a doubt, and emphasized the standard was proof beyond reasonable doubt. If the jury were left in reasonable doubt as to whether the accused was innocent or guilty, the jury were told, they must give him the benefit of the doubt and acquit him. Similarly, they were directed, if after considering all the evidence in the case they were satisfied that the Prosecution's evidence was not of such a nature and quality as to make them sure of the guilt of the accused man, they must acquit him. Likewise, the judge directed, it is obvious that if they believed the accused man to be innocent, they also must acquit him.

[49] It was after so directing, that the judge told the jury she was impressing upon them that they were duty bound to return a verdict in accordance with the evidence and the oath they had taken. They should therefore reach a verdict based on the evidence that they had heard in that courtroom and they were bound by the evidence in this case and that evidence alone and they must not speculate about matters on which they have no evidence. The judge expanded on this limitation and told the jury to concern themselves only with what has taken place in their presence in the courtroom. She told them they must return a verdict free from any bias and without sympathy for the accused or any other person who may have suffered or may have been affected by this matter.

[50] It was then that the judge gave the direction which is impeached, saying:

> "Your function, members of the jury, is to conduct a calm and dispassionate view of the evidence and give a true verdict according to your oath. And I must tell you that in carrying out your function as sole judges of the facts, you must be fair to both sides; be fair to the accused and be fair to the Prosecution as well."

[51] As appears, this direction served to guide the jury in clear terms on the very point which Nervais now says the direction may have undermined or diminished, namely, that the Prosecution must satisfy the heavy burden of proof beyond reasonable doubt. It is, therefore, the fact that the judge directed the jury that being fair to both sides included holding the Prosecution to the standard of proof she had clearly laid out to them, of proof beyond reasonable doubt. On this examination, there is no substance to the contention that the jury may have been misled by the direction from the judge to be fair

to both sides. In fact, the judge had told the jury what such fairness entailed, such as not using a standard of proof beyond a shadow of a doubt or of absolute certainty; not to speculate on matters on which they had heard no evidence in the court room; to act free from bias or sympathy for the accused or any other affected person; to take a calm and dispassionate view of the evidence; and to give a true verdict according to the evidence and their oath.

Conclusion on Nervais' Conviction

[52] We see no need to address in this judgment the ground of appeal, which of course we have considered in our deliberations, that the judge should have directed on self-defence. We briefly indicated in paragraph [30] our view that such a direction would have been based entirely on speculation because there were no facts alleged that were capable of raising a prima facie case of self-defence, which is the threshold this court recently restated in *Troy Stanford v The Queen*.[9] None of the grounds of appeal succeed. We therefore dismiss the appeal against conviction by Nervais.

/s/ CMD Byron

The Rt. Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D. Hayton

/s/ W. Anderson

The Hon Mr. justice W. Anderson

/s/ M. Rajnauth-Lee

Mme Justice M Rajnauth-Lee

/s/ D. Barrow

Mr Justice D. Barrow

[9] [2017] CCJ 7 (AJ)