[2010] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 87/2006

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE HARRISON JA
THE HON MR JUSTICE MORRISON JA

DONALD PHIPPS v R

Frank Phipps QC and Miss Kathryn Phipps for the applicant

Jeremy Taylor and Vaughn Smith for the Crown

Curtis Cochrane, Director of State Proceedings, for the Attorney General

11, 12, 13, 14 January and 30 July 2010

MORRISON JA:

Introduction

[1] Shortly after 4:00 on the morning of 15 April 2005, Constable Gavaskar Adams received instructions to proceed to a location in Western Kingston. He was accompanied by two other police officers on duty and they travelled in a police vehicle, driven by him, to a point close to the intersection of Beeston Street and Rose Lane. There, he came upon a large fire burning in an open lot of land on Rose Lane. Alighting from the vehicle, Constable Adams observed a heap of motor vehicle tyres on

fire in the open lot and what appeared to be human bodies partially covered by the tyres. In due course, after the fire was extinguished by a team of officers from the Trench Town Fire Station, the human remains were identified as the bodies of Mr Rodney Farquharson ("Rodney") and Mr Daten Williams ("Scotch Brite").

[2] The applicant was originally charged jointly with Mr Garfield Williams with the double murder, but on 23 March 2006, at the end of the case for the prosecution, Mr Williams was discharged upon a concession by the Crown that there was no evidence against him.

[3] On 12 April 2006, after a 30 day trial before Marsh J and a jury, the applicant was found guilty of two counts of murder. On 30 May 2006, he was sentenced to concurrent terms of imprisonment for life on each count and the court ordered that he should serve a period of not less than 30 years before becoming eligible for parole.

The case for the prosecution

[4] The case for the prosecution was based in part on direct and in part on circumstantial evidence. A total of 35 witnesses gave evidence on behalf of the Crown, including expert witnesses who spoke to the results of forensic enquiries undertaken as part of the wide ranging police investigation of the murders, as well as to some arcane aspects of cellular telephony. Even by way of summary, therefore, it is necessary to recount

much of this evidence in some detail. The history of the matter divides itself naturally into the events of the late evening of 14 April 2005 and the early morning of 15 April 2005, the commencement of the police investigation and the subsequent progress of the investigation.

Bayshore Park, Harbour View, 14 – 15 April 2005

[5] Up to the time of his death, Rodney lived with his girlfriend, Miss Christine Cruickshank and their two daughters at Bayshore Park, Harbour View, in the parish of St Andrew. They had known each other for four years and Miss Cruickshank was at that time heavily pregnant with their third child. Rodney was a businessman, engaged in the mining of sand for the cement company and block making, in addition to which he owned trucks and trailer heads. He had also at one time owned a wholesale store in the Matthews Lane area of downtown Kingston.

[6] At some point shortly before 10:00 p.m. on the evening of 14 April 2005, while he was at home with his family watching television, Rodney received a call on his cellular telephone. He was a customer of Digicel and his telephone number was 362 1048. Upon receiving this call, he immediately went to the bathroom and got dressed in jeans and a yellow 'Tommy' T-shirt and left the house, Miss Cruickshank said, at "Some minutes to 10:00". Miss Cruickshank said further that he left driving a car which belonged to a friend of his called "Tanny" and he was

accompanied by their next door neighbour, known to her only as 'Scotch Brite', but who would later be identified to be Mr Daten Williams.

[7] At about 3:00 a.m. the following morning, Miss Cruickshank became aware that Rodney had not returned home and twice tried calling him on his cellular phone, but on both occasions got only a recorded voice mail message. She went back to bed and when she awoke about three hours later, there were a number of persons, friends of Rodney, outside on a balcony of her house. Among the group of friends were Mr Conrod Williams (known as "Tanny"), in whose car Rodney and "Scotch Brite" had left the night before. Miss Cruickshank never saw either Rodney or Scotch Brite again.

[8] As it turned out, the car which Rodney borrowed from Tanny actually belonged to a Miss Ann-Marie Hutchinson. However, "Tanny", who was her driver, was allowed to keep the car overnight. He was also Rodney's cousin and next door neighbour and had on previous occasions loaned him the car, as he confirmed doing again on the evening of 14 April 2005 at some time between 9:30 and 10:00 p.m. He would not see the car (a grayish blue Toyota Corolla) again until nearly a month later (on 13 May 2005) when he was asked by Miss Hutchinson to accompany her to the Elletson Road Police Station, where he identified it as the car which he had loaned to Rodney on the night of 14 April 2005.

[9] Mr Kelroy Rashford ("Kelroy"), another of Rodney's friends, lived within walking distance of Rodney's home in Bayshore Park. He had known Rodney from they were children growing up in the district of Haughton in St Elizabeth. At about 12 midnight on 14 April 2005, apparently prompted by a visit from two other acquaintances, Kelroy used his cellular phone (368 1497) to call Rodney on his cellular phone (the number of which Kelroy could not recall, though he did say that it was a Digicel phone). Kelroy identified the person who answered Rodney's phone as the applicant, who was previously known to him as 'Zeeks' or 'father Zeeks'.

[10] The applicant had been known to him, Kelroy told the court, for some 14 years before. He had met him from the time when he (Kelroy) used to sell peanuts on Chancery Lane in downtown Kingston, having previously heard of him from Rodney, who "was on the lane at the same time". He was accustomed to seeing the applicant sometimes "five times for the day, or like two times for the day". He would also see him from time to time at night, as he was a regular attendant at the applicant's "Cool Tuesday" parties "what him always keep round by Matthews Lane".

[11] While Kelroy was unable to recall having spoken with the applicant at one of these parties, they had often spoken to each other between 1991 and 2005. Before 14 April 2005, he had never spoken to the applicant on the telephone, but he knew his voice from having heard him

speak into the microphone, sometimes twice per night (that is, between 2:00 a.m. and 7:00 a.m.) during the Cool Tuesday parties, for perhaps three or five minutes each time, depending on whether "the party nice". In addition, Kelroy testified that he had a compact disc recording which he had purchased at Cool Tuesday (he had had two, but one had been broken), on which the voice of the applicant could be also heard, and he would play this recording from time to time at his home, as well as in his car when moving around. As a result of all this, Kelroy said, he knew and was able to recognise the applicant's voice.

[12] Kelroy told the court that after the applicant answered his call to Rodney's number on the night of 14 April 2005, saying "Hello, who is this", he heard the voices of Rodney and others in the background saying "is Kelroy". The applicant then told Kelroy that he had something to say to him, and went on to say, in Kelroy's words, "we have Rodney down here, now, because him violate…and we not going to see him back again…If we do see him, him a go pick out him fingernail them, or him toenail them, or piece of him…Unno nah go see him back again". Kelroy then heard the applicant say (apparently to Rodney) that he should speak to Kelroy, and Rodney responded, addressing himself directly to Kelroy, "Delly, a Father Zeeks yuh a talk to". At that point, Kelroy testified, the applicant took back the phone from Rodney and started speaking directly to him, finally saying "All right, you know what, I want you and Tim come down

here now". When asked by Kelroy, "for what occasion?", the applicant's response was that he did not have to know. After an interval, Kelroy then heard Rodney address him directly again, saying "Kelroy, I want you and Tim feh come Downtown right now…unno do, mek haste and come and unno make haste…before the road get busy". He then heard the applicant say, apparently to Rodney, "A weh yuh a do? A police yuh a tell him feh call?". "Same time", Kelroy's evidence continued, "me hear Rodney voice change…Like a lick him get, the impression that he gave to me...Him voice sounded loud, like him crying…Like them - like him, you could hear him get a lick". He then heard Rodney crying and saying "Delly, jus duh what him seh. Yuh feh duh what Father Zeeks tell yuh feh duh. Get Tim and yuh and him come on".

[13] Kelroy's evidence was that while this entire conversation was taking place, he had had his phone on "speaker", so that everyone in the group by now gathered at his home could have heard what was being said. He then decided to go to Mr Oliver Clue's house, also in Harbour View. Accompanying him was Mr Oneil Patrick, also known as Joe, who actually lived at the house shared by Rodney and Miss Cruickshank. Mr Clue, who also gave evidence for the prosecution, described himself as "a Politician, Councillor and also a Farmer". He was at the time a Councillor for the Harbour View Division and a representative of the People's National Party

("PNP"). He had been a Councillor since 2003 and before that had been the Member of Parliament, also as a member of the PNP, for the East Rural St Andrew constituency from 1992 to 2002. He knew Rodney and shared a good relationship with him, Rodney also having been a member of the PNP and an area leader in the constituency. He had had occasion in the past to call Rodney on his cellular phone and knew his number to be 362 1048.

[14] When Kelroy and Joe arrived at Mr Clue's house, Kelroy reported to him what had been happening and, while he was there, he received a call from the applicant on his cellular phone. The applicant asked him if he had found Tim, to which Kelroy replied that he had not found him yet, but that as soon as he did he would call back. He then hung up, but after further discussion with Mr Clue, he placed a call to Rodney's phone, which was again answered by the applicant. Kelroy activated the speaker on his phone, so that Mr Clue and Joe could hear what was being said. When the applicant answered the phone, he again asked Kelroy if he had found Tim yet, to which Kelroy responded that he had not. At this point, Mr Clue then took the phone from him and identified himself (saying, "Is me Mr Clue, man"), to which the applicant responded "Which Mr Clue that?". Mr Clue's response ("A you bredda friend") was met by the applicant asking "A what unno a deal with?". Then followed

further conversation between the applicant and Mr Clue, the details of which Kelroy was not able to remember, for another five minutes or so.

[15] Within another few minutes, Kelroy's phone rang again and he was able to see from the monitor that it was again a call from Rodney's phone. It was, Kelroy told the court, again the applicant on the line, asking "What happened, weh unno a deal wid? A uptown me live. You know what unno a duh? Unno know what unno a duh quick, because me have feh duh what me have feh duh, or unno nah see Rodney back". The applicant then asked Kelroy if he had found Tim and when Kelroy replied that he had not, the applicant asked him "What unno a duh?" Kelroy's response was that he would do whatever the applicant wanted him to do, whereupon Mr Clue again took the phone from Kelroy and continued the conversation with the applicant. In answer to Mr Clue saying that he would bring Tim and that the applicant needn't worry about it, the applicant's response was "A what yuh a deal wid? Police. If unno bring police come, a bare gunshot down a this". This conversation continued for another 10 to 15 minutes, with, according to Kelroy, Mr Clue trying "to calm down Zeeks".

[16] After these calls were completed, Kelroy then left Mr Clue's house and went home, where he and Joe remained until morning, when he tried calling Rodney's number again. This time, he said, he got "nothing at all".

He subsequently gave a statement to the police and handed over to them his cellular phone, which was in due course tendered in evidence as an exhibit at the trial. He never saw either Rodney or Scotch Brite, who was also known to him, again.

[17] Joe told the court that he was actually related to Rodney, in that his sister was the mother of Rodney's son. He had in the past worked with Rodney in the block making business at Bayshore Park and, for a two week period in 2004, with the applicant at Matthews Lane. During that period, he had spoken to, and been spoken to by the applicant on more than one occasion. His evidence was that at about 12:15 on the morning of 15 April 2005 he was sleeping at the home of Daten Williams, also known as Scotch Brite, in Bayshore Park, about two blocks away from Rodney's house, when he was awakened by Tim, who was also a resident of Bayshore Park. Together they walked to Rodney's house, where he saw a crowd of people at the gate and then, as he put it, "from there so phone call start mek". Among the crowd were Kelroy and "nuff more people" whose names Joe did not know. Tim was one of the persons who made a call, though Joe was not able to say to whom he made the call.

[18] After a while, Joe went with Kelroy (by car) to a house "over the other side of the river", where another of Rodney's friends called 'Waggy' lived, woke him up and told him something. While there Kelroy made a

call on his cellular phone, which was in speaker mode, to a person who Joe was able to identify as the applicant on the basis of his acquaintance with him and his knowledge of his voice (although he had never heard him speak on the telephone before). He heard the applicant ask Kelroy "if wi get di ting dem yet", and then say, after Kelroy had responded no, "Hurry up and get the ting dem and mek somebody traffic you in wid dem", to which Kelroy responded "Yes boss".

[19] Joe then left Waggy's house with Kelroy and together they went to Mr Clue's house. He too gave evidence of the telephone calls in Mr Clue's presence to a number which was answered by the applicant. He heard Rodney's voice at the other end of the phone saying that "wi must hurry up and get the ting dem" and, in answer to Kelroy's question whether he (Rodney) was alright, saying that he was. But he also heard Rodney say "don't get no police involve" [sic]. He then heard the applicant's voice on the phone again, saying that he had heard "when Rodney tell wi say wi must go a station, but nuh police caan come round di lane…and if nuh police come round deh a bare gunshot and right now Rodney a go pon di fire".

[20] Mr Clue's evidence covered much of the ground already covered by Kelroy and Joe, but it also contained some important elements of its own. His account of the events of the morning of 15 April 2005 began with

his having been woken up by his stepson at some minutes to 3:00 a.m. and then meeting with Kelroy and Joe on the verandah of his house. Mr Clue had known the applicant for over 10 years, having met him on several occasions "at different political arenas, for rural conferences, you name it", put on by the People's National Party. He had spoken to the applicant and been spoken to by him both in person and over the telephone, in the latter case on two occasions that he could recall when he called the applicant. Mr Clue had last seen the applicant as recently as two days before, when he had gone to Matthews Lane in connection with a by-election in the Western Kingston constituency and had engaged him in a conversation for about five minutes.

[21] On the morning in question, after some initial conversation between Mr Clue, Kelroy and Joe, Kelroy dialed Rodney's number 362 1048 in Mr Clue's presence and put the phone on speaker mode so that they could all hear what was being said. When the phone was answered, Mr Clue recalled speaking first and asking for Rodney. He recognised the voice of the person who responded as that of the applicant, who said that "Rodney presently is under arrest", in response to which Mr Clue asked "why?". Mr Clue said that a strange voice then came on the line, saying that "Mr Phipps is presently uptown" and that "I should try to get in touch with Mr Phipps". This Mr Clue understood to be a reference to the applicant and so he then used his own phone (432 7446) to dial the

number he had for the applicant (which he could only remember when he was in the witness box as "the 416 number"), but succeeded in getting only a recording. At Mr Clue's request, Kelroy then dialed Rodney's number again and again placed the phone on speaker mode. Someone in due course answered and said that "Rodney Farquharson is in trouble" and that, "where they reach…even if 'Zeeks' give order to save him, they will have to finish the job".

[22] This exchange greatly upset Mr Clue and, with the phone off, he and the other persons present on his verandah (Kelroy, Joe and Mr Clue's stepson, Omar Matthews) discussed the situation. They decided that the police should be notified and this was done by telephone. Mr Clue then asked Kelroy to redial Rodney's number, which he did, and, when it was answered, Mr Clue again asked to speak to Rodney. He then heard the applicant's voice (again over the speaker), saying "Boy leave country and come to town…deh behave like big fish, disobeying…and Spanglers going take over the lane…no more country man". Mr Clue then insisted that he speak with Rodney, saying "What is the position with Rodney?", to which the applicant answered "big man, you should be in your bed with your wife…you asking about Rodney. You listen to Rodney for the last time". Mr Clue then heard Rodney, who was usually "very loud", say "boss, boss" three times in a very low voice. According to Mr Clue, he sounded "like somebody in serious trouble". At this point in his evidence,

Mr Clue recalled that just after the applicant had told him that he should be in bed with his wife, he had also said that "my dick is in Rodney's mouth", causing him further upset and prompting him to say to the applicant in response, "You know that you a mad man, you are a very mad man". Mr Clue described the applicant's tone during this telephone conversation, which ended abruptly when Rodney's phone went dead, as "very aggressive".

[23] After discussing the turn of events some more, Mr Clue and his visitors decided that the police should be notified again and this was done. By the time Kelroy and Joe finally left him and he retired to bed, it was close to 4:00 a.m. on 15 April 2005.

[24] Mr Clue woke up at minutes to 8.00 a.m. later that morning and went to Rodney's house in Bayshore Park, where he saw a group of over 60 men, women and children gathered at the gate. Still later that same morning, at what he recalled to be "exactly nine minutes after nine", Mr Clue called the applicant on his "416 number", which was the number that the applicant had given him some months before. He made this call, he told the court, "to discuss what took place [with Rodney] the night and to find out where is Rodney and what went wrong". When the applicant answered his phone, Mr Clue asked him "Zeeks, where is Rodney, what happen to Rodney?", to which the applicant replied, "I haven't seen

Rodney for the last two weeks". The applicant then went on to say, Mr Clue testified, that he was hoping that he (Mr Clue) "would call him to tell him when the party, along with myself, would pay him an outstanding bill from the 13th of April". Mr Clue, who understood the applicant to be referring to a bill in connection with the recently concluded by-election, told him that he was calling "pertaining to Rodney", in response to which the applicant again told him that he had not seen Rodney for over two weeks. During this conversation, Mr Clue told the court, the applicant's voice was a "different voice" from the one he had used in the conversation the night before, when he had been very aggressive. Now, on the morning after, the applicant "was very calm and very humble".

Rose Lane, Kingston, 15 April 2005

[25] After his gruesome find of the two burning bodies in the open lot of land on Rose Lane on the morning of 15 April 2005, Constable Adams notified police control and remained on the scene until the arrival of a fire unit from the Trench Town Fire Brigade. District Officer Jacinto Thompson gave evidence that, pursuant to a call received at 5:58 a.m., he led a crew of fire officers to the location on Rose Lane which immediately set about extinguishing what appeared to be a heap of tyres burning on the open lot. There appeared to be about 10 car and truck tyres in the heap. It was only after the fire had been extinguished that he discovered that the tyres had actually been covering two human bodies. He also

observed a 45 gallon "tinning" drum very close to the tyres, as well as what appeared to be blood spots going across from Beeston Street onto the open lot on Rose Lane.

[26] While the firemen were putting out the blaze, Constable Adams was joined on the scene by other police personnel and he and other officers travelled in the police vehicle along Beeston Street and on to Matthews Lane to the Glenford Phipps Memorial Basic School, where they stopped and alighted from the vehicle. There, Constable Adams saw a man, who was known to him before as 'Fowl Tripe', scrubbing the surface of the road using a commercial 'push' broom and a green water hose. Spoken to by Constable Adams, the man stopped what he was doing and the constable discerned a "rawish smell" on the surface of the road. Constable Adams then proceeded on foot in a northerly direction along Matthews Lane and observed what appeared to be bloodstains on the road surface "in a droplet form". It was, in fact, as Constable Adams described it, a "trail of blood", leading him up Matthews Lane to its intersection with Beeston Street (towards Rose Lane), where he saw a "sneaker-type shoe", also with what appeared to be bloodstains on its sole. He marked each droplet of blood along the trail by using a stone to draw a circle around it. It took Constable Adams approximately four to five minutes to walk from the basic school on Matthews Lane to the Beeston Street intersection, while it had earlier taken him about three

minutes to drive from the point at which he had parked the police vehicle on Beeston Street when he had first seen the bodies burning to the basic school on Matthews Lane.

[27] Later that morning, officers from the Police Scenes of Crime Section collected the brown stains resembling blood along Matthews Lane, at the intersection of Beeston Street and Rose Lane, and on Rose Lane itself, by applying a solution of saline to a cotton swab and using the swab to collect the stains by scraping them from the ground, then wrapping the swabs in grease paper, which was then placed in a sealed envelope and labelled accordingly.

[28] It emerged from his evidence that, immediately before he set out for Rose Lane that morning, Constable Adams had been at the Kingston Public Hospital ("KPH"), where he had seen a man not previously known to him, Rastafarian in appearance, who appeared to be suffering from wounds to his face. Later the same morning, one of the officers from the Scenes of Crime Section received instructions to go to the KPH, where he saw and spoke to a man identified to him as David Foster. He collected some items of clothing (a pair of short, blue jeans and a multi-coloured plaid shirt), on which he observed brown stains, from Mr Foster, packaged them and a few days later also submitted this package to the forensic lab. This evidence, as well as a statement taken by another police officer

from Mr Foster on 17 April 2005, would in due course be revealed to be a matter of some significance to the applicant's case.

[29] Still later, also during the course of the morning, Miss Nordia McIntosh, the mother of Miss Cruickshank, Rodney's girlfriend, was taken to Rose Lane by the police. She identified the two men as Rodney, her daughter's boyfriend, who had been known to her for some nine years, and Scotch Brite, who had been known to her for about six months. Miss Vivine Rowe, the mother of Scotch Brite, would a few days later (on 20 April 2005) also identify his body at Madden's Funeral Home as that of her son, Daten Williams.

[30] Some time between 10 and 11:00 a.m. that morning, Dr Ere Seshaiah, a Consultant Forensic Pathologist employed to the Ministry of National Security, visited the scene and conducted on the spot post mortem examinations on the two bodies. Both bodies had been severely burnt and presented on post mortem burnt injuries "all over the body". A steel rod was found in the right leg bone of the body identified to be that of Rodney Farquharson and there were two entrance gunshot wounds with corresponding exit wounds present on the body, both to the head. The body identified to be that of Daten Williams, or Scotch Brite, also presented with post mortem injuries "all over the body", as well as two gunshot entrance wounds with corresponding exit wounds to the head.

[31] In Dr Seshaiah's opinion, the deaths of both men were due to multiple gunshot injuries, which would have resulted in death within five minutes, and in both cases the bodies appeared to have been burnt after death. The faces of the men, though badly burnt, would have been recognizable to persons who had known them before. Upon completion of his examination of both bodies, Dr Seshaiah removed the sternum (or breastbone) from each of them and handed them over to the police officers. Dr Seshaiah also removed and handed over two warheads and a fragment of a warhead from the head of the body identified as Rodney's.

The forensic investigation begins

[32] At about 10:45 on the same morning, Mr Fitzmore Coates, a senior forensic officer employed to the Ministry of National Security in the Government Forensic Science Laboratory ("the forensic lab"), was also taken to the scene at Rose Lane. He observed the partially burnt bodies on a pile of burnt tyres and there was a smell of fuel in the vicinity of the tyre heap. Next to it was a scorched metal drum, in which he observed the partially burnt sole of a shoe and some other burnt material. There was also a smell of fuel in the drum. Mr Coates collected the material from the drum, dirt from the pile of rubble, as well as a part of the partially burnt shirt which was found on one of the bodies. These items were

packaged and taken back to the forensic lab, where they were subjected to gas chromatographic analysis, which is a process whereby the samples are separated and tested to show what the various components are made up of. In this case, the material from the drum, the soil and the fragment of clothing were all found to contain gasoline residue, leading Mr Coates to the conclusion that the bodies had been placed on one set of tyres and another set placed on top of them. The heap had then been saturated with gasoline and set alight. The gasoline ("a highly flammable hydrocarbon accelerant"), would readily support burning and generate high heat or, as Mr Coates put it, "thousands of degrees farenheit".

[33] The bloodstains collected from the road surface by the scenes of crime officers, the sterna removed from the bodies by Dr Seshaiah and the clothing taken from Mr Foster by the police officer at the KPH, were all also submitted to the forensic lab for testing and analysis. In addition, Misses Veronica and Minerva Farquharson, the mother and sister of Rodney respectively, and Miss Rowe, the mother of Scotch Brite, were taken by police officers to the forensic lab, where mouth swabs were taken from them for the purpose of DNA analysis.

[34] The Government Forensic Analyst, Ms Sherron Brydson, presented to the court her findings on analysis of this material. Ms Brydson is the head

of the Biology Section of the forensic lab, the main function of which is to provide analysis of body fluids such as blood and semen, and of hair, bones and so on, for DNA analysis.

[35] Firstly, the swabs of what appeared to be bloodstains taken from the road surface along Matthews Lane were tested and found to be bloodstains of human origin.

[36] The sterna taken from the bodies of Rodney and Scotch Brite were then subjected to DNA analysis by Ms Brydson, who explained to the court the nature and function of such analysis. 'DNA' is the acronym for deoxyribonucleic acid, which is found in each cell of the human body that has a nucleus, organised into 23 pairs of chromosomes, half of which is inherited by a person from each parent. It is therefore the "blueprint" which is unique to each individual (save in the cases of identical twins, triplets or quadruplets, etc., who share the same DNA). DNA testing involves the isolation of a minimum of eight "markers" in the bodily part being analysed, in this case the sternum, which is what is then said to constitute the DNA "profile" of the particular person. What DNA analysis does is to enable the analyst to generate a statistical evaluation, using computers, of the probability of finding a like profile of the person whose DNA has been subjected to analysis, in a given area of population, such as, for example, Jamaica, or the wider Caribbean region.

[37] Having derived by DNA analysis of the sterna of Rodney and Scotch Brite a profile in respect of each of the men, Ms Brydson then conducted a similar analysis on the two swabs of human blood allegedly found at the intersection of Beeston Street and Rose Lane and obtained what she described as "a partial" match, that is to say, five out of the eight markers analysed were found to match. She then compared that partial profile with the profiles of Rodney and Scotch Brite. In relation to Rodney, she found that it was different, in the sense that the eight markers which made up his profile that she compared with the five from the swabs did not compare. But in the case of Scotch Brite, when each of the five markers from the swabs was compared with its corresponding marker in his profile, they were found to be the same. The probability of a complete match between the DNA from the sternum taken from Scotch Brite's body and the blood found on these swabs, determined statistically, would have been 7.8 in 10 billion, or one in one billion, two hundred and six million. In the case of the partial profile actually found, the probability of a match, though more frequent, was nevertheless one in one million in the Jamaican population. So that, unless Scotch Brite had an identical twin, the chance of finding someone else in the Jamaican population with that same profile was one in one million.

[38] DNA analysis carried out on the buccal swab taken from Miss Veronica Farquharson yielded on probability analysis, a 99.91% probability that she was the mother of Rodney. In the case of similar analysis of the swab taken from Miss Rowe, there was a 98.6% probability that she was the mother of Scotch Brite. Or, in the cautious language of Miss Brydson, the tests "did not exclude" these ladies from being the mothers respectively of the two deceased men.

[39] It emerged in cross examination on behalf of the applicant that Ms Brydson had also examined the two items of clothing which had been taken from Mr David Foster. Both the multi-coloured plaid shirt and the pair of blue denim shorts exhibited brown stains which tested positive for the presence of human blood. DNA analysis was also carried out on samples of those brown stains and swabs containing human blood collected from Matthews Lane and the profiles of each were found to be identical. In other words, the samples of blood collected on Matthews Lane matched exactly the blood found on the clothing taken from Mr Foster.

[40] And finally, also in cross examination, it turned out that Ms Brydson had actually visited premises at numbers 93 and 96 Matthews Lane and had collected swabs and scrapings which led her to believe that goats had been slaughtered at number 93. In re-examination, Ms Brydson

described the area in which she had found a distribution of goat blood as being at the doorway of the premises at number 93.

The cellular connection

[41] On 18 May 2005, Detective Inspector McArthur Sutherland led a team of some 30 to 40 police officers to Matthews Lane, where they divided into smaller groups. Inspector Sutherland was armed with a search warrant for premises at 96 Matthews Lane, which is next door to the Glenford Phipps Memorial Basic School, which is itself opposite number 93 Matthews Lane. Upon his arrival in the area, he led one of the groups of police officers to number 96, where he met and was introduced to the applicant (who was already in police custody) at the gate. The applicant confirmed that he was the owner of those premises and, after some delay (the key to the metal gate at the entrance to the premises could not be found), Inspector Sutherland and his team gained entrance to the premises.

[42] Checks were then carried out on the premises, a dwelling house, by members of the team in the presence and view of the applicant, in whose presence two cellular phones were taken from a Miss Salome Binns, who was said to be the mother of the applicant's child, and Renaldo Phipps, described in evidence as a "young boy", who was said to be the son of the applicant. A third cellular phone and a SIM card were taken

up by Inspector Sutherland from a table in the living room. The phone taken from Miss Binns was a black Panasonic phone. All three phones and the SIM card were handed over to Operation Kingfish office in downtown Kingston.

[43] Deputy Superintendent Michael Phipps was also a member of the police party that carried out searches of premises on Matthews Lane on the morning of 18 May 2005 and he led the team that went to 93 Matthews Lane, also armed with a search warrant. Having gained entry to the premises after showing the warrant to an occupant, also identified as Miss Salome Binns, the team proceeded with the search, during which a Nokia cellular phone was found. It too was in due course handed over to Operation Kingfish.

[44] Assistant Commissioner Leslie Green ("ACP Green") is a British police officer (a member of the Metropolitan Police Force in London) who has been on secondment to the Jamaica Constabulary Force ("JCF") since 2004. In that capacity, he was associated with the establishment of the Centre for Narcotics and Major Crime Task Force, better known as Operation Kingfish, which is a unit of the JCF with responsibility for major crimes investigation. ACP Green, who had had some formal training and considerable experience in the use of computers, was responsible for encouraging and enhancing the capabilities of members of the JCF with

regard to investigations and, in this capacity, also identified additional software and investigative approaches for use by the JCF. As part of this process, ACP Green was instrumental in acquiring a software package that could assist in obtaining data from the SIM chips which are used in cellular phones and this package was installed on a computer in Operation Kingfish itself. ACP Green's evidence was that he had no reason to believe that that computer had been subject to any malfunction during the period October 2004 to May 2005.

[45] ACP Green told the court that the 'SIM' chip (or a SIM card) is a small chip manufactured for use in cellular phones and other types of devices "and it stores data in relation to telephone calls, text messages and telephone numbers in relation to the use of that cellular phone when the chip is placed into that cell phone; and the data is either stored in the cellular phone or on the SIM within the cell phone".

[46] Detective Inspector Winston Hunt was at the time of the trial a Detective Sergeant attached to the Major Investigative Team at Operation Kingfish. Among his functions were the reading and analysis of data from SIM cards of cellular phones, through the use of a computer with associated software and a 'SIM Card Reader' attached to the computer. The process by which this is done is that the particular SIM card is first placed into a 'SIM Card Adapter', which is then itself placed in the

SIM Card Reader, which in due course generates the display on the computer monitor of the data stored on that SIM (the 'SIM Report').

[47] On 18 July 2005, Detective Inspector Hunt received the Panasonic and the Nokia cellular phones which had been recovered from the premises at 96 and 93 Matthews Lane respectively on 18 May 2005. Having removed the SIM cards from each phone and gone through the process described above in respect of each, the respective SIM Reports were printed (and they were subsequently admitted in evidence at the trial as exhibits 11 and 12 respectively).

[48] On page two of the SIM Report for the Panasonic phone, 13 names were listed, next to each of which a telephone number appeared. The name listed seventh on that page was "Zeeks" and the number next to that name was 416 9280. On the same page, the name "Danold" appeared third from the bottom of the page and the number next to that name was described by Detective Inspector Hunt as a "99 number".

[49] On page four of the SIM Report in respect of the Nokia phone, 18 names were listed, next to each of which a telephone number also appeared. The second name from the top of that page was "Danold Phipps" and the number next to that name was 416 9280. On page five of the same report, the name which appeared fifth from the bottom of that

page was "Danold 2" and the number which appeared next to that name was also described as the "99 number".

[50] This exercise having been completed, Detective Inspector Hunt handed both reports and the phones to the relevant Operation Kingfish officer for analysis and further action. Mr Ishmale Leslie was in April 2005 a Detective Sergeant of police attached to the National Intelligence Bureau ("the NIB"). The NIB was, as its name suggests, concerned with the business of intelligence gathering and dissemination and also comprised the Analyst Unit of the JCF. That unit was concerned with crime analysis, telephone call analysis, and the like. As a member of the unit, Mr Leslie interfaced from time to time with telecommunications providers, such as Digicel, Cable & Wireless and Oceanic Digital, whenever police investigators required data in respect of a particular phone, such as calls made to and from the number in question. In such a case, the request for the data would originate with Mr Leslie, who would send it on by electronic mail to the service provider from whom the information was required. The information furnished in response to the request would in turn also be remitted to him by electronic mail. In respect of Digicel, the individual to whom such requests would usually be directed was Mr Richard McFarlane, who was at the material time the manager in charge of the Business Risk Department of that company.

[51] Some time after 19 April 2005, Mr Leslie made such a request of Digicel by electronic mail to Mr McFarlane in respect of a total of seven "primary numbers", that is, the numbers in relation to which the information was requested. With regard to calls made to and from the primary numbers, Mr Leslie requested the dates on which calls were made, the times the calls were made, the duration of the calls and the numbers that were called. The primary numbers were 362 1048, 408 0076, 416 9820, 368 1497, 432 7446, 399 3050 and 409 2696, and the period for which the information was sought was 1 April 2005 to 2 May 2005.

[52] The department of which Mr McFarlane had charge at Digicel was responsible for fraud, revenue insurance and what he described as "law enforcement liaison". As the company's law enforcement liaison officer, it was Mr McFarlane's responsibility to ensure that the company complied with its obligations under the Telecommunications Act, 1999 and the Interception of Communications Act, 2002. As he understood it, the mandate to the company as a telecommunications provider under both Acts was, in accordance with the prescribed procedures, to provide designated law enforcement agencies and personnel with information requested from the company's customer base. Such agencies or personnel were as designated by the Minister of National Security. NIB was such an agency and, in respect of Digicel, Mr McFarlane was at the material time the primary contact person.

[53] Requests for information from designates would normally come to the company by written request and by electronic mail. Responses to such requests would sometimes be collected by the requesters and would sometimes be sent out by electronic mail. While Mr McFarlane was prepared to say that the computer system in his department was, in general terms, in proper working order over the relevant period, he was not in a position to say that it was in fact working on 15 April 2005. But further evidence in this regard was provided by Mr James Kirk, who was the Information Technology Director at Digicel in 2005, who told the court that at the material time the company's entire network of in excess of 200 computers was properly programmed, in good working condition and performed "perfectly". In his capacity as IT Director, Mr Kirk from time to time worked with Mr McFarlane and his department and he confirmed that to the best of his knowledge the computers used in that department were also in good working order at the material time.

[54] Although Mr McFarlane was the person who developed the protocol within his department for handling such requests, his role was a supervisory one and he did not personally deal with the responses to the requests made by Mr Leslie. However, the information requested by Mr Leslie was provided by electronic mail from Digicel. After downloading the file containing the information, Mr Leslie then recorded it in a spread sheet and analysed the data to see if any inferences could be drawn with

regard to calls made to or from the primary numbers for the period from 11:30 a.m. on 14 April 2005 to 8:00 p.m. on 15 April 2005. The information downloaded by Mr Leslie was in due course formatted by him to show the names and telephone numbers, each colour coded for ease of identification. The number thus coded in respect of the applicant was 416 9280, in respect of Mr Clue, 432 7446, in respect of Rodney, 362 1048 and, in respect of Kelroy, 368 1497. The information was then copied onto a compact disc, which was handed over by Mr Leslie on 1 July 2005, at the offices of Operation Kingfish, to Detective Sergeant Andrew Beet, a member of the telecommunications unit attached to Scotland Yard in London, England, for delivery to Mr David Bristowe for further analysis.

The cellular analysis

[55] Mr Bristowe was the final witness called by the prosecution at the trial. He was a forensic engineer specialising in telecommunications matters and his basic qualification was a degree in physics, together with electronics and communications. For the last 12 years immediately preceding the trial of this matter he had been dealing more with mobile phone communications and, as a practicing member of the Academy of Experts of the United Kingdom, which was his home, he had given evidence in telecommunications matters in over 160 cases, mostly for the prosecution, but sometimes for the defence.

[56] At some point between May and September 2005, at the request of the JCF, Mr Bristowe undertook an assignment in relation to the investigation of this matter, which involved in the first place a review of the area of interest on a theoretical basis and later a visit to Jamaica in September 2005. He had previously received information on the Digicel network from Mr McFarlane in connection with investigations into other matters and on 19 July 2005 he was handed a copy of a compact disc containing data relating to seven Digicel telephone numbers, by Detective Sergeant Beet. After loading the data on the compact disc onto his computer, Mr Bristowe reviewed it and in early September 2005 paid a visit to Jamaica. While here, he was taken by police officers to Rose Lane, to an address in Matthews Lane, to the vicinity of three Digicel cell sites that he considered to have particular relevance, to an address in Harbour View and to two other Digicel sites in that area. In the process, he "took a whole series of measurements in the areas of interest…[and]…then analysed those measurements".

[57] In order to elucidate his analysis, Mr Bristowe indicated to the court in some detail the way in which a mobile or cellular phone operates. It is in fact a radio transmitter receiver, which works in association with 'cell sites', which are the antennas which can be seen on the tops of many buildings in the city (a set on the Air Jamaica building not far away, for instance). The very first thing that happens when one turns on a mobile

phone in the morning is that it goes through a process known as registration. That is to say, when the mobile phone is first turned on, it makes contact with one of these antennas, whereupon the signal is routed back through to the computers of the mobile phone network, where two things have to be carried out. One is that, in association with a piece of equipment known as the Home Location Register (the "HLR"), it is determined whether the user is entitled to make a call, whether he or she is a subscriber and, if the user is a "pay-as-you-go" customer, how much credit he or she has available. The location of the phone in question is then stored in what is called the Visitor Location Register. This is the registration process.

[58] When a call comes in to someone from somewhere outside the network, the network interrogates the register to ascertain the location of that person's phone and passes that call back out to a group of cell sites to make contact with that phone. A record is kept in the computers of the mobile phone company of the number from which that call was made, together with the duration of the call, the charge and the particular details of the cell sites which served the phone of the person receiving the call. Using an ordinary tourist map of Jamaica, Mr Bristowe demonstrated to the court the location of the various Digicel cell sites that were in operation at the material time, pointing out that in the country

areas the cell sites were fairly widely spaced, whereas in Kingston there were a lot of cell sites close together. The reason for this, Mr Bristowe explained, is that a cel1 site is limited in capacity by the number of calls it can handle, so in a country area where there are few customers, a cell site can cover a large area, whereas in the city, the area covered by any one cell site is quite small. A typical cell site would normally have three antennas on it, each serving a part of the circle around the cell site. Together the three antennas cover the circle around the cell site, but any one antenna only covers part of that circle. When a call is made on the Digicel network, a record is kept of both the cell site and the antennae which served the call therefore narrowing down the area in which the user of the phone may have been when that cell site served the call.

[59] For the purpose of the analysis, Mr Bristowe was supplied with a number of maps, of varying quality, of Kingston. These were supplemented by satellite photographs of the city which are freely available on the internet from the Google Earth website. The area with which Mr Bristowe was particularly concerned was an area roughly bounded by Spanish Town Road to the west, Heywood Street to the south, Matthews Lane to the east, and Charles Street to the north. Rose Lane, Matthews Lane, and Beeston Street are all within that area.

[60] The purpose of the analysis was to indicate the approximate area of use of four Digicel cellular phones at the times when particular calls were being made, on the basis of which Mr Bristowe was able to arrive at certain findings and to draw certain conclusions. The numbers of the phones were 362 1048 (which was Rodney's phone, referred to by Mr Bristowe as the "red 1048 phone"), 416 9280 (the applicant's phone, "the blue 9280 phone"), 432 7446 (Mr Clue's phone, "the green 7446 phone") and 368 1497 (Kelroy's phone, "the orange 1497 phone"). All four numbers were preceded by the numbers 01876, which is the area code for Jamaica. The source data for Mr Bristowe's analysis was derived from the compact disc that had earlier been delivered to him by Detective Sergeant Beet.

[61] The results of Mr Bristowe's analysis were demonstrated to the court by way of a visually aided presentation, supported by a copy of a part of a map obtained from the National Land Agency, which showed a section of Kingston. He also used a copy of a satellite image of a section of Kingston and a schedule, prepared by him, of the calls that were made from the four phones in question between 9.00 p.m. on Thursday 14 April 2005 and 6.00 p.m. on Friday 15 April 2005. All three documents were tendered in evidence at the trial and admitted without objection.

[62] Mr Bristowe was particularly concerned in the first place with two addresses, the first being the open lot in Rose Lane, "where something had been burnt on the ground, there was quite a bit of burnt ground…when [he] went there", and the second being 95 Matthews Lane. He was also concerned with three Digicel cell sites, one located on the roof of the Eagle Pharmacy, the second located in Oxford Mall, and the third in Bond Street, at the corner of Bond Street and Spanish Town Road. The record made and kept by the mobile phone company of which antenna attached to a particular cell site served a particular call was included in the information supplied to Mr Leslie by Digicel and made available to Mr Bristowe.

[63] By the use of a test instrument known as a "network monitoring handset", which is, "a particular type of mobile phone which has the ability to display the relative strength of a number of local cell sites able to service a call", and the taking of various measurements, Mr Bristowe was able to determine which of those cell sites would have served the user of a Digicel phone in the vicinity of either 95 Matthews Lane or what he described as the "Rose Lane burnt site". Against that background, he then considered the records of the usage of the red 1048 phone (Rodney's) and the blue 9280 phone (the applicant's) over the relevant period, and was able to determine which of the cell sites served those phones at various times between 9:34 p.m. on the 14 April 2005 and 3:37

a.m. on the following morning, 15 April 2005. The records established that those phones were in fact predominantly served by two particular antennas on the Oxford Mall and the Eagle Pharmacy cell sites, from which Mr Bristowe was able to arrive at the following conclusion (at page 1217 of the transcript):

> "The fact that the calls went between these two antennas on many occasions in the period we have considered, tells me that at those times the two users of those two phones were within the area bounded by the line which I have drawn on the screen. So, at that time, the users of the phones were within this very small area of Kingston. I cannot say that they were at the address in Matthews Lane. I cannot say they were at the burnt site but what I can say is that at that time the users of those phones were in this very small area of Kingston."

[64] When he was cross examined on behalf of the applicant, Mr Bristowe stated that he could not say from his analysis whether the users of the red 1048 phone and the blue 9280 phone were together within the area indicated, his answer to a specific question in this regard being "They may be, they may not".

[65] Mr Bristowe then directed the court's attention to the green 7446 phone (Mr Clue's) and the orange 1497 phone (Kelroy's), in respect of which he had considered the Harbour View area and the address to which he had been particularly directed, that is, 64 Martello Drive. Using the same equipment and methodology as before, Mr Bristowe

determined that the strongest service at that address was provided by an antenna of the Digicel cell site at the Harbour View Stadium, and that a user of a Digicel phone at that address would be served by this particular antenna. His examination of the call data records of the green 7446 phone suggested that it was used at Martello Drive at 11:06 p.m., 11:20 p.m. on 14 April 2005, 2:25 a.m., 2:27 a.m., 2:31 a.m., and 2:32 a.m. on 15 April 2005. However, at 2:37 a.m., the records suggested that the user had moved away from the Martello Drive address at that time, as it was then served by a different antenna of the Harbour View Stadium Digicel cell site.

[66] In respect of the orange 1497 phone, Mr Bristowe determined that at 2:11 a.m. and 2:14 a.m. that phone was served by a different cell site (the Harbour View Gypsum cell site), by an antenna not directed towards Martello Drive, leading him to doubt that the user of that phone was at that address at those times. However, the orange 1497 phone was served by the Harbour View Stadium cell site, which offered the best service at 68 Martello Drive, for 10 calls made between 2:44 a.m. and 3:40 a.m. But, later that morning, at 3:57 a.m. and 5:37 a.m., the orange 1497 phone was again served by a different cell site, leading Mr Bristowe to conclude that the user may or may not have been at Martello Drive at that time.

The Crown closes its case

[67] That was the case for the Crown. As already indicated, prosecuting counsel then told the court that it was "quite clear" that there was no case for Mr Garfield Williams to answer, no evidence having been given by any of the 35 witnesses called by the prosecution to implicate him in any way. The jury was accordingly directed by the judge to return a formal verdict of not guilty and Mr Williams was discharged.

[68] Marsh J then heard a detailed submission from counsel for the applicant that the case against him should be dismissed, on the ground that his constitutional rights had been breached by the treatment meted out by the police during the course of the trial to Mr David Foster, who was to be a material witness for the applicant. Mr Foster had been taken into custody by the police on 15 March 2006, when the case for the Crown at trial was well underway. It appears that a document had also been taken from him, which, the defence contended, pertained to the evidence he was expected to give for the applicant. After these matters were brought to attention in court on 15 March 2006, the document was handed over by the police in court. In a voir dire held to enquire into the circumstances in which Mr Foster came to be taken into custody, evidence was given by police officers to suggest that Mr Foster's detention had actually taken place in ignorance of the fact that he was expected to give evidence at the trial.

[69] Marsh J disagreed with the submission made on behalf of the applicant that the conduct of the police (including the reading of a document relating to the applicant's defence found in Mr Foster's possession) was in beach of the applicant's constitutional and common law rights and impacted so fundamentally on the case as to impair his chances of a fair trial. The judge took the view that it had not been established "that the impugned conduct was so unworthy or shameful that it would be an affront to the public conscience" to allow the prosecution to proceed.

The case for the defence

[70] The applicant made an unsworn statement from the dock, in which he denied any involvement in the double-murder of Rodney and Scotch Brite. Rodney, he said, was his good friend, while he did not even know who Scotch Brite was, the witnesses who sought to implicate him were lying and he stood falsely accused and innocent of the charges.

[71] The defence called Miss Minerva Farquharson, Rodney's older sister, for the purpose apparently of confirming his date of birth (said by Miss Farquharson to have been 8 March 1971, despite a different date appearing on his birth certificate) and an officer from the Registrar General's department (who confirmed that his date of birth as stated in the official record was 9 June 1971). In addition, a police officer from the

Criminal Records Office was called to give evidence that Rodney was recorded as having six convictions (on two dates in 1996 and 1998, relating to three separate counts on each occasion).

[72] The main witness for the defence, as had already been foreshadowed, was Mr David Foster. It appears that on the day on which he was to give evidence at the trial he was escorted into court by a sergeant of police, who had held him in his waist, taken him from the lock up and brought him into court. A resident of Orange Street in downtown Kingston, Mr Foster gave evidence that he had known Rodney for about two years before April 2005. According to Mr Foster, he used "to store weed for [Rodney] when him go to the country and buy his weed". He had also known the applicant for eight to 10 years as the 'community leader' for the Matthews Lane community. He regarded the applicant, who he knew as Zeeks, as an elder in the community.

[73] On 14 April 2005, a dispute had arisen between Rodney and another man, known only as "Scandal", as to the delivery of a quantity of ganja being stored by Mr Foster. As a result, Mr Foster arranged for Rodney and Scandal to meet downtown to resolve the matter. The meeting took place on Luke Lane "about after midnight". Rodney was accompanied by a man known only to Mr Foster as Scotch Brite, while Scandal was accompanied by "two of his friends". Mr Foster left the men

talking while he went to collect the ganja which he had in storage for Scandal and upon his return he found Rodney and Scandal in a "heated argument". Upon seeing him, both men rushed towards him and grabbed the bag of ganja which was in his hand, "pulling it towards each other", Scandal telling Rodney to "let go off his weed" and Rodney telling Scandal that "he is holding on to the weed for part payment over what him owe him". As this struggle continued, Mr Foster testified, he "held on to the weed still and was telling them to cool down, you know, to deal with it better than that".

[74] But, Mr Foster testified, the quarrel between the two men continued unabated ("they keep on pulling and arguing"), until Scandal pulled a gun from his waist and told Rodney "to let go off his weed or he is going to shoot him". Rodney refused to let go off the bag, telling Scandal that he wanted the weed for the money that he (Scandal) owed to him. While this was going on, Scotch Brite was standing among some other persons who were a little distance away. Scandal then told Rodney that he needed the bag and that he was to let go of it, "because he is going to shoot him", to which Rodney's response was that he was not letting go and that Scandal could not shoot him "because he is idiot". Rodney then pointed to the two men who were on the scene with Scandal and said, "A dem two pussy hole deh a fool yuh mek yuh tink yuh a bad man…you can't shoot mi". Those two men, who were known to Mr Foster as 'My

Lord' and 'Lion Heart' then pulled their guns from their waists and came over to where Mr Foster, Rodney and Scandal were standing. Lion Heart then asked Rodney, "Who yuh a call pussy hole?" and started to hit him in his head with the gun, when My Lord also joined in "and they were both hitting Rodney in the head with the gun". In due course, Scotch Brite, who had been standing nearby, attempted to intervene by trying to "tug a gun off [Lion Heart's]… shoulder, when Lion Heart turned around and, after a verbal exchange between them, shot Scotch Brite in the head, causing him to fall to the ground. And finally, after yet another verbal exchange, Scandal "draped Rodney in the waist" and shot him in the head.

[75] The next thing he knew, Mr Foster testified, was that he found himself, with Rodney and Scotch Brite partially on top of him, on a moving cart. The cart was being pushed by 'My Lord' and 'Scandal' along Beeston Street and then onto Rose Lane, where all three men on the cart were dumped in an open lot. Mr Foster then watched as the men retraced their steps along Rose Lane and back onto Beeston Street, before he too got up and made his way to Matthews Lane, where he collapsed at the intersection of Matthews Lane and Heywood Street. He did not see either 'My Lord' or 'Scandal' throw gasoline or anything like that or light a fire on the bodies of Rodney and Scotch Brite when they were dumped in the open lot on Rose Lane, neither did he see them pack

tyres on or under the bodies in the open lot before they left them there. There was not, as far as he could recall, a drum in the open lot in the vicinity of where he was dumped along with the bodies of Rodney and Scotch Brite.

[76] When Mr Foster regained consciousness, he found himself at the KPH being attended to by a nurse. There were also three policemen there, who tried to interrogate him as to how he had been shot, but were prevented from doing so by the nurse who indicated to the policemen that they could not speak to him at that time. He was in due course placed on a bed and his clothes were taken from him by one of the same policemen who had earlier tried to question him. The clothes that were taken from him were a "short black pants and a sleeve-less, short sleeve stripe shirt".

[77] Mr Foster remained in hospital for two weeks and, within a day or two of his being there, the man known to him as 'My Lord' came to see him. According to Mr Foster, 'My Lord' told him that he (Mr Foster) was lucky to be alive and that if "I wanted to keep myself and my family alive I shouldn't say anything about the situation, especially to the police". This visit made Mr Foster feel afraid. He was subsequently visited in hospital by a police officer who took a statement from him, in which he stated that he had been shot "out by the Ward theatre area". After he was

discharged from hospital he returned to his home on Orange Street, where he had lived for about 15 years and where he was still living when he gave evidence. He had not told the police the truth about the events of 15 April 2005 because of the threat he had received. It was not until sometime later that he went to the office of Mr Churchill Neita QC and gave a statement in connection with the matter.

[78] On 15 March 2006, Mr Foster was taken off his bicycle on the road by the police and taken to the 'Flying Squad', where he was questioned. He had in his possession at the time a statement that he had given to Mr Neita in connection with this trial and this statement was taken from him and read by several police officers, before it was given to a senior officer. He was held at the Flying Squad from about 11 - 11: 30 a.m. that morning until about 6:00 p.m. in the late afternoon and, while there, he was kept handcuffed to a filing cabinet. He was then taken to the Gun Court lock-up, where he remained until he was taken by the police to court to give evidence.

[79] When he was cross examined, Mr Foster told the court that he did not hear any cellular phone ring at any time during the altercation between Rodney, Scandal and the other two men, neither could he recall either seeing Rodney with a cell phone or making any calls that night. Mr Foster was also questioned by counsel for the Crown about the

statement that he had originally given to the police on 17 April 2005 and the statement that he subsequently gave to the applicant's counsel before the trial. He was asked about a man called Dwayne St Aubyn Collins, who, he agreed, was a friend of his. He was then asked, above strenuous objection from counsel for the defence, but apparently without a ruling from the trial judge, whether he was aware that on 22 April 2005 Mr Collins had given a statement to the police indicating that on 15 April 2005 at about 1:00 a.m. he had given assistance to Mr Foster to get to the Kingston Public Hospital from the intersection of Princess Street and Charles Street. While Mr Foster's answer to this question was that he was aware that Mr Collins had given a statement to the effect suggested by counsel, he maintained that he had no recollection of having seen Mr Collins that morning at all. A number of other matters were also put to Mr Foster, who admitted saying most of them to the police in his original statement, but continued to maintain that he had given that statement because he had been threatened.

[80] Dr Guyan Channer, a doctor on the staff of the KPH was also called as a witness for the defence. He confirmed from the official hospital docket that Mr Foster had been admitted to KPH at 3:13 a.m. on 15 April 2005, with a history of a gunshot wound to the right mid face and an exit wound on the left neck. Mr Foster had been given intravenous fluids and taken to the operating theatre, where, under anesthesia, the facial

muscle through which the bullet had passed was surgically repaired. Dr Channer considered that there was a possibility that the injury he received might have rendered Mr Foster unconscious before he was brought to the hospital. He was discharged from the hospital on 26 April 2005.

[81] That was the case for the defence. Addresses by counsel on both sides were followed by the judge's summing up to the jury and the verdict of guilt on both counts of the indictment, with the consequence already described at para. [3] above.

The application for leave to appeal

[82] The applicant applied for leave to appeal and, his application having initially been considered by a single judge of this court and was refused, he has accordingly renewed it before the court itself. At the outset of the hearing, Mr Phipps QC for the applicant sought and was given leave to argue supplemental grounds of appeal in substitution for the grounds originally filed by the applicant. Based on these grounds, the applicant complained as follows:

> "1. The verdicts of the jury were unreasonable and cannot be supported having regard to the evidence.
>
> 2. The trial was unfair because of procedural irregularities.
>
> 3. Inadmissible evidence was allowed at the trial.

(i) The data presented as evidence of the location for the use of telephones in conversation with the applicant were obtained in breach of the Interception of Communication Act and the Jamaica Constitution.

(ii) Delroy Rashford's evidence that he heard the applicant's voice on a compact disk.

4. The learned trial judge misdirected the jury by a failure to direct them adequately or at all on the facts as they relate to -

(i) voice recognition and

(ii) on the evidence that would go to prove a charge of murder."

The applicant's submissions

[83] Grounds 1 and 2 were argued together by Mr Phipps. He submitted that there was no evidence in the case to show that the applicant did anything to cause or contribute to the death of Rodney and Scotch Brite. There was no direct evidence of any overt act by the applicant and, insofar as the prosecution relied on statements allegedly made by the applicant to Kelroy, O'Neil Patrick and Mr Clue, these statements, taken separately or taken together did not amount to an admission by the applicant of involvement in the murders. As a result, Mr Phipps submitted, the case was left to the jury to return a verdict "based on prejudice and speculation". We were specifically referred by Mr Phipps to a remark made by the trial judge before passing sentence on the applicant that

"there was no evidence which the jury heard on which they could say exactly what was your part in it, but the jury having heard the evidence believed that you were part of what happened that night which resulted in the death of these two gentlemen". If this was the judge's view of the evidence, Mr Phipps submitted, then he ought to have stopped the case, but instead he had shelved his responsibility by leaving it to the jury without evidence to support it.

[84] In support of the applicant's contention that the trial was unfair because of procedural irregularities, Mr Phipps referred us to what he described as the "shocking treatment" of the defence witness, Mr David Foster, who received a gunshot injury on the night in question and whose blood was found on Matthews Lane. His evidence, Mr Phipps submitted, had not been contradicted by the case for the prosecution in any way and he was the only witness who was able to speak to precisely what had happened that night. The defence was severely handicapped by the manner in which he was treated by his having been brought into court to give his evidence in handcuffs, and also when counsel for the prosecution was allowed to cross examine him in a "totally impermissible manner", when the contents of a statement allegedly made by someone not called as a witness were put to him (see para. [83] above).

[85] Mr Phipps further submitted that, to the unfair treatment of the case for the defence, must be added "the highly prejudicial treatment of the applicant during the trial where at every adjournment the co-accused was granted bail but the applicant was ordered to remain in custody". He concluded that taken together these were serious irregularities and an abuse of the process of the court that must have tipped the scales against the applicant and in favour of the prosecution, thereby causing "a grave miscarriage of justice".

[86] The applicant's complaint in ground 3 was that inadmissible evidence had been allowed at the trial in two respects. Firstly, that the data obtained by the police from Digicel on the use of the applicant's telephone on the night of 14 April 2005 had been obtained in breach of the provisions of the Interception of Communications Act ("the ICA") and the Constitution of Jamaica ("the Constitution"). And secondly, that Kelroy's evidence of having previously heard the applicant's voice on a compact disc was inadmissible hearsay.

[87] With regard to the first point, Mr Phipps submitted that the process by which Mr Leslie had secured the call records data from Digicel was not in conformity with the requirements of the ICA (section 16(2)) and was as such a breach of the applicant's constitutional right of freedom from interference with his means of communication (section 22(1) of the

Constitution). But further, and in any event, Mr Phipps submitted, the ICA was *lex imperfecta* and was therefore void and of no effect, since the purpose of the legislation should have been stated in the Bill presented to Parliament in order to comply with the savings provisions in section 22(2) of the Constitution. As to the second point, Mr Phipps submitted that no foundation had been laid for the admission in evidence of an unauthenticated recording made by an unknown person, which had then been listened to by the witness and used at the trial to bolster his own credibility.

[88] And finally, on ground 4, Mr Phipps complained of non-directions by the judge amounting to misdirection of the jury in two respects. Firstly, that it is a well known fact that mistakes have been made in the past in voice recognition. Secondly, that the jury had to be satisfied to the required standard that the applicant had committed some act that caused death, the facts in this case requiring "a clear direction indicating that murder must be distinguished from any other charge that the evidence may reveal". In support of these two points, Mr Phipps relied on the decisions of the Privy Council in ***Aurelio Pop v R*** (2003) 62 WIR 18 and ***Hunter & Moodie v R*** [2003] UKPC 69 respectively.

The respondent's submissions

[89] Taking grounds 1 and 2 together, as Mr Phipps had done, Mr Taylor for the Crown pointed out that on a careful reading of the transcript it appeared that on many occasions when adjournments were about to be taken, the question of the remand status in the interim of Mr Williams and the applicant was in fact dealt with by the judge after the jury had withdrawn. It therefore appeared, he suggested, that what had really happened was that individual court reporters had not recorded this aspect of the matter uniformly, with some specifically noting on the adjournment that the jury had withdrawn before the applicant's remand status was dealt with, while others had omitted to do so. But in any event, he submitted further, even if the applicant had been remanded in custody in the presence of the jury, nothing had been shown to displace the presumption that jurors are persons of ordinary courage and firmness likely to remain true to their oath (***R v Porter and Williams*** (1965) 9 JLR 141).

[90] With regard to ground 3, taking Mr Phipps' *lex imperfecta* point first, Mr Taylor submitted that the ICA was passed in conformity with section 22(2)(a)(i) of the Constitution, it being a law which was reasonably required in the interests of public safety. Furthermore, Mr Taylor submitted, the ICA was protected by the well established presumption of the constitutional validity of legislation, which was applicable save where the language of the statute in question is inconsistent with the presumption,

which had not been demonstrated in this case. For the first of these points, Mr Taylor relied on the decision of the Court of Appeal of The Bahamas in ***Dwight Major and Keva Major v The Superintendent of Her Majesty's Prison and the Government of the United States of America*** (Const/Civil App 14 & 15/2005, judgment delivered 25 May 2006). On the presumption of validity of legislation, Mr Taylor referred us to the decision of the Privy Council on appeal from a decision of this court in ***Stone v R*** (1980) 35 WIR 268, and to two decisions of the Court of Appeal of Trinidad & Tobago in ***Attorney General of Trinidad & Tobago v Ramesh Mootoo*** (1976) 28 WIR 304 and ***Faultin v Attorney General of Trinidad & Tobago*** (1978) 30 WIR 351.

[91] As regards the question whether the procedure laid down in the ICA for the obtaining of evidence from a telecommunications provider such as Digicel had been complied with in this case, Mr Taylor, after a careful review of the statute, accepted that it had not been and that there had been "some departures from the procedure as laid down by section 16 of the ICA". However, he submitted, this did not by itself make the evidence thus obtained inadmissible, since the primary test of admissibility of evidence was relevance. In this regard Mr Taylor relied heavily on the well known decision of the House of Lords in ***R v Sang*** [1979] 3 WLR 26, and also on the later decision in ***R v Sultan Khan*** [1996] 3 WLR 162, both of which established the principle, he submitted, that evidence

even if illegally obtained remained admissible once it satisfied the test of relevance. In addition, he directed our attention to the decision of the Privy Council on appeal from this court in ***Herman King v R*** (1968) 12 WIR 268 which confirmed the applicability of the principle even where the evidence was obtained in breach of the Constitution. To similar effect, Mr Taylor submitted, are the Canadian decision of ***Papakosmas v R*** (1999) 196 CLR 297 and the decision of the Caribbean Court of Justice in ***Clyde Anderson Grazzette v R*** (CCJ App. Cr. 1/2009 April 3, 2009).

[92] In order for the applicant to succeed on this point, Mr Taylor submitted, it would be necessary for him to demonstrate that the admission of such evldence was more prejudicial than probative, which he had failed to do in this case. The evidence was in fact strongly probative and there was nothing in the Telecommunications Act which would alter or vary the position in any way.

[93] On the question of voice identification, which is the subject of the applicant's first complaint in ground 4, Mr Taylor submitted that it is settled law that such evidence was admissible and that the judge had "carefully and meticulously reviewed the evidence" given by the three Crown witnesses who had purported to identify the applicant by voice. He had brought to the jury's attention all the relevant factors that needed to be taken into account and had in addition given a full ***Turnbull*** direction.

There was therefore no basis, Mr Taylor concluded, for the applicant's complaint on the question of the judge's directions on voice identification. In support of these submissions, Mr Taylor referred us to the decision of this court in ***R v Rohan Taylor, et al*** (1993) 30 JLR 100.

[94] More generally, Mr Taylor pointed out that the Crown placed reliance at the trial on circumstantial evidence to prove its case against the applicant. That evidence showed that his voice was identified and recognised by three witnesses and the details of what was said by the applicant "left the inescapable inference to be drawn that he was complicit in the deaths" of both Rodney and Scotch Brite. Mr Bristowe's unchallenged analysis of the call data also confirmed that over the relevant period both the phones belonging to Rodney and the applicant had been in use in the general area of western Kingston which included Matthews Lane, Rose Lane and Beeston Street. On the totality of the evidence presented by the Crown, Mr Taylor submitted, there was sufficient evidence to prove beyond reasonable doubt that the applicant played an active part in the double-murder, as the jury found.

[95] Mr Taylor submitted finally that the trial judge had dealt adequately and fairly with the evidence of the applicant's witness, Mr Donald Foster, and that the jury had concluded, as they were entitled to do, that he was a witness of convenience and had not spoken the truth.

[96] At the invitation of the court, submissions were also invited from the Attorney General, who had not been represented during the hearing of the appeal, on the constitutional points taken by the applicant in ground 3. We are grateful to the learned Director of State Proceedings for responding so quickly to this invitation and for providing the court with detailed written submissions, which were filed on 8 February 2010.

[97] With regard to Mr Phipps' *lex imperfecta* point, the Director submitted that the right of freedom from interference with one's means of communication enshrined in section 22(1) of the Constitution was not absolute, but was explicitly subject to section 22(2)(a)(i), which confirms the lawfulness of any statutory provision reasonably required and made to preserve public safety, order, morality and health. The purpose of the ICA, although not expressly stated in the Act, "is ascertainable by implication and upon examination of the spirit and mischief of the Act". That purpose, the Director submitted, is "to curb criminal activity in the interest of national security". In this regard, the Director drew to our attention section 16(3)(a) and (b) of the ICA, in which the circumstances in which a designated person may issue a notice under section 16(2) are stated. The Director submitted further that the absence of an explicit statement in the Act of its purpose did not, without more, render it *lex imperfecta* or null and void, since there is no requirement in the

Constitution that the purpose of the Act should be so stated. For these submissions, the Director also relied on the presumption of validity of legislation, citing, in addition to the cases already cited by Mr Taylor, the Australian case of ***Federal Commissioner of Taxation v Munro*** (1926) 38 CLR 153.

[98] The Director also submitted, somewhat at variance with Mr Taylor's submissions on the point, that the applicant's reliance on section 16 of the ICA to establish procedural irregularities was misconceived. The point being made by this submission, as we understood it, was that section 16 was concerned with "communications data" and not with "voice", and that the words allegedly spoken by the applicant in this case were not "communications data" as defined by the Act. Accordingly, the Director submitted, section 16 had no application to the case at all. But in any event, the Director submitted, even if the evidence had been illegally obtained, it remained admissible at common law, relying for this proposition, as Mr Taylor had done, in ***R v Sultan Khan*** and ***Herman King v R***.

[99] In a brief written reply to the Director's submissions, Mr Phipps sought to make it clear that the real nub of his complaint about the ICA had nothing to do with whether Parliament had the power under the Constitution to pass a law abridging constitutional rights in certain

circumstances, which was accepted, but was that in any such case it was required to state in the Act itself, such as the ICA, "the particular provision in the Constitution relied on for the removal of the protection of communication". It is the failure of the ICA to follow this course which, in Mr Phipps' submission, rendered the ICA *lex imperfecta*. He referred us in support of this submission to ***Forbes v Director of Public Prosecutions and Commissioner of Correctional Services*** [2007] UKPC 61.

[100] In a final word, Mr Taylor indicated his agreement with the Director's submissions (somewhat curiously, since, in one respect at any rate, those submissions took a different tack from the ones he had made earlier). He also brought to the court's attention two decisions of the Court of Appeal of The Bahamas that had been handed down after we had reserved our judgment in this matter, that is ***Meckel Taylor v Commissioner of Police*** (MCCrAPP 35/2008, judgment delivered 28 January 2010) and ***Melvin Maycock Sr et al v The Attorney General and the Government of the USA*** (CAIS 152/2008, judgment delivered 28 January 2010).

The issues

[101] It appears to us that the following are the issues (listed not necessarily in the order in which they were argued) which arise for consideration in this matter:

(i) Whether the ICA is lex imperfecta, as the applicant contends and, if it is, with what result;

(ii) Whether evidence was admitted at the trial in breach of the Constitution, the common law or the ICA and, if so, what was the effect of this breach on the applicant's trial;

(iii) whether the applicant's trial was affected with or vitiated by procedural irregularities;

(iv) whether the learned trial judge's directions to the jury with regard to the issue of voice recognition were adequate in the light of the evidence in the case;

(v) whether the learned trial judge's directions to the jury with regard to the evidence that was needed to prove the charge of murder were adequate in the light of the evidence in the case; and

(vi) whether the verdict of the jury was unreasonable and cannot be supported in the light of the evidence.

Issue (i) – is the ICA *lex imperfecta?*

[102] Section 22 of the Constitution provides as follows:

> "**22**. - (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without

> interference, and freedom from interference with his correspondence and other means of communication.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) which is reasonably required—
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the rights or freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephone, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or
>
> (b) which imposes restrictions upon public officers, police officers or upon members of a Defence Force."

[103] The aspect of the freedom enshrined in section 22(1) that is engaged in this case is the freedom from interference with a person's means of communication, given the extent to which the ICA, by providing for the interception of communications (albeit pursuant to an order of the court) and for the compulsory disclosure in specified circumstances of communications data, does limit or qualify that freedom. That subsection is expressly subject to, as the Director pointed out, section 22(2) and there

appears to be no dispute in this case that the ICA on the face of it is a law which falls within section 22(2)(a), as a law passed in the interests of public safety and public order. But Mr Phipps contended that legislation abridging the protection given in section 22(1) "must clearly be seen as complying with the provisions specified in the constitution for that purpose, not left to be ascertained by implication as the learned director submits". In other words, the legislation, in this case the ICA, as a condition of its constitutional validity, must state expressly that it is a measure reasonably required on one of the bases set out in section 22(2)(a).

[104] The only authority cited by Mr Phipps in support of this proposition was ***Forbes v DPP.*** The question which arose for decision before the Board in that case was whether the Extradition Act 1991, which provides for the extradition in certain circumstances of Jamaican citizens to, among other countries, the United States of America, was inconsistent with section 16(1) of the Constitution, which guarantees to citizens of Jamaica freedom of movement, including "immunity from expulsion from Jamaica". In a judgment delivered by Lord Hoffmann, the Board considered that "there is no doubt that if that provision had stood alone, "Mr Forbes' extradition to the United States would be an infringement of his immunity from expulsion from Jamaica". However, Lord Hoffmann went on to refer to section 16(3) of the Constitution, which provides as follows:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision…
>
> > (e) for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence…".

[105] The Board concluded that the Extradition Act was a law which made provision for the removal of a person from Jamaica to be tried outside Jamaica for a criminal offence and that it therefore fell within the terms of section 16(3)(e) and was not inconsistent with section 16(1). But, Mr Phipps pointed out, in that case the title of the Extradition Act itself gave "due notice of its purpose as a provision of the kind specified in the subsections of the constitution i.e. for the removal of a person from Jamaica". And further, Mr Phipps submitted, extradition is actually specifically referred to in section 16(3)(e) as a matter falling outside of the immunity from expulsion conferred by section 16(1), thus obviating the need for its inclusion by implication in the "multifarious provision" in section 16(3)(a) as a "law reasonably required in the interest of defence, public safety,…".

[106] On a close reading of Lord Hoffmann's judgment in ***Forbes v DPP***, we do not think that anything turned in particular on either of the points made by Mr Phipps. We derive considerable support for this view from the

manner in which the Board dealt with the further – unsuccessful – submission made by Mr Phipps himself on behalf of the appellant in that case, that is, that the Extradition Act itself was inconsistent with section 16 because it was not actually contained in the Constitution. It was therefore, Mr Phipps had submitted, a law extrinsic to and which added to the Constitution, which accordingly could only be enacted by the special amendment procedure prescribed in section 50. This is how this point was disposed of by Lord Hoffmann:

> "In the opinion of the Board that submission is mistaken. There is no reason why the provisions for extradition need to [be] spelled out in terms in the Constitution. The reference in section 16(3) to matters which are contained in or bound under the authority of "any law", means exactly what it says, namely, any law which is passed by parliament and which contains provisions of the kind specified in those subsections."

[107] Similarly, it seems to us that the reference in section 22(2) of the Constitution to anything contained in or done under the authority of any law must mean exactly what it says, that is, any law which is passed by Parliament and which contains provisions of the kind specified in that subsection. So that in the absence of a specific provision in the Constitution itself requiring that an Act of Parliament which is intended to limit or qualify in some way a constitutionally enshrined freedom should, in effect, "certify" that it is reasonably required for a purpose permitted by the Constitution, we consider that there is no such restriction in the

Constitution on the power of Parliament. The important consideration in every case must be whether the Act in question satisfies the constitutional criterion of being reasonably required for a purpose specified in the Constitution.

[108] In the case of the ICA, some internal indication that that criterion is met may be found in section 16 itself, in that it is a precondition to the issue of a notice by a designated person requiring disclosure of any communications data that that person must be satisfied that it is necessary to obtain that data either in the interests of national security or for the prevention or detection of a specified offence in certain circumstances (section 16(3)(a) and (b)).

[109] But in any event, taking the matter from the standpoint of general constitutional principle, it appears to us that this is a case, as both Mr Taylor and the Director strongly contended, in which the presumption of the constitutional validity of legislation applies. The relevant principle is that every Act of the legislature is presumed to be valid and constitutional until the contrary is shown. All doubts are resolved in favour of the validity of the Act and, if it is fairly and reasonably open to more than one construction, that construction will be adopted which will reconcile the Act with the Constitution and avoid the consequences of unconstitutionality. Where the presumption operates, there is a very

heavy burden on the person challenging the validity of the Act in question "to show that in the circumstances which existed at the time it was passed, the legislation violated rights enshrined in the Constitution" (***Attorney–General of Trinidad & Tobago v Mootoo*** (1976) 28 WIR 304, per Corbin JA, at page 336. The judgments of Hyatali CJ and Phillips and Corbin JJA in this case all contain valuable discussions of the principle which invariably repay careful study).

[110] Two authoritative and well known statements of the principle by the Privy Council, the first in a case from Antigua and Barbuda and the second in a case from Jamaica, suffice to make the point. In ***Attorney-General and Another v Antigua Times Ltd*** (1975) 21 WIR 560, 573-4, Lord Fraser said this:

> "Revenue requires to be raised in the interests of defence and for securing public safety, public order, public morality and public health and if this tax was reasonably required to raise revenue for these purposes or for any of them, then s 1B is not to be treated as contravening the Constitution. In some cases it may be possible for a court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required. This presumption will be rebutted if the statutory

> provisions in question are, to use the words of Louisy J, "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power". If the amount of the licence fee was so manifestly excessive as to lead to the conclusion that the real reason for its imposition was not the raising of revenue but the preventing of the publication of newspapers, then that would justify the conclusion that the law was not reasonably required for the raising of revenue. In their Lordships' opinion the presumption that the Newspapers Registration (Amendment) Act 1971 was reasonably required has not been rebutted and they do not regard the amount of the licence fee as manifestly excessive and of such a character as to lead to the conclusion that s 1B was not enacted to raise revenue but for some other purpose."

[111] And in ***Hinds et al v R and DPP v Jackson*** (1975) 24 WIR 326, 340, Lord Diplock said this:

> "In considering the constitutionality of the provisions of s 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings *in camera* are reasonably required in the interests of "public safety, public order or the protection of the private lives of person concerned in the proceedings". The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: ***Ladore v Bennett*** ([1939] AC 468) ([1939] AC at p 482). But in order to rebut the presumption their Lordships would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings *in camera* were reasonably required for the protection of any of the interests referred to;

> or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of s 20 (4) of the Constitution under which it purported to act.
>
> No evidence has been adduced by the appellants in the instant case to rebut the presumption as respects the interests of public safety and public order."

[112] In the instant case, Mr Phipps, quite properly in our view, did not attempt to argue that the ICA was not a measure justified in the interests of public safety and public order. In ***Dwight and Keva Major v Superintendent of Her Majesty's Prisons and the Government of the USA***, a decision of the Court of Appeal of The Bahamas, Ganpatsingh JA characterised interception of communications as "an indispensable means used by law enforcement and intelligence agencies to combat serious crime, more so where there is an international dimension" (para. 22). We entirely agree and we therefore conclude on this point that the burden on the applicant to rebut the presumption that the ICA is a measure reasonably justifiable in our democratic society has not been discharged.

Issue (ii) – was inadmissible evidence admitted at the trial?

[113] This issue primarily concerns the evidence obtained by the police from Digicel, purportedly pursuant to section 16 of the ICA, which formed the basis of Mr Bristowe's analysis and upon which the Crown heavily

relied at the trial and again in this court. We take as our starting point some definitions. The first relevant one for the purposes of this case is to be found in section 2(1) of the ICA, which defines an "authorized officer" as follows:

> "2.—(1) In this Act, unless the context otherwise requires – 'authorized officer' means --
>
> (a) the Commissioner of Police,
>
> (b) the officer of the Jamaica Constabulary Force in charge of –
>
> (i) internal security; or
>
> (ii) the National Firearm and Drug Intelligence Centre or any organization replacing the same; or
>
> (c) the Chief of Staff, or the head of the Military Intelligence Unit, of the Jamaica Defence Force."

[114] Relevant definitions are also to be found in section 16(1) of the ICA:

> "**16.** (1) In this section –
>
> 'communications data' means any –
>
> (a) traffic data comprised in or attached to a communication, whether by the sender or otherwise, for the purposes of any telecommunications network by means of which the communication is being or may be transmitted;
>
> (b) information, that does not include the contents of a communication (other than

any data, falling within paragraph (a)), which is about the use made by any person-

(i) of any telecommunications network; or

(ii) of any part of a telecommunications network in connection with the provision to or use by, any person of any telecommunications service;

'designated person' means the Minister or any person prescribed for the purposes of this section by the Minister by order subject to affirmative resolution;

'traffic data' in relation to a communication, means any data -

(a) identifying, or purporting to identify, any person, apparatus or location to or from which the communication is or may be transmitted;

(b) identifying or selecting, or purporting to identify or select, apparatus through or by means of which the communication is or may be transmitted;

(c) comprising signals for the actuation of -

(i) apparatus used for the purposes of a telecommunications network for effecting, in whole or in part, the transmission of any communication; or

(ii) any telecommunications network in which that apparatus is comprised;

(d) identifying the data or other data as data comprised in or attached to a particular communication; or

(e) identifying a computer file or computer programme, access to which is obtained or which is run by means of the communication, to the extent only that the file or programme is identified by reference to the apparatus in which it is stored, and references to traffic data being attached to a communication include references to the data and the communication being logically associated with each other."

[115] The statutory regime for the obtaining of communications data by a designated person is set out in section 16(2) – (10) of the ICA. However, it is only necessary to consider the meaning and effect of subsections (2) – (4) of section 16:

"(2) Where it appears to the designated person that a person providing a telecommunications service is or may be in possession of, or capable of obtaining, any communications data, the designated person may, by notice in writing, require the provider –

(a) to disclose to an authorized officer all of the data in his possession or subsequently obtained by him; or

(b) if the provider is not already in possession of the data, to obtain the data and so disclose it.

(3) A designated person shall not issue a notice under subsection (2) in relation to any communications data unless he is satisfied that it is necessary to obtain that data -

(a) in the interests of national security; or

(b) for the prevention or detection of any

offence specified in the Schedule, where there are reasonable grounds for believing that-

(i) such an offence has been, is being or is about to be committed; and

(ii) the sender or recipient of any communication, or the subscriber to the telecommunications service, to which the data relates, is the subject of an investigation in connection with the offence.

(4) A notice under subsection (2) shall state-

(a) the communications data in relation to which it applies;

(b) the authorized officer to whom the disclosure is to be made;

(c) the manner in which the disclosure is to be made;

(d) the matters falling within subsection (3) by reference to which the notice is issued; and

(e) the date on which it is issued."

[116] In the instant case, although the evidence was that the NIB was a designated person for the purposes of the ICA, it seems clear that the evidence obtained by Mr Leslie from Digicel by electronic mail, was not obtained in conformity with the statutory procedure in at least the following respects:

(a) there is no evidence that Detective Sergeant Leslie (as he was at the time) was an "authorized officer" within the meaning of section 2(1) and for the purposes of section 16(2)(a); and

(b) there is no evidence that a notice in writing was issued by NIB as a designated person to Digicel in the terms required by section 16(4).

[117] We accordingly consider that Mr Taylor's concession that "there were some departures from the procedure laid down in section 16 of the ICA" was quite properly made. The question that remains therefore is what is the effect of this departure from the statutorily prescribed procedure on the admissibility of the evidence which was thus obtained by the Crown?

[118] Mr Taylor suggested that we need look for the answer to this question no further than section 17(1) of the ICA, which provides that "communications data obtained in accordance with section 16 shall be admissible as evidence in accordance with the law relating to the admissibility of evidence". However, it seems to us that the reference in that section to "communications data obtained in accordance with section 16" plainly limits its application to a case in which the requirements of section 16 have in fact been fully complied with, in which case all other questions of admissibility (such as relevance, or objections on the basis of

the rule against hearsay, for example) will fall to be determined by reference to the general law of evidence. In a case such as this, in which a breach of section 16 is conceded by the Crown, it seems to us the admissibility of the evidence so obtained must be sought on the basis of some wider principle.

[119] In ***R v Sultan Khan,*** the Crown conceded that the installation by the police of a listening device on the outside of the house occupied by a man suspected of being involved in the importation of heroin on a large scale, had amounted to civil trespass and an intrusion on the privacy of those persons who believed themselves to be secure from being overheard when they had the conversations that were monitored as a result. The question arose whether a tape recording made by the use of the device, which incriminated the appellant (who had been a visitor at the home of the suspect), was admissible in evidence. It was held by the House of Lords that it was an established principle of English law that the test of admissibility of evidence was relevance and that, accordingly, relevant evidence, even if obtained illegally, was admissible. The tape recording was therefore admissible.

[120] ***Sultan Khan*** broke no new ground in this regard. Indeed, it expressly applied the earlier, well known decision of the House of Lords in ***R v Sang*** [1980] AC 402, which had confirmed after full argument that a

judge has no discretion to refuse to admit relevant admissible evidence on the ground that it was obtained by improper or unfair means and that the court is not concerned with how evidence is obtained (see the judgment of Lord Diplock, at page 436). Earlier still, in ***King v R***, a decision of the Privy Council on appeal from this court, it had been held that the fact that evidence was obtained in breach of a right enshrined in the Constitution did not render the evidence inadmissible, the Board expressly approving its own even earlier decision in ***Kuruma Son of Kaniu v R*** [1955] AC 197, 203, in which Lord Goddard had observed that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue…the court is not concerned with how the evidence was obtained". (See also the decision of this court, applying ***King***, in ***R v Howard*** (1970) 16 WIR 67; and, more recently, the decision of the House of Lords in ***R v Sargent*** [2001] UKHL 54, para. 17, in which Lord Hope observed that "the general rule [is] that the test of admissibility is whether the evidence is relevant. The fact that it was obtained illegally does not render it inadmissible if the evidence is relevant".)

[121] In the light of this unbroken chain of authority, it appears to us that in the instant case the question of the admissibility of the communications data obtained by the NIB from Digicel falls to be dealt with entirely on the basis of its relevance, irrespective of the admitted imperfections in the way in which the evidence was obtained. Mr Phipps did not seek to

contend that this evidence was not relevant and in our view it plainly was, given the central importance to the Crown's case of the pattern of cellular telephone usage by the applicant, Rodney, Kelroy and Mr Clue over the period 14 – 15 April 2005. We therefore hold that the evidence was properly admitted by Marsh J, as was Mr Bristowe's evidence, which was primarily based on the data thus provided by Digicel.

[122] The second part of Mr Phipps' complaint on ground 3, which gave rise to the issue now under consideration, was that Kelroy's evidence of having listened to the applicant's voice on a compact disc was inadmissible hearsay. This complaint can, we think, be dealt with quite shortly. The rule against hearsay renders inadmissible evidence of a statement made by any person other than one made while giving oral evidence in the proceedings, as proof of any fact stated (see Cross & Tapper on Evidence, 11th edn, page 588). However, evidence of words spoken may not be hearsay and their admissibility will depend on the use to which they are intended to be put by the party seeking to introduce the evidence. So that as Lord Wilberforce puts it in his influential judgment in ***Ratten v R*** [1972] AC 378, 387, "A question of hearsay only arises when the words are relied on 'testimonially', ie as establishing some fact narrated by the words".

[123] In the instant case, Kelroy's evidence of having heard the applicant's voice on a compact disc before was not adduced by the prosecution for the purpose of proving the truth of anything said by him on the compact disc, but for the more limited purpose of persuading the jury that there was a basis upon which Kelroy was able to identify the applicant's voice on the telephone. In other words, given that the evidence of what the compact disc recorded the applicant as having said was not being relied on testimonially, no question of hearsay arises at all in these circumstances.

Issue (iii) – procedural irregularities

[124] The first of the procedural irregularities of which Mr Phipps complained related to the fact that, whenever an adjournment came to be taken, the applicant was remanded in custody while his co-accused's bail was extended in the presence of the jury. While it is clear from a reading of the transcript that this is what happened on a number of occasions, it is also clear, as Mr Taylor pointed out, that this was not an invariable pattern. But in any event, apart from Mr Phipps' bare assertion that, on the occasions when it did happen, this was discriminatory treatment which was prejudicial to the applicant, absolutely nothing has been advanced to suggest that this was in fact the case.

[125] In ***R v Porter & Williams***, the applicants, who were policemen, were charged with the murder of a citizen. Their trial in the Home Circuit Court attracted considerable public interest and large crowds assembled daily around the court house, making remarks such as "They are murderers, they must hang". On the first day of the trial, while prospective jurors were entering the court, persons were heard to say: "Any jury who let go this man because he is a policeman, it would be serious". The trial judge invited the foreman of the jury to inform him of any conduct tending to intimidate him or any member of the jury (no such report was made to the judge) and, in his summing up, directed the jury that they should not allow themselves to be swayed by any public emotion.

[126] The applicants were both convicted and one of the arguments advanced on behalf of one of them on appeal was that, by reason of the conditions prevailing during the trial, he was not afforded a fair hearing by an independent and impartial court, as he was entitled to under the Constitution. This court considered that the question was whether an inference could be drawn that the jury must have concentrated on the disorderly behaviour of the crowd and its evident hostility to the applicants, rather than upon the evidence in the case, or that they probably were intimidated by such behaviour and thus biased against the applicants for the purpose of the trial. This is how Lewis JA gave the court's response to this question (at page 149H):

> "Having carefully considered the evidence and the relevant portions of the transcript we find ourselves quite unable to draw either of these inferences. While it is possible that members of the jury may have heard the remarks about which Inspector Stewart testified, there is no certainty that they did hear them; nor, if they did hear them, does it appear that they treated them as anything other than the idle and misguided comments of an excited crowd. Jurors must be presumed to be persons of ordinary courage and firmness, and the fact that they made no complaint to the learned trial judge after his invitation to them to do so, points rather to the view that they were in no way affected by the behaviour of the crowd."

[127] In the instant case, Marsh J told the jury early in his summing up that in considering their verdict they should not be influenced by any prejudice against the applicant or any bias in his favour. Further, he reminded them of the oath which they had each taken "to arrive at a true verdict according to the evidence", that they could only arrive at a verdict based on what they had heard "in this particular courtroom" and that the case "must only be decided by the evidence adduced in this court and on that evidence alone".

[128] In our view, in all the circumstances of this case, these remarks by the judge would have sufficed to focus the minds of the jury, as persons of ordinary courage and firmness, on the business at hand, that is, to consider the evidence carefully and to render a true verdict according to

law. While it would obviously have been best if the remand status of the applicant had been dealt with as a matter of routine after the jury had withdrawn, we do not think that, to the extent that there may have been occasional departures from this ideal during the course of the long trial, any prejudice to the applicant has been demonstrated to have resulted from any such lapse.

[129] Mr Phipps' second complaint of procedural irregularity concerned the treatment meted out by the police to Mr David Foster, the main witness for the defence. This matter was fully ventilated at the trial in a voir dire conducted by the judge, during which some seven witnesses were examined as a result of an application on behalf of the applicant to dismiss the case as having been conducted in breach of his constitutional rights and as such amounting to an abuse of the process of the court. The applicant has not appealed from Marsh J's ruling that it had not been established "that the impugned conduct was so unworthy or shameful that it would be an affront to the public conscience to allow the prosecution to [continue]". But the applicant nevertheless maintains that the treatment of Mr Foster by the police, who took him into custody while the applicant's trial, at which he was expected to give evidence for the defence, was in progress and took from him and read a copy of a statement given by him to defence counsel concerning the incident under investigation at the trial, "severely handicapped" the conduct of

the defence. The applicant's further complaint was that Mr Foster had been brought into court when he was to give evidence "displayed before the jury as a prisoner in the hands of the police".

[130] While, in our view, the way in which Mr Foster was treated by the police was inadequately explained and wholly unfortunate, we have found ourselves completely unable to conclude, as Mr Phipps invited us to do, that the defence was thereby severely handicapped. The contest between the Crown's witnesses and Mr Foster turned entirely on issues of credibility, which the jury resolved, as they were entitled to do, in the Crown's favour. We think that notwithstanding all that had gone before he actually entered the witness box, Mr Foster was able to give his evidence in full detail and that the jury would have had ample time to observe him and to make a careful assessment of his credibility.

Issue (iv) – voice identification

[131] The applicant's complaint on this issue is that the learned trial judge did not direct the jury adequately on voice identification, in particular, by failing to tell them that, as with visual identification, it is a well known fact that mistakes have been made in voice identification. Given the nature of the case presented by the prosecution at trial, this is obviously an issue of critical importance.

[132] In ***R v Rohan Taylor et al***, the case for the prosecution against three of the four applicants was based in part on the evidence of a single witness who testified to having heard and recognised their voices in the backyard of her premises at about 2:00 in the morning. In addition to those voices, the witness had also heard another voice crying for "murder, help", and the sound of four explosions sounding like gunshots. Later that morning, she went into her backyard where she observed blood on the side of her house, on the ground and on an old stove. Later still, the body of a man bespattered with blood was found in a cemetery some three to four chains from her home.

[133] On appeal from their conviction for murder, these three applicants contended that the quality of the identification evidence was so poor that the case ought to have been withdrawn from the jury, following the guidelines in ***R v Turnbull*** (1976) 63 Cr App R 132 and ***Reid v R*** [1989] 3 WLR 771. Delivering the judgment of the court, Gordon JA adopted as a correct statement of the law in this jurisdiction a passage from the American case of ***Bowlin v Commonwealth*** 242 S.W. 694, 195 Ky 600 in the following terms:

> "The law regards the sense of hearing as reliable as any other of the five senses, so that testimony witness recognized accused by his voice [sic] is equivalent to testimony he was recognized by sight."

[134] After citing the earlier decision of this court in ***R v Clarence Osbourne*** (1992) 29 JLR 452, 455, in which it had been said, in reference to voice identification, that there was no warrant for laying down that "a Turnbull type warning is mandatory in every sort of situation", Gordon JA went on to observe that the directions to be given in each case would depend on the particular circumstances of each case and said the following (at page 107):

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act."

[135] In the result, the court in ***R v Rohan Taylor et al*** concluded that the summing up of the trial judge in that case, which had "followed implicitly the guidelines given in ***Turnbull***" was "scrupulously fair and adequate"

(page 108). As Mr Taylor pointed out, this case was also referred to with approval by this court in ***Siccaturie Alcock v R*** (SCCA No. 88/99, judgment delivered 14 April 2000), although this was a case in which "the evidence of voice identification was not decisive to the conviction" in the light of the other evidence implicating the defendant (see per Langrin JA at page 11; and see also an oral judgment of Cooke JA in ***Kenneth Christie v R***, SCCA No. 181/2006, judgment delivered 19 June 2009, para. 3, in which it was said that "the caution that ***Turnbull*** mandates, is to be equally adopted in respect of the approach to voice identification.")

[136] The proper approach to voice identification has also been the subject in recent years of both judicial decision and academic comment in the United Kingdom. In ***R v Hersey*** [1998] Crim LR 281 and ***R v Gummerson*** [1999] Crim LR 680, the Court of Appeal held that in cases of identification by voice, the judge should direct the jury by a careful application of a suitably adapted ***Turnbull*** direction. In ***R v Hersey***, the court considered that in such cases, as in cases of visual identification, it was vital that the judge should spell out the risk of mistaken identification and the reason why a witness may be mistaken, point out that a truthful witness may yet be mistaken, and deal with the strengths and weaknesses of the identification evidence in the case before him. In the later case of ***R v Roberts*** [2000] Crim LR 183, the court referred to academic research which indicated that voice identification was more difficult than visual

identification and concluded that the warning given to the jury should be even more stringent than that given in relation to visual identification. Indeed it has been suggested by one learned commentator that "the dangers of mistaken voice identification are much greater than those of visual identification" (D. Ormerod, "Sounds Familiar? - Voice Identification Evidence" [2001] Crim LR 595, 620; see also R. Bull and B. Clifford, "Earwitness Testimony", in Heaton-Armstrong, Shepherd and Wolchover (eds), Analysing Witness Testimony, London, 1999; Ormerod, "Sounding Out Expert Voice Identification" [2002] Crim LR 771; and ***R v Chenia*** [2004] 1 All ER 543, esp. per Clarke LJ, as he then was, at [99] – [105]).

[137] In our view, the considerations which have influenced these developments in the United Kingdom and elsewhere are equally applicable to this jurisdiction, with the result that in cases of voice identification the judge should at the very least give to the jury a ***Turnbull*** warning, suitably adapted to the facts of the particular case before him. As with visual identification, much will depend on whether the defendant's voice was known to the witness before and with what degree of familiarity, but even in such cases the danger of mistaking one voice for another will need to be highlighted for the jury. It will also be necessary for the jury to consider whether at the time of recognition there was a sufficient opportunity for the identifying witness to properly identify the voice in question. While much of the standard ***Turnbull*** warning will

probably be appropriate in most cases, the actual warning given in a particular case should nevertheless take into account the fact that some aspects of that warning may carry less, but sometimes more, importance in cases of voice identification. So that, for example, the circumstances of the actual identification in cases of violent crime, may be less stressful to the witness than in visual identification, but on the other hand, unlike with visual identification, the effects of the stress of the situation could well affect the speaker's voice (see the editorial commentary on ***R v Hersey***, at page 283). These are but examples and what is important is that the warning given in each case should reflect all the nuances of the particular case.

[138] It is with these considerations in mind that we come now to the way in which Marsh J left this aspect of the case to the jury. The learned trial judge introduced the question of voice identification early in his summing up, when he said this at page 1884 of the transcript:

> "Mr. Foreman and your members, as you heard in the addresses of both counsel, Counsel for the Prosecution is relying on voice identification to prove that the voice that they heard saying certain things, last three witnesses say they heard is in fact the voice of the accused. Now, in order for the evidence of a witness to be accepted who said that he recognized an accused person by voice, to be cogent there must be evidence of the degree of familiarity the witness have had with the accused and his voice including the time the witnesses may have had to listen the

voice of the accused and the occasion when the recognition of the voice occurred must be such that such words used to make a recognition of that voice is safe to act on. The correlation between the witness and the accused man's voice and the words spoken on the particular occasion or occasions affects (sic) the cogency, it creates the knowledge of the accused and few words are needed for recognition. The less familiar the witness is with the voice the greater necessity there is for mere spoken words to be recognition and it is impossible and therefore unsafe on which to act. Of course, of paramount importance is the witness's familiarity with the voice of the accused.

You, Mr. Foreman and your members, will have to decide whether or not each of the three witnesses who testified that they recognized the voice of the accused was so familiar with the accused voice as to recognize it when they heard the accused speaking. You may take into account the length of time he knew the accused because that is not the real issue, the most important thing, what is most important in this regard is how long; over what period he heard the accused speaking; is there any other evidence which may support the evidence of the witnesses' credibility that it was the accused speaking on the particular occasions, if there is, you should take that also into consideration when you are assessing whether or not you can conclude that a witness who comes and said that the voice he heard on occasion B or C is in fact the voice of the accused person. I should also point out to you, Mr. Foreman, and your members, that you will remember that in this case each of the witnesses who came to say that the voice that they heard was the voice of the accused, they were hearing this voice on a telephone and you will recall that in his address to you and in suggestions made to the witnesses the evidence is that, but for the witness Oliver Clue, none of the other witnesses who came to

> have heard [sic] the voice of the accused at the relevant period would ever heard him speak on the telephone before so that is something that you take into consideration as well. When assessing the witnesses with regards, especially to identification by voice, the credibility of both witnesses is essentially important and Mr. Foreman and your members, I propose when I begin to deal with the evidence in this case to go through evidence of the three gentlemen Mr. Rashford and Mr. Clue and Mr. Patrick because it is very important to deal with the credibility because the foundation of the Crown's case is in your purview of the evidence of these persons."

[139] In keeping with his promise, the judge devoted considerable attention in summing up to the evidence of the three witnesses who had purported to identify the applicant's voice, that is Kelroy, O'Neil, and Mr Clue, paying close attention to the specific details of the telephone conversations that each had testified to having had with the applicant. In relation to each witness, the judge reminded the jury of the length of time that the applicant had been known to them, the circumstances in which they had come to know him, the frequency with which they would meet and speak to each other, the length of time for which they would hear the applicant's voice, whether they had ever spoken to him on the telephone before, how recently before the night in question they had spoken to him, the details of the telephone conversations that they had had with him on the night of 14 April 2005, and the basis on which they were able to claim familiarity with the applicant's voice (for example, in

Kelroy's case, the compact disc recording from the applicant's 'Cool Tuesday' parties in Matthews Lane). The judge also reviewed carefully the cross examination of each of these three witnesses, highlighting a potential weakness in respect of two of them by pointing out to the jury that Mr Clue was the only one who claimed to have ever spoken to the applicant over the telephone before the night in question.

[140] Later in the summing up, after he had reviewed in detail Mr Bristowe's evidence and his conclusions based on his analysis of the call data received from Digicel, Marsh J cautioned the jury on the limits of that evidence in relation to the question of voice identification and reiterated his earlier warning at pages 2045- 2049 of the transcript:

> "Now, Mr. Foreman and your members, I must tell you, you having heard this evidence, that what Mr. Bristowe is saying is not that the telephones were used by particular persons but that in his opinion, his expert opinion, they were used at particular times, and in particular areas. So whereas if you accept this, of course it is evidence that the phones were used in particular areas. You are still going to have to grapple with whether or not the calls were in fact made by the parties who they said made them, and you remember that in this particular case the prosecution produced two persons in the form of Mr. Rashford and Horace Oliver Clue who said that they made particulars calls and they heard particular things.
>
> The evidence therefore at its best, if you accept it, is that particular toll call numbers called particular toll call numbers at particulars

times, that Mr. Clue said he made calls, that Mr. Rashford said he made calls, but as to who is at the other end, that is going to be a matter for you.

You remember what I told you about voice identification, where Mr. Foreman and your members, the case depends partially on the correctness of one or more identifications of the accused by way of his voice, and the accused is not admitting and, in fact, denies that the voice was his. You should have very special caution taken before you can accept the evidence that the voice that is alleged to have been heard is in fact the voice of the accused. Remember how yesterday I told you when I was dealing with voice identification, I told you that you have to look at a number of things including the opportunity before the particular incident that these witnesses would have had to have heard the voice of the accused, the times at which they say they heard this voice, how many words were used, if enough words had been used to give them an opportunity of making a proper identification of the voice of the accused. You should also remember, as I told you yesterday, that there is only, of the three witnesses who recognised, as they put it, the voice of the accused that night, the only person who says that he had heard the accused voice before on toll call was Horace Oliver Clue, so you also bear that in mind.

Suggestion had been made about the clarity of the call on the morning as opposed to the call on the night, and recall that this suggestion had been made to Horace Oliver Clue and Mr. Clue's recollection was that the call on the night was not as clear as the call of the morning because the call on the morning the voice of the accused was calm, the voice of the accused on the previous night was aggressive, to use the word of Mr. Clue. . You remember that also when you are considering the evidence of

> the three witnesses who spoke about recognising the voice of the accused.
>
> You should also remember and take into consideration as well, Mr. Foreman and your members, the fact that the witness, especially the witness Rashford, that Rashford had said something in evidence which he had not said in his statement, and that the very same thing applies to Horace Oliver Clue, and remember what I told you that in your assessing whether you can believe them or not, these are things that you also take into consideration."

[141] And finally, at the very end of the summing up, the learned judge accepted the suggestion of counsel for the Crown and returned to the question in the following terms at page 2097 of the transcript:

> "Mr. Foreman and your members, when I summed up to you today about voice identification I omitted to indicate to you that sometimes people can be very convincing although they are mistaken when they say that they identify somebody by their voice on a telephone. And you are going to be very careful in your assessment of the evidence, because an honest witness can also be a mistaken witness. The witness may honestly feel that the person they heard on the 'phone was John Brown, but in fact it turns out to be otherwise.
>
> So you look on the evidence, the circumstances under which the identification of the voice was made. You look at the previous history of that person who heard the particular voice. The person who seeks to identify the person by voice, what opportunity that other person would have had to have heard the voice.

> I told you that of the three persons who said they heard the accused, only one had given evidence that he had spoken to and heard the accused on a telephone. So please remember that."

[142] In our view, these extracts from the learned judge's summing up to the jury describe full and proper directions to the jury on the issue of voice identification. He reminded them of all the relevant factors to be taken into account, including potential weaknesses in the evidence, and gave warnings appropriate to the circumstances of the case. At the end of the day, it was entirely a matter for the jury to decide what weight should be given to the various factors and it appears to us that in this regard they had the benefit of as much assistance as could reasonably be expected from the judge. While it is a fact that, as Mr Phipps submitted, the judge did not tell the jury that it is a notorious fact that mistakes have been made in voice recognition in the past, we think that this omission is more than outweighed in this case by the judge's repeated emphasis of the need for caution in assessing the evidence of voice identification. As Lord Slynn of Hadley said, in reference to the ***Turnbull*** warning, in ***Shand v R*** [1996] 1 WLR 67, 72, "…no precise form of words need be used as long as the essential elements of the warning are pointed out to the jury". In our view, the essential elements of the warning were adequately and accurately conveyed to the jury by the judge in this case.

[143] As far as the evidence was concerned, there was, in our view, ample evidence from which the jury could have come to the conclusion that all three identifying witnesses were sufficiently familiar with the voice of the applicant to have enabled them to make a reliable identification of his voice on the night in question. In the case of Kelroy, he had known the applicant for some 14 years before April 2005, he had often spoken with him, he was accustomed to hearing him speak over the microphone at the 'Cool Tuesday' sessions and, although he had never spoken to him over the telephone before, he had also heard his voice on the compact disc recording. In the case of Joe (Oneil Patrick), although he had never spoken to the applicant over the telephone before that night either, the applicant was previously known to him, he had worked for the applicant in his block making business on Matthews Lane during which time he had seen him every day, he had spoken to and been spoken to by the applicant, recalling an occasion on which the applicant had spoken to a group of which he had been a part for "around 15 minutes". And in the case of Mr Clue, he had known the applicant for over 10 years through their joint association with the PNP, he had spoken to and been spoken to by him at various political functions over the years, he had also spoken to him over the telephone, as recently as 13 April 2005. Perhaps significantly in this regard, the applicant did not deny knowing any of these three gentlemen.

[144] Further, the evidence of all three witnesses also suggested, it seems to us, that they would have had ample opportunity to hear and to identify the applicant's voice on the night in question. It was entirely a matter for the jury to consider whether, in the light of the trial judge's repeated warnings to them about the need for caution, they were of the view that the witnesses were truthful and could have and did make a reliable identification of the applicant as the person whose voice they told the court that they heard and recognised.

Issue (v) – the judge's directions on the evidence in relation to the charge of murder

[145] In ***Hunter & Moodie v R***, which was cited to us by Mr Phipps, Lord Hope referred to the earlier case of ***Von Starck (Alexander) v R*** (2000) 56 WIR 424, 429, in which Lord Clyde had emphasised the duty of the trial judge "to leave to the jury all the possible conclusions that may be open to them on the evidence, whether or not they have been canvassed by the defence" (para. 27). Hence, Mr Phipps contended, the trial judge in the instant case ought to have given the jury a clear direction "indicating that murder must be distinguished from any other charge that the evidence may reveal", for example, conspiracy to commit murder, or accessory before the fact to murder.

[146] The short answer to this submission, in our view, is plainly the one given by Mr Taylor, that is, that the evidence presented by the prosecution in this case disclosed the offence of murder only and no other. It seems to us that once the jury accepted the evidence of what the applicant was alleged by the witnesses Kelroy, Oneil and Mr Clue to have said on that fateful night, that evidence pointed to no other possible conclusion than that he had been an active participant as a principal in murdering Rodney and Scotch Brite. Any invitation to the jury to consider the possibility of other offences, such as conspiracy, for instance, would in our view have been purely speculative in the light of that evidence, which clearly attributed a leading role to the applicant in the commission of the offence for which he was charged. Given the state of the evidence, we consider that the trial judge was entirely correct when he told the jury at the end of his summing up that "on the evidence which you have heard the only verdicts open to you is [sic] the verdict of guilty or not guilty on each count of the indictment".

Issue (vi) – whether the verdict of the jury was unreasonable in the light of the evidence

[147] As has already been pointed out, the case for the Crown against the applicant was based in part on direct and in part on circumstantial evidence. The jury was asked to infer from what the three witnesses who identified the applicant by voice told the court that they had heard him

say, and from all the other circumstances described by the evidence, that the applicant either killed Rodney and Scotch Brite or was a party to a common design which resulted, as it was intended to, in their deaths in the early morning of 15 April 2005. Although no complaint is made about the judge's directions to the jury on circumstantial evidence, which were comprehensive and entirely accurate, it may be useful to recall them to mind here (see pages 1902 -1905 of the transcript):

> "Now, circumstantial evidence is evidence from which you may infer the facts in issue. Nobody has come here to give evidence to say that they saw this accused man do anything, but that does not mean that because the prosecution cannot produce a witness who actually saw the killings that the case against the accused cannot be proven. The case against the accused can be proven, as I indicated to you by what is called in law, circumstantial evidence.
>
> Now, circumstantial evidence, Mr. Foreman and your members, operate in this way. One witness is called to prove a fact and prove that fact to the extent that you feel sure of it. Another witness proves other facts (sic)to the extent that you feel sure of them. A third witness proves something else also to the extent that you feel sure of that fact, and collectively all the evidence of these witnesses must lead to one inescapable conclusion and that conclusion must be that this accused is the person who did, or was involved in the doing of the act or acts which brought about the death of Rodney Farquharson and Daten Williams.
>
> Now, each fact standing by itself would not necessarily prove the guilt of the accused, but the prosecution is asking you to say that

> taken collectively, all of them standing together lead to the conclusion that you are sure that this accused man was involved in the particular act or acts which brought about the death of the deceased.
>
> None of the facts taken separately necessarily prove the guilt of the accused, but taken together they lead to the inevitable conclusion of the accused's guilt. If the result of the circumstantial evidence then is such that you arrive at the conclusion that the guilt of the accused had been proven beyond a reasonable doubt, then it is open to you, Mr. Foreman and your members, to find the accused guilty on the evidence that you have heard.
>
> All the circumstances relied on must point in one direction and one direction only, and that direction must be the guilt of the accused. If the circumstantial evidence falls short of that standard, if it does not satisfy that standard, if it leaves gaps, then it has no value at all and you are obliged to find that the circumstantial evidence has not come up to the top standard required and therefore, you find the accused not guilty. What you must have is an array of circumstances that point to one conclusion and only one and that is the guilt of the accused. Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether evidence upon which the prosecution relies to prove this case is reliable and whether it does prove guilt."

[148] Mr Taylor submitted that the inference of the applicant's guilt was irresistible on the evidence, while Mr Phipps submitted that on the totality of the evidence, including that called on behalf of the defence, the verdict was unreasonable. The question is therefore whether there was

sufficient evidence in the case to ground the jury's verdict that the applicant was guilty of murder.

[149] Before going to the evidence for the prosecution, we should first consider the evidence of the main witness for the defence, Mr David Foster, bearing in mind that, as Marsh J correctly told the jury, if his evidence was believed or if it created a reasonable doubt in their minds as to the applicant's guilt, the only proper verdict would have been one of not guilty. Mr Foster's evidence had the advantage of providing the only eye witness account of the circumstances in which Rodney and Scotch Brite lost their lives. That evidence was also corroborated to some extent by the forensic evidence, which showed that some of the blood stains found on Matthews Lane matched the blood stains found on Mr Foster's clothing. It also derived support from the evidence of Dr Channer that Mr Foster had been admitted to the KPH shortly after 3:00 on the morning of 15 April 2005, having sustained a gunshot injury to his face, and had remained in the hospital until 26 April 2005. All of these matters were quite properly specifically pointed out to the jury by Marsh J in his summing up. The judge also reminded the jury of the explanation given by Mr Foster for having initially lied to the police about the circumstances in which he had been injured on the night in question, telling them that it was entirely a matter for them to decide whether Mr Foster was a witness of truth whose evidence could be relied on.

[150] On the other hand, Marsh J also took the jury fully through Mr Foster's searching cross examination by counsel for the Crown and reminded them of the details of the statement, which he had since repudiated, that he had initially given to the police. The judge also reminded the jury of Mr Foster's evidence in cross examination that he did not recall hearing any cellular telephones ringing or seeing Rodney with or making any calls from a cellular telephone at any time during the incident which resulted in his being shot by Scandal.

[151] At the end of a comprehensive review of the case for the defence, including the applicant's unsworn statement, the learned trial judge left the matter to the jury in this way at page 2094 of the transcript:

> "Now, Mr. Foreman and your members, you must bear in mind what I had told you earlier on with regards to your assessment of the evidence of the defence witnesses, your assessment of the statement of the accused, and I told you how to act if you came to particular conclusions with regards to the weight that you should give to the statement of Mr. Phipps and what do you think of the evidence of, exclusively and essentially, Mr. Foster because it is Mr. Foster who tells you what he said happened that morning.
>
> Now, the prosecution has asked you to find that the accused man either did the acts which resulted in the death of the two deceased or if he did no do it, he was part of the whole plan. Now, they have not produced evidence of 'I was there and I saw'. The defence is saying 'I wasn't there but here is a witness who was there and

> could tell you what he saw.' Mr. Foreman and your members, what do you make of this witness? What view do you take of the Crown's case? It is a matter entirely for you and bearing in mind what I have already told you, it is a burden on the prosecution which never shifts and that burden is to satisfy you so that you feel sure of the guilt of the accused."

[152] In our view, the judge's treatment of the case for the defence, and in particular Mr Foster's evidence, about which no complaint has been made on appeal, was full and conspicuously fair to the applicant. It was therefore entirely a matter for the jury to decide whether they found his evidence to be credible in all the circumstances of the case. By its verdict, it is clear that the jury rejected the case for the defence and Mr Foster's evidence in particular as, it seems to us, they were fully entitled to do, bearing in mind among other things that on Mr Foster's own admission he had previously put forward a radically different account in a written statement to the police of what had happened to him on the night in question.

[153] In coming to this view, we have not lost sight of Mr Phipps' submission that the case for the defence was "severely handicapped" by the manner in which Mr Foster was treated, that is, by his having been taken into custody by the police during the trial and eventually being brought to court "as a prisoner in the hands of the police". As we have already pointed out, Marsh J, after conducting a voir dire in the absence

of the jury into the circumstances in which Mr Foster came to be taken into police custody, concluded that no breach of the applicant's constitutional and common law rights had been established and accordingly overruled the submission made on the applicant's behalf that the prosecution's case against him should be dismissed for that reason (see para. [69] above). In his summing up to the jury, the learned judge, having adverted to Mr Foster's evidence that, on the day when he was to give evidence on the applicant's behalf, he had been brought into court in the custody of the police, with a policeman holding him in his waist, said this at page 2063 of the transcript:

> "Now, Mr. Foreman and your members, this bit of information about how he was brought into court ought not to affect in anyway shape or form, what you have to decide, and that is to assess the evidence of David Foster fairly and impartiality. It should not be used against him in anyway at all."

[154] In our view, this clear statement to the jury and the detailed and absolutely fair treatment that the judge accorded Mr Foster's evidence in his summing up, were adequate in the circumstances to dispel any prejudice that might have entered into the jury's minds about Mr Foster's evidence.

[155] Having rejected Mr Foster's account of the circumstances in which the deceased men were killed, the jury would then have redirected their

attention, as they were more than once told by the judge to do, to the case for the prosecution. If, having taken into account the judge's repeated warnings on the need for caution in assessing the voice identification evidence, the jury found, as it was open to them to do on the evidence, that the applicant had been correctly identified as having been with the deceased men on the night in question, the next question would be whether an inference of guilt could properly be drawn from the statements taking into account all the surrounding circumstances. In our view, several of those statements can lend themselves to no other reasonable interpretation. Thus, the applicant was said to have told Kelroy, more than once, that he would not see Rodney again after that night; further, that while these statements were being made, Rodney had been heard in the background crying and saying "Father Zeeks". Later, the applicant was heard to say that "if any police come around there is pure gunshot, and right now Rodney is on the fire", and not so long after that (to Mr Clue) "you asking 'bout Rodney. You listen to Rodney for the last time".

[156] It seems to us that this evidence, if believed, together with the finding not long afterwards of the burning bodies of Rodney and Scotch Brite in the same area in which the applicant was known to be based and in which, as the expert evidence subsequently showed, the applicant's and Rodney's cellular telephones were in active use over the same period

during which Kelroy, Joe and Mr Clue all testified to having heard the applicant speak over the telephone, point clearly to the integral involvement of the applicant in the killing of the two men. It therefore seems to us that the verdict of the jury was fully justified on the evidence in the case.

Conclusion

[157] In the result, we are of the view that the application for leave to appeal must be dismissed and the applicant's sentences are to run from 30 August 2006.