Michaelmas Term
[2020] UKPC 27
Privy Council Appeal No 0030 and 0031 of 2019 and 0005 of 2020

JUDGMENT

Stubbs (Appellant) *v* The Queen (Respondent) (Bahamas)

Davis (Appellant) *v* The Queen (Respondent) (Bahamas)

The Queen (Appellant) *v* Evans (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of the Bahamas

before

Lord Kerr
Lord Lloyd-Jones
Lord Kitchin
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON

2 November 2020

Heard on 2, 6 and 7 July 2020

Appellant
(Stubbs)
Edward Fitzgerald QC
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(Instructed by Simons
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Respondent
(The Queen)
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Tom Poole
(Instructed by Charles
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Appellant
(Davis)
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Appellant
(The Queen)
Peter Knox QC
Tom Poole

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Respondent
(Evans)
Ben Cooper QC
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LORD LLOYD-JONES AND LORD HAMBLEN: (with whom Lord Kerr, Lord Kitchin and Lord Burrows agree)

Introduction

1. This is a case with a long history. It relates to an alleged murder and attempted murder committed in Nassau in the Bahamas on 29 March 1999. The appellants (Stubbs and Davis) and the respondent to the Crown's appeal (Evans) (together "the defendants") were charged with the murder and attempted murder in April 1999. Since then there have been three trials and three Court of Appeal hearings. This is the second appeal to the Privy Council.

2. This appeal relates to the third trial which was presided over by Jones J in July 2013. It resulted in the conviction of all three defendants on both charges and a sentence of life imprisonment for each of them on the murder charge. The defendants appealed against conviction and sentence. In its judgment dated 24 January 2019, the Court of Appeal dismissed the conviction appeals of Stubbs and Davis but allowed that of Evans. It allowed the sentence appeal of Stubbs and Davis, replacing their life sentences with sentences of 45 years imprisonment. Stubbs and Davis now appeal to the Privy Council against conviction and sentence. The Crown appeals against the Court of Appeal's decision to quash Evans's conviction, or, alternatively, not to order a retrial. The appeals have been consolidated.

3. The central issues in the appeals concern the admission of identification evidence, including what is said to be 'dock identification' evidence, the admission of a police analyst's ballistics report without the analyst being required to give oral evidence, and the judge's directions on these and other matters.

The outline facts

4. On 29 March 1999, at about 1.30am, Jimmy Ambrose, a police officer, and Marcian Scott, were at the nightclub Club Rock located on Bay Street in Nassau. Scott had been a police officer and was either still with the police or had recently become a security officer. Both were in plain clothes. While they were inside the club a fight broke out between two groups of men. One of those men approached the officers to report what had happened, and he, along with a second man, went with the officers outside. While the officers were talking with the two men, some men who had been part of the other group in the fight emerged from the front door of the club. Some of these men had firearms and began shooting in the direction of the officers and the two men. Scott

identified two of the men with firearms as Stubbs and Davis. As the officers and the two men attempted to run away, Ambrose was set upon by a man alleged to be Davis, who grabbed his arm and threw him to the ground. The man then kicked Ambrose, produced a gun and fired at Ambrose as he lay on the ground. Two other men, alleged to be Stubbs and Evans, joined this man and also fired at Ambrose while he was on the ground. The men who had attacked Ambrose ran off.

5. Meanwhile, police officers Garath Ryan and Antoine Duncombe, who had been at the Cocktails and Dreams nightclub west of Club Rock, heard gunshots and observed people running from Club Rock to the parking lot of Cocktails and Dreams. The officers saw a male come into the parking lot holding what appeared to be a black firearm in his hand. He approached a reddish coloured Honda vehicle which was about 20-30 feet from their position and slid the firearm under the car. The man then ran back towards the road and entered a white Mustang vehicle, which drove away. Ryan and Duncombe identified this man as Stubbs. The officers made their way to the Honda car and Duncombe retrieved a black pistol from under it. No fingerprints were found on the gun. The ballistics evidence was that the gun matched bullet casings found outside Club Rock. Ryan and Duncombe proceeded to Club Rock's parking lot where they saw a group of persons standing around Ambrose. Davis was standing with the group. He was pointed out as being one of the men who shot the policeman.

6. Two other police officers, Inspector Calvin Robinson and Officer Frank Burrows, were also in the area after 1 am and heard gunshots. They said they saw a man running from the parking lot outside Club Rock and into an alley. While he was running, the man turned and pointed a gun at Burrows and Robinson, although he did not fire it. This man they said was Evans. Robinson said he then saw Evans attempt to conceal the gun in a pile of sand that was part of a construction site. Another officer, Constable Knowles, who had just arrived at this scene, searched the sand and retrieved the gun. The ballistics evidence was that the handgun matched bullet casings collected from outside Club Rock.

7. Ambrose died at 4 pm on 29 March 1999.

8. On the same day, the defendants were interviewed under caution by Superintendent Elsworth Moss and Acting Superintendent Hutcheson on suspicion of shooting Ambrose. Each of the defendants said they had been at Club Rock that night but denied any involvement in the shooting.

9. On 8 April 1999 the defendants were charged with murder (of Ambrose) and attempted murder (of Scott). Evans was also charged with firearms offences.

Procedural history

10. In June 1999 and January 2000, a preliminary inquiry was held during which evidence was taken from several witnesses. Identification evidence was given by Scott and by John Campbell, who had been outside Club Rock at the time of the shooting. He had given a statement to the police on 29 March 1999 describing the three men he said had attacked Ambrose. He had also attended an identification parade on 30 March 1999 in respect of which he made a statement the same day.

11. The first trial took place between 14 May 2002 and 18 June 2002 before Allen J (as she then was) and a jury. A fourth defendant, Newbald, was acquitted at the close of the prosecution case. The defendants were convicted of murder and sentenced to death. Their convictions were overturned on appeal on 8 March 2004.

12. The defendants' second trial commenced on 5 February 2007 before Isaacs J (as he then was) and a jury. The trial was aborted on 27 February 2007 on the first day of Isaacs J's summing up, due to the jury reporting that a third party had attempted to influence one of the jurors.

13. The third trial took place between 10 June and 25 July 2013 before Jones J and a jury. The defendants were convicted of all offences. The defendants were sentenced to life imprisonment for murder and ten years' imprisonment for attempted murder. Evans was also sentenced to three years for each firearms offence. All sentences were to run concurrently.

14. Following the convictions at the third trial, the defendants appealed. When the defendants came before the Court of Appeal on 4 May 2015 (Conteh, Isaacs and Adderley JJA), Isaacs JA was asked to recuse himself on account of his previous involvement in the second trial. The application was refused by a written judgment dated 4 June 2015 and the appeal hearing continued between 14 and 25 September 2015 before Conteh, Isaacs and Crane-Scott JJA.

15. On 8 July 2016, the Court of Appeal unanimously dismissed the appeals against conviction and sentence in respect of Stubbs and Davis. The majority of the Court of Appeal (Conteh and Isaacs JJA) dismissed the appeal of Evans. Crane-Scott JA dissented and would have upheld Evan's appeal against conviction in respect of all four offences.

16. The defendants appealed against conviction and sentence to the Privy Council, the appeal being heard on 2 July 2018. In its judgment of 18 October 2018, the Privy Council allowed the three appeals against conviction on the ground that Isaacs JA should have recused himself from the hearing of the appeal in the Court of Appeal: [2018] UKPC 30;

[2019] AC 868. The case was remitted to the Court of Appeal for a re-hearing of the appeal before a differently constituted court. Since the Board upheld the defendants' appeal on the basis of the failure of Isaacs JA to recuse himself, it did not hear oral argument on the remaining grounds of appeal and made no findings on those grounds.

17. The rehearing in the Court of Appeal took place on 12 to 14 November 2018 before Longley P, and Barnett and Evans JJA. Judgment was delivered on 24 January 2019. In respect of both Stubbs and Davis, the Court of Appeal unanimously dismissed their appeals against conviction and their applications to adduce fresh evidence. However, it allowed their appeals against sentence and replaced their life sentences in each case with sentences of 45 years' imprisonment. After taking into account time already spent in custody, 35 years' imprisonment was imposed on Stubbs and 34 years imprisonment was imposed on Davis, both to run from the date of the Court of Appeal judgment.

18. In respect of Evans, the Court of Appeal allowed his appeal against his convictions for murder and attempted murder and quashed these convictions. However, it dismissed Evan's appeals against conviction for the two firearms offences. The majority (Barnett JA and Evans JA) found it was not appropriate to order a retrial. Longley P dissented on the issue of a retrial.

19. By order dated 8 October 2019, the Court of Appeal granted Stubbs and Davis permission to appeal against conviction and sentence to the Privy Council on certain grounds. By order dated 10 October 2019, the Court of Appeal granted the Crown permission to appeal against its decision to quash Evan's conviction or, alternatively, not to order a retrial in his case.

The evidence at the third trial

John Campbell

20. Campbell gave evidence that on 29 March 1999 he was outside Club Rock when he saw two men run towards two officers, who were about 15 feet away from him. About five minutes later, he saw four other men exit the club shooting. They fired in the air and in the direction of the officers. The two men and one of the officers ran away out of the exit gate to the road. The other officer ran towards a black truck 25-30 feet away from him. One of the shooters, who wore a grey and white camouflage vest and a grey and white camouflage fisherman hat, ran after the officer near the truck, grabbed him from the back, threw him down and started to stomp on him. This was about eight feet from the truck. He said that he could see the face of this man, who was tall, medium build, with a dark complexion. After this the man stomping the officer shot him using a black gun. Two other men ran past him and joined in. They started stomping and then shot at the

officer while he was on the ground. One of the men wore a tannish light-colour outfit. He had seen this man twice before at a bar when he was living in Yellow Elder for about two to three minutes each time and from 25-30 feet. He said he had not seen him for a while before the incident. The other man who joined in wore a red shirt and black jeans. One man had a black gun and the other a chrome gun. The three men put the guns in their waist and exited the western gate heading to the Cocktails and Dreams area. The entire incident took about five minutes. Campbell said nothing obstructed his view of the men and there was lighting from the club and in the driveway.

21. Campbell said that afterwards lots of other police officers arrived. The man in the camouflage jacket and vest and the fisherman hat came back and stood amongst the crowd around the officer on the ground. Campbell said he told the officers that this man was one of the men who shot the officer. Officers took hold of this man, who said, "It wasn't me".

22. On 30 March 1999, Campbell attended an identification parade. He said he was told by the police that “these are them here”. He was taken to a room where he said he identified three men. He said the man standing at position number 10 was the man who had been wearing the camouflage vest and the camouflage fisherman hat. He was permitted to identify him in court as Davis. He said the man standing at position number 5 was the man who had been wearing the tannish outfit. He was permitted to identify him in court as Stubbs. The person who was wearing the red shirt and the black jeans was standing at position number 2. He was permitted to identify him in court as Evans.

23. Campbell was cross-examined by counsel for each of the defendants on his statements of 29 and 30 March 1999 and his earlier oral evidence at the first trial. It was put to him that he only identified one person at the identification parade as stated by Inspector McKenzie, the officer who supervised the parade. It was also put to him that his 30 March 1999 statement said that he had identified only two individuals, one at position number 10 and the other at position number 2, the latter of whom he called, “Die” from Ridgeland Park (spelt “Dye” in his statement), a name by which Stubbs was known. Campbell maintained he had identified three individuals. He admitted that he called Evans “Die” at the preliminary inquiry but said that he called Stubbs and Evans by each other’s names deliberately to avoid giving evidence. He also admitted that his statement said that he saw three, not four, individuals exit the door of the club shooting, but he denied that he had tailored his evidence to the fact that four men were later charged.

Inspector Rodney McKenzie

24. Inspector McKenzie was the police officer who conducted the identification parade which Campbell had attended. He said that Campbell had picked out one person, the person who had stood at position number 10 (Davis), and no one else.

25. Inspector McKenzie agreed in cross-examination by counsel for Evans that three potential eyewitnesses besides Campbell had attended the identification parade and that none of those people had picked out Evans either.

Marcian Scott

26. Scott had given evidence at the preliminary inquiry and at the first trial but had died before the second trial. His deposition from the preliminary inquiry was admitted as evidence pursuant to section 168 of the Criminal Procedure Code ("CPC"). His evidence from the first trial was admitted as evidence pursuant to section 66 of the Evidence Act.

27. In his deposition Scott said that on 29 March 1999, the date of the incident, he was employed by the Royal Bahamas Police Force. He said that shortly after 12 am he and Ambrose went to Club Rock to meet an informant. He was in plain clothes. On their arrival at Club Rock, a fight broke out between two groups of young men. They went to see what the problem was, but when they reached the balcony of the club, the fight was already over. He said that a young man came up to them and said something and he was advised to make a complaint at the police station. They went outside the club. Whilst outside, the young man "tried to go back at the fellas he was fighting with". He was advised not to take matters into his own hands.

28. By that time a second group of men were at the front door of the club. There were about seven other people right outside the club at this time. Words were exchanged, and then shots were fired from the front door of the club. He said that he ducked and ran for cover behind a car, as did Ambrose. When he looked up, he said he saw Stubbs and Davis with guns in their hands, firing in the direction of himself and the other young men he had earlier spoken to. Stubbs was wearing a bright yellow shirt. He said Ambrose and the two other men ran towards the road. Stubbs fired in the direction of Ambrose and the other men.

29. Scott said that he then ran back to the club entrance, looked behind him and saw Davis hold Ambrose's left hand and fire a shot at him. He saw Stubbs run to where Ambrose was on the floor and that he also fired several shots at the officer. Both Stubbs and Davis then ran off leaving the area. He went over to Ambrose and saw that he was shot. Shortly afterwards, the police arrived. He said Davis came back to the scene, was pointed out by the crowd as one of the shooters and was arrested.

30. Scott said that when the men shot Ambrose, he was about 20 feet away from them. He also said that there was lighting on in the club building and lights in the parking area. He said he knew Stubbs and Davis because he had had dealings with them before. He was asked how long he had known Stubbs and he said that he knew him for a year from working at CID. Scott identified both Stubbs and Davis in court.

31. It was put to him in cross-examination that he could not have known Stubbs for about a year before the incident, because Stubbs had been in prison for more than three years immediately prior to the incident. Scott said he had known him, heard about him, and seen him. He may have known him longer.

32. Davis represented himself at the preliminary inquiry. In cross-examination of Scott, he put to him that Scott and Ambrose had previously arrested him and they had had a dispute at the police station. Scott admitted that he had punched and slapped Davis on this occasion to "put you in your place" because Davis became disorderly. It was put to Scott by Davis that Scott was giving evidence against him in order to get even. Scott denied this. During re-examination the prosecution elicited from Scott that Davis had been arrested for threats of death and possession of a firearm because of allegations made by Evans's girlfriend.

33. In his evidence in examination in chief at the first trial Scott said that he observed four men at the doorway of Club Rock holding firearms. Shots were fired in the direction of himself, Ambrose, and two other persons who were in his company at the time. Scott said he and Ambrose ducked behind a car. The other two men ran off in the direction of the road. Scott heard continuous fire and saw through the glass in the car doors that the men were still firing. He ran behind a second car parked parallel to the first and saw the men jump over the barricades in front of the club and move in his direction. There were people all around. From behind the rear of the second car he saw Stubbs about six feet away from him, firing shots in the direction of the road where the two men had run off. He ran back to the club door. He looked back and saw Davis grab Ambrose by the left arm. Ambrose struggled to pull away and Davis shot at him. Scott said that at that point he was 20-35 feet away from them. There was lighting at the club to the west, and to the parking area at the east, west and front. There were no obstructions between himself and Ambrose and Davis, whom he saw for about 30 to 35 seconds. Ambrose fell to the ground, got up again and stumbled. At this point, Stubbs pointed and fired at Ambrose. After Stubbs and Davis stopped firing, Scott said they stomped and kicked the deceased and then they ran off. He himself ran to where the deceased was lying on the ground. While he was there, Davis, who was standing over him, was pointed out to him as one of the shooters. He said Davis started to deny that he had shot the officer.

34. Scott said he had seen Davis three or four times before in his capacity as a police officer and that the last time he saw him was about a week before the incident. He said that he had known Stubbs for about nine years. He saw him once or twice before that incident, and although he was not sure, the last time was for about five minutes around four months ago. He said that he came to know Stubbs in his capacity as a police officer. He was permitted to identify Stubbs and Davis whilst they were in the dock.

35. Scott was cross-examined about the fact that he had said at the preliminary inquiry that he had known Stubbs for one year before the incident and seen him four months

earlier. Scott said the reason why he lied about how long he knew Stubbs was because of threats made to him and his family who he said lived in the same area as Stubbs. He also said he knew Stubbs from the Ridgeland Park area and from school, where he had seen him occasionally.

Police officers Ryan and Duncombe

36. Ryan and Duncombe said they were on surveillance duty at the Cocktails and Dreams nightclub on West Bay Street sometime after 1 am. They heard shots and saw people running from where Club Rock was located across the parking lot towards Cocktails and Dreams. Both said they saw a man come into the parking lot holding what appeared to be a black gun. They observed this from about 20 feet away and there was lighting in the parking lot and from the Cocktails and Dreams club. They said that they saw the man's face for about two to five minutes from several angles. The officers said that they recognised this man as being Stubbs. Ryan said that he had seen Stubbs multiple times over the past ten-year period. Duncombe said he had seen Stubbs multiple times over the past four or five years.

37. The officers said that Stubbs then slid the firearm under a reddish Honda vehicle, stood up, looked around, crossed the road and jumped into a tinted white Mustang, which drove off. The officers made their way to the Honda vehicle and Ryan found under it a black .45 Llama pistol with the serial number erased. The firearm was dusted for fingerprints. Stubbs's fingerprints were not found on the gun.

38. Afterwards, the officers went to the yard outside Club Rock. There they saw what appeared to be a lifeless body on the ground that was surrounded by a group of people. They recognised the body to be that of Ambrose. Davis was in the group and the officers heard others in the group shout that Davis was one of the men who shot the policeman. Davis did not say anything in reply.

39. Both officers were cross-examined on the basis that they had had previous dealings with Stubbs in which charges had been dismissed and therefore they had a motive to lie about Stubbs's involvement in the offence, which both denied. It was also put to the officers that they had worked in the Firearms Unit and it was accepted that in 1999 both had access to firearms.

40. Both officers agreed that they had arrested another suspect that night, Jermaine Poitier. Poitier had been pointed out to them by Leonardo Murphy, who was one of the two men who had made the complaint about the fight to Ambrose and Scott before the shooting started. Duncombe said that Poitier was wearing a red shirt and black jeans.

Officer Burrows and Inspector Robinson

41. Sometime after 1 am Burrows and Robinson were on patrol in a van along Bay Street just past Club Rock when they heard rapid gunfire. The officers got out of their vehicle and ran back towards the club. They said they saw a man running from the exit gate into an alley. There was lighting from lamp poles on the street and the man was about 20-30 feet away when they first saw him. Burrows said he saw the man trying to put a silver handgun in his waist but that he could not get it in. Robinson did not see this. The officers recognised the man as Evans.

42. Both officers pursued Evans into the alley. Robinson was in front and Burrows five feet behind. There was lighting from the business premises in the alley. Burrows shouted, "Police stop!". The officers alleged that Evans turned and pointed the gun in their direction but did not fire. Both officers pulled out their service revolvers and fired shots at Evans**.** The alley led to Virginia Street where there was a building under construction. Robinson said Evans put the firearm in a pile of sand.

43. Evans was then said to have put his hands up, said that it was not him and that some men were trying to kill him. Burrows searched the sand for a gun but did not find anything. Constable Knowles, who arrived seconds later, also searched the sand. He pulled out a silver Desert Eagle .357 magnum handgun. Robinson said they showed it to Evans. Burrows said Evans was not shown the gun. As they were searching, another man known as 'Twin' (Eric Newbold) came up and said, "Officer release him, it ain't him". Robinson asked the man 'Twin' to come to him, but he ran off instead.

44. Robinson said he and Knowles then took Evans to Central Police Station.

45. In cross-examination, it was put to both officers that they had fabricated the evidence that Evans was in possession of a firearm in order to justify the use of their service revolvers. Both officers denied this.

46. Burrows admitted that he had not mentioned in his report that he saw Evans attempting to put a gun in his waist. Robinson admitted that he had not mentioned in his report that Evans was shown the firearm by Knowles. Robinson stated Burrows and Knowles searched the pile of sand and Knowles retrieved the gun. Burrows stated that Knowles 'jook' his hand into the pile of sand and pulled out the gun.

47. It was further put to Robinson that he did not take Evans to the police station, but that this was done by other officers. Robinson denied it. He said he handed Evans over to the duty officer at Central Police Station and that he would have told the duty officer why they were there. He said that he could not remember to whom he spoke on this

occasion or if they were male or female and no paperwork was filled out in his presence. He did not see if Knowles showed the gun to the duty officer, although he was in the vicinity. Robinson and Knowles left separately and met at CID and Robinson said it was there that he put his initials on the gun. The gun was not tested for fingerprints.

48. Knowles did not give evidence at any hearing and had died by the time of the third trial.

Sergeant Phyllis Smith

49. She said that one of her duties was to collect the exhibits in the case. She gave evidence about the items of clothing that had been seized from suspects after they were arrested, which she handed to Inspector Higgs for gunshot residue testing. She said that she had received the following items: a striped shirt, a pair of burgundy denim trousers (Evans's clothing); a red shirt, a pair of tennis [shoes], a pair of black denim trousers (Jerome Poitier's clothing); a pair of black tennis [shoes], multicoloured trousers and a multicoloured shirt. She could not say whether the multicoloured items were a camouflage pattern or not because she did not open the sealed bag that they were in.

Inspector Terence Higgs

50. Higgs was a firearms and toolmarks examiner employed in the public service and attached to the forensic science section of the police force. He emigrated to the United States in 1999 and was not called to give evidence at any of the trials. The prosecution sought to admit his report dated 18 June 1999 into evidence under section 120 of the CPC. The report had been admitted at the first and second trials, with another firearms examiner attached to the police force being tendered to put the report in evidence and to be cross-examined about it. At the second trial this had been Earl Thompson, and the prosecution had given notice that they intended to call him for this purpose at the third trial.

51. In his report Higgs stated that in his opinion both the black .45 Llama pistol and the silver .375 Desert Eagle handgun matched bullet casings found at the scene of the incident.

52. Both Stubbs and Evans made applications to the judge under section 120(2) of the Criminal Procedure Code ("CPC") submitting that it was in the interests of justice that Higgs be available for cross-examination. On 5 July 2013, the judge accepted Evan's submission and ruled that it was in the interests of justice that Higgs give live evidence**.** He ordered that the prosecution take steps to secure Higgs's attendance.

53. On 16 July 2013, the judge found that the prosecution had not taken all reasonable steps to bring Higgs to trial to give oral testimony and had not taken any steps at all to have him give evidence by video link. The judge found, however, that it was in the interests of justice that the report be admitted without calling Higgs, but with Thompson giving oral evidence in relation to the report and being cross-examined about it.

Inspector Moss and the interview evidence

54. Inspector Moss interviewed all the defendants and the contents of their interviews were read out in evidence.

55. Stubbs said that he had been at the club for about half an hour when he saw that everyone was heading outside. He followed and saw Evans with a gun beating up someone. He then heard a shot followed by several shots and saw Evans being chased by police. He said he went up to the police, raised his shirt, and then went home. He said he had seen Davis and Evans in the club together. He denied having a gun or being involved in the attack and stated that he did not know that the man who had been shot was a policeman.

56. Davis said that he had been at Club Rock that night and that he had a fight with a member of the Raiders gang inside the club. The fight had been broken up by a security officer. The security officer and the Raiders members went outside, and he went to the door of the club. He said he saw 'Tall' with three other gang members standing outside, and Tall pointed him out (i.e. Davis) as the person who had attacked and slapped him inside the club. Davis said he then walked from behind the barricades at the entrance to the club and heard shots firing. He ran, bumped into someone and jumped over the fence into the road. He saw officer Rolle with a gun, who told him to stop, which he did. Davis said he was then searched. No weapon was found on him. Davis denied having a gun or seeing anyone with a gun and said that he only heard shots. He was asked in interview "what about the gun the police found that you tried to hide?" Davis said that the gun retrieved by the police was not his.

57. Evans requested to have his lawyer present but was not able to provide his lawyer's surname. Attempts were made to find out his lawyer's details by telephoning his girlfriend. Contact could not be made with Evan's girlfriend and the interview was stopped. Evan's sister, Altaneese Evans, then attended the police station and the interview was continued in her presence. Evans said that he was present at the club that night when a fight broke out. He was not involved in the fight and he did not know what it was about. After the fight had stopped, he went outside, when men who had been involved in the fight said, "that look like one of them right there". They started beating him. Evans then said that he did not want to say anything else until he had seen his lawyer. The interview was then stopped. It was not resumed.

Defence evidence

58. Stubbs and Davis did not give evidence or call witnesses but relied upon the contents of their statements in interview.

59. Evans similarly did not give evidence and relied upon his statement in interview. He also called three witnesses: Inspector McClure, Helen Farmer and Shandiola Colebrooke.

60. Inspector McClure was the officer who made up the detention record for Evans when he was brought into Central Police Station. She had recorded that Ryan had arrested Evans, and that officers Rolle and Dames had brought him into the police station. She had noted that he had been arrested for possession of an unlicensed firearm, ammunition, and attempted murder. She said that if a weapon had been brought in with a suspect, she would normally note the type of weapon on the detention record, although the weapon would remain with the arresting officer. In this case there was no note made of any weapon on the detention record.

61. The evidence of Colebrooke from the second trial was admitted pursuant to section 66 of the Evidence Act because she could no longer be traced. Helen Farmer was the court reporter on 21 February 2007 before Isaacs J in the second trial when Colebrooke gave oral evidence. Farmer read out for the jury Colebrooke's testimony. The jury was also given a transcript of Colebrooke's oral evidence for the remaining duration of the trial.

62. Colebrooke said that on 29 March 1999 she was at Club Rock when a fight broke out inside the club. She saw a man she knew as 'Eric' being involved in this fight. The police had escorted him and another man out of the building. She left the club. When she got outside, another fight had started on the pavement to the left of the door. She said there was a man "getting ganged by a lot of fellas in black". She said the man started to stagger, managed to get away and ran off. She identified that man in court as Evans. She did not know Evans but had seen him occasionally when she visited Bozine Town.

63. She was then heading towards her car when she saw Eric, who was to the left of the door of the club, pull out a black gun and start shooting. She said she heard three or four shots. Once he started shooting, she ran to her car because she was afraid for her life and left the area. She agreed that she did not know if Evans came back after running off.

64. She said that when she saw Evans being beaten up outside there were lights from the building and in the parking lot. The fight did not last long because Evans was trying to get away. It felt like 20 minutes but was not as long as that. She estimated 10-15

minutes. There was lighting to the left-hand side of the building so she could see Eric when he pulled out the gun. When Eric was shooting, she was near her car, which was about 75-150 feet away. Colebrooke went on to say that she saw Eric again the Wednesday after the incident, when he said that he "shot a cop".

The grounds of appeal against conviction

65. The grounds of appeal may be summarised and re-numbered as follows:

Stubbs

(1) The judge wrongly permitted what is said to be a 'dock identification' of him by Campbell and failed to give adequate directions on this and on Campbell's identification evidence generally.

(2) The judge wrongly (a) admitted Scott's deposition from the preliminary inquiry and transcript of his evidence from the first trial into evidence; (b) failed to edit it and to remove what is said to be a 'dock identification'; and (c) failed to give adequate directions on his identification evidence.

(3) The Court of Appeal should have admitted the fresh evidence to the effect (it is said) that Scott had ceased to be a police officer by the date of the killing on 29 March 1999.

(4) The judge wrongly allowed Thompson to adduce Higgs's report into evidence without requiring Higgs to attend to give oral evidence and wrongly failed to give proper directions on this issue.

Davis

(1) The judge wrongly admitted Scott's deposition and the transcript of his evidence at the first trial and, in particular, the bad character evidence which emerged as a result of Davis's cross-examination of Scott at the preliminary inquiry should have been excluded by the judge.

(2) The judge should not have admitted the evidence of Scott and Duncombe that statements were made by people at the scene of the incident, to the effect that Davis was one of the attackers.

(3) The Court of Appeal should have admitted the fresh evidence to the effect (it is said) that Scott had ceased to be a police officer by the date of the killing on 29 March 1999.

The Crown's appeal in the case of Evans

66. The grounds of the Crown's appeal may be summarised as follows:

(1) The majority of the Court of Appeal was wrong to hold in relation to the case against Evans that the judge erred in admitting Higgs's report.

(2) The Court of Appeal was wrong to hold that the judge erred in other respects.

67. Evans advances a number of other grounds to support the Court of Appeal's decision. In particular, he contends that:

(1) The judge wrongly permitted a 'dock identification' of Evans by Campbell.

(2) The judge failed properly to direct the jury on the identification evidence as a whole.

(3) The judge caused substantial prejudice to Evans by failing to differentiate the evidence in respect of him from that of his co-defendants, and by failing to summarise the evidence called on his behalf and to summarise adequately for the jury his defence.

68. The Crown only challenges the decision of the majority of the Court of Appeal not to order a retrial if its appeal succeeds on the ground that Higgs's report should have been admitted in evidence against Evans.

Stubbs's appeal against conviction

Stubbs Ground 1: The judge wrongly permitted what is said to be a 'dock identification' of him by Campbell and failed to give adequate directions on this and on Campbell's identification evidence generally.

69. The issue as to whether the judge at the third trial should have permitted what is described on behalf of Stubbs as a 'dock identification' by John Campbell has a complex factual background. On 30 March 1999, the day after the incident, Campbell was invited to attend an identification parade in which all 3 accused appeared. Stubbs appeared at number 5, Davis at position number ten and Evans at position number two. The identification parade was organised and supervised by Inspector McKenzie. No formal written record of what occurred at the parade survived. However, throughout the legal proceedings which followed, Inspector McKenzie consistently maintained in his evidence that Campbell had picked out only Davis. Campbell, on the other hand, gave widely differing accounts of what had occurred at the parade to which it is necessary to refer in some detail.

70. On 29 March 1999, the day of the incident and the day before the identification parade, Campbell made a statement in which he described three men shooting Officer Ambrose. One was wearing "white grey and black camouflage pants, a grey black and white camouflage vest and a cap the same colour". The second was wearing "black pants and red shirt". He could not say what the third man was wearing. In that statement he did not identify any of the men by name.

71. In a second statement dated 30 March 1999, made after he had attended the identification parade, Campbell stated that at the parade he had identified two males whom he had seen at the incident. One had number 10 on his chest. Campbell said that he did not know his name. At the time of the incident that man wore "a grey camouflage pants, white shirt and a camouflage [illegible] fisherman's hat". He had seen this man lift up the police officer, throw him to the ground, "start stumping him" and then shoot him. Campbell stated that "the other man I identified was #2, a man I know as Dye of Ridgeland Park West who also was kicking and stumping the officer. I have known Dye for about eights (sic) and the last time I saw him was when he came into Club Rock with some fellas. After they had shot the officer they just walked out of the club yard." It should be noted that the man at position number 2 in the parade was Evans.

72. At the preliminary inquiry Campbell described three men who had shot Ambrose and identified them as the three men in the dock, Davis, Stubbs and Evans. He claimed to have identified them at the identification parade. He said he had picked out Davis at position number 10, Evans at position 2 and Stubbs at position 5. In cross-examination he said that the man he knew as Die was number 5. He claimed to have identified three persons at the identification parade including Evans. Referred to his statement of 30 March 1999 he said that he identified number five as Die of Ridgeland Park West. He then accepted that he identified Evans as Die. At the first trial, he accepted that at the preliminary hearing he had picked out Evans and called him Die. At the third trial he accepted that at the preliminary hearing he had picked out someone other than Stubbs and had said that that person was Die.

73. At the first trial Campbell gave evidence that he had picked out three men in the identification parade. He had picked out number 10, then number 35 (sic), then number 2. Number 10 was the person who grabbed the officer, licked him down and was firing shots. He had been wearing camouflage pants with a vest and a cap. He identified that person in court as Davis. Campbell then said that in the identification parade he had identified the man in the tannish coloured clothing and he was number 5. He had seen that man beat and shoot at the officer He identified that man in court as Stubbs. Campbell then said that in the identification parade he had identified number 2 who had beaten and shot at the officer. He identified that man in court as Evans. He had been wearing dark coloured clothes. In cross examination he said that in his statement of 30 March 1999 he said that he had picked out three persons. He said that there was a reason why he had called the wrong man (Evans) by the name of Die in the preliminary inquiry and that was because he was being threatened. (However, he appears to go on to say that this was after the preliminary inquiry.) He said that at the preliminary hearing he had called Clinton Evans Die and had called Die Clinton Evans. He said that he had identified three men in the identification parade but accepted that in his statement of 30 March 1999 he had said that he identified two.

74. At the second trial Campbell gave evidence that at the identification parade he picked out at position number ten the man who had been wearing the camouflage fisherman hat. He identified him in court as Davis. He also gave evidence that at the identification parade he picked out at position number two the man in the red shirt and black jeans. He identified him in court as Evans. Campbell explained how he knew the man who had been wearing the tannish coloured shirt. He only knew that person by his nickname, Die. He identified him in court as Stubbs. He had not picked that man out in the identification parade. In his statement of 29 March 1999 he had not told the police that that man was Die. He had mentioned the name Die for the first time in his statement of 30 March 1999. He accepted that at the first trial he had picked out the wrong person at the preliminary inquiry. He admitted wrongly identifying Evans as Die. He explained: "I identify Clinton Evans as Die because I didn't want nothing else to do with the case anymore because from I give a statement, I didn't have no protection or anything." He had not identified Stubbs on the identification parade because he was in fear for his life. [3181]

75. At the third trial Campbell gave evidence of the incident. He said that four men came out of the club shooting. He saw one man grab the officer, "lick him down and start to stomp him". He was dressed in "a gray and white camo vest and a gray and white camouflage fisherman hat". He had never seen him before. He was joined by two other men who started "stomping and shooting at the officer whilst he was on the ground". One had "a tannish light-color outfit". The other had a red shirt and black jeans. He did not know what happened to the fourth man he saw coming out of the club. Campbell said that at the identification parade he picked out three men. Number ten was the man who had on the camouflage. He identified that man in court as Davis. He said that at the identification parade he picked out the man with the tannish outfit. He had seen that man before the incident. He had known of him for eight or more years and had seen him in

Yellow Elder. Following legal argument, Campbell said that at the parade he had picked out the man at position number five as the man in the tannish shirt. He identified that man in court as Stubbs. Campbell said that at the parade he had picked out the man at position number two as the man wearing the red shirt and the black pants. He identified that man in court as Evans. In cross examination he accepted that at the preliminary inquiry he had identified Evans as Stubbs but said there was a reason for that. He said that he knew the man in the tannish outfit as Die. He accepted that in his statement of 30 March 1999 he had stated that the person at position number two was Die of Ridgeland Park West. He stated that he had received threats and at the preliminary inquiry he had said that "Clinton Evans was Die Stubbs and Die Stubbs was Clinton Evans just to see if I can get off the case and not go through with it."

76. On behalf of Stubbs, Mr Edward Fitzgerald QC submits that the judge should not have permitted a dock identification of Stubbs by Campbell at the third trial because there had been no satisfactory prior identification of him by Campbell. He points to the evidence of the independent identification parade officer, Inspector McKenzie, that Campbell did not pick out Stubbs at the identification parade and submits that, in any event, Campbell's evidence that he had identified Stubbs at the parade was riddled with inconsistencies. The judge had permitted the dock identification of Stubbs on the basis that Campbell claimed to have identified Stubbs at the parade. However, his reasoning fundamentally neglected the significance of the independent evidence of Inspector McKenzie and it misunderstood the important role of the judge to prevent highly prejudicial yet unreliable evidence going before the jury.

77. While a dock identification by an identifying witness who has not made a previous identification of the accused is not per se inadmissible (*Pipersburgh v The State* [2008] UKPC 11; (2008) 72 WIR 108, para 10), it is well established that a dock identification in such circumstances is undesirable and ought not to be allowed (*Goldson v The Queen* (2000) 56 WIR 444, 448). Whether or not to permit a dock identification is a matter entrusted to the trial judge who will need to consider with great care whether the admission of such evidence might imperil the fair trial of the accused (*Tido v The Queen* [2011] UK PC 16; [2012] 1 WLR 115; (2012) 79 WIR 1). The dangers of permitting an identification of an accused for the first time in court are well known. In *Holland v HM Advocate* [2005] SCCR 417, para 47 Lord Rodger, having referred to the safeguards offered by identification parades, drew attention to positive disadvantages of an identification carried out when the accused is sitting in the dock with the implication that the prosecution is asserting that he is the perpetrator is plain. There must, in such circumstances, be a considerable risk that the witness's evidence will be influenced by this. Lord Rodger continued:

> "So a dock identification can be criticised in two complementary respects: not only does it lack the safeguards that are offered by an identification parade, but the accused's position in the dock

> positively increases the risk of a wrong identification." (at pp. 432-433)

78. In the present case the Court of Appeal dealt with this ground of appeal very briefly. First, it referred to the fact that Campbell had insisted in his evidence that he had identified Stubbs at the identification parade. It considered that, if this were true, there was no real basis for refusing to permit him to identify Stubbs in the dock. Secondly, it considered that the conflict between the evidence of Campbell and that of McKenzie, which it described as "fundamental" was properly left to the jury. Thirdly, it observed that the quality of Inspector McKenzie's evidence was adversely affected by the absence of his notes of the results of the identification parade. The Board does not consider, however, that the reasons given by the Court of Appeal meet the force of the complaint. As to the first, there was at least a serious issue as to whether Campbell had identified Stubbs at the identification parade and there was, therefore, a need to address the situation in which Campbell had not identified Stubbs in the parade. As to the second, it was for the judge to decide whether to permit the identification in court in circumstances where there was conflicting evidence. As to the third, notwithstanding the lack of any official written record of what had occurred during the identification parade, Inspector McKenzie had been consistent throughout these protracted proceedings in maintaining that Campbell had not picked out Stubbs.

79. In the Board's view, the distinction drawn by the authorities between cases of identification and recognition is more to the point. Where an identifying witness claims previous acquaintance with the person identified, different considerations will apply. In *Stewart* [2011] UKPC 11, (2011) 79 WIR 409 the identifying witness claimed to have known the accused and his family for a long time. In that case the Board considered that the identification in court could not properly be regarded as a dock identification at all. By the time the witness came to point out the accused in the dock she had already told the police precisely who he was. The dock identification was a "pure formality" (per Lord Brown at para 10). Similarly, in *France v R* [2012] UKPC 28; (2012) 82 WIR 382, another case of recognition, Lord Kerr, delivering the opinion of the Board, observed (at para 33) that a dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified and that the dangers inherent in such an identification are clear. He continued (at para 34):

> "There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression, but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in

> both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'."

80. In the same way, what occurred in court at the third trial when Campbell identified Stubbs was not a dock identification in the strict sense. What does emerge with some clarity from the confused history is that, whatever happened at the identification parade, Campbell said and was recorded as saying in his second statement made on 30 March 1999, shortly after the identification parade, that he recognised the man in the "tannish outfit", whom he claimed to have seen attacking and shooting at Officer Ambrose, as a person he knew as Die from Ridgeland Park West and that he had known him for about eight years. Whether or not he had picked out Stubbs in the identification parade, Campbell was saying that he recognised the man in the "tannish outfit" as someone he had seen before and whom he knew by his nickname. The fact that he said in his second statement that the person he recognised as Die was at position number two and the fact that he wrongly identified Evans as Die at the preliminary hearing, while no doubt relevant to whether his claim of recognition should be accepted by the jury, does not make this anything other than a case of claimed recognition. Furthermore, it was common ground throughout these proceedings that Stubbs was known as Die and had lived at Ridgeland Park West.

81. Mr Fitzgerald on behalf of Stubbs submitted that the slight nature of Campbell's claimed prior knowledge of Die meant that this should not be considered a recognition case. The accounts that Campbell gave at various times on this point were not entirely consistent but the gist of them was clear enough. In his statement of 30 March 1999 Campbell stated that he had known Die for about eight years and that the last time he had seen him was when he came into Club Rock with some others. At the second trial, Campbell's evidence was that he had known the person wearing the tannish coloured shirt for about eight years prior to the incident. He said that he knew him when he lived in Yellow Elder, Derby Road (an area of Nassau adjoining Ridgeland Park West). He had seen him a few times in a club on Robinson Road and had seen him walking through Yellow Elder a few times. He would see him two, three times in a month or so. He had not seen him for a few years, for a long period of time before the incident. He knew him by his nickname which was Die. At the third trial, it was Campbell's evidence that when he was living in Yellow Elder he saw him twice at a bar on Robinson Road. He did not know him personally. He had seen him. They lived in the same area. He had seen him as he, Campbell, was passing the club. He had seen him about three or four times. He did not know him but knew about him for about eight or more years. He had not seen him for a while – for many years. He could not say exactly how many. It is also significant that at the third trial there was no challenge to Campbell's evidence that he had known the man in the "tannish outfit" for about eight years and that he knew him as Die. The thrust of the cross-examination by Mr Ducille on behalf of Stubbs was not that Campbell was

mistaken but that he was being dishonest. When Campbell was cross-examined by Mr Cargill on behalf of Davis, he repeated that he knew Stubbs as Die. Although the judge permitted further cross-examination by Mr Ducille, this was not challenged.

82. The decision of the Court of Appeal, Criminal Division in *R v Fergus*, 6 November 1991, [1992] Crim LR 363 on which Mr Fitzgerald relies is clearly distinguishable. There, the complainant said that he did not really know the accused before the incident but that he had seen him and his brothers once before when someone had told him who he was. The judge permitted the accused to be identified in court. Allowing an appeal against conviction the Court of Appeal observed that there was an important distinction between cases where the complainant claimed to recognise the attacker as a person he already knew well and those where the complainant had never seen the assailant before. The case where the complainant had seen the assailant only once or on a few occasions before might well be treated as that of identification rather than recognition. The identification of a person through a name which was only known by hearsay was almost equivalent to a dock identification. Since the only previous time when the complainant had seen the accused was a casual incident when there was little occasion to remember him and bearing in mind the difficult lighting and circumstances when the attack occurred the conviction was unsafe. In the present case, the claimed basis of recognition is certainly not as tenuous as that in *Fergus*. Moreover, it was not disputed that Stubbs was known as Die and that he lived in Ridgeland Park West. In the Board's view this was a sufficient basis on which to treat this as a recognition case.

83. In these circumstances, whether or not Campbell picked out Stubbs in the identification parade, the identification in court was not in truth a dock identification because Campbell was simply confirming his previous account to the police that he recognised one of the attackers as a man he knew as Die from Ridgeland Park West. The judge was entitled to permit Campbell to identify in court the person he claimed to know as Die. Such evidence does not fall within the mischief of the prohibition on dock identifications. There was no real risk that Campbell would be influenced by seeing Stubbs in the dock into honestly but mistakenly believing that he was one of the attackers when in fact he was not or that he would mistakenly pick out Stubbs as Die from Ridgeland Park simply because he was sitting in the dock. Moreover, Campbell's claim in court that Stubbs was the man he knew as Die was open to challenge on the basis of evidence that, on at least one account, he had failed to identify him at the identification parade and on the basis of the incorrect identification at the preliminary hearing. Whether or not Campbell's claim that he had picked out Stubbs in the parade was a proper basis for allowing a dock identification, the claimed recognition of Die was a proper basis for what occurred.

84. For the same reasons, the complaint on behalf of Stubbs that the identification parade was not conducted in accordance with the safeguards in the Force Standing Order has no substance. In fact, there was no objection at the trial to the introduction of evidence of the identification parade on this ground. More fundamentally, however, as this was a

recognition case the circumstances in which the identification parade was conducted were irrelevant to the decision to permit the identification of Stubbs in court as the man Campbell claimed to know as Die.

85. Mr Fitzgerald on behalf of Stubbs then turns his attention to the judge's summing up in relation to this issue. The judge reminded the jury of Campbell's evidence that he had picked out at the identification parade the man at position five as the man in the tannish outfit who was one of the men who had shot the officer. He had seen this man before in the area of Yellow Elder at a bar on about two occasions. In court he had pointed to Stubbs as being that man. The judge reminded them of Campbell's previous inconsistent statement. He also reminded the jury that Inspector McKenzie's evidence was inconsistent with Campbell's claim to have picked out the man at number 5 in the parade. The judge directed the jury to consider what effect the inconsistencies in Campbell's evidence and the contradiction between his evidence and that of Inspector McKenzie had on Campbell's credibility. He continued:

> "I must tell you that the contradiction between the evidence of John Campbell and Detective Inspector Rodney McKenzie is fundamental. Both accounts cannot be true and are not reconcilable. It is a matter for you the jury." [551]

The judge also gave a *Turnbull* direction on identification evidence. [565-568]

86. Mr Peter Knox QC, who appears for the Crown on this appeal, draws our attention to the conclusion of the Court of Appeal, stated in the context of the appeal of Evans, that whilst it is arguable that the trial judge could have been more robust in his directions, having reviewed them in their entirety the Court of Appeal had no doubt that the jury had the benefit of the necessary directions as to the care they must take in evaluating identification

87. The Board's view that the case of Stubbs should properly be considered a recognition case provides a complete answer to a number of the criticisms advanced by Mr Fitzgerald, because this was not a true dock identification case in the sense which requires a direction to the jury warning them of the dangers of dock identifications. First, there was no need for the judge to direct the jury that the risk of a false identification increases when a witness who has been unable to identify a defendant at an identification parade makes a dock identification. Secondly, for the same reason the judge was not required to direct the jury that if they found Campbell's claim to have identified Stubbs at the parade to be doubtful, this would significantly reduce any weight that could be given to a dock identification. Thirdly, the judge is not to be criticised for having failed to describe what occurred as a dock identification or to warn the jury about the caution needed in the case of Campbell's identification of Stubbs in court. The judge did, however, direct the jury more generally of the need to consider the inconsistencies in

Campbell's evidence and the conflict with the evidence of Inspector McKenzie and their effect on his credibility. Fourthly, for the reasons given above, it was unnecessary to direct the jury about the breach of Force Standing Orders in the conduct of the identification parade.

88. The further submissions made on behalf of Stubbs in this regard may be dealt with briefly. First, it was unnecessary for the judge to direct the jury that Inspector McKenzie's evidence was the only "independent" evidence of the parade. That would have been obvious to the jury. Secondly, the judge in summing up reminded the jury in detail of the inconsistencies in Campbell's evidence and of the conflict with Inspector McKenzie's evidence.

Stubbs Ground 2: The judge wrongly (a) admitted Scott's deposition from the preliminary inquiry and transcript of his evidence from the first trial into evidence; (b) failed to edit it and to remove what is said to be a 'dock identification'; and (c) failed to give adequate directions on his identification evidence.

89. Scott took part in the preliminary inquiry and made a deposition. He gave evidence at the first trial. On both occasions his evidence was that he had recognised Stubbs and Davis, both of whom he had known previously by name, as persons who shot at him and Officer Ambrose during the incident. Scott died before the second trial took place. At the third trial the deposition was admitted in evidence pursuant to section 168 of the CPC and the transcript of Scott's evidence at the first trial was admitted in evidence pursuant to section 66 of the Evidence Act. On behalf of Stubbs, Mr Fitzgerald advanced a series of linked grounds of appeal in relation to the admission of this evidence.

90. The first relates to the admission of the transcript of Scott's evidence. Section 66 of the Evidence Act provides that a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if "the document is or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information", and if one of the conditions set out in section 66(2) is satisfied. One of those conditions is where the maker is dead. The statement is not to be given in evidence unless the court is of the opinion that the statement ought to be admitted in the interests of justice having regard to any likelihood that the accused will be prejudiced by its admission in the absence of the person who supplied the information on which it is based (section 66(4)(b)(ii)). At the trial it was submitted that Scott's evidence had not been "supplied to" the shorthand writer at the first trial whom the prosecution called to tender it in evidence. In the Board's view, the judge was correct in rejecting this submission. As the Court of Appeal observed the shorthand writer had a duty properly to transcribe the evidence given by Scott to the court. In any event, this was not a ground of appeal for which leave to appeal was sought from the Board.

91. Secondly, it is submitted on behalf of Stubbs that the deposition should have been excluded in the exercise of the common law power to ensure a fair trial (*Scott v The Queen* [1989] 1 AC 1242, 1258H – 1259H) and that the transcript of evidence should have been excluded because it was not "in the interests of justice" as Scott's evidence had been shown to be potentially unreliable and that unreliability could not properly be exposed without an opportunity to cross-examine Scott before the jury that was actually trying his case. At the trial Stubbs and Davis objected to the admission of the evidence under section 66 of the Evidence Act and section 178 of the CPC. Stubbs's counsel objected on the following grounds:

> (1) At the preliminary inquiry, Scott had initially said that he had known Stubbs for a year before the incident from working at CID. When he was told that Stubbs had been in prison until March 1999 – Stubbs had been in prison between 19 September 1996 and 10 March 1999 – he said that he had known him from before he went to prison and so had known him for three years.
>
> (2) At the first trial he said that he had known Stubbs for about nine years from the Ridgeland Park area and also in his capacity as a police officer prior to that. He also said that the last time he saw Stubbs prior to the incident was about four months before. He said that the reason for the inconsistency was that there were threats against his family who lived in the same area as Stubbs.
>
> (3) Scott had not attended an identification parade.
>
> (4) In his statement he had mentioned three persons involved in the incident, at the preliminary inquiry he mentioned two and in his evidence at the first trial he had described four men whom he said came from inside the club with guns in their hands.

92. During the course of legal argument on the admission of Scott's evidence, the judge was referred to *Scott v The Queen*, a decision of the Board on a provision in a Jamaican statute similar to section 168 of the CPC. In that case the judge in a murder trial had admitted in evidence, pursuant to section 34 of the Justices of the Peace Jurisdiction Act, the sworn deposition of a witness who had died before the trial. The deposition was the only evidence of identification which was a matter in issue. Lord Griffiths, on behalf of the Board, considered (at pp 1258G – 1259H) that while the discretion of a judge to ensure a fair trial included a power to exclude the admission of a deposition, it was a power that should be exercised with great restraint. The mere fact that a deponent was not available for cross-examination was obviously an insufficient ground for excluding the deposition for that was a feature common to the admission of all depositions which

must have been contemplated by the legislature. It would, of course, be necessary in every case to warn the jury that they had not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they could safely rely on the evidence in the deposition. In some cases, it might be appropriate to develop this warning by pointing to inconsistencies in the evidence. In an identification case it would also be necessary to give the appropriate warning of the danger of identification evidence. It would also be necessary to scrutinise the deposition for inadmissible matters. Provided these precautions were taken, it was only in rare circumstances that it would be right to exercise the discretion to exclude the deposition. Those circumstances would arise when the judge was satisfied that it would be unsafe for the jury to rely upon the evidence in the deposition. Neither the inability to cross-examine, nor the fact that the deposition contained the only evidence would be sufficient to justify the exercise of the discretion. It was the quality of the evidence in the deposition that was the crucial factor that should determine the exercise of the discretion. It was only when the judge decided that directions to the jury could not ensure a fair trial that the discretion should be exercised to exclude the deposition.

93. In his ruling of 21 June 2013 the judge referred to the inconsistencies in Scott's evidence and the explanation which Scott had provided. He also referred to the fact that there was other evidence in relation to the identification of Stubbs and Davis which supported Scott's identification evidence. The judge directed himself in accordance with *Scott v R*. He referred to the fact that Stubbs and Davis were identified by dock identification. He stated that unless the witness has provided the police with a complete identification by name or description, an identification parade should be held. He accepted that a dock identification should generally not be allowed because it lacks probative value and is highly prejudicial. It was good practice to hold an identification parade unless there was no point in doing so. In his view the quality of the identification evidence in Scott's deposition and transcript in relation to both Stubbs and Davis could not be used unsupported. Fairness to all the parties dictated that all the evidence be placed before the jury that was admissible. What was required was an appropriate direction. In his view Scott's evidence of identification was not of such a poor quality that it should be excluded.

94. In his deposition and in the transcript of his evidence Scott said that he knew both Stubbs and Davis by name and claimed to recognise them. Therefore, it was not strictly an identification case. Mr Fitzgerald is, however, correct in his submission that although Scott claimed to know and to recognise Stubbs and Davis, that claim was disputed and the failure to hold an identification parade might have deprived them of an advantage in that the disputed issue of Scott's prior knowledge of them might have been resolved in their favour had Scott failed to identify them in a parade. In *Goldson and McGlashan v R* (2000) 56 WIR 444, where a witness's claim that she knew the accused was disputed, Lord Hoffmann, on behalf of the Board, noted (at p 448) that an identification parade, had one been held, would have tested the honesty of the witness's assertion that she knew the accused. (See also *Pop (Aurelio) v R* [2003] UKPC 40; [2003] 62 WIR 18; *Ebanks (David) v R* [2006] UKPC 6; [2006] 68 WIR 390 per Lord Carswell at paras 16-19; *R v*

Harris [2003] EWCA Crim 174 per Potter LJ at para 33.) However, in his ruling admitting Scott's deposition and transcript the judge in the present case expressly referred to *Goldson* so he clearly had this possible disadvantage in mind when exercising his discretion.

95. The Board considers that the judge directed himself correctly as to the law and took appropriate account of all relevant considerations. In particular, he took account of the lack of an identification parade, the discrepancies in Scott's evidence and the fact that Scott's was not the only identification evidence. In all the circumstances, it was a proper exercise of discretion.

96. It is then submitted on behalf of Stubbs that the judge should have ordered the editing of the transcript of Scott's evidence to remove his identification in court of Stubbs which was wrongly permitted at the first trial. This point is subsumed within the previous ground. On 19 June 2013 Mr Ducille, counsel for Stubbs, had objected to the admission of Scott's deposition and transcript on a number of grounds, including the identification of Stubbs at the first trial. There was, however, no separate application by Stubbs for either the deposition or the transcript to exclude the identifications in court. The application to exclude the deposition and the transcript in their entirety was then rejected by the judge in his ruling of 21 June 2013 considered above. On 25 June 2013 Mr Ducille did seek to raise the argument that the transcript should be edited to exclude Scott's evidence that he knew Stubbs, because no identification parade had been held. The judge rejected the submission on the basis that he had already ruled on the point. In his view there was nothing in this further complaint because it had not been pursued as an independent point. Furthermore, by the time that Mr Ducille had attempted to raise this as a distinct point, the deposition including Scott's identification of Stubbs and Davis by name ("Die Stubbs" and "Yogi") as the attackers had already been read to the jury on 21 June 2013. Even if it was practically possible at that point, which it was not because the deposition had been read into the evidence, there was no reason for the judge to reverse his earlier ruling which dealt fairly and thoroughly with the substance of this complaint that there had been no identification parade.

97. Mr Fitzgerald further submits that the judge's directions on Scott's identification evidence were defective. The Board considers that there is no substance in this complaint. The judge warned the jury that the evidence of Scott which had been read to them was not necessarily of the same weight as evidence which had been tested before them by cross-examination and he warned them as to its limitations. The judge expressly pointed out that Scott had not attended an identification parade and that his identification of Stubbs and Davis had been a dock identification. He explained to the jury the safeguards provided by an identification parade and the major disadvantages of a dock identification carried out when the accused is sitting in the dock and where the implication is that the accused men are the culprits. He also directed the jury to consider what Scott had said about his previous knowledge of Stubbs and Davis and to bear in mind any inconsistencies in Scott's evidence about how long he had known them and the

explanation he had given for those inconsistencies, matters of which he had previously reminded the jury.

98. On behalf of Stubbs, Mr Fitzgerald complains that the judge's direction did not draw the jury's attention to the possibility that an identification parade and an inconclusive result might have benefited Stubbs and Davis. However, the judge did give full directions on what Scott had said about knowing Stubbs and Davis and the inconsistencies in his evidence. In the circumstances there is no reason to think that this omission could have affected the jury's verdicts.

Stubbs Ground 3: The Court of Appeal should have admitted the fresh evidence to the effect (it is said) that Scott had ceased to be a police officer by the date of the killing on 29 March 1999.

99. At the preliminary inquiry Scott gave evidence that at the date of the incident, 29 March 1999, he was a police officer employed by the Royal Bahamas Police, attached to the CID Division. At the first trial he stated at two points in his evidence that he was a police officer at the date of the incident. On behalf of Stubbs and Davis it is submitted that this claim was false, that Scott had been dismissed from the police force in February 1999 and that by March 1999 he was working for a private company. Mr Fitzgerald submits that, had the jury at the third trial been aware that Scott was not a police officer at the relevant time, this would have cast a wholly different light on Scott's evidence. It would have shown that he was capable of lying about fundamental features of the case.

100. The Court of Appeal refused an application to adduce fresh evidence in relation to this matter in the form of Scott's National Insurance records. Mr Fitzgerald submits that the Court of Appeal erred in refusing the application and, in particular, points to the statement of Lord Hope in *Benedetto v The Queen* [2003] UKPC 27; [2003] 1 WLR 1545, para 65 that while it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence.

101. In the Board's view, however, the Court of Appeal is not to be criticised for its decision refusing the application. First, there was no satisfactory explanation as to why the information could not have been obtained with reasonable diligence before the first trial in 2003 and put to Scott when he gave his evidence. Equally, there was no reason why this information could not have been relied on at the subsequent trials when objecting to the introduction of Scott's deposition and transcript. In his affidavit in support of the application to adduce the evidence in the Court of Appeal, Stubbs stated that it was in 2007 that he became aware of the possibility that Scott was still a police officer at the

time of the offence. The judgment of the Court of Appeal makes clear that this information was supplied by Stubbs to his counsel during the third trial in 2013.

102. Secondly, as the Court of Appeal pointed out, the evidence was ambiguous and does not necessarily support the conclusion that Scott was not a police officer on 29 March 1999. The National Insurance records stated that the identify of Scott's employer changed from the Bahamas Government in February 1999 to the Island Hotel Company in March 1999. It was, however, the evidence of Superintendent Uel Johnson, in response to the application before the Court of Appeal, that Scott had applied for disengagement on 16 March 1999, that his date of discharge was given as 11 January 1999, which was the anniversary of his date of enlistment, and that his final salary disbursement was made on 14 May 1999.

103. Thirdly, the Board respectfully differs from the view of the Court of Appeal that this was a matter that could have affected the reliability of his testimony. Scott made clear in his evidence that since the incident he had ceased to be a police officer. At the preliminary inquiry he stated that he was no longer a police officer and that he was employed at Paradise Security Services, Paradise Island. At the first trial he said that he had left the police force in 1999. He thought it was shortly after the incident. That night he had gone with Officer Ambrose to meet an informant. Even if he had ceased to be a police officer by the date of the incident, it is difficult to see why he might have lied about being a police officer at the date of the incident as opposed to just having ceased to be a police officer or what advantage such a lie might bring. In the circumstances, the Board does not consider that this evidence could have made any difference to the jury's verdicts.

Stubbs Ground 4: The judge wrongly allowed Thompson to adduce Higgs's report into evidence without requiring Higgs to attend to give oral evidence and wrongly failed to give proper directions on this issue.

104. The Higgs Report recorded that various items had been received for examination. These included the .45 auto Llama pistol and the .357 magnum Desert Eagle; .45 and .357 cartridges and casings; various items of clothing taken from Davis, Evans and Jerome Poitier, and hand swabs taken from the same individuals. It reported that the pistols had been test fired and found capable of discharging, that "laboratory comparisons were conducted" and that it was found that certain casings said to have been recovered from the crime scene were discharged by the .45 pistol and the .357 magnum. It was also reported that no examinations were conducted on the articles of clothing that were submitted.

105. The prosecution sought to adduce the report through the evidence of Thompson, a firearms examiner attached to the police. This application was made pursuant to section 120 of the CPC which provides that:

"120. (1) Any document purporting to be —

(a) a survey for public purposes within the meaning of the Land Surveyors Act; or

(b) a report made under the hand of an analyst on any matter or thing duly submitted to him for examination and report, shall be receivable in any criminal proceedings in any court as evidence of any matter or thing contained therein relating to the survey or examination as the case may be.

(2) Notwithstanding subsection (1) the court may of its own motion or where it appears desirable in the interests of justice on the application of any party to the proceedings require the person who did the survey or the analyst to attend before the court and give evidence.

…

(6) Notwithstanding anything to the contrary in this or any other law, any document purporting to be a report of an analysis, test or examination carried out by a person employed in the public service in the capacity of an analyst, chemist, laboratory technician or medical practitioner shall be receivable, without proof of the signature, qualification, employment or office of the person by whom the report purports to be issued, in any proceedings of a criminal nature as prima facie evidence of the results of such analysis, test or examination, as the case may be."

106. Counsel for the defendants applied for the report to be excluded under section 120(2) as it would not be in the interests of justice for it to be admitted unless Higgs attended to give oral evidence.

107. Counsel for Stubbs identified no particular reason for Higgs being required to attend to give oral evidence, despite being asked by the judge to do so. He said that "there were certain things which Mr Higgs can answer which Mr Thompson is incapable of" and that he did not want to say more "in earshot of the prosecution". Counsel for Evans explained that she wished to ask Higgs about the articles of clothing and the swabs and why he had not examined them.

108. On 5 July 2013, the judge ruled that it would be in the interests of justice for Higgs to attend to give oral evidence. His reasoning was that while Thompson could give evidence relating to the items which had been examined, he could not do so in relation to the items which had not been examined or explain why this had not been done.

109. The prosecution had made efforts to secure Higgs's attendance prior to this, but he had been reluctant to attend. Security and passport issues had been raised by him. The prosecution did not, however, make any further efforts to secure his attendance after the judge's ruling, nor did it seek to make arrangements for the giving of his evidence by video link. In these circumstances, after a voir dire on 13 July 2013, the judge found that the prosecution had not taken all reasonable steps to ensure that Higgs was available to give live evidence. He nevertheless ruled that it would be in the interests of justice for Higgs's report to be admitted through Thompson, provided that all references to items that had not been examined were excluded. The report was to be limited to matters which had been examined and therefore to matters which the judge considered Thompson could be asked about. In accordance with this ruling, Thompson attended and read out the relevant parts of Higgs's report and was then cross-examined at some length by all defence counsel.

110. On behalf of Stubbs, Mr Fitzgerald contends that: (1) unless section120 of the CPC is to be interpreted as requiring the attendance of a witness who the defence wish to cross-examine and who is available, it is unconstitutional; (2) in any event, it was not in the interests of justice for the Higgs report to be admitted, as confirmed in the judge's earlier ruling of 5 July 2013.

111. As Lord Bingham stated in the Privy Council decision in *Grant v The Queen* [2006] UKPC 2; [2006] 1 AC 1, para 12 it is a "fundamental common law principle" that:

> "…the evidence against the accused at a criminal trial should be given by witnesses who attend court to give evidence on oath, who can be cross-examined by or on behalf of the accused and whose demeanour under questioning can be assessed by the tribunal charged to evaluate the reliability of their evidence."

112. The importance of that principle is widely recognised. It is reflected in article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the sixth amendment to the Constitution of the United States and the jurisprudence relating to those provisions – see *Grant* at paras 17-20.

113. It is also reflected in article 20(2) of the Constitution of the Commonwealth of the Bahamas which provides that:

"(2) Every person who is charged with a criminal offence –

…

> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf…"

114. In *Vincent v The Queen* [1993] 1 WLR 862, 867 in relation to the equivalent provision to article 20(2) in the Jamaican Constitution, the Privy Council stated that such provisions "codify in writing the requirements of the common law which ensure that an accused person receives a fair trial".

115. Mr Fitzgerald does not suggest that article 20(2) confers an absolute right to cross-examine a witness. He recognises that there are various exceptions to the hearsay rule. He says that such exceptions may be justifiable where the witness is unavailable, but that does not apply here. In the present case the witness was apparently available and the defence wished to cross-examine him. That, he submits, is his constitutional right. Unless section 120 of the CPC is interpreted in a manner which recognises that right, it is unconstitutional.

116. Section 120 provides a specific and limited exception to the hearsay rule. It applies to surveys "for public purposes within the meaning of the Land Surveyors Act" and to reports "made under the hand of an analyst on any matter or thing duly submitted to him for examination or report". An "analyst" is defined in section 120(4) as meaning:

> "a person employed in the public service as an analyst, a firearms examiner, a ballistics expert, a firearms technician or a radiologist or, subject to him being designated for the purposes of this section by the Minister responsible for the Health Services, a laboratory technician".

117. It is accordingly confined to reports of certain public service analysts. Such reports will be prepared by the analysts in the exercise of their public service duty, reflecting their particular expertise.

118. The right to adduce such reports under section 120 is a restricted one. It is subject to the safeguard of the court's power under section 120(2) to require the analyst to attend to give evidence either "of its own motion" or, on the application of any party to the

proceedings, "where it appears desirable in the interests of justice". As the Court of Appeal observed, this is a discretion which must be "carefully exercised".

119. In *Grant* at para 16 Lord Bingham stated that new exceptions to the hearsay rule were allowable under a constitutional provision such as article 20(2) provided that they do "not compromise the fairness of the proceedings which [article] 20 is designed to protect".

120. In the Board's view, this is the governing principle. The safeguard of section 120(2) provides a means by which it can be ensured that the fairness of the proceedings is not compromised. It will not be in the interests of justice to admit a hearsay report if to do so would operate unfairly to the defendant in the context of the proceedings as a whole. In such circumstances an order requiring the attendance of the witness can and should be made, either on the application of the defendant or by the court of its own motion. That being so, section 120 is not unconstitutional.

121. Nor does the Board accept that ensuring the overall fairness of the proceedings means that there are mandatory requirements to be met in every case, such as an absolute right to cross-examine a witness who is available, as contended for by Mr Fitzgerald. What is necessary to ensure the overall fairness of the proceedings will depend on the circumstances of the particular case.

122. It is against this background that the decision of the judge falls to be considered. It was his view, confirmed by the Court of Appeal, that it was in the interests of justice to allows Higgs's report to be adduced in evidence through Thomson, without requiring Higgs to attend to give oral evidence.

123. In the Board's view, there are a number of considerations which support the discretionary decision which the judge reached. In particular:

> (1) This was not a case in which the analyst's report was to be admitted without any opportunity of cross-examination. The evidence was to be adduced through Thompson, whose expertise was the same as Higgs's. Any expert questions arising in relation to the report could be put to Thompson.
>
> (2) It had not been suggested to the judge that there was any aspect of the firearms or ballistics evidence in the report which could not be addressed through questioning of Thompson.

(3) It is now said that Thompson could not speak to the "laboratory comparisons" carried out by Higgs matching the casings to the pistols, but the casings and pistols were still available and the defence could have asked Thompson to carry out a further test or to carry out a test themselves.

(4) It was not made clear at the time, nor has it been since, what questioning of Higgs on the "laboratory comparisons" might have assisted the defence. In 2013 Higgs would be most unlikely to have had any recollection of comparisons he made in 1999. The best he is likely to have been able to do would have been to describe the nature of the comparisons which it was his practice to carry out.

(5) In so far as the defence wished to ask about the chain of custody of evidence, this was a factual matter addressed by Sergeants Rolle (who collected the casings) and Smyth.

124. Particular criticism is made by Mr Fitzgerald of the reliance placed by the judge and the Court of Appeal on the fact that Stubbs's counsel did not identify any reason why he wished to cross-examine Higgs. It is submitted that there was no need for him to do so and that it was sufficient that he wanted to cross-examine Higgs. That criticism is founded, however, on Mr Fitzgerald's submission that there is an absolute right to cross-examine an available witness, which submission the Board has rejected. In any event, in considering whether to require a witness to be called is in the interests of justice or is necessary to ensure the fairness of the proceedings, the reasons why the defence require the attendance of the witness are clearly relevant.

125. Criticism is also made of the apparent contradiction between the two rulings made by the judge, a criticism endorsed by the Court of Appeal in allowing the appeal of Evans. It is said that having ruled on 5 July 2013 that it was in the interests of justice to require Higgs to attend to give evidence, it was perverse for the judge to rule otherwise on 13 July 2013. All that had happened in the intervening period was that the prosecution had failed to take any steps to act on the judge's earlier ruling.

126. There is, however, no contradiction between the two rulings. The 5 July 2013 ruling was made on the basis that Higgs's attendance was necessary so that he could explain why tests on the clothing and swabs were not carried out, which Thompson could not do. On 13 July 2013 the judge considered that this could be adequately addressed by excising those parts of Higg's report. The report was now limited to matters which it was considered that Thompson could address. Both rulings were therefore guided by what could be addressed by Thompson.

127. For all these reasons the Board considers that the judge was entitled in the exercise of his discretion under section 120(2) to conclude that it was not in the interests of justice to require Higgs to give oral evidence.

128. As to the directions given by the judge, he did not give a specific direction on the correct approach to Higgs's report as hearsay evidence. The importance of such a direction was emphasised in *Grant* at para 20(4). It would have been preferable for such a direction to be given, but in the circumstances of this particular case the Board does not consider this to be an omission which could have affected the jury's verdict. It had been possible to test much of Higgs's report in cross-examination through the evidence of Thompson. In relation to the "laboratory comparisons" carried out by Higgs, for reasons already stated, there would have been little that could usefully have been asked so long after the event. It is also to be noted that there was no suggestion that such a direction should be given either before or after the summing up, even though there were many other directions about which issue was taken. Such a direction would also have served to emphasise the evidence that the .45 and .357 casings matched the guns found and that there was no expert evidence to the contrary, which would have been unhelpful to the defence.

129. We accordingly reject Stubbs's grounds of appeal relating to the Higgs report.

Stubbs appeal against conviction: conclusion

130. For these reasons Stubbs's appeal against conviction should be dismissed.

Davis's appeal against conviction

131. On behalf of Davis, Mr Richard Thomas advances a number of grounds of appeal, in some of which he adopts the submissions on behalf of Stubbs.

Davis Ground 1: The judge wrongly admitted Scott's deposition and the transcript of his evidence at the first trial and, in particular, the bad character evidence which emerged as a result of Davis's cross-examination of Scott at the preliminary inquiry should have been excluded by the judge.

132. Here Davis adopts the submissions made on behalf of Stubbs. The Board repeats paras 89 to 95 above which apply equally to Davis's appeal.

The bad character evidence.

133. During the preliminary inquiry Scott was cross-examined by Davis. Scott admitted that there had been an altercation between them at a police station and that he had punched Davis. In re-examination it emerged that the reason that Davis had been at the police station was because of death threats he had allegedly made against Evans's girlfriend.

134. This was referred to by Davis's counsel in generalised terms when he was making submissions in support of the exclusion of Scott's evidence. Once the judge had ruled that Scott's evidence be admitted there was, however, no suggestion that this part of the evidence be excluded.

135. In any event, the evidence of the confrontation between Davis and Scott was relied upon by Davis. Not only did Scott's admitted punching of Davis reflect badly on Scott, but Davis relied on the confrontation in support of his contention that Scott was lying against him because he bore him a grudge. The allegations made against him were relevant background to that confrontation evidence. Further, they were only allegations and there was no evidence that the matter went any further.

136. In all the circumstances, the Board does not consider that the judge erred in failing, of his own motion, to exclude the alleged death threats nor, if he did, that it was sufficiently prejudicial to Davis to affect the jury's verdicts.

137. For these reasons, this ground of appeal is dismissed.

Davis Ground 2: The judge should not have admitted the evidence of Scott and Duncombe that statements were made by people at the scene of the incident, to the effect that Davis was one of the attackers.

138. On behalf of Davis, it is submitted that hearsay identification evidence given by Scott and Duncombe as to accusations against Davis made by unknown persons in the crowd should not have been admitted in evidence at the trial. Scott's evidence, which was read to the jury, was that when Davis returned to the scene others in the crowd pointed him out as responsible for the shooting and that Davis had denied involvement. Duncombe's evidence was that four or five others in the crowd had angrily pointed out Davis as one of the men who had shot the police officer and that Davis made no reply. When objection was made to the admission of Duncombe's evidence on this point, the judge ruled it admissible. A number of references were made to this evidence in the summing up but the judge gave no direction as to how the jury should approach this

anonymous hearsay evidence. Although this was raised as a ground of appeal before the Court of Appeal, it is regrettable that it is not addressed in the judgment of the Court of Appeal.

139. On behalf of the Crown Mr Knox relies on section 39 of the Evidence Act which provides in relevant part:

> "(1) Subject to subsection (2) and to this Act, hearsay evidence shall not be admitted in evidence.
>
> (2) Hearsay evidence may be admitted –
>
> …
>
> (d) where the statement was made in the presence and in the hearing of the person against whom the evidence is tendered, and where such person had an opportunity of replying to such statement; …"

He submits that there was nothing wrong with the judge's decision, in the exercise of his discretion, to admit this evidence provided that the accused had an opportunity to answer the accusations as, on the evidence, Davis did in this case.

140. In reply Mr Thomas accepts that section 39(2)(d) confers a power to admit hearsay evidence in the circumstances there described but submits that the evidence should only be admitted if it can be evidence against the defendant. He submits that each accusatory statement could only be evidence against Davis if he could be found to have accepted it. If it called for an answer and he failed to deny it, there could be circumstances where the jury might properly conclude that his silence amounted to acceptance. However, in his submission, those circumstances do not arise here. The evidence of Campbell was that when he pointed out Davis to the police officers at the scene, who must have included Duncombe, Davis said to the officers who then took hold of him, "It wasn't me". The evidence of Scott was that when Davis was pointed out "he got up and started denying that he was the one who shot him". It was only Duncombe who gave evidence that Davis gave no reply to accusations against him. Mr Thomas submits that in those circumstances it would have been impossible for the jury to conclude safely that Davis had made no response and by doing so accepted the accusation. Accordingly, the statements could not be used as evidence against Davis and should not therefore have been admitted.

141. At common law, statements made in the presence and hearing of a party are admissible as evidence against him of the truth of the matters stated if, by his answers, conduct or silence, he has acquiesced in their contents (*Phipson on Evidence*, 19th ed, (2017), para 37-01). The classic formulation of the principle is provided by Lord Atkinson in his speech in *R v Christie* [1914] AC 545, at p 554:

> "… [T]he rule of law undoubtedly is that a statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save so far as he accepts the statement, so as to make it, in effect, his own. If he accepts the statement in part only, then to that extent alone does it become his statement. He may accept the statement by word or conduct, action or demeanour, and it is the function of the jury which tries the case to determine whether his words, action, conduct, or demeanour at the time when a statement was made amounts to an acceptance of it in whole or in part. It by no means follows, I think, that a mere denial by the accused of the facts mentioned in the statement necessarily renders the statement inadmissible, because he may deny the statement in such a manner and under such circumstances as may lead a jury to disbelieve him, and constitute evidence from which an acknowledgment may be inferred by them."

142. Although there is some conflict in subsequent cases as to the precise scope of the principle (see *Hall v R* (1971) 55 Cr App R 108; *R v Chandler* (1976) 63 Cr App R 1) this is irrelevant to the present appeal. A helpful statement of the position at common law is provided by the Court of Appeal, Criminal Division in *R v Collins; R v Keep* [2004] 1 WLR 1705, paras 28-34. Having surveyed the authorities, Thomas LJ continued:

> "[I]t is clear that where an allegation is made against the accused in his presence:
>
> i) it is for the jury to determine whether a statement made in the presence of the accused calls for some response.
>
> ii) If it does, and if no response is made, the statement can only be evidence against the accused if by his reaction to it, he accepts that statement as true; although that is a question for the jury to determine, mere silence cannot of itself amount to an acknowledgement of the truth of an allegation.

> iii) A distinction is made in the authorities between cases where the defendant is on equal terms with those making the accusation (in which case silence may be used against him) and those where the defendant is at a disadvantage (in which case silence cannot be used against him)."

143. In the Board's view there is force in this submission on behalf of Davis. In particular the Board considers that section 39(2)(d) of the Evidence Act cannot have had the effect of rendering admissible evidence of accusations save in circumstances where it was open to the jury to find that the accused had in some way accepted the truth of the accusation. The question whether there was anything which could amount to such an acceptance was simply not addressed at the trial. Unless the judge could reasonably be satisfied that an acquiescence in the accusation could reasonably be inferred, he should have excluded the evidence or, if it was admitted in evidence, he should at least have directed the jury as to the circumstances in which they could take it into account against Davis. Furthermore, having regard to the evidence of Campbell and Scott that Davis denied the accusations which they heard, it is difficult to see any basis on which the jury could reasonably have concluded that by his conduct Davis acquiesced in the accusations of which Duncombe gave evidence. Moreover, there was no direction to the jury as to the circumstances in which such accusations might be taken into account as evidence against Davis.

144. However, the impact of this irregularity has to be assessed in the context of the case against Davis. The other evidence against Davis was extremely strong. Davis was identified by Campbell in an identification parade on 30 March 1999, the day after the incident. Although there is a conflict of evidence in relation to whether Campbell identified anyone else at that parade, it is clear that Campbell picked out Davis at position number ten in the parade as one of the shooters and this was confirmed by Inspector McKenzie who supervised the parade. Furthermore, it was not disputed that Davis was previously known to Scott who recognised him at the scene of the offences as one of the shooters. In all the circumstances and having regard to the totality of the case against Davis, the Board is confident that this irregularity has not given rise to any miscarriage of justice and that the case falls within section 13 of the Court of Appeal Act ("the proviso") which reads:

> "Provided that the court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred."

Davis Ground 3: The Court of Appeal should have admitted the fresh evidence to the effect (it is said) that Scott had ceased to be a police officer by the date of the killing on 29 March 1999.

145. Davis also seeks permission to appeal on this ground which is also advanced on behalf of Stubbs. The Board rejects this application for the reasons set out at paras 99-103 above.

Davis's appeal against conviction: conclusion

146. For these reasons Davis's appeal against conviction should be dismissed.

The Crown's appeal against the decision to quash Evans's conviction

147. The Court of Appeal allowed the appeal of Evans against conviction on the counts of murder and attempted murder and decided, by a majority, not to order a retrial. The Court of Appeal noted that Evans had also been convicted of firearms offences. Although Evans's notice of appeal to the Court of Appeal had challenged those convictions, it dismissed that part of Evans's appeal. The Crown now appeals against the Court of Appeal's decision to quash Evans's convictions for murder and attempted murder. In the alternative, it appeals against the decision not to order a retrial.

148. In coming to its conclusion that the appeal against conviction should be allowed, the Court of Appeal noted that the only evidence against Evans was the identification evidence of Campbell and the forensic report linking the bullet casings found at the scene of the killing to the gun which Officers Burrows and Robinson said Evans had buried in the sand. The Court of Appeal considered that the admission of the Higgs Report without requiring Higgs to attend for cross-examination deprived Evans of a fair trial. It then went on to observe that, in the absence of the ballistic report, it was not satisfied that the identification evidence was such that a jury properly instructed could convict Evans.

149. The Board proposes to consider the merits of the Crown's appeal without prejudice to Evans's contention that the Board should not do so as the Crown's appeal does not raise an important point of law or involve a substantial miscarriage of justice. Since the Board's conclusion is that the appeal should be dismissed, it is not necessary to rule on this preliminary objection.

The Higgs report

150. On behalf of the Crown, Mr Knox submits that the Court of Appeal was wrong to hold in relation to the case against Evans that the judge erred in admitting the Higgs report.

151. The main reason given by the majority of the Court of Appeal as to why the failure to call Higgs was more prejudicial to Evans than to Stubbs was that, unlike Stubbs, Evans did not deny in interview that the gun retrieved by the police was his. That is not, however, a justified distinction. Evans's interview was cut short and this issue had not been raised before it was terminated. In any event, Evans's case at trial was that it was not his gun and that it had been planted by the police.

152. The other matter relied upon by the majority was that Evans's counsel, unlike counsel for Stubbs, had given reasons why Higgs should be called, namely so that he could be cross-examined about the items which had not been examined. The judge had accepted in his 5 July 2013 ruling that this meant it was in the interests of justice that Higgs be called, and the majority considered that it was "not for this Court to hold that the trial judge was in error when he found that it was in the interest of justice that the analyst be called". This, however, is to ignore the judge's later ruling that, provided that the Higgs report was edited to exclude mention of the items which had not been examined, it was in the interests of justice that the report be admitted with Thompson rather than Higgs being called. As already explained, there is no contradiction between the two rulings.

153. The Board therefore agrees with Longley P that there was no justification for treating Evans differently to Stubbs in this regard, and that the reasons why the judge was justified in admitting the report as against Stubbs equally apply in the case of Evans.

154. The Board accordingly concludes that the Court of Appeal erred in holding that the judge's discretionary decision to admit the report as against Evans was wrong.

The McClure evidence

155. The Court of Appeal described this as "a troubling issue". They summarised the issue as follows, at para 197:

> "…The trial judge categorically refused to put to the jury the evidence of Inspector McClure that no guns were brought to the station when the third appellant was brought in by officers Robinson

> and Knowles notwithstanding that officer Robinson had said that he and Knowles had personally taken the third appellant [Evans] to the police station with the gun. The third appellant was inviting the jury to infer that those officers were not credible about the gun which they said that they recovered from him after he hid it in the sand. Whilst that may not be the only inference the jury may have inferred from Inspector McClure's evidence, it appears to us that the third appellant was entitled to have that put to the jury for its consideration. This was not done and this in our view was an error on the part of the trial judge."

156. The Board agrees with the analysis of the Court of Appeal. Evans had called Inspector McClure as a witness and she had said that if Evans had been brought in with a firearm a note would have been made of that fact on the detention record and a note of the type of firearm it was. This did not happen. It was Robinson's evidence that Knowles, who had the gun, came into the police station with him. It is no answer to say that it was noted on the detention record that Evans had been arrested for possession of a firearm. That applied to all the defendants, whether or not they allegedly had a gun. The apparent conflict between the evidence of McClure and Robinson was potentially significant given that Evans was challenging Robinson's credibility. The judge omitted any mention of these matters in the summing up and then refused to add to or correct the summing up when this omission was pointed out. As the Court of Appeal held, this was an error.

Identification evidence against Evans

157. With regard to the judge's directions on the identification evidence against Evans, the Court of Appeal observed that, whilst it was arguable that the trial judge could have been more robust in his directions, the Court of Appeal had reviewed the directions in their entirety and had no doubt that the jury had the benefit of the necessary directions as to the care they must take in evaluating identification evidence led at the trial. Nevertheless, the Court of Appeal considered that in the absence of the ballistic report, it was not satisfied that the identification evidence was such that a jury properly instructed could convict Evans. It explained that the other evidence implicating Evans, other than the forensic report, had been the identification evidence of Campbell who claimed that he identified Evans at the identification parade but admitted that he called Evans Die which is the nickname of Stubbs. This was inconsistent with the evidence of Inspector McKenzie who conducted the identification parade and who said that Campbell did not identify Evans at the identification parade. Furthermore, it drew attention to the evidence of Inspector McKenzie that three potential eyewitnesses besides Campbell had attended the identification parade and that none of them had picked out Evans. Accordingly, the Court of Appeal had a lurking doubt as to the safety of the conviction of Evans on the counts of murder and attempted murder. In its view these verdicts were unsafe.

158. The Board shares the misgivings of the Court of Appeal in relation to the identification evidence against Evans. At the first trial Campbell said that at the parade he had identified the man at position number 2 and he identified that man in court as Evans. At the second and third trials Campbell said that at the parade he had picked out the man at position number 2 as the man wearing the red shirt and the black pants or jeans. On each occasion he once again identified that man in court as Evans. However, the Board has grave reservations concerning the identification of Evans by Campbell.

(1) First, in his statement dated 30 March 1999 made after the identification parade Campbell said that he had identified the man at position number 2 (who was Evans) but said that he knew him as Die of Ridgeland Park West (who was Stubbs).

(2) Secondly, at the preliminary inquiry Campbell identified the three men in the dock as the three men who had shot Officer Ambrose. He claimed to have identified Evans as number 2 in the parade. He later accepted at all three trials that at the preliminary hearing he had deliberately picked out Evans and called him Die. His evidence at all three trials was that the reason he had called the wrong man Die at the preliminary hearing was because he was being threatened. At the third trial, Campbell accepted that he had not previously known Evans.

(3) Thirdly, Inspector McKenzie was consistent in his evidence that Campbell did not pick out Evans in the parade.

(4) Fourthly, in his first statement dated 29 March 1999 Campbell described one of the men as wearing black pants and a red shirt and said that that man had a black gun. At the first trial he said that he could not really pinpoint the colour of the clothes worn on the night of the incident by the man he identified as Evans, but he said that he had been wearing dark clothes. At the second and third trials he said the man had a red shirt and black jeans. The Higgs report records that the clothes taken from Evans after his arrest at the scene were a striped shirt and burgundy coloured pants but that Higgs had also received for testing a red shirt and denim trousers which had been worn by Jermaine Poitier. Poitier had been arrested by Officer Duncombe that night as a suspect in this matter.

(5) Fifthly, it was Inspector McKenzie's evidence that three eyewitnesses of the incident other than Campbell failed to identify Evans in the identification parade.

(6) Finally, it appears that the manner in which the identification parade was conducted was in breach of Bahamas Standing Order, F12, which requires that only one suspect shall be included in a parade.

159. More fundamentally, and contrary to the view of the Court of Appeal, the Board considers that the permitted identification of Evans by Campbell in court was a material irregularity in the course of the trial. By contrast with the evidence given by Campbell against Stubbs, this was not a case of recognition but a true case of identification. In the third trial Campbell expressly accepted that he had not previously known Evans. In these circumstances, a dock identification of Evans should have been permitted, if at all, only in circumstances where there had been a previous identification of Evans so that the identification in court was merely confirmation of the earlier identification. (See *Swaby v R* [1997] UKPC 68, 12-13.) However, in the present case the evidence of the earlier claimed identification of Evans by Campbell was riddled with inconsistencies, was undermined by Campbell's acceptance that, at the preliminary inquiry, he had deliberately out of fear falsely identified Evans as Die, and was contradicted by the evidence of Inspector McKenzie, the police officer responsible for the identification parade, with the result that there was no safe basis on which a later dock identification could be permitted.

160. The judge did give a direction to the jury on identification evidence in general and on the dangers of dock identifications in particular. The judge related the latter direction to the identification of Stubbs and Davis by Scott in the first trial in 2002 and the identification of Davis by Campbell at the third trial. However, curiously, the judge did not relate it to the identification of Evans by Campbell at the third trial. In particular, the judge emphasised the lack of the safeguards which exist in the case of an identification parade and the danger that a witness may be influenced by seeing the accused in the dock into making a mistaken identification. The judge had previously warned the jury about the inconsistencies in Campbell's evidence of his identification of Stubbs and Evans and how it conflicted with the evidence of Inspector McKenzie. However, the Board considers that in the particular circumstances of this case the directions given were inadequate to cure the material irregularity which had occurred. There was no sufficient basis for a dock identification of Evans by Campbell and it should not have been permitted. The decision to permit a dock identification in these circumstances was so prejudicial and unfair as to render the verdict unsafe.

161. The evidence of identification given by Campbell was fundamental to the Crown's case against Evans. Accordingly, there can be no question of the application of the proviso in the case of the Crown's appeal in relation to Evans. This is further borne out by the trial judge's error in summing up in relation to the McClure evidence. The Board has come to the conclusion that the convictions of Evans on the counts of murder and attempted murder were unsafe and that the Crown's appeal in the case of Evans should accordingly be dismissed.

162. In these circumstances it is not necessary to address the other criticisms of the summing up advanced by Mr Ben Cooper QC on behalf of Evans.

Retrial

163. The decision of the Court of Appeal not to order a retrial in the case of Evans was a majority decision (Sir Harman Longley P, dissenting). The majority noted that the appeal had been allowed primarily because of the admission of Higgs's report in circumstances where the Crown had failed to take reasonable steps to call Higgs to give evidence. In its view, to order a retrial would be contrary to the principle in *Reid v The Queen* [1980] AC 343 that the Crown should not be given another chance to cure evidential deficiencies in its case against an accused. Furthermore, the majority noted that to order a retrial would put Evans on trial for a fourth time for an offence alleged to have been committed in 1999, some twenty years earlier. The record did not show that Evans was responsible in any way for the previous retrials. Notwithstanding the heinousness of the crime, the majority considered that it would not be in the interests of justice to order a retrial.

164. In his dissenting judgment on this issue Longley P observed (at paras 245-6) that the majority would allow the appeal and quash Evans's conviction because they considered that the admission of the Higgs report without Higgs being available for cross-examination rendered the trial of Evans unfair. In his view this was undoubtedly "the pivotal finding by the majority" that led to the decision in Evans's case. However, he considered that the inability to cross-examine Higgs had not caused any prejudice to Evans. In his view, "those guilty of serious crimes should not go free because of some technical blunder" (at para 247). The jury had obviously believed the identification evidence of Campbell and had rejected the case of mistaken identification put forward by Evans. He considered that even if the Higgs report were discounted, the remaining evidence – in particular that of the gun and the circumstances of its finding, which supported Campbell's identification of Evans – was still sufficient to found a conviction. That evidence would be available at a retrial and no new evidence would be presented at a retrial. In his view, the majority overlooked the fact that Evans was charged with being concerned in these offences on the basis of joint enterprise.

165. In his submissions on behalf of the Crown, Mr Knox submits that if the Board concludes that Higgs's report was properly admitted in evidence but that there are other reasons for upholding the Court of Appeal's decision to allow Evans's appeal against conviction, this is a proper case in which to order a re-trial. This is because, on this premise, the prosecution was not at fault for failing to call its evidence properly, and so a new trial would not have the effect of allowing the Crown to cure a deficiency in its case at trial. (See *Reid v The Queen* [1980] AC 343 per Lord Diplock at p 348F.) As these circumstances have, indeed, arisen, he submits that the Board should adopt the approach reflected in the dissenting judgment of Longley P. Notwithstanding the passage of time,

he submits that the importance of the case, the nature of the killing and the strength of the evidence all make it appropriate for there to be a retrial.

166. It is the usual practice of the Board to defer to the view of the appellate court in the local jurisdiction as to whether there should be a retrial in any particular case. As Lord Diplock explained in *Reid v R*, it is the local court that is best attuned to the interests of justice in its particular jurisdiction.

> "The recognition of the factors relevant to the particular case and the assessment of their relative importance are matters which call for the exercise of the collective sense of justice and common sense of the members of the Court of Appeal of Jamaica who are familiar, as their Lordships are not, with local conditions." (p349)

However, as the decision of the Court of Appeal in the present case was not unanimous and as the Board's reasoning in dismissing the Crown's appeal differs from that of the Court of Appeal in allowing Evans's appeal, the Board considers it necessary to state briefly the reasons why it has come to the clear conclusion that there should be no retrial in the case of Evans.

167. The Board has referred above (at paras 157-8) to its grave misgivings concerning the quality of the identification evidence of Evans by Campbell, misgivings that could not be allayed at a further trial. In other circumstances, this might lead to the question whether a reasonable jury, properly directed, could safely convict Evans on the basis of the expert evidence in the Higgs report, in the absence of the evidence of identification by Campbell. However, the matter does not end there. Evans has already suffered the ordeal of being tried for these offences on three occasions and has endured three appeals to the Court of Appeal. On two of those occasions the Court of Appeal held that his conviction was unsafe. On the occasion on which the Court of Appeal upheld his conviction by a majority, the judge who delivered the majority judgment should have recused himself from sitting because he had been the trial judge at the second trial. That necessitated an appeal to this Board which caused further delay. It is now some 21 years since the murder of Officer Ambrose and some seven years since the third trial took place. Evans bears no responsibility for the repeated trials, repeated appellate hearings and the inordinate delay. Evans is now 47 years of age. He has been living in a state of uncertainty since the age of 26. Although he has been at liberty since the most recent ruling of the Court of Appeal, he has spent several years in prison, at one stage under a mandatory sentence of death imposed in breach of his constitutional rights. In the Board's view, to subject Evans to a fourth trial would be oppressive.

168. For these reasons, the Board agrees with the majority in the Court of Appeal that it would not be in the interests of justice to order a retrial of Evans.

169. In these circumstances, Evans does not pursue his appeal against conviction for the firearms offences.

Applications for permission to appeal against sentence – Stubbs and Davis

170. Both Stubbs and Davis seek permission to appeal against sentence. On 24 January 2019 the Court of Appeal allowed the appeals of Stubbs and Davis against sentence to the extent that on their respective convictions for murder it quashed the sentence of life imprisonment and substituted a sentence of 45 years imprisonment. It then stated, at para 229:

> "Both Stubbs and Davis have spent time in custody relative to this offence. Stubbs has spent 10 years (1999-2001, 2002-2004 on remand and 2013-2019 post-conviction) and Davis has spent 11 years (1999-2004 on remand and 2013-2019 post-conviction). As such, Stubbs is to serve 35 years from the date of this judgment while Davis is to serve 34 years from the date of this judgment."

171. On behalf of Stubbs and Davis it is objected that a sentence should ordinarily run from the date it was imposed following conviction, even if it is varied on appeal. The applicants have demonstrated that the course taken by the Court of Appeal in this case of substituting a sentence from the date of the order on the appeal operates to their prejudice when calculating remission of sentence under section 27 of the Correctional Services Act 2014. On behalf of the Crown Mr Knox does not seek to resist this ground of appeal and accepts that the sentences imposed on the applicants should run from 25 July 2013. In the Board's view this is clearly correct and would avoid the arbitrary unfairness to the applicants which would otherwise result.

172. In addition, Stubbs and Davis seek permission to appeal against sentence on the ground that the sentences imposed by the Court of Appeal wrongly failed to reflect the fact that the applicants had been subjected to a series of breaches of their constitutional rights. Here, they rely first on the breach of their right to a fair trial within a reasonable time under article 20(1) of the Bahamas Constitution and, secondly, on the fact that following their conviction at the first trial they were wrongly sentenced to the death penalty on a mandatory basis. (The Board notes in this regard that shortly before the start of the third trial Jones J refused a stay application on behalf of Stubbs on grounds of delay and adverse publicity. The judge held that although the delay was excessive and in breach of his constitutional right to be tried within a reasonable time, and that he was entitled to a declaration to that effect, he could still have a fair trial. An appeal against that decision was dismissed by the Court of Appeal on 30 May 2013 for reasons handed down on 31 July 2013.) In the Board's view the two matters on which the applicants rely are important mitigating factors of which appropriate account should certainly have been taken by the

Court of Appeal in resentencing the applicants. Unfortunately, it is not possible to conclude on a reading of the judgment that these factors were taken into account.

173. In these circumstances, in each case we grant permission to appeal against sentence and we allow the appeals on both grounds. We quash the sentences imposed for the offences of murder. We remit the matter to the Court of Appeal in order that the appellants may be re-sentenced. We emphasise that in resentencing the appellants, as they now are, the Court of Appeal should give appropriate weight to the important mitigating factors identified in the previous paragraph.

Conclusion

174. For the reasons set out above, the Board will humbly advise Her Majesty that:

(1) The appeal against conviction by Stubbs should be dismissed;

(2) The appeal against conviction by Davis should be dismissed;

(3) The Crown's appeal against the order of the Court of Appeal in the case of Evans should be dismissed;

(4) Stubbs and Davis should be granted permission to appeal against sentence and their appeals against sentence allowed to the extent that their sentences for murder should be quashed and the matter remitted to the Court of Appeal for re-sentencing.