THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. P016 of 2018

Cr. No. 56 of 2003

BETWEEN

Joseph Melville

Appellant

AND

The State

Respondent

PANEL:

A. Yorke-Soo Hon, JA

M. Holdip, JA

R. Boodoosingh, JA

APPEARANCES:

Mr Evans B. Welch Jr. and Ms Evanna Welch appeared on behalf of the Appellant

Mr Travers Sinanan and Ms Tricia Hudlin-Cooper appeared on behalf of the Respondent

DATE OF DELIVERY: 2 September 2021.

JUDGMENT

Joint Judgment delivered by: A. Yorke-Soo Hon, JA; M. Holdip, JA and R. Boodoosingh, JA.

INTRODUCTION

[1]. In July 2001, Joseph Melville ("the appellant") was charged for attempted murder, conspiracy to murder, kidnapping and assault occasioning actual bodily harm and convicted on 15 March 2004 of all counts. On appeal, a retrial was ordered and at the retrial, he was again convicted for the said offences. On 28 July 2017 he was sentenced to a term of 19 years imprisonment with hard labour for attempted murder; 9 years for conspiracy to murder; 14 years for kidnapping and 4 years for assault. It is against these convictions that he now appeals.

CASE FOR THE RESPONDENT

[2]. The appellant was an attorney at law whose office was located at Suite 9, 18-20 Pembroke Street, Port of Spain ("the office"). Patricia Cox, the virtual complainant ("the VC") was his secretary and was employed with him between February 1997 and June 2001.

[3]. Mrs Veronica Rostant ("Mrs Rostant") and the appellant were friends and she knew the VC well. In 1999, Mrs Rostant retained him to look after her deceased son's estate consisting of a house and insurance monies in the sum of approximately $146,000. On a date in 2000, she went to the appellant's office and spoke with him. He assured her that the money was there and available to her if she needed anything. On 26 June 2001, she went to the appellant's office in the company of PC Frank and enquired about payment and the appellant told her to return on 29 June 2001.

[4]. On the morning of 28 June 2001, the VC arrived at the office and met one Jason Holder ("Holder") whom she had seen twice in the preceding days. She first saw him on 24 June 2001, around 1:00 am at the appellant's home when she went to return a vehicle, which she had borrowed from him. She also saw him on 25 June 2001, when she arrived at the office, Holder was seated on the appellant's chair and the appellant was not there.

[5]. Sometime in the afternoon of 28 June 2001, the appellant arrived at the office. He and Holder then left around 2 pm. The appellant drove to Bournes Road, St James where he remained seated in the vehicle and Holder exited and spoke to one Ainsley Alleyne ("Alleyne"), who was known to Holder. Holder informed Alleyne that the man in the vehicle was a lawyer who was offering $40,000 to kill a woman. He told him of a plan which involved pretending to take the woman to collect some documents, but really intending to kill her. Alleyne then came to the car and spoke to the appellant about an inheritance matter and the appellant replied, *"You know, time is of the essence, we will deal with that later.*" Holder and the appellant then drove off but later returned to Bournes Road where Alleyne spoke with the appellant who asked him to get another vehicle and they went in search of same. Alleyne eventually spoke to one Hilton Winchester ("Winchester") and informed him of the plan. Alleyne sat with Winchester in his vehicle and they followed the appellant to the vicinity of Park and Pembroke Streets where Alleyne entered the appellant's vehicle and the appellant told him about the plan. The appellant indicated that the VC was discussing his business with a police officer named Frank and that the Fraud Squad was getting too close to him and that "*she had to come out of it*". The appellant told Alleyne not to enter the vehicle until the woman got inside and that "*it was supposed to be a skilful operation. She mustn't rise back up at all".*

[6]. The appellant then proceeded to telephone the VC at the office around 3 pm. In the presence of Alleyne, he told her that he wanted her to go to the home of a client to collect some documents and to bring them back to the office. He instructed her to go to the corner of Park and Pembroke Streets where she would meet Holder and another person in a vehicle and that they would take her to the client. Although the appellant's request for her to collect documents from a client's home was normal, it was unusual for her to do so in the company of persons unknown to her. She left the office and proceeded as directed. As she approached the vehicle she observed that one man was seated in the driver's seat and that Holder exited the vehicle and motioned to another man, whom she later learned was Alleyne. As Alleyne drew closer, she observed the appellant on the other side of the street approaching their direction. When he arrived he said to Holder, "*look at the time, go handle your scene*" and told the VC to go with the men and to return the documents to him.

[7]. Around 3 pm, Zedekiah Aaron, the building's watchman who was stationed at the front of the building, had noticed the VC leaving the building and proceeding upwards along Pembroke Street. Around 15-30 minutes later, the appellant arrived and entered the building. Sometime between 4:30 pm and 5:00 pm the appellant exited the building with some files in his hand and walked down Pembroke Street. He gave the files to a man before returning to the office. Around 5:30 pm, the appellant exited his office and enquired from Zedekiah whether the VC left and he replied that she did and that she walked in an upward direction along Pembroke Street.

[8]. The VC together with Alleyne and Holder entered the vehicle. Holder sat in the front passenger seat, whilst the VC and Alleyne sat in the rear passenger seats and they proceeded to drive out of Port of Spain, stopping only at a gas station at Richmond Street. The VC was not familiar with the area because she lived in

Sangre Grande. She saw a sign labelled Fort George and asked if anyone lived there, but no one replied. As the vehicle proceeded she said, *"We passed one house on the left. I was feeling very funny".* Alleyne then grabbed the VC by her neck and pulled her lower down on the seat. She started to struggle and Alleyne unbuttoned the VC's shirt and started sucking her breast and unzipped her pants. While this was happening Holder turned around and took 2 gold chains, a ring and $70.00 from her. Alleyne and Holder told her that they were murderers.

[9]. The vehicle came to a stop and Alleyne exited it and told Holder to lock the doors. He went to see if the "coast was clear" before returning to the vehicle and dragging the VC out by her feet. He held her at the back of her pants and pulled her up the hill. Holder asked her about what she told Mrs Rostant and the police about the appellant and she said, "*I didn't tell Mrs Rostant and the police anything. All I knew is that Melville and Mrs Rostant was having some financial issue and he was given a deadline which was Friday 29th June 2001, to pay Mrs Rostant."* Holder then told her that the appellant paid him $1000 to kill her. The VC replied, "*If is money you want, I will give you $20,000 to spare my life.*" After they passed a tower, they placed her to sit on a stone close to a precipice. Alleyne asked her why the appellant wanted her dead and she said that the appellant had taken $150,000 from one of his client's accounts and placed it into his account and that she knew about it.

[10]. Whilst the VC was seated on the stone Holder grabbed a large stone on the ground and held it over her head saying that he was going to bash her head with it. He then turned to Alleyne and dropped the stone. He told Alleyne that he looked stronger and that he should strangle her instead. Alleyne replied saying, "*handle your business*". Whilst the men were deciding on how to kill her, the VC used the opportunity to throw herself down the hill. Holder quickly went after her and told Alleyne to meet him on the other side. Holder retrieved her but took her to a

different spot. This caused Alleyne to lose contact with them and he eventually returned to the vehicle and he and Winchester left.

[11]. Holder told the VC to remove her shirt and bra, which he used to tie her hands and feet. Her pants came off earlier while she was rolling down the hill. He tore off her underwear leaving her completely naked. He then went behind her and said that he was going to put her in a sleeper. He held her by her neck and she became unconscious.

[12]. Ainsley Letren ("Letren") was on the tower at Cumberland Hill, Fort George when he observed through his binoculars from a distance of approximately 300 feet a man (Holder) with his hands around a woman's neck. The woman was on the ground naked, her feet and hands were tied and she was struggling and trembling. Letren shouted out to the man to let go of the woman's head. Holder then left the woman and started to run up the hill towards him. Letren quickly ran down the tower, jumped on his motorcycle and drove away. He reported the incident to the police.

[13]. The VC saw Holder running up the hill, but did not see Alleyne. She untied herself, climbed over the hill and hid. She then made her way through the forest.

[14]. That night, Holder, Alleyne and the appellant met at the Guiaco gas station. They sat in the appellant's vehicle and reported back to him what had transpired with the woman. He drove into a dark street close by and stopped in the yard with a house. The appellant then took out some documents from the vehicle and told them to get rid of them so that he could account for where he was at that time. He asked them if they wanted to stay at that house until things "died down" but they declined the offer.

[15]. On the morning of 29 June 2001, the appellant called Mrs Rostant to ask when she was coming to the office and she said around 10 am. He then went to her house and asked her when last she had seen the VC as the VC had not turned up for work that day. Mrs Rostant said that she last saw her when they both left the office together sometime before. He told Mrs Rostant that he would “fix her business”. Around 2 pm the appellant called Mrs Rostant and told her that he was leaving the office and that he had cancelled their meeting.

[16]. That very day the VC having walked through the forest naked for hours eventually met a couple who assisted her and she made a report at the St James Police Station. She was later medically examined.

[17]. On the afternoon of 30 June 2001, the appellant telephoned Alleyne saying that he and Holder had “lapsed” and requested that Alleyne meet him at Cricket Wicket. As the appellant drove up, Alleyne and his wife entered his vehicle. The appellant told him that he had heard the news on the radio and “*he couldn't sleep, he couldn't party on the following week”.* He asked to go somewhere to speak privately and they went to Lapeyrouse Cemetery. The appellant spoke to Alleyne alone. He said that he wanted Alleyne to tell him what really happened. Alleyne told him he had the same account that Holder had already given him, but the appellant said that he wanted to hear it from Alleyne. Alleyne told him that they had strangled the woman in the vehicle with his vest and made sure that she was dead and that he pushed her off the precipice. The appellant said to Alleyne, "*Why didn't you take her by her hand and foot and fling her off the hill and make sure she dead and break her neck?*"

[18]. On 9 July 2001, the appellant accompanied by his attorney went to the St James Police Station. PC Sylvester Malco took the appellant to the Criminal Investigations Department (“CID”) Office and in the presence of his attorney cautioned him and

told him that Sgt Julien was investigating a report against him that he and another man conspired to kill the VC. The appellant replied, "*I don't know anything about that report"*. He was informed of his legal rights and he requested a telephone call. Sometime later the police arranged a confrontation and he was pointed out by Alleyne. The appellant indicated that *"Today is the first day I saw this man in my life."* Sometime later, the appellant and others were charged for the offences.

[19]. On 14 November 2002, Alleyne was granted immunity from prosecution by the Director of Public Prosecutions ("DPP") and was made a witness on behalf of the state. He testified at the preliminary enquiry. In May 2003 his decapitated and partially burnt corpse was discovered.

CASE FOR THE APPELLANT

[20]. The appellant did not testify nor called any witnesses. The tenor of his case put through cross-examination was that of a denial. He claimed that on the evening of 28 June 2001, he never gave instructions to the VC to meet anyone at the corner of Park and Pembroke Streets. He also did not instruct the VC to go with anyone to collect documents for him. He had never seen Alleyne before the police confrontation.

[21]. The appellant had no previous convictions nor any matters pending before the court.

GROUNDS OF APPEAL

[22]. Grounds 1 (a), 1 (b), 2 and 6 are connected and therefore we find it convenient to deal with them together.

GROUND 1 (a)

[23]. **The learned Trial Judge fundamentally erred as a matter of law when she allowed into evidence on the voir dire inadmissible material in the form of a mugshot which purported to be an image of the deceased witness Ainsley Alleyne and without which exhibit the State would have been unable to establish a prima facie case that the witness was deceased and so meet the requirements for his deposition to be read pursuant to the provisions of the Indictable Offences Preliminary Inquiries Act.** (sic)

GROUND 1 (b)

[24]. **The learned trial judge erred as a matter of law in the procedure adopted during the voir dire in allowing the said mugshot purporting to be one of Ainsley Alleyne to be shown to the witnesses Heather Duncan and Officer Julien for the purpose of their making an identification of the image therein.** (sic)

GROUND 2

[25]. **The procedure adopted and background circumstances attendant on the witness's identification of the photograph in court was such as to render that identification evidence to be bias and manifestly unreliable and the learned trial judge failed to take account of this factor in arriving at her decision.** (sic)

GROUND 6

[26]. **The State failed on the voir dire to satisfy the requirements of s.39 of the Indictable Offences Preliminary Inquiries Act in that the evidence led was not sufficient to establish beyond reasonable doubt that the deponent Ainsley**

Alleyne was dead and consequently his deposition was wrongly admitted into evidence in the trial and without which admission the prosecution would have been unable to make out a prima facie case on the charges against the Appellant. (sic)

(i). Was the photograph wrongly admitted?

SUBMISSIONS - GROUND 1 (a)

[27]. Counsel for the appellant, Mr Evans Welch Jr. submitted that the judge wrongly admitted the photograph of Alleyne into evidence at the voir dire in the absence of the prosecution laying any proper foundation under **section 10** of the **Administration of Justice (Miscellaneous Provisions) Act 1996** ("AJ(MP)A"). He argued that the prosecution failed to call a photographer to establish the background of the photograph and the identity of the person who was being photographed. He submitted that the prosecution's approach was to simply introduce the photograph to the witnesses by presenting it to them and asking them if they knew the person whom the image represented. He indicated that prosecuting counsel described the photograph as a mugshot and acknowledged that she had no information as to the date it was taken neither its age but defence counsel surmised that it was possibly from 1998.[1] He submitted that the photograph was inadmissible and in the absence of it there could be no nexus between the cadaver and Alleyne.

[28]. In reply, Mr Travers Sinanan submitted that the judge did not err when she allowed into evidence the mugshot photograph as it was neither being used by the prosecution as prima facie proof of Alleyne's identity nor as evidence of the

[1] Transcript dated 5 May 2017, pages 32-33. The numbering of the pages in the court's copy of the transcripts are different and are recorded at pages 26 – 27).

truth of its contents. He submitted that at the trial, the prosecution showed the photograph to four witnesses, two of whom included Alleyne's aunt, Heather Duncan ("Ms Duncan") and Sgt Dennis Julien, the police complainant. Both witnesses had a long history of interactions with Alleyne and had known him quite well. He argued that the photograph was shown to them for recognition of Alleyne but it was their evidence that was important. The origin of the photograph could neither diminish nor enhance the testimony of the recognition of these witnesses. He contended therefore that there was no requirement for the origin of the photograph to be established in accordance with **section 10** of the **AJ(MP)A.** Counsel referred to **Maugham v Hubbard**[2].

[29]. Mr Sinanan submitted that the nexus between the Alleyne who was charged in 1998, the Alleyne who testified at the preliminary enquiry and the headless corpse was created by circumstantial evidence and referred to **Mc Greevy v Director of Public Prosecutions**[3]**.** He also submitted that the strong circumstantial evidence as to Alleyne's name, address and alias was buttressed by the fingerprint evidence of WPC Kamlar Penjilia which provided undeniable scientific proof that the corpse was that of Alleyne.

LAW, ANALYSIS AND REASONING

[30]. **Section 10** of the **AJ(MP)A** amended the **Evidence Act Chap 7:02** by inserting new sections 14A – 14E into the Evidence Act ("EAA"). **Section 14A of the EAA** provides for the admission of photographs at criminal proceedings as prima facie proof of identification provided that the photograph is supported by authenticated evidence and that the photographer testifies as to the procedure he adopted to produce the photograph. **Section 14A** states as follows:

[2] 108 E.R. 948 (1828).
[3] [1973] 1WLR 277.

> *"14A. (1) Subject to subsection (2), in any criminal proceedings a photograph of any object may be admitted in evidence as prima facie proof of the identity of that object, provided that the photograph is supported by a certificate signed by the photographer before a Justice of the Peace authenticating the photograph as being a true image of the object aforesaid.*
> *(2) The photographer shall be required to give evidence of the procedure adopted by him to produce the photograph."*

[31]. In **Maugham v Hubbard** a rough cash book kept by the plaintiff was put into the witness's hands which contained an entry with his initials but had no stamp. By seeing his initials on the entry he had no doubt that he had received the money. It was held that this was sufficient parol evidence of the payment of the money. The written acknowledgement having been used to refresh the memory of the witness, and not as evidence of the payment, did not require a stamp. Lord Tenterden CJ, stated at page 949 that:

> *"In order to make the paper itself evidence of the receipt of the money it ought to have been stamped… The paper itself was not used as evidence of the receipt of the money, but only to enable the witness to refresh his memory and when he said that he had no doubt he had received the money there was sufficient parol evidence to prove payment".*

[32]. Similarly in **Birchall and Ors. v Bullough**[4], an insufficiently stamped promissory note purporting to contain the defendant's signature and expressed to be issued for money lent was used for the purpose of refreshing the defendant's memory and obtaining his admission of the loan. The court held that the plaintiffs were entitled to use the promissory note for such purpose despite the provision of the Stamp Act 1891 which stated that an instrument which was not duly stamped shall not be given in evidence or be available for any other purpose.

[4] (1896) 1Q.B. 325.

[33]. In **R v Tolson**[5], the prisoner was indicted for bigamy committed in September 1860. A photograph of the first husband was allowed to be shown to a witness who was present at the first marriage in order to prove his identity as the person mentioned in the marriage certificate. The witness said that there was a resemblance and she believed that it was the same person. Another witness testified that he served in the same regiment with a man with the first husband's name who was stationed at Canterbury in 1858 and went to India and whom he saw alive there in 1863. When shown the photograph he confirmed that it was the man to whom he was referring. Upon admitting the photograph, Willes J had the following to say at page 104:

> ***"The photograph was admissible because it is only a visible representation of the image or impression made upon the minds of the witnesses by the sight of the person or the object it represents; and, therefore is, in reality, only another species of the evidence which persons give of identity, when they speak merely from memory".*** [emphasis added]

[34]. It is trite that for evidence to be admissible a proper foundation must be laid by the party seeking its admission. The main objective is that the photograph must be a fair and accurate representation of what it is attempting to illustrate. This may be established either by the photographer testifying as to the accuracy of the photograph and the procedures adopted to produce it. This method is guided by the statutory requirements of **section 14A**. The rationale behind this provision was to allow the return of stolen items to their owners so that they may enjoy the benefit of their assets and obviate the need to store recovered stolen property and to produce them at trial. Thus **section 14A** deals with photographs of objects. The Honourable R. L. Maharaj, then Attorney General, at the 36th sitting of Parliament on 2 August 1996, whilst speaking about **clause 10** of the

[5] (1864) 4 F & F 103, 176 ER 488.

Administration of Justice (Miscellaneous Provisions) Bill which introduced section 14A to the Evidence Act stated :

> *"The second issue which Part III of the Bill addresses is the reception into evidence of certain forms of documentary evidence, such as photographs, computer records and government records. Clause 10 of the Bill amends the Evidence Act by inserting several new sections—14A to 14E.*
>
> ***The new section 14A of clause 10 would permit the admission into evidence of photographs of objects as prima facie proof of the identity of those objects. As a safeguard, the photograph must be accompanied by a certificate signed by the photographer before a Justice of the Peace. The rationale behind this provision is to allow the return of stolen items to their owners so that they might enjoy the benefit of their assets and to obviate the necessity of storing recovered stolen property and producing them at trials****."* [emphasis added]

[35]. Alternatively, the appropriate foundation may be established under what is known as the "*illustrative theory"* also called the "*pictorial testimony theory*" where a witness has personally observed the person or object which the photograph purports to represent. He may testify that it fairly and accurately portrays that person or object. This theory finds favour in jurisdictions such as Canada and the United States of America. In **R v Penney**[6]**,** Cameron JA stated that:

> *"[35] … It should be noted that in Canada two separate theories for the admission of such evidence have been accepted: the illustrative theory and the silent witness theory. (See: Elliott Goldstein, Visual Evidence, Vol. 1, c. 2.2.)* ***Under the illustrative theory, a photograph or a videotape is used to illustrate or clarify the evidence of a witness.*** *The silent witness theory has the video speaking for itself …*
>
> *…*
>
> *[39] Like all evidence, videotape evidence must be relevant. However, here that is not at issue.* ***It is generally said that the factors which are***

[6] 2002 NFCA 15.

considered in assessing the admissibility of videotapes are the same as those for photographs: 1) their accuracy in truly representing the facts; 2) their fairness and absence of any intention to mislead; and 3) their verification on oath by a person capable to do so. *(Regina v. Creemer and Cormier, 1967 CanLII 711 (NS CA), [1968] 1 C.C.C. 14 (N.S.C.A.)). Of course, such evidence may nevertheless be excluded if its prejudicial effects outweigh its probative value. However, that too is not at issue in this case.*

…

[41] Turning first to the requirement for verification on oath by a person capable to do so, this is nothing more than a statement of the obvious: that a photograph or a videotape can only be placed before the court, in the absence of consent, with the testimony of a witness who is able to state the facts which will demonstrate that the item has some relevance to an issue before the court. Under the illustrative theory a witness would be expected to state that the photo, to some extent, is consistent with his recollection*. If the videotape is a "silent witness", then the person on oath may, for example, explain in what manner the videotape was recorded, the placement of the camera etc. so that the trier of fact is in a position to assess the weight to be given to what he or she observes. The law does not permit a trial judge, on the voir dire, to assess the credibility of the witness and refuse to admit the photo or videotape because he does not believe the witness on the balance of probabilities or beyond a reasonable doubt when the witness says that the photograph represents what he saw. That surely is the function of the jury."* [Emphasis added]

[36]. The pictorial testimony theory or illustrative theory has also been described in the following way:

"There are two primary bases for the admissibility of visual evidence such as photographs and videotapes: the illustrative (or pictorial testimony) theory and the silent witness theory. Under the illustrative theory, a photograph, videotape or motion picture is linked to the testimony of a witness, and it has no probative value independent of the testimony with which it is associated. It is considered to be "pictured communication" of a qualified witness, and may only be used to support or supply detail to the oral testimony; a sponsoring witness is required to testify that what is

shown in the image is an accurate reflection of that which was observed in person"[7].

[37]. In this case, the photograph was shown to Ms Duncan and tendered through her since she knew Alleyne and was able to say that he was her nephew and the same Alleyne whom she had referred to in her evidence[8].

[38]. The photographer did not testify and there was no background detail as to the photograph's origin and authentication as required under **section 14A of the EAA.** Nonetheless, we are of the view that the appropriate foundation was laid through the evidence in chief of Ms Duncan, who testified of her personal knowledge, relationship and interaction with Alleyne from his birth until she last saw him some 2 months before his death. She gave evidence that she was his aunt and that she jointly cared for him. Although he moved out of the family home whilst he was a teenager, she maintained contact with him and continued to see him up until approximately 2 months prior to his death.

[39]. Therefore, Ms Duncan's evidence established an adequate basis for the admission of the photograph as evidence. It was used as a tool to refresh Ms Duncan's memory that she knew the person called Ainsley Alleyne whose alias was "Beetle" and when confronted with it her response provided sufficient parol evidence that she knew him. It was the visible representation of the visual image or impression made on Ms Duncan's mind by the sight of the person it represented and it was a form of identification since she was speaking merely from memory. The photograph further represented a pictured communication of Ms Duncan which supported her oral testimony containing details of her personal observations and knowledge of Alleyne since his birth and it was linked to her testimony although it

[7] Nathan Wiebe, 'Regarding Digital Images: Determining Courtroom Admissibility Standards', (2000) Volume 28 No 1 *Manitoba Law Journal* 61, 2000 CanLIIDocs 75.
[8] Transcript dated 5 May, 2017 page 30 lines 23 – 39.

had no probative value independent of it. In the circumstances, we hold that there is no merit in this ground.

*(ii). Was the **Peter Blake**[9] principle wrongly applied?*

SUBMISSIONS - GROUND 1 (b)

[40]. Mr Welch submitted that the judge wrongly applied the **Peter Blake** principle in admitting the mugshot and allowing it to be tendered into evidence through the witness Ms Duncan. He argued that the **Peter Blake** principle allows a witness under cross-examination by the opposing party to be shown a document and to be questioned about its contents provided that he accepts them as true without necessarily seeking to tender the document. He added that the **Peter Blake** principle was not one which could be used by a prosecutor to tender into evidence a document through his own witness in chief, in substitution for or as an alternative to first laying the proper evidential foundation. He submitted that this was even more so the case in the face of statutory provisions to the contrary governing the matter. He referred to **Michael Wiltshire, Jennifer Wiltshire v Wendell Flaviney PC #13248**[10]and **The State v Andy Brown and Ors**[11]**.**

[41]. Counsel submitted that the introduction and tendering of the mugshot under the **Peter Blake** principle was a backdoor introduction of inadmissible evidence and was a circumvention of the rule that a document has to be tendered into evidence through its maker, in this case the photographer. He also submitted that since identification evidence is considered a special genre of evidence that requires great caution and care prior to its admission, it does not lend itself to the approach adopted by the prosecutor.

[9] [1977] 16 J.L.R 61.
[10] San F'do Mag. App. No 2 of 2006.
[11] Crim. No. 112 of 2003.

[42]. In reply, Mr Sinanan submitted that the mugshot was properly admitted into evidence. He advanced that the use of the **Peter Blake** principle was not a backdoor approach to tendering inadmissible evidence and added that on careful examination, the authorities referred to in **Peter Blake** revealed that a document does not have to first be admissible before it can be placed in the witness's hand. He referred to **Birchall v Bullough.**

[43]. Mr Sinanan submitted that the **Peter Blake** principle does not only apply to cross-examination. He argued that **Wiltshire** provided guidance as to the use which was to be made of a document and that the learning sought to distinguish the 'situation' in **Peter Blake** from that of **section 10 of the AJ(MP)A.** He contended that the proper foundation had been set by the prosecution to allow the photograph to be shown to Ms Duncan and Sgt Julien.

LAW, ANALYSIS AND REASONING

[44]. In **Peter Blake**, a police witness whilst under cross-examination gave an account that was consistent with the case for the defence but which was irreconcilable with his evidence in chief. Defence counsel proceeded to place a document containing a newspaper clipping in the witness's hands and sought to ask him certain questions geared towards testing his credibility. However, counsel was stopped short by the judge on the basis that he was required to first establish the relevance of the document. On appeal, it was held that counsel was entitled in cross-examination to confront a witness with a document notwithstanding its admissibility and without disclosing its contents to elicit a response which may either be favourable to the facts which the cross-examiner has sought to establish or damaging to the witness's credibility. Watkins JA in delivering the judgment of the court stated as follows on page 68:

> *"Whatever may be the truthfulness or otherwise of this newspaper clipping there can be little doubt that the denial of counsel to his right to solicit answers from the witness on it as it was put into his hand deprived his client of the right to a fair trial of his case, however, unintentional and mistaken or misled the court was. It is neither necessary nor desirable to speculate what answers would have been elicited from the witness.* ***It is enough to say that the court deprived itself of a vehicle of testing the credit of the witness on an issue in the case on the outcome of which the guilt or innocence of the Appellant largely depended****."* [emphasis added]

[45]. The principle in **Peter Blake** that counsel was entitled in cross-examination to confront a witness with a document regardless of its admissibility was also followed in **Wiltshire v Flavinney** where defence counsel was deprived of the opportunity in cross-examination to show the witness a photograph. The Court of Appeal held that the magistrate had erred in not allowing counsel to show the photograph to the witness, but that such error did not affect the fairness of the trial.

[46]. The court then distinguished the use of the **Peter Blake** principle from **section 10 of the AJ(MP)A, (section 14 EAA)** as follows:

> *"In Peter Blake the photograph or document need not be admitted into evidence, in which case the Court does not look at it but takes the evidence that the witness gives in response to questions arising from the photograph. Under s 10 the photograph is admitted into evidence and the Court may make its own findings based on that what it sees."*

[47]. In **Andy Brown and Ors.,** Mohammed J (as he then was) considered the **Peter Blake** principle in great detail as it related to placing a station diary extract in the hands of a police witness under cross-examination without seeking to have it admitted into evidence. The court considered whether admissibility was a requirement for a document to be placed in the hands of a witness and concluded

that admissibility was not a condition precedent to same. In delivering his ruling Mohammed J stated:

> *"Now, having looked at these cases, including original cases cited in Peter Blake, in my very respectful and humble view, the principle does not bear any qualification that the document must first be admissible, before it is capable of being put into hands of the witness. There seems to be no proviso in this regard referred to in the earlier cases that were referenced in the Court of Appeal Judgment in Peter Blake; so that, in my very respectful and humble view,* ***admissibility is not a condition precedent for the placing of the document in the witness' hand, to begin with (sic).****"*[12]
> [emphasis added]

[48]. Mohammed J considered the cases of **R v Gillespie**[13] and **R v Cooper**[14], which set out the procedure for cross-examination. He then attempted to settle what the proper procedure in cross-examination should be and suggested an approach[15]. That approach is consistent with the approach set out by the Court of Appeal in **Jay Chandler v The State**[16] which is as follows:

> ***"[24]. The "Peter Blake" principle refers to a practice in which a document is placed in the hands of a witness by cross-examining counsel, who asks the witness whether he sees what the document purports to record, without the cross-examiner going into the contents of the document. If the witness responds that he sees it and accepts the contents as being true, the witness may then be cross examined on the contents of the document. If the witness does not accept the document as being true, or is not in a position to say whether it is, then it constitutes hearsay evidence for all intents and purposes, and the cross examiner can go no further with the document.*** *The cross examiner cannot ask the witness, if having seen the document whether he still abides by his original evidence*

[12] Transcript dated 10 March 2010, page 11 lines 36 – 47.
[13] (1967) 51 Cr App R 172.
[14] (1986) 82 Cr. App. R. 74.
[15] Transcript dated 10 March 2010, page 11 line 48 to page 12 line 38.
[16] Criminal Appeal No. 19 of 2011.

because that may bring out inadmissible hearsay evidence by the back door.

…

[28]. *A review of the relevant case law shows that where cross-examination is allowed on a document to test the credit of a witness, the witness either has some knowledge of or is familiar, or has some connection with the document…"* [17] [emphasis added]

[49]. In this case, whilst Ms Duncan and Sgt Julien were giving evidence in chief at the voir dire, prosecuting counsel placed the photograph of what purported to be an image of Alleyne in their hands. The line of cases has repeatedly demonstrated that this common law rule of evidence of some antiquity is usually invoked during cross-examination. The purpose of the rule is to confront a witness with a document, notwithstanding its admissibility, to elicit a response that can be used as a vehicle to test the witness's credibility on an issue, the outcome of which the accused's guilt or innocence was dependent.

[50]. In the instant matter, we agree with counsel for the appellant that the **Peter Blake** principle was incorrectly applied when the prosecution placed the photograph in the hands of Ms Duncan and Sgt Julien since the procedure is one exclusive to cross-examination. However, we are of the view that apart from this procedural error, no injustice occurred to the appellant. The objective of introducing the photograph to the witnesses was merely to aid their memory of the visual image of Alleyne. Both Ms Duncan's and Sgt Julien's evidence in chief extensively outlined their knowledge and interaction with Alleyne which provided a sufficient basis for the photograph to be shown to them. Therefore, although the procedure

[17] Birchall and Ors. v. Bullough (a promissory note signed by the defendant), R v. Mullarkey (a medical report that a doctor had seen but not made), Gillespie v. Simpson (sales receipts where the defendants were store workers handling sales), R v. Duncombe (a paper on which the witness had written something), and R v. Cooper (letters written by the defendant's wife and signed in both their names). In other cases, the document itself bears an objective element as in Wiltshire v. Flaviney (a photograph of premises) and R v. Blake (a newspaper clipping).

through which the photograph was placed in the hands of the witnesses was incorrect, the judge was not wrong to admit the photograph in evidence. In the circumstances, there is no merit in this ground.

(iii). Bias

SUBMISSIONS - GROUND 2

[51]. Mr Welch submitted that during cross-examination it emerged that the mugshot had been shown to Sgt Julien by the prosecutor 2 days before he identified same in court. He argued that this was fatal and rendered the identification in court unreliable. He added that there was a serious risk of some conscious or unconscious bias in the mind of Sgt Julien who may have perceived that the sole reason that the photograph was being introduced was that the prosecutor believed that it contained a true image of Alleyne. He also submitted that a similar line of reasoning regarding bias was applicable to Ms Duncan who said that she was influenced to identify the body as her nephew by the fact that she was told that it was his body that was found and which she was going to identify. He advanced that she may have well adopted the same approach with the mugshot photograph.

[52]. Counsel submitted that the judge failed to adequately consider the impact of Sgt Julien seeing the photograph beforehand and contended that this was manifested when the judge stated that she believed that Sgt Julien's familiarity with Alleyne influenced his identification of the photograph. Mr Welch further contended that since the photograph was of significant vintage and was being introduced to Sgt Julien many years after he had last seen Alleyne alive, procedures equivalent to an identification parade ought to have been adopted to ensure the integrity of the identification process. He contended that to eliminate the possibility of

unconscious bias, Sgt Julien and Ms Duncan alike ought to have been shown several photographs of persons prior to their testimony and they should have been asked whether they recognised any of them.

[53]. In reply, Mr Sinanan submitted that showing the photograph to Sgt Julien before his testimony did not amount to bias nor was it manifestly unreliable or prejudicial. He contended that the procedure adopted by prosecuting counsel did not fall afoul of any known principle or guideline for the conduct of pre-trial witness conferences. He argued that prosecuting counsel is entitled to have a conference with a witness as part of the preparation of the case and it would have been reckless of her to seek to put same in the witness's hands without ascertaining whether the witness was in a position to identify it. He added that it would have been unfair to the witness to seek to recollect occurrences of some 10 years before the trial without being allowed a reasonable opportunity to refresh his memory.

[54]. Counsel submitted that the background and circumstances leading up to Sgt Julien recognising Alleyne in the photograph shows that this was a case of recognition of the person depicted and a proper foundation was established by his evidence in chief. He contended that there was no real risk of witness contamination nor did the conduct of prosecuting counsel fall into the arena of witness training or coaching. He referred to the case of **R v Momodou and Limani.**[18]

LAW, ANALYSIS AND REASONING

[55]. In **R v Momodou and Limani** the appellants were convicted of violent disorder which arose out of a disturbance at a detention centre. After the incident, an immediate process of group therapy counselling and training was commenced. No

[18] [2005] 2 Cr App R 6 CA.

notes were made of the discussions, and the sessions took place before any members of staff gave witness statements to the police. In considering the issue of witness training and witness familiarization, Lord Judge had the following to say in paragraphs 61 -62:

> *"[61]. There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of well-known principle that discussions between witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness…*
>
> *[62] This principle does not preclude pre-trial arrangements to familiarise the witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence.* ***Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques****.* ***The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process****. Nevertheless the evidence remains the witness's own uncontaminated evidence..."* [emphasis added]

[56]. Whilst witness training or coaching is absolutely prohibited, nothing precludes counsel from preparing a witness to testify. In the **State v McCormick,** Copeland J had the following to say on pages 791 -792:

> *"…It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial*

the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer…and is to be commended because it promotes a more efficient administration of justice and saves court time.

Even though a witness has been prepared in this manner, his testimony at trial is still his voluntary testimony. Nothing improper has occurred so long as the attorney is preparing the witness to give the witness' testimony at trial and not the testimony that the attorney has placed in the witness' mouth and not false or perjured testimony.

When a witness' testimony appears to have been memorized or rehearsed or it appears that the witness has testified using the attorney's words rather than his own or has been improperly coached, then these are matters to be explored on cross-examination, and the weight to be given the witness' testimony is for the jury. The sanctions of the Code of Professional Responsibility are there for the attorney who goes beyond preparing a witness to testify to that about which the witness has knowledge and instead procures false or perjured testimony. DR7-102, Code of Professional Responsibility." [19]

[57]. Counsel may sensibly prepare a witness so that the witness is equipped for his appearance in court and would not be taken by surprise. This will allow the witness to give his testimony in the most effective manner. The United States Court of Appeal, in its decision in **Ibarra v Baker[20]** said, "*An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way".* Finch J in **re. Eldridge**[21] posited that *"His duty is to extract facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."*

[19] 259 S.E.2d 880, 882 (N.C.1979).
[20] 338 F. App'x 457 (5th Cir. 2009) at 465-466. See also John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277 (1989).
[21] 82 N.Y. 161, 171 (1880).

[58]. In this case, Sgt Julien had not seen the person whom he knew and spoke of as Ainsley Alleyne alias "Beetle" for some 15 years. Therefore, it was sensible for the prosecution to prepare Sgt Julien by showing him the photograph of Alleyne to connect his knowledge of him. There is no evidence before us to either suggest that the prosecutor coached or trained Sgt Julien in giving his evidence nor even attempted to do so. There is nothing to suggest that she encouraged him to make a false statement or to misrepresent or to mislead the court in any way. We find no impropriety on the part of the prosecutor whatsoever. Therefore, we do not agree that by being shown the photograph prior to his testimony, Sgt Julien's testimony was compromised in any way. His testimony clearly demonstrated that Alleyne was well known to him. His evidence was that Alleyne was a dark negro man, approximately 22 years old, approximately 5 feet and 6 inches tall, had a few gold teeth and was slim built. He said that he had known Alleyne before this matter, and indicated "*whenever we see him, we would search him because it was said that he was in drugs*".[22] He had arrested him in June 2001 in relation to this matter. He took him to the station and questioned him for some 30 minutes. In November 2002 he had spent a couple of hours with Alleyne when he took him to the office of the DPP where Alleyne agreed to and signed an immunity document in his presence. After that Sgt Julien saw Alleyne every weekend when he took him to the San Fernando Criminal Investigations Department and then to a safe house. On 21, 22, 25 and 26 November, 2002 he escorted Alleyne to and from the Port of Spain Magistrates' Court. Even if the photograph was not shown to Sgt Julien, his evidence clearly established that he was familiar with Alleyne. The photograph merely presented a validation opportunity to Sgt Alleyne that the image represented the person whom he knew as Alleyne; therefore no complaint of conscious or unconscious bias can be made. In light of Sgt Julien's compelling knowledge of Alleyne it was therefore unnecessary for Sgt Julien to be shown

[22] Transcript dated 8 May, 2017 page 95 lines 1-20.

several photographs of persons prior to his testimony in order to ascertain whether he recognised any of them.

[59]. Similarly, in the case of Ms Duncan, even if she was told that it was the body of her nephew that she was going to identify, we do not agree that that would have influenced her to conclude without more, that it was Alleyne. Without repeating the evidence of her knowledge and proximity to Alleyne, we are satisfied that she was sufficiently familiar with him. In the circumstances, we hold that there is no merit in this ground of appeal.

(iv). Was Alleyne's death proven?

SUBMISSIONS - GROUND 6

[60]. Mr Welch submitted that the prosecution failed to satisfy the requirements of the **Indictable Offences (Preliminary Enquiry) Act, Chap 12:01** ("IO(PE)A") in proving the death of Alleyne. He argued that there was nothing to suggest that the name Ainsley Alleyne alias "Beetle" as stated in the fingerprint form and the person who gave evidence at the preliminary enquiry, Ainsley Alleyne also called "Beetle" were the same.

[61]. He submitted that it was open to the prosecution to prove that the deponent Ainsley Alleyne at the preliminary enquiry was the same Alleyne who had signed his fingerprint slip in 1998 and was the cadaver. He added that this could have been achieved by having a handwriting expert compare the signatures. Alternatively, someone who was familiar with Alleyne's signature such as the Clerk of the Court, Ms Khan in whose presence Alleyne had signed many times, was qualified to do so.

[62]. In reply, Mr Sinanan submitted that there was irrefutable scientific evidence of matching fingerprints of Alleyne and that of the cadaver. He contended that this evidence strengthened the circumstantial evidence in the case which was supported by the recognition evidence of Ms Duncan and Sgt Julien. He indicated that the fingerprint evidence was lacking at the previous trial, but in this case, the fingerprint evidence was called and provided a link with the cadaver and the person known as Ainsley Alleyne.

[63]. Mr Sinanan argued that the suggestions outlined by the counsel were purely based on opinion and disregarded the prosecution's sole discretion as to how to present their case and must therefore be discounted.

LAW, ANALYSIS AND REASONING

[64]. **Section 39(1)** of the **IO(PE)A,** states as follows in relation to the reading of a deceased person's deposition at trial:

> *"39. (1) Where any person has been committed for trial for any offence, the deposition of any person taken before a Magistrate may, if the conditions set out below are satisfied, without further proof be read as evidence on the trial of that person, whether for that offence or for any other offence arising out of the same transaction or set of circumstances as that offence.*
>
> *The conditions referred to above are the following:*
> *(a) the deposition must be the deposition either of a witness whose attendance at the trial is stated to be unnecessary in accordance with the provisions of section 21(5), or, of a witness who is proved at the trial by the oath of a credible witness to be dead, or so ill as not to be able to travel although there may be a prospect of his recovery, or incapable in consequence of his condition of mind of giving evidence, or absent from Trinidad and Tobago, or kept out of the way by the prosecutor or the State or by the accused person or by some other person on his behalf;*

(b) it must be proved at the trial, either by a certificate purporting to be signed by the Magistrate before whom the deposition purports to have been taken or by the oath of a credible witness, that the deposition was taken in the presence of the accused person or the prosecutor, as the case may be, and that he or his legal adviser had full opportunity of crossexamining the deponent;
(c) the deposition must purport to be signed by the Magistrate before whom it purports to have been taken." [emphasis added]

[65]. In this case, Alleyne's deposition was admitted on the condition that he was dead based on the evidence of seven witnesses.[23] On a perusal of the judge's ruling on the voir dire, it is noted that she correctly identified the statutory conditions for the admission of the deposition of a witness who was dead.[24]

[66]. In this case, the judge had the sole discretion to admit the deposition of Alleyne. This court will only intervene where it can be shown that the judge's exercise of that discretion was plainly wrong[25].

[67]. In order to determine whether the judge had exercised her discretion in a manner that was plainly wrong, it will be helpful to set out in detail the evidence before her. Ms Duncan stated that she knew Ainsley Alleyne. She also knew him as "Beetle". He was born 27 March 1982. She knew him from birth. She shared responsibility for his care along with his grandmother Monica Duncan. His mother was Sherma Duncan Smith, also called Sherma Duncan or Sherma Smith, her sister. He lived at 9 Upper Bournes Road, St James until his teenage years when he was asked to leave the family's residence. She maintained contact with him after that. He had lived in Dibe and also in Petit Valley. She then gave evidence of identifying a body at the Forensic Science Centre as Ainsley Alleyne. In doing so

[23] Heather Duncan, Everlene Khan, Hector Quashie, Cpl Dirk John, Officer Keith Louison, WPC Kamlar Penjilia and Sgt Dennis Julien.
[24] Transcript dated 9 May 2017 page 4 lines 8 -20.
[25] Jade Bovell v The State C.A.Crim.T.10/2014.

she observed the general structure of the body and checked that his penis was circumcised as Ainsley Alleyne was circumcised as a child. She also attended a funeral service for him. She was shown a mug-shot photograph apparently taken in 1998 and said it was the true image of her nephew Ainsley Alleyne.

[68]. Everlene Khan gave evidence that she was a note-taker with the Chief Magistrate in court on the days when Ainsley Alleyne gave evidence in the preliminary enquiry. She recorded his entire evidence in deposition form and read it over to him before Ainsley Alleyne signed it as being true and correct. She attached her stamp and gave evidence of the formalities attendant to the taking of the deposition including the signing by the Magistrate.

[69]. Officer Hector Quashie gave evidence that on 20 March 1998 he was attached to the St James Police Station. On that day he spoke to PC John No. 13010. He was given instructions and he recorded fingerprint impressions from one Ainsley Patrick Alleyne, alias "Beetle", on an official fingerprint slip. He then filled out information on that slip which he obtained during his interaction with Alleyne and saw Ainsley Alleyne sign it. This slip was the one that WPC Penjilia later considered. This information included the address, 9 Upper Bournes Road, St James. The mother's name on the fingerprint slip was given as Sherma Duncan Smith. He was shown a photograph which he said bore "a slight resemblance" to the Ainsley Alleyne he lifted the fingerprints from on that form.

[70]. Dirk John gave evidence that on 19 March 1998 he investigated a report of larceny of a bird and a cage and charged Ainsley Alleyne also known as "Beetle" for this offence. This is the same officer who had given instructions to Officer Quashie. Before arresting him he saw Alleyne around the St. James area over a 6 month period. Alleyne was convicted before a Magistrate in April 1998. At the voir dire

in 2017, having been shown a photograph, he testified that it looked like the Ainsley Alleyne he arrested in 1998.

[71]. Keith Louison was a retired police photographer. In 2003, WPC Penjilia handed him two fingerprint slips. One had the name Ainsley Alleyne alias "Beetle" written on it. He made fingerprint enlargements and handed them over to WPC Penjilia.

[72]. WPC Penjilia, police fingerprint expert gave evidence consistent with her expertise. In May 2003 she saw a body of a headless male, which had been partially burnt. At the Forensic Science Centre a few days later she took finger impressions from two fingers of that same body. The left middle and ring fingers. She compared these prints to the filed prints found at the Fingerprint Bureau. She found that they matched with finger impressions on the fingerprint slip with the name Ainsley Patrick Alleyne also called "Beetle". She explained in detail how she compared the impressions and that she found 12 matching ridge characteristics. She spoke of the international standards and concluded that the finger impressions on the fingerprint slip of Ainsley Patrick Alleyne were the same as those found on the body. She was cross-examined extensively on the process used and how she arrived at her conclusions.

[73]. Retired Sergeant Dennis Julien was a police sergeant at the St James Police Station in 2001. He charged the appellant in this matter. He too knew Ainsley Alleyne. He described him as a "character" in the district who would often be searched for drugs. In relation to this matter, Alleyne had been arrested and was given immunity. He was placed in a safe house. He took him to give evidence at the Magistrates' Court hearings. He was shown a photograph of Alleyne and stated that the photograph was a true image of Ainsley Alleyne whose alias was "Beetle".

[74]. We turn now to consider the judge's ruling. She recounted the salient features of the evidence of Everlene Khan[26] in that the deposition was taken before the Chief Magistrate in respect of different information numbers. She referred to Ms Bassaw as the prosecutor and Mr Cunningham as defence counsel. One Ainsley Alleyne was called as a witness and after being sworn in, he testified in the presence of the appellant. She recorded his evidence in writing and read it over to him whereupon he signed it as true and correct in the presence of the Magistrate and the appellant. She then placed the deposition stamp on it and the Magistrate signed it. She gave evidence in the same vein in relation to each of the days that Alleyne gave evidence. On 21 November 2002, Alleyne was not cross-examined but was cross-examined on the 22, 25 and 26 November 2002. Based on this evidence the judge was satisfied that Ainsley Alleyne gave evidence in accordance with **sections 39 (1) (b) and (c).**

[75]. The judge then went on to consider whether Ainsley Alleyne, the deposition maker, was dead in accordance with **section 39 (1) (a).** This, she found, was established by the evidence before her. The witness Ms Duncan said that she knew Ainsley Alleyne as "Beetle". Her sister, Sherma Howell, also called Sherma Duncan and Sherma Smith was his mother and Ainsley Alleyne was her nephew. She gave evidence that she knew him from his birth on 22 March 1982 and that she shared responsibility for his care when he was growing up. At one time he lived at 9 Upper Bournes Road, St James and after he left the family's home she maintained contact with him. She sometimes saw him every day though, days would pass and she would not see him. At the Forensic Science Centre she identified a corpse as being the true image of Ainsley Alleyne. The body was burnt and the head was missing. She was shown a photograph and identified the image in that photograph as being that of Ainsley Alleyne.

[26]Transcript dated 9 May 2017, pages 4 to 6.

[76]. The judge then recounted the evidence of Officer Quashie, who had recorded a fingerprint impression on a fingerprint form of someone named Ainsley Alleyne. The address recorded was 9 Upper Bournes Road, St James. This was also followed by the evidence Dirk John who had arrested someone by the name of Ainsley Alleyne also called "Beetle" for larceny of a bird and cage in March 1998.

[77]. The judge relied on the address on the fingerprint form being the same as the address of Ms Duncan's nephew and indicated that she did not put any weight on the identification by Officer Quashie of an image in a photograph as being that of Ainsley Alleyne. She considered the similarity of address, the name and the nickname and concluded that the person arrested for the larceny of the bird and cage was the same Ainsley Alleyne who was Ms Duncan's nephew.

[78]. As stated in her ruling, the next question the judge addressed was whether the person who had been arrested and fingerprinted was the same person as the corpse found. The judge did not rely on Ms Duncan's evidence that she identified the corpse by the circumcised penis since it was of no assistance.

[79]. The judge relied instead, on the evidence of the fingerprint expert, WPC Penjilia who compared the fingerprint of the headless corpse and the person who had been charged for larceny of bird and cage and found that there were 12 similarities in the finger impressions.

[80]. Next, the judge addressed the issue of whether the person charged (which she accepted was the same person as the headless corpse), was the same person who had testified before the Chief Magistrate and who gave the deposition in question. Sgt Julien had identified the image on a photograph as being that of Ainsley Alleyne and so had Ms Duncan. The judge found that based on all of the interactions Sgt Julien had with Ainsley Alleyne, he was in a position to recognise

the image on the photograph as that of Ainsley Alleyne. These were as follows: (i) he had arrested him before, (ii) he took a statement from him about the present incident (iii) Alleyne was given immunity (iv) He went with him to the DPP's Office (v) He placed him in a safe house and (vi) During the preliminary enquiry he took him to court. Based on these factors taken together the judge was satisfied that the person who testified in court was the same Ainsley Alleyne who was dead.

[81]. We are satisfied that there was sufficient evidence before the judge to prove that the Ainsley Alleyne who testified at the preliminary enquiry was dead and all the requirements of **section 39 (1) of the IO(PE)A** were met. In the circumstances, the exercise of the trial judge's discretion was not plainly wrong. Accordingly, we find that there is no merit in this ground.

GROUND 3

The appellant's trial was rendered unfair, as he was unfairly prejudiced by assurances given during the voir dire by the Learned Trial Judge when admitting the mugshot into evidence, to the effect that the said mugshot had no probative value and was not helpful to the prosecution's case, which said assurances the Learned Trial Judge, to the Appellant's disadvantage, subsequently resiled from when giving her ruling in the matter. (sic)

SUBMISSIONS

[82]. Mr Welch submitted that the judge was manifestly inconsistent in her approach towards the admission of the photograph. She indicated that she could not see how it could assist to show that the cadaver belonged to Alleyne. She assured counsel that she would allay his fears since there was no probative link. Counsel added that the implication of the judge's assurance was that if admitted, the

photograph would not prejudice the appellant's case and as a result he did not further pursue the objection. He contended that this proved detrimental to the appellant since the judge considered the identification of the photograph as critical to her findings resulting in gross unfairness to the appellant.

[83]. Mr Sinanan submitted that the judge's utterances did not cause any unfair prejudice to the appellant. Counsel's objections were premature and pre-emptive, in that they were made prior to the court being seized of all relevant evidence on the issue. He contended that the judge did not embark upon an admissibility test in relation to the photograph, but rather conducted a thorough enquiry by asking the prosecutor about the nature of the proposed evidence so that she could have assessed its relevance and probative value. Counsel submitted that the judge cautioned defence counsel that he should wait to see the relevance. He added that while the judge clearly stated that at that stage she could not see how the photograph could be used to create a link to the cadaver, that neither amounted to assurances nor was she applying any test of admissibility. He posited that there was no degree of opacity in the court's indication that could have caused counsel, a senior practitioner, to believe otherwise and that the judge's conclusion was based on the cogency of the circumstantial evidence as a whole and that the photograph was not critical to her finding.

LAW, ANALYSIS AND REASONING

[84]. We find it helpful to set out the circumstances surrounding the admission of the photograph. Ms Duncan was the first witness to be called by the prosecution on the voir dire to determine whether to admit Alleyne's depositions. In her evidence she described the facial features of Alleyne whereupon defence counsel objected on the basis that this was fresh evidence and that the relevant notice in respect of same had not been issued. The judge then proceeded to ask the prosecutor, ***"If***

we are dealing with a headless body, how does the facial features assist in any way?"[27]. The prosecutor explained that the evidence would assist in providing a link with the cadaver and with the person who gave evidence at the preliminary enquiry.[28] After consideration, the judge allowed the questions under the rubric of amplification as Ms Duncan had gone to the Forensic Science Centre to identify the body of someone she had known since his birth. She was now being asked to identify the features of that person. At the end of Ms Duncan's evidence in chief, the prosecutor asked for the photograph to be shown to her and counsel objected on the basis that it was prejudicial. We observed the following exchange:

> *"**COURT: Mr Rajcoomar, how could that, in, and of itself, be prejudicial when the purpose of this application is for the Court to decide whether or not it should put in the deposition of Ainsely Alleyne**?*
> ***MR RAJCOOMAR**: For this reason …*
> ***COURT**: Let me finish. **For the court to be satisfied that he is dead, how does that – how is that prejudicial? The fact that – remember, I have to decide, not the jury - - the fact that I see a photo, what does that do? How does that affect things negatively?***
> *…*
> ***THE COURT:** Mr Rajcoomar, I take you to the logical steps. This witness stated that the body she identified was headless*
> ***MR RAJCOOMAR:** And burnt*
> ***THE COURT:** And burnt. **I don't see how the photograph can work against you***
> ***MR RAJCOOMAR:** My Lady, I am guided by you.*
> ***THE COURT:** No, no. But tell me, how? So, she sees a photograph; she says, "This is Ainsley Alleyne." Does it take the state's case any further?*
> ***MR RAJCOOMAR:** Because this is going to be used later on - - having read the documents, and I have read them correctly - -*
> ***THE COURT:** Yes*
> ***MR RAJCOOMAR:** -- to say that is Ainsley Alleyne, who was arrested and charged in 1998, and where (sic) this mugshot . . .*

[27] Transcript dated 5 May, 2017 page 19 lines 37 -39.
[28] Transcript dated 5 May, 2017 page 20 lines 12 – 20.

THE COURT: *Well, before you continue - - the fact that you have a photo, which is a mugshot, doesn't suggest that – even though it is a mugshot, that he was arrested and - - it doesn't add anything to the fact that he was the same person who was charged and arrested. It doesn't make that link.*
MR RAJCOOMAR: *But that is what it is going to be used for, later on.*
THE COURT: *It cannot. It cannot. That's what the State intends to do? Because she identifies this mugshot …*
MS BHOLA: *Well yes. Yes, please.*
THE COURT: *Wait. Is the State saying, this witness identifies this mugshot - -*
MS BHOLA: *Yes, please*
THE COURT: *- -* ***which is that of Ainsley Alleyne. An officer is going to come to say, Ainsley Alleyne was arrested; this is the mugshot. I can't see them doing that because the body was headless. Mr Rajcoomar, I don't see it as being prejudicial to you. It doesn't assist in identifying the body. No. So I'm trying to understand your****…*
MR RAJCOOMAR: *My Lady, if I take your logic - -*
THE COURT: *No . . .*
MR RAJCOOMAR: ---logically, My Lady's argument, it would mean that it is irrelevant.
THE COURT: Well, you know that sometimes one has to weigh (sic) to see the relevance. And this is not the jury. If - -
MR RAJCOOMAR: *I accept that. I accept that, My Lady.*
THE COURT: *- -* ***in my consideration of the evidence, would this sway me to say this body was, in fact, that of Ainsley Alleyne? I can't say that. The jury is not here. So the fact that a witness - - - a photo goes in; she says it is Ainsley Alleyne. I don't see that as - - at this stage, I don't see how it can be used to make a link to a headless body.***
MR RAJCOOMAR: *I'm guided by My Lady.*
THE COURT: *I don't. Ms. Bhola, is that what…*
MS BHOLA: *My Lady, we are using fingerprint evidence. Of course, the photograph - - because I have filed it - - - will be shown to some of the police officers. But primarily, to make the identification of the body, it's fingerprint evidence. We can't use the …*
THE COURT: *If they can't.*
MS BHOLA: *Yes*
THE COURT: So, I think - - I can allay your fears. I can't see the link. I'm waiting to see - - everybody could come in and say, "That's the man, and

I charged him." That still doesn't link us to the headless body. So please, let me allay your fears. I will allow it in.
MR RAJCOOMAR: *I'm guided My Lady."* [emphasis added]

[85]. We have not been referred by counsel to any authorities where assurances were given by the court and acted upon to the detriment of the accused. However, the court is entitled to a change of mind where an oral decision has been given but not yet perfected as illustrated in **Re L and B (Children) (care proceedings: power to revise judgment)**[29]. The issue which arose for consideration in that case was whether and in what circumstances a judge who has announced her decision orally was entitled to change her mind. Lady Hale SCJ in delivering the judgment of the panel indicated that a judge has the power to change his mind once it was done before the order was drawn up and perfected. However, in determining whether to exercise that power the overriding objective must be to deal with the case justly. Lady Hale SCJ stated the following at paragraph 27:

> *"[27] Thus one can see the Court of Appeal struggling to reconcile the apparent statement of principle in* ***Re Barrell Enterprises [1972] 3 All ER 631, [1973] 1 WLR 19***[30]*, coupled with the very proper desire to discourage the parties from applying for the judge to reconsider, with the desire to do justice in the particular circumstances of the case. This court is not bound by Re Barrell Enterprises or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected.* ***I would agree with Clarke LJ in Stewart v Engel [2000] 3 All ER 518 at 531, [2000] 1 WLR 2268 at 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up****. On the other hand, in Re Blenheim Leisure (Restaurants Ltd (No 3), Neuberger J gave some examples of cases where it might be just to revisit the earlier*

[29] [2013] 2 All ER 294.
[30] Re Barrell Enterprises held that although a court is entitled to reverse its oral judgment at any time before the order is drawn up and perfected, it must only be done in exceptional circumstances.

decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances." [emphasis added]

[86]. Whilst the instant matter can be distinguished from the above case, in that it was at the beginning of a voir dire that the judge expressed evaluative views of the mugshot, the principle that a judge may change his mind anytime before the order is perfected obtains, once done pursuant to the overriding objective to deal with the case justly.

[87]. In this case, it was solely for the judge to decide whether she was satisfied that the conditions of **section 39 (1)** were met before she exercised her discretion to admit Alleyne's deposition. Therefore it was for her to decide how the photograph was of assistance to her in arriving at her findings. We note however that prior to allowing the photograph, she repeatedly stated that she would "allay" counsel's fears in that she could not see or could not see at that stage, the link between the photograph and the headless corpse. Whilst the judge was entitled to express her view on the evidence, regrettably, we find that it was done prematurely since at the time of her comments she had only heard the first witness in chief, Ms Duncan. In our view, the judge's comments did not amount to any assurances to experienced defence counsel that the judge was satisfied that the admission of the mugshot would not be prejudicial to the defence's case. In light of the preliminary stage at which the judge commented, together with counsel's knowledge of the proceedings, we find it somewhat odd that he could have derived from the judge's comments the implication that the photograph had no probative value on the central issue regarding the admission of Alleyne's deposition. The photograph by itself, independent of the witnesses' testimony was of no probative value. However, when linked to their evidence it acquired probative value. Apart from Ms Duncan, the prosecution intended to call other witnesses to support its application, in particular WPC Penjilia, who matched the

fingerprints of Ainsley Alleyne taken in 1998 with that of the cadaver. That evidence was crucial to the judge's findings in admitting the deposition. We note that although the judge stated that she could not see the link, she indicated that she was waiting to see it and when defence counsel suggested that the photograph was irrelevant she indicated that sometimes one has to wait to see the relevance.

[88]. Moreover, the judge did not embark upon a test of admissibility in allowing the photograph, rather the prosecution attempted to admit the photograph under the **Peter Blake** principle as described under ground 1 (b). However, we reiterate that Ms Duncan's evidence of her knowledge of Alleyne provided a sufficient basis for the photograph to be admitted into evidence. Admissibility was for the judge. What follows from this is that any assurances did not render the photograph inadmissible. The judge still had to decide this issue and whatever value or weight she placed on it was a matter for her in any event. The point has been made that she did not rely on the photograph for identification but on circumstantial evidence.

[89]. We hasten to add that even if the judge's comments amounted to assurances that the admission of the mugshot would not be prejudicial to the appellant, the court was entitled to a carefully considered change of mind before giving its final decision at the end of the voir dire. In **Barrell** and **Re L and B**, the court had delivered its oral decision after considering the case for both sides in their entirety, whereas in this case the court's comments were made after hearing the first witness for the prosecution. It is difficult for us to appreciate counsel's conclusion that the judge's comments amounted to an assurance at that early stage.

[90]. In our view, the trial judge's ruling on the deposition demonstrated that the photograph by itself was not crucial to her findings, but rather her findings were

based on the strength of the evidence as a whole and in particular the fingerprint evidence of WPC Penjilia (see ground 6). In the circumstances, we hold that the judge's comments did not result in unfairness to the appellant and therefore there is no merit in this ground.

Grounds 4 and 5

Grounds 4 and 5 related to identification and were considered together. There was some overlap of these grounds with those considered above.

[91]. **Ground 4**

Failure by the learned Trial Judge to follow Turnbull guidelines when determining the accuracy of the identification evidence in relation to the photograph.

> **(a) The learned trial judge applied a completely inadequate test in arriving at her conclusion as to the correctness of the identification evidence in relation to the photograph, namely whether the witnesses were familiar enough with the person Ainsley Alleyne to recognise an image of him and in settling the matter on that sole basis she completely failed to consider and to direct herself also by the principle that an honest witness may make mistakes in recognition of someone familiar.** (sic)
>
> **(b) The learned judge fell into fundamental legal error when she arrived at the conclusion that the image in the photo was that of Ainsley Alleyne without first taking into account and directing herself on the weaknesses of the identification evidence in relation to same and consequently the possibility of mistake by the witnesses.** (sic)

Ground 5

The evidence of identification as it related to the photograph was overall of such poor quality as to be unreliable and the learned trial judge erred as a matter of law and fact in not upholding the no case submission and in her finding that the State had proven its case beyond reasonable doubt. (sic)

SUBMISSIONS

[92]. Counsel submitted that the judge failed to direct herself in accordance with the Turnbull guidelines and never considered the possibility of mistaken identification that is, although a witness may be familiar with a person, mistakes in recognition are possible. He added that the judge did not consider that the photograph was a small black and white, head alone mugshot of vintage, was of an unknown origin and that it was purporting to represent someone whom the witnesses had not seen in some 15 years and that their memories might have waned.

[93]. He also submitted that the judge wrongly rejected the no case submission made on behalf of the appellant without considering the principles in **Daley v R**[31] which stipulate that when considering a no case submission on the issue of identification, a judge was required to focus on the overall quality of the identification evidence. He contended that in addition to the fact that the witnesses were identifying a mugshot of timeless origin and date after some 15 years and that their memories may have faded, there was no corroboration of their evidence by the photographer. He submitted that the weaknesses in the witnesses' evidence could not be corroborative of each other and referred to **Blackstone's Criminal Practice F18.22 (undated).**

[31] (1994) 1 A.C. 117.

[94]. Mr Sinanan submitted that the photograph was shown to the witnesses for the purposes of recognition and it was not used in and of itself as proof of the contents therein.

[95]. He contended that the judge did not err by declining the no-case submission because there was very strong evidence before the court that was of good quality. He submitted that the judge had before her cogent and compelling evidence from Ms Duncan and Sgt Julien which established their respective knowledge of and dealings with Alleyne. She also had before her the compelling scientific evidence of WPC Penjilia. He submitted that when these pieces of evidence were put together, they were more than adequate to satisfy the court that the recognition by the witnesses was properly made with respect to the mugshot. He further submitted that the judge properly exercised her discretion to admit the deposition and referred to **Nankisoon Boodram and Ors. v The State.**[32]

LAW, ANALYSIS AND REASONING

[96]. The trial had before her an application to admit the deposition of Ainsley Alleyne given on 21, 22, 25 and 26 November 2012 taken before the Chief Magistrate on the ground that he was dead. This evidence was important against the appellant and therefore is of significance to the conviction.

[97]. **Section 39 (1)** of the **IO(PE)A** provides for the admission of the deposition of a deceased witness at trial who had previously given evidence at the preliminary enquiry and had been proved by a credible witness to be dead.

[32] (1997) 53 WIR 352.

[98]. In **Andy Adams v The State**[33]**,** Weekes JA (as she then was) posited that once the statutory requirements under **section 39 (1) (a), (b) and (c)** of the **IO(PE)A** were satisfied, the court can then exercise its discretion to admit the deposition. She stated in paragraph 19 that:

> *"As long as there is evidence sufficient to satisfy the conditions outlined in s. 39(1) (a) (b) and (c), the court will normally exercise its discretion to admit the deposition: Barnes, Scott and Walters v. R 37 W.I.R. 330."*

[99]. Therefore, to allow the deposition the judge had to be satisfied that: i. the witness was dead; ii. the deposition was taken with all necessary formalities observed before a Magistrate in the presence of the accused; iii. the legal adviser had full opportunity of cross-examining the witness. A credible witness must prove the witness was dead. In doing so she considered the evidence advanced by the prosecution. The fact that the deposition was taken before a Magistrate in the presence of the accused can be proved by a Certificate signed by the Magistrate or by the oath of a credible person that the deposition was taken as stated above.

[100]. In **Anderson Mapp and Darryl Charles Bissoon v The State**[34] the Court of Appeal considered **section 39 (1) of the IO(PE)A** in the context of establishing the death of a witness, who had earlier given evidence at the preliminary enquiry. Although the prosecution's application was made on the ground that the witness was being kept away, the court was satisfied that on the circumstantial evidence, it was open to the judge to conclude that the witness was dead. Thus circumstantial facts and evidence which exclude any other reasonable explanation for a witness's absence may strongly support the inference that the witness was dead.

[33] Cr App No 33 of 2009.
[34] Cr. App. Nos. 13 & 14 of 2012.

[101]. In this case, the essence of the evidence of the witnesses called was to provide proof of Alleyne's death. One component involved showing the photograph to Ms Duncan and Sgt Julien who both knew Alleyne well.

[102]. It is trite that where the identity of an accused is in issue, visual identification may either be satisfied by identification evidence or by recognition evidence. In **R v Turnbull and Ors.**[35], Lord Widgery CJ laid down the guidelines to be followed in such cases. This is not a case of visual identification of a person who is suspected of having committed a crime. This case involves a different species of identification, namely the identification of a witness who is dead for the purposes of admitting his depositions.

[103]. In this case, any issue of identification concerned the species of identification in the context of admitting the deposition of Alleyne, a crucial witness to the prosecution's case. Identification has to be seen in the context of what is being sought to be proved. The key point was to prove that the person Ainsley Alleyne, who had given evidence before the Magistrate had been proven to be dead.

[104]. The judge in her ruling did not refer to any authorities on this species of identification she may have considered. She did not state that she had warned herself that persons can make mistakes even with recognising persons whom they know. However, she clearly had in mind that both Ms Duncan and Sgt Julien had known Alleyne well enough to be able to recognise a photograph of him. Recognition is different from identification. They both saw him on different occasions in good lighting, sometimes for long periods, and at close range. By doing so they were familiar with his appearance. The appellant submitted that the first-time identification of the photograph in the witness box was inappropriate. However, this was a case of recognition of a photograph of a

[35] [1976] 3 All ER 549 at 551 – 552.

person known to the parties distinct from the identification of a stranger seen in difficult circumstances.

[105]. This was also a case of identification of a photograph for the purposes of admission of a deposition. It was not the identification of an accused person which went to the issue of guilt. These are very different concepts. One cannot be equated with the other. The deposition of the witness, for example, can be proved by comparing signatures, without the need for identifying the person. The principles of **Turnbull** and **Daley** were therefore not applicable in these circumstances.

[106]. It was clear, in any event, that the judge was alive to the principles that relate to identification and recognition. She specifically discounted the identification of the photograph by Officer Quashie because he was not familiar with the person other than meeting him on one occasion.

[107]. There was no suggestion in the judge's ruling that she considered the evidence of Ms Duncan and that of Sgt Julien to be corroborative of each other's evidence.

[108]. The judge accepted in those circumstances that they ought to have been able to definitively identify him in a photograph. A person familiar with someone can in most cases look at a photograph taken some time before in order to ascertain whether that is the person he or she knows.

[109]. In respect to counsel's submissions that the memories of the witnesses of the person whom they knew as Ainsley Alleyne may have waned having not seen him in some 15 years and the possibility of misidentification, we note that the judge did not specifically refer to weaknesses or expressly warn herself of the dangers of identification evidence. However, as noted before, what the judge had to be satisfied of was that the deponent in the Magistrates' Court was dead. In this

regard, the fingerprint evidence proved to the satisfaction of the judge that the headless corpse was the same as the person Ainsley Alleyne of a specific previous address who Sgt Julien said gave evidence in the Magistrates' Court. There was the evidence of an Ainsley Patrick Alleyne who had been arrested in 1998 and who was known by the name "Beetle" and whose address was 9 Bournes Road, St James. It was clear that the judge decided that the deponent was dead based on the circumstantial evidence of his name, nickname and address. Officer Quashie could not categorically link the mug shot with the person from whom he had taken the fingerprint impression from, but he did say it resembled him a little. The judge was relying not on identification evidence from the photograph, but on the circumstantial evidence of the confluence of the name, address, alias and general characteristics. This, in the circumstances, was sufficient circumstantial evidence for the judge to have concluded as she did. Her admittance of the deposition did not turn on identification of the photograph. It could not. Officer Quashie did not give evidence, for example, that he had attached a photograph of the Ainsley Alleyne whose fingerprint he took to the fingerprint form. There was no specific link between that photograph and the fingerprint form.

[110]. At best, the photograph was consistent with the other circumstantial evidence. Ms Duncan could likely have recognised her nephew from a photograph. Sgt Julien stated the mugshot photograph was the Ainsley Alleyne who had given evidence before the Chief Magistrate. Officer Quashie who took the fingerprint impression found it resembled the Ainsley Alleyne slightly. This was not surprising given the lapse of time.

[111]. The judge in actuality discounted the identification evidence. She relied on and placed heavy weight on the other circumstantial evidence, specifically, the name, address and alias. The judge stated she discounted Officer Quashie's evidence regarding the photograph. She did say, however, that she based her conclusions

on the interactions Sgt Julien had with Alleyne that he was in a position to identify him from a photograph. It is clear that the judge accepted the fingerprint evidence comparison made by WPC Penjilia. She had the benefit of seeing and evaluating the evidence and it is clear she accepted it.

[112]. Put another way, even if there was no photograph put into the hands of the witnesses, the judge had the coincidence of name, address and alias. She was entitled, on that evidence, to find that the requirements of **section 39 (1) of the IO(PE)A** had been satisfied. The ground of identification relating to the photograph was unrelated to evidence against an accused advanced to prove guilt. The judge was entitled to conclude on the circumstantial evidence that the maker of the deposition was in fact dead and we conclude it has not been demonstrated that she was wrong to do so. These grounds based on identification in relation to the deposition of Ainsley Alleyne accordingly fail.

Ground 7

Inadmissible evidence of a highly prejudicial nature was admitted into evidence at the Appellant's trial when the deposition of the deceased witness Ainsley Alleyne was read to the jury, and included material which ought to have been excluded and which said material created a serious risk that the jury on hearing it, would have taken it into account in arriving at their verdict, thus rendering the Appellant's conviction unsafe. (sic)

SUBMISSIONS

[113]. Mr Welch submitted that the utterances made by the VC to Alleyne as to why the appellant wanted her dead was not that of a conspirator, nor were they made pursuant to the execution of the conspiracy though said whilst the conspiracy was

in progress. Such utterances were inadmissible for several reasons. Firstly they were not incidental to carrying out the conspiracy. Secondly, the VC was not a co-conspirator. Thirdly, the VC gave no evidence that the appellant stole Ms Rostant's monies and deposited them into his account. It was contrary to the evidence that she gave at the first trial that she was paid in full in 1999 and at the preliminary enquiry which suggested that she was paid in part. Furthermore, no evidence that the appellant had stolen Ms Rostant's monies and deposited them into his account could be drawn from PC Frank's evidence. Counsel contended that such evidence was highly prejudicial in that it supplied a clear motive for the appellant wanting to kill the VC, when such motive was uncertain. That evidence would have tipped the balance in favour of Alleyne's evidence over the appellant's denials.

[114]. Mr Welch also argued that the evidence constituted an attack on the appellant's character by suggesting that he was a dishonest man. This, he submitted, neutralized the judge's good character direction in relation to the appellant's credibility and he referred to **Arthurton v R[36].** He concluded that the evidence was by its nature very powerful and it could not be safely assumed that the verdict would have been the same if this evidence was excluded.

[115]. Mr Sinanan in reply, submitted that the judge properly admitted into evidence the conversation between Alleyne and the VC since it was evidence of the furtherance of the conspiracy. He contended that the utterances were a declaration made in the furtherance of the common purpose and not part of the narrative as the conspiracy was still in existence. The utterance was made by the VC when she was in the charge of Alleyne and a co-conspirator and the conspiracy was being moved forward as they were still discussing how they were going to kill her. He referred to **R v Platten[37].**

[36] (2004) UKPC 25.
[37] [2006] EWCA CRIM 140.

[116]. Counsel submitted that there was independent evidence emanating from the watchman and the VC's mother which established a prima facie case against the appellant's participation see: **Melville and Anor v The State**[38]. He also referred to **Ahern v R**[39] and **R v Jones and Ors**.[40]

[117]. He referred extensively to the first appeal, where the court relied heavily on **Tripodi v R**[41] and contended that the utterances and the events were inextricably bound up in the transaction contemplated by the conspiracy. He argued further that the principle of admissibility was not unlike the principle of res gestae. The court held that the evidence of the utterance was admissible since they were accompanying and explaining the acts which were taking place in furtherance of the conspiracy. Consequently, the admission of the utterance caused no prejudice to the appellant.

LAW, ANALYSIS AND REASONING

[118]. In this case, we note the following exchange occurred between Alleyne and the VC shortly after he and the others brought her to Cumberland Hill, Fort George. This exchange was reflected in Alleyne's deposition dated 21 November 2002. He stated that:

> *"…I asked her what it is this man want you so dead for. She said he took $150,000.00 from one of his clients and put it in his account and she knows about it".*[42]

[38] Cr. App. Nos. 24 & 25 of 2004.
[39] [1988] 62 ALJR 440.
[40] [1997] 2 Crim App R 119.
[41] [1961] 104 CLR 1.
[42] Transcript dated 15 May 2017, page 74 lines 48-50.

The admissibility of evidence in conspiracy cases

[119]. The established test for the admissibility of evidence in relation to cases involving conspiracy was succinctly set out in **Archbold 2021**[43] as follows:

> *"**It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another.** The judge (and not the jury: Platten [2006] EWCA Crim 140; [2006] Crim.L.R. 920) must be satisfied that **the act or declaration was made by conspirator, that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement**: Devenport and Pirano, above; Jones, §33-63.* [emphasis added]

[120]. In the case of **Platten,** the appellant and others were charged with conspiring to supply controlled drugs. Waller LJ in considering the condition that the act or declaration must be in furtherance of the common design stated that mere narratives or statements made after the conclusion of a conspiracy were inadmissible because they were not in furtherance of the common design. However, statements which were made during the conspiracy and as part of the conspiracy were admissible because they were part of the natural process of pursuing the arrangements to carry out the conspiracy. Wallen LJ stated as follows in paragraphs 35 - 36:

> *"[35] The exclusion of what is described as "mere narrative" applies however only to "narrative" after the conclusion of the conspiracy. Statements made during the conspiracy and as part of the conspiracy, because they are part of the natural process of making the arrangements to carry out the conspiracy, will be admissible …*
> *[36] … the evidence is admissible when it can be said of it "this is the enterprise in operation". Furthermore … the evidence is admissible not just*

[43] Chapter 33, paragraph 66 "*Determining admissibility of act or declaration"*

as to the nature and extent of the conspiracy, but also as to the participation in it of persons absent when the declarations are made."

[121]. Wallen LJ then considered specific utterances which the appellant complained were improperly admitted by the judge. In particular, a conversation between a conspirator and someone not charged in the conspiracy. He held that it was not conclusive that only conversations between co-conspirators were considered to be admissible. Wallen LJ stated in paragraph 45 that:

> ***"[45] It is said that this was not a conversation between one conspirator and another. In the sense that Keith was not a defendant in the proceedings and charged as a conspirator that is true. But as Mr Cooke in his respondent's skeleton makes clear it was never the Crown's position that Keith was not a party to the conspiracy and indeed the nature of the conversation when set out in full would make it likely that he was. In any event it is not conclusive that the conversation would not be admissible that it should be between co-conspirators.*** *Conspirators have to make arrangements for the carrying out of the conspiracy and from the conversation in full it can be seen that this was on any view a conspirator Mr Formby making arrangements for the carrying out of the conspiracy, such a conversation is clearly admissible against all conspirators. It is thus compelling evidence against Platten that he was a party to the conspiracy."* [emphasis added]

[122]. In our view, the circumstances in the instant case can be factually distinguished from that in **Platten**. In **Platten,** whilst the conversation was between a conspirator and a person who was not charged, the nature of their conversation when set out in full, demonstrated that it was likely that the person not charged was a co-conspirator. In this case the conversation was between Alleyne, a co-conspirator, and the VC who quite clearly was the target of the conspiracy and not part of the conspiracy. Therefore, in our view the utterance made by the VC does not fall within the principles set out in Platten nor do they meet the requirements set out in paragraph 119 above and was clearly inadmissible.

The principle of Res Gestae

[123]. We turn now to consider whether the utterances were admissible under the principle of res gestae. The common plan to kill the VC was in operation when the VC uttered to Alleyne what she believed to be the reason for the appellant wanting to kill her. She was already kidnapped and brought to the location and as a natural part of moving the plan forward the men engaged in dialogue with the victim.

[124]. The principle of res gestae allows acts and/or statements that occur at the same time as the facts in issue and are connected as part of the same story, to be admissible in evidence.[44] Lord Wilberforce in delivering the decision of the Judicial Committee of the Privy Council in **Ratten v R[45]** explained the res gestae principle in the following way at 806 -809:

> *"… In the context of the law of evidence it may be used in at least three different ways:*
>
> > *1.When a situation of fact (e.g. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing in a broader sense, what was happening…*
> >
> > 2*. The evidence may be concerned with spoken words as such (apart from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, i.e., are the relevant facts or part of them.*
> >
> > *3. A hearsay statement is made either by the victim of an attack or by a bystander - indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend*

[44] See Stone's Justices' Manual 2021, Part 2.111.
[45] [1971] 3 All ER 801. See also R v Andrews [1987] 1 All ER 513.

on whether it was made as part of the res gestae. A classical instance of this is the much debated case of Reg. v. Bedingfield (1879) 14 Cox C.C. 341, and there are other instances of its application in reported cases. These tend to apply different standards, and some of them carry less than conviction. The reason, why this is so, is that concentration tends to be focused upon the opaque or at least imprecise Latin phrase rather than upon the basic reason for excluding the type of evidence which this group of cases is concerned with. There is no doubt what this reason is: it is twofold. The first is that there may be uncertainty as to the exact words used because of their transmission through the evidence of another person than the speaker. The second is because of the risk of concoction of false evidence by persons who have been victims of assault or accident. The first matter goes to weight. The person testifying to the words used is liable to cross-examination: the accused person… can give his own account if different…

The possibility of concoction, or fabrication, where it exists, is on the other hand an entirely valid reason for exclusion, and is probably the real test which judges in fact apply. In their Lordships' opinion this should be recognised and applied directly as the relevant test: the test should be not the uncertain one whether the making of the statement was in some sense part of the event or transaction…Conversely, if he considers that the statement was made by way of narrative of a detached prior event so that the speaker was so disengaged from it as to be able to construct or adapt his account, he should exclude it. And the same must in principle be true of statements made before the event. The test should be not the uncertain one, whether the making of the statement should be regarded as part of the event or transaction. This may often be difficult to show. But if the drama, leading up to the climax, has commenced and assumed such intensity and pressure that the utterance can safely be regarded as a true reflection of what was unrolling or actually happening, it ought to be received. The expression "res gestae" may conveniently sum up these criteria, but the reality of them must always be kept in mind: it is this that lies behind the best reasoned of the judges' rulings.

…

These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in

such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused."

[125]. In the Seychelles case of **Roble and Ors v The Republic**[46], the court applied **Ratten**. In delivering the majority judgment Msoffe JA stated in paragraphs 46 – 47 that:

"[46]…The English case of Ratten v R [1971] 3 All ER 801 has been cited on many occasions. It may be equally applicable in this case. ***Evidence of event[s] that is/are part/continuous of the whole event forms part of the res gestae. Are the recordings res gestae?***

[47] The phrase res gestae (literally, 'things done') refers to the inclusionary exception by which a party is allowed to admit evidence which consists of, among other things, everything that is said and done in the course of an incident or transaction that is the subject of a civil or criminal trial. The res gestae exception is based on the view that, because certain statements are made spontaneously in the course of an event, they carry a high degree of credibility." [emphasis added]

[126]. In the Australian case of **Tripodi v R**, the court noted that acts or declarations which are admissible as res gestae or relevant facts against the maker in an ordinary case may be similarly admissible against all conspirators once one was acting in preconcert and the statement was made in furtherance of the common design. The court stated in paragraph 6 that:

"[6] Usually the question of admissibility will relate to directions, instructions or arrangements or to utterances accompanying acts. It is customary at criminal trials simply to treat the presence or absence of the prisoner as decisive of the admissibility of things said and it is a pity to rob that empirical but practical and convenient test of any of its usefulness. But often enough in an ordinary case where there is no

[46] [2016] 1 LRC 1.

confederation or preconcert, directions, instructions and the like although spoken in the absence of the prisoner may, according to the circumstances of the case, be admissible as res gestae or relevant facts. It is easy to understand therefore that preconcert confederacy or combination may make such directions and the like admissible when they are given by one of several acting in preconcert with the prisoner and are given in furtherance of the common design." [emphasis added]

[127]. In this case, the situation of fact that was being considered inter alia was the conspiracy to murder and the attempted murder of the VC. It would have been arbitrary and artificial to confine the evidence to when Holder held the VC behind her neck and she went unconscious before he was interrupted by Letren. It was important to know in a broader sense, what was happening and why. In the course of events, Alleyne and the others had already kidnapped the VC, brought her to Fort George and told her that they were murderers. They were dragging her up the hill. Holder had asked her about what she told the police and Ms Rostant about the appellant and she replied that she did not say anything and that all she knew was that Ms Rostant and the appellant were having financial issues and that the appellant was given until 29 June 2001 to pay. He told her that the appellant had paid him to kill her and she pleaded for her life, offering to pay him a higher sum. Although Alleyne's evidence reflected that the appellant had told him earlier of the reason why he wanted the VC dead, that is because she was discussing his business with PC Frank and that the Fraud Squad was getting too close to him, Alleyne pressed the VC himself. The VC's response was made spontaneously in the course of the events and under the pressure of her knowing that she was about to be killed. As such, her utterance may be regarded as a true reflection of what was unfolding or actually happening and there was no room for concoction. In our view, the VC's utterance formed part of the res gestae or relevant fact in this matter because it provided clarity as to the reason for the appellant wanting her dead. Moreover, while the utterance was not necessary towards carrying out the

conspiracy, it formed an integral component of truly understanding the appellant's involvement as a party to the conspiracy.

[128]. With respect to Mr Welch complaint that the impugned utterance was prejudicial because it provided a clear motive for the appellant wanting the VC dead, we note that the judge was careful to warn the jury that motive was not an element of the offence and the prosecution did not have to prove same. However, if the prosecution had evidence of motive, that such evidence was admissible because from it, the intention of the offender may be inferred. She directed the jury that "…*you have to look at all the evidence, if you are not satisfied that motive has not been established, that is not the end of the case, you look at the other evidence to see if the offences have been established."* In our view, the judge's directions on motive were sufficient and it was for the jury to decide on the weight they would attach to it.

The appellant's good character

[129]. Mr Welch complained that the utterances in question constituted an attack on the appellant's character by suggesting that he was a dishonest man. He argued that this evidence neutralized the good character direction in relation to the appellant's credibility and ought to have been excluded.

The law prior to the Evidence Amendment Act 2009

[130]. In **Arthurton v R**, a case from the British Virgin Islands, the appellant who had no previous convictions was charged with unlawful sexual intercourse with a girl under the age of 13. When interviewed by the police, he denied the charge. The case for the prosecution effectively depended on the uncorroborated evidence of the child. Under cross-examination, the police officer who interviewed the

appellant revealed that the appellant was previously arrested and charged for a similar offence. Defence counsel proceeded to make an application for the jury to be discharged but although the prosecution accepted that the utterance was unfounded and prejudicial it was suggested that it may be overcome by a strong good character direction and a direction that such an utterance was "totally irrelevant and to be ignored". The judge proceeded with the matter and gave a good character direction instructing the jury that he had no previous convictions and that he was not likely to have committed the offence. She also warned the jury to disabuse from their mind the words blurted out by the police officer and reminded them that the appellant was of good character. The appellant was subsequently convicted and appealed the safety of the conviction on the basis that the judge had failed to discharge the jury when prejudicial evidence emerged and failed to adequately direct the jury in a manner that removed the prejudice. The Board of the Judicial Committee of the Privy Council considered that the central issue in the case was whether the complainant was to be believed and therefore the appellant's good character was important to this inquiry. It was held that he was entitled to both limbs of the good character direction and the prejudicial evidence that he was previously arrested for a similar offence undermined the propensity limb and with it a major plank of the defence's case. The court concluded that the judge had erred by not discharging the jury since it was doubtful whether any directions could have overcome the unfairness.

[131]. **Arthurton** was decided at a time where an accused person's character was totally protected unless he lifted his shield and made imputations or attacked the character of the prosecutor or witnesses for the prosecution[47]. The now repealed **section 13 (3) of the Evidence Act**[48], provided that:

[47] See R v Becouarn [2005] UKHL 55.
[48] Repealed by the Evidence Amendment Act 2009.

"13 (3) A person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless –

(a)…….

(b) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution".

[132]. **Arthurton** can be distinguished from the instant case. In **Arthurton**, the prejudicial disclosure made by the officer concerned a separate matter alleging that the accused had committed an offence similar in nature to the one charged which both parties accepted was unfounded and of no probative value. In this case, the impugned utterance was in relation to the same matter before the court and no objections were raised by counsel as to its admission at trial. As mentioned earlier, the utterance provided support for the appellant's motive for wanting the VC dead. **Arthurton**, therefore, is inapplicable to the instant case since it was decided prior to the coming into effect of the Evidence Amendment Act 2009.

The current law under the Evidence Amendment Act 2009

[133]. In January 2010, the Evidence Amendment Act No 19 of 2009 was proclaimed which abolished the common law rules in relation to bad character and created a new statutory regime. This amendment included inter alia, statutory recognition to bad character evidence as well as provided several gateways through which bad character evidence may be admitted. However, the provisions of the 2009 Evidence Amendment Act do not apply to preliminary enquiries or criminal trials

which were in progress before its commencement. **Section 15 X of the EAA** provides that:

> *"[15X.] Sections 15H,15I, 15J, 15K, 15L, 15M, 15N, 15O, 15P, 15Q, 15R, 15S, 15T, 15U, 15V and 15W* ***shall not apply to a preliminary enquiry or criminal trial which is in progress on or before 25th January 2010****."* [emphasis added]

[134]. The history of the instant matter is as follows: the preliminary enquiry occurred sometime around 2002, the first trial in 2004, the first appeal in 2008 and the retrial in 2017. The retrial is now the subject of this appeal and thus falls to be considered within the provisions of the 2009 Amendment and not under the law as it previously stood.

[135]. **Section 15K (1**) defines bad character in the following way:

> ***"15K(1) Reference to evidence of a person's bad character is to evidence of, or a disposition towards, misconduct on his part, other than evidence which—***
>
> ***(a) has to do with the alleged facts of the offence with which the accused is charged****; or*
>
> *(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.*
>
> ***(2) For the purpose of this section and sections 15L to 15W, "misconduct" includes the commission of an offence or other reprehensible behaviour****."* [emphasis added]

[136]. In this case, the impugned utterance accused the appellant of dishonest criminal conduct which was inextricably tied to the kidnapping, conspiracy to murder, attempted murder and assault on the VC, the offences for which he was charged. It was because of the allegation that the appellant had taken a client's monies and deposited them into his account and that the VC had known about it, that he

wanted her dead. Alleyne's evidence that the appellant had told him that the VC was talking to an officer named Frank and the Fraud Squad about his business and that they were getting too close to him so "she had to come out of it", also suggested that there may have been a link between the appellant's earlier dishonest criminal actions and the charged offences. In the circumstances, there was neither evidence of misconduct nor reprehensible behaviour that can be attributed to the appellant independent of this case. He was a man of absolute good character and was entitled to the standard direction on both limbs of credibility and propensity, which the judge rightly gave.

[137]. In **R v Weaver**[49] and **R v Palin**[50], it was held that in the event that prejudicial material against the accused was inadvertently revealed in the presence of the jury, this did not necessarily call for the discharge of the jury. Rather, the critical question was whether in all the circumstances of the trial it may have resulted in unfairness to the accused. In **Ronald John v The State**[51] it was held that the judge's direction adequately ensured that the evidence in no way influenced the jury to use it to the prejudice of the appellant.

[138]. We note that the judge gave the following direction in respect of the imputation that the appellant had stolen Mrs Rostant's monies. She stated that:

> ***"Now, the incident and the issue about monies owing, et cetera, has been put before you as background information in relation to this matter, and without that you would not have understood the evidence. But the Accused is not before the Court charged with that, so I warn you that do not, on that basis, judge the Accused negatively and if you think he might have owed her or not. No, that is not what it is about. It was only introduced as background information. He is not charged with taking any***

[49] [1968] 1 QB 353.
[50] [1969] 3 All ER 689.
[51] Criminal Appeal No. 7 of 2006.

money from Mrs. Rostant. So I wanted to tell you that in relation to that issue."[52] [emphasis added]

[139]. In our view, this direction though general, adequately addressed the imputation of the appellant stealing monies and how the jury should treat with it.

[140]. Alternatively, it may be argued that a more specific direction ought to have been woven into the good character direction, that is, that the jury should not draw adverse inferences in relation to the appellant's credibility due to the fact that he was being accused of stealing. In such a case the court must consider the impact of such an omission on the verdict of the jury. In **Carlos Hamilton and Jason Lewis v The Queen[53]** the Board held that the strength of the evidence was such that even if the jury had known about the good characters of the appellants, it would have made no difference to the verdicts. Lord Hope stated the following in paragraph 66:

> *"… **The evidence, taken as a whole, pointed inevitably to this being a joint attack on Saleem and to the fact that the appellant Hamilton was neither provoked nor was he acting in self-defence. If the jury had known about the good characters of the appellants, we do not believe that it would have made any difference to the verdicts, such was the strength of the evidence.**"* [emphasis added]

[141]. Even in cases where the jury is entitled to know of the good character of the appellant and they are deprived of that direction, once it would have made no difference to the verdict because of the strength of the evidence, the appellant suffers no prejudice. In this case, there was cogent evidence from the VC and Alleyne demonstrating that the appellant was the mastermind behind the plan to kill the VC which for the most part was corroborative of each other. There was

[52] Summation dated 1 June 2017 page 31 lines 18-27.
[53] [2012] UKPC 31. See also Bally Sheng Balson v The State of Dominica (2005) 65 WIR 128.

also supporting deposition evidence from the building's watchman, Zedikah. Without repeating the evidence, we note that the VC's stated that the appellant was involved in the conspiracy, that she had received a telephone call from him around 3 pm on the date in question directing her to go to the corner of Park and Pembroke Streets where she would meet Holder and another man in a vehicle who would take her to collect some documents from a client. Zedekiah saw the VC left around 3 pm and she walked up Pembroke Street. When the VC arrived at the corner of Park and Pembroke Streets she saw the appellant there. He told Holder "*look at the time, go handle your scene"* and told her to go with the men. At Cumberland Hill, while in the captivity of the men, Holder had informed her that the appellant was paying them to kill her. Alleyne's deposition also indicated that the appellant was paying them to kill her. He also said that after the VC entered the vehicle at the corner of Pembroke and Park Streets, the appellant said to Alleyne "*it was supposed to be a skilful operation. She mustn't rise back up at all*". That evening 15 -30 minutes after the VC left, Zedekiah saw the appellant arrive at his office and around 5:30 pm, some 2 hours later he enquired from Zedekiah if the VC had left. This suggested that he was trying to conceal any knowledge of the VC's whereabouts and his involvement.

[142]. The evidence, taken as a whole pointed inevitably to the appellant as the person who plotted and directed the killing of the VC. In the event that the judge had given the specific warning to the jury on how to deal with the impugned evidence in relation to the credibility limb of the good character direction, we do not believe that it would have made a difference to the verdict given the strength of the evidence. Accordingly, there is no merit in this ground.

DISPOSITION

[143]. The appeal is dismissed and the convictions and sentences are affirmed.

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A. Yorke-Soo Hon, JA

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M. Holdip, JA

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R. Boodoosingh, JA