

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 32/2011

**BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)**

DAVID RUSSELL v R

**Mrs Valerie Neita-Robertson instructed by Robertson and Co for the
appellant**

Miss Dahlia Findlay for the Crown

21 May, 31 July and 27 September 2013

HARRIS JA

[1] This appellant, David Russell, was convicted in the Home Circuit Court on 15 April 2011, on two counts of an indictment charging him with the murders of Emilio Richards and Omar Watson. He was sentenced to a term of 30 years imprisonment at hard labour on count one. On count two he was sentenced to life imprisonment with the stipulation that he should serve 40 years before becoming eligible for parole.

[2] A single judge refused an application by the appellant for leave to appeal against conviction. Before us was a renewal of that application. On 31 July 2013, the application was treated as the hearing of the appeal. The appeal was dismissed and the conviction and sentences were affirmed. It was ordered that the sentences should commence on 15 April 2011. We promised to put our reasons in writing. This promise we now fulfil.

Prosecution's case

[3] The prosecution's case was that sometime after two o'clock in the afternoon of 28 May 2006, Detective Constable Michael Anderson was travelling along the Dumbholden main road in the parish of St Catherine. On reaching an area of the road in the vicinity of the Salt Pond Housing Scheme, he observed three vehicles travelling in a convoy immediately ahead of him. The convoy was headed by a brown Honda Civic motor car followed by a white Toyota and a blue motor car. As soon as Constable Anderson obtained an opportunity to pass these cars he did so. However, before passing, he noticed that the appellant, who was the driver of the Honda Civic motor vehicle, put his hand over the top of the car, and pointed towards the Salt Pond Housing Scheme. The cars which had been following went in the direction of the housing scheme. This housing scheme was close to a cane field. The appellant stopped, reversed and then proceeded in the same direction as the two cars.

[4] When the appellant halted, Constable Anderson passed him. While passing, Constable Anderson said that he had a lateral view of the appellant's face, at which time, they were about 8 feet apart. He asserted that, after passing, he looked in his rear-view mirror and was able to secure a full view of the appellant's face for about 8 seconds.

[5] The appellant, Constable Anderson related, had been previously known to him for about six years. He had known him as Bigga Pang. He knew where the appellant lived and had seen him on various occasions over the years.

[6] On arrival at work at the Spanish Town Police Station that afternoon, Constable Anderson accompanied his superior officer and other policemen to a cane field near the Salt Pond Housing Scheme in Dumbholden. A white Toyota motor car owned by Andy Richards, the uncle of Emilio Richards, was seen there. The bodies of the deceased men were observed in the rear seat of that vehicle. Their hands and faces were bound.

[7] The appellant was taken into custody on 1 June 2006. After he was charged and arrested, he underwent a question and answer session, conducted by Sergeant Michael Simpson, the investigating officer. The contents are as follows:

“Question one: What is your name?

Answer: David Andrew Russell.

Question two: Are you called by any other name?

Answer: Yes. Bigga Pang.

Question number three: What is your date of birth?

Answer: March 13, 1964,

Question four: What is your occupation

Answer: Businessman.

Question five: Where do you work?

Answer: Self employed.

David Russell. 1/6/06.

Question six: How long are you self-employed?

Answer: A couple of years now.

Some five years.

Question seven: How long have you been living at Westbay?

Answer: From 1996.

...

Question eight: Who is living with you there?

Answer: Mother, father, brother, niece and nephew.

...

Question nine: Who is the owner of the house where you are living?

Answer: Mr. Gladston Russell, my father.

Question ten: What type of house, is it – what type of house, is it a two-storey house or a one-storey house?

Answer: Is just a regular house, and they build up on it and add on upstairs.

Question seven [sic]: Are you the owner of a motor vehicle?

Answer: Yes,

Question twelve: What type of vehicle, colour, make, year, is it a right hand drive vehicle and what is its license number?

Answer: Honda Civic motor car, 2001, left-hand drive, and brown colour, and I do not remember the registration number.

Question thirteen: Are you the owner of any other motor vehicle?

Answer: Yes, a 1987 Mercedes Benz, which is parked in the garage downstairs and a white Toyota Land Cruiser, which is write off.

Question fourteen: Is the 2001 Honda Civic registered in your name?

Answer: Yes, ...

Question fifteen: Do you know a man by the name of Omar Watson, o/c 'Blacks' o/c 'Lotto'?

Answer: Yes, I know him as Omar or 'Blacks'.

Question sixteen: Do you know his address?

Answer: No, I only know that he lives in Newlands.

Question seventeen: How long have you known Blacks o/c Omar.

Answer: About five years.

Question eighteen: Where did you meet him?

Answer: I think over Hellshire.

Question nineteen: The man you called name Blacks, have [sic] he ever visited your home?

Answer: Yes.

Question twenty: How many times?

Answer: Plenty times.

Question twenty-one: Do you know Blacks [sic] girlfriend?

Answer: No.

Question twenty-two: Do you ever meet any of Blacks [sic] children?

Answer: No.

Question twenty-three: What type of work.

twenty-three: What type of work Blacks does?

Answer: No, but I know him have a shop up at Hellshire

Question twenty-four: Do you and Blacks, have ever been in any business or transaction?

Answer: Yes.

Question twenty-five: What type of transaction of [sic] business that you and Blacks ever had?

Answer: He bring [sic] things to sell me.

Question twenty-six: When you mentioned things that he brought to sell you, what type of things do you mean?

Answer: Like a few ounces.

Question twenty-seven: When you say ounces, what are you referring to?

Answer: Like coke.

Question twenty-eight: Is coke called cocaine:

Answer: Yes.

Do you know – question twenty-nine. Do you know that coke and cocaine are drugs?

Answer: Yes

Question thirty: Do you see [sic] ganja?

Answer: No.

Question thirty-one: Do you sell cocaine?

Answer: No, but if I know somebody that wants something, I will tell them a price and make a money off it.

Question thirty-two: Do you know Emelio, o/c Biggs?

Answer: No.

Question thirty-three: Do you know Gregory Park or Caymanas Race Track?

Answer: Yes, I know Gregory Park and Caymanas Race Track, because I own a horse there.

Question thirty-four: When was the last time you spoke with Blacks, Omar, whose name is also Lotto.

Answer: Last week Sunday the 28th day of May 2006.

Question thirty-five: Have you ever spoken between Black and Omar are [sic] /or the man call 'Lotto' any time, between 21st day of May 2006, and Saturday, the 27th day of May, 2006?

Answer: I spoke to him on Saturday the 27th of May 2006.

Question thirty-six: What time on Saturday did you speak with him?

Answer: I don't remember what Time.

Question thirty-seven: How did you talk with him?

Answer: On the phone and in person.

Question thirty-eight: Where did you see him?

Answer: He come to my house in the night.

Question thirty-nine: Was he alone when you saw him on the 27th day of May 2006.

Answer: No, he wasn't alone

Question forty: Who was with him?

Answer: Two other guys, I don't know them.

Question forty-one: Were you alone when Lotto and the two men visited you?

Answer: Yes.

Question forty-two: What type of transaction did you and these men have?

Answer: No answer.

Question forty-three: Are you the owner of a license [sic] firearm?

Answer: No.

Question 44: If any of the men who was at your house on Saturday the 27th day of May, 2006, say that you showed them a firearm, are they telling a lie?

Answer: Yes

Question 45: What type of clothes were you wearing on the night in question?

Answer: A line [sic] suite.

Question 46: Do you know how the men reached your house on Saturday the 27th day of May, 2006?

Answer: They drive [sic] a white car.

Question 47: Do you know the make car or what type of car?

Answer: It was a station wagon. I don't know if it is a Toyota or Caldina.

Question 48: What was the visit about?

Answer: They just come to talk to me about something.

Question 49: What was that something?

Answer: (No answer)

Question 50: How long were these men at your house?

Answer: About half hour.

Question 51: What was the time they left, night or day?

Answer: In the night.

Question 52: Did you make any contact with any of the men that Saturday night after they left?

Answer: Yes, I called one of them.

Question 53: Who did you call?

Answer: 'Blacks'.

Question 54: How did you make this communication and by what means?

Answer: I called him with the cellular.

Question 55: What is the number for your cellular and 'Blacks' cellular?

Answer: My cellular number is 425-5355 and 'Blacks' cell is 362-7499.

Question 56: What type of cellular do you own?

Answer: Both of them is Digicel.

Question 57: What did you two speak about?

Answer: (No answer).

Question 58: When was the next time you saw these three men?

Answer: Sunday, the 28th, they came to my house about 1:30 p.m. in the afternoon.

Question 59: Before the men came to your house on the Sunday morning, the 28th May, 2006, did you

speak to 'Blacks' on the telephone or see him in person?

Answer: He called me on the phone.

Question 60: What did he speak to you about?

Answer: He asked what's going on, if I see the guy that they came to see on Saturday night and I told him no and I am not getting through.

Question 61: Who was the guy?

Answer: Some guy name 'Robby' from Red Hills.

Question 62: What type of business 'Robby' does?

Answer: I don't know.

Question 63: What did you want to speak with 'Robby' about?

Witness: Something that 'Blacks' want to talk to him about.

Question 64: Do you know the something 'Blacks' wanted to talk to him about?

Answer: No.

Question 65: What type of vehicle did these men leave in?

Answer: The same car that they came in on Saturday.

Question 66: Where did you talk with the men on Sunday?

Answer: We are [sic] on the outside talking and one of them wanted some water and I sent 'Blacks' to go and get it.

Question 67: Was there anyone with you on Sunday when they came?

Answer: No, only my mother and father was [sic] there.

Question 68: Do you know a man by the name of 'Tusky'?

Answer: Yes.

Question 69: When was [sic] last time did you see 'Tusky' and where?

Answer: Sunday when mi go play football match a Union Gardens.

Question 70: What time did you leave your home for Union Gardens?

Answer: About 2:30 p.m.

Question 71: You are telling me that you did not see 'Tusky' at your house on Sunday, the 28th day of May?

Answer: No.

Question 72: If anyone say that you were in the company of 'Tusky' between the hours of 12 midday and 3:30 p.m., Sunday the 28th day of May, 2006, are you saying that they are lying?

Answer: Yes, they would be lying

Question 73: Can you describe 'Tusky'?

Answer: Yes.

Question 74: Describe him?

Answer: Him tall, me bigga than him, like a medium built, my complexion and maybe him inna him 30's.

Question 75: Anything peculiar about him, like bumps, cut, and mark and those things?

Answer: No, sir.

Question 76: Is 'Tusky' a regular visitor at your home?

Answer: No.

Question 77: On Sunday the 28th day of May, 2006, did you leave your house after the men left?

Answer: No, not right away at the exact moment.

Question 78: Who left together?

Answer: They left together.

Question 79: Who are they, namely?

Answer: 'Blacks' and the other two.

Question 80: Do you know Dumbholden in St. Catherine?

Answer: No. I don't party in St. Catherine.

Question 81: Between 2:30 p.m. and 3:00 p.m. on Sunday 28th-5-06 were you along with other men driving in the Dumbholden area of St. Catherine?

Answer: No.

Question 82: Where were you at that time?

Answer: That was the time I went to Union Gardens to play a football match.

Question 83: If anyone say that on Sunday the 28th day of May, 2006, you were driving your Honda, champagne colour or brownish motor car, along Dumbholden main road with two other vehicles in company of you, to include a white Toyota station wagon registered 3202 EJ, are they lying on you.

After that question

Answer: They would be lying.

Question 84: Are you saying that on the [sic] Sunday 28th-5-06 between the hours of 2:30 p.m. and 3:00 p.m. you were not driving in the company of two other cars?

Answer: No.

Question 85: On Sunday the 28th-5-06 at the house, at no time were you upstairs with three men?

Answer: Is just one time when me send 'Blacks' up there for the water.

Question 86: Are you saying that on Sunday 28th-5-06, you and the three men were in your kitchen transacting business?

Answer: No, the only time was Saturday night.

Question 87: And whilst doing so, did you make arrangements to buy cocaine from them?

Answer: No, we did not make [sic] arrangement.

Question 88: Are you saying that on Sunday 28-5-06 between 2:30 p.m. and 3:00 p.m. whilst travelling along Dumbholden main road in the company of the two other cars, you stopped at an entrance to the cane field at Salt Pond, used your hand to indicate to them to turn down on the cane interval?

Answer: No.

Question 89: Did your car follow behind the other two cars in the interval?

Answer: No.

Question 90: Where is your car now?

Answer: Mi bredda suppose to have it, his name is 'Chris'.

Question 91: Do you have lots of friends?

Answer: Yes.

Question 92: In terminology, you refer to your friends as 'soldier'?

Answer: No.

Question 93: Do your friends refer to you as 'Boss'.

Answer: No.

Question 94: As a businessman, do you refer to yourself as a leader in command by giving orders?

Answer: No.

Question 95: Do you know the tone of voices?

Answer: No.

Question 96: So if you heard your mother calling you, would you recognize her voice?

Answer: Yes.

Question 97: What tone of voice do you believe you have?

Answer: Soft.

Question 98: Did you give the men, whom were upstairs with you on Sunday, the 28th-05-06, who were not involved in the transaction [sic]. To tie up the men and you assisted them.

Answer: No.

Question 99: Do you know duct tape?

Answer: Yes.

Question 100: I am putting it to you that on Sunday 28th-05-06 Emelio Richards o/c 'Biggs', Andy Richards and Omar Watson o/c 'Lotto' o/c 'Blacks' o/c 'Omar' came to your home about 12 midday as planned to sell you cocaine and during which time four men, along with yourself, armed with guns, held them up, robbed them of cash, jewellery, cell phones, cocaine, used duct tape [sic] tie them up and put them in their vehicle, drive them along with two other cars including your car to Salt Pond, Dumbholden.

District in a cane field where you and the men opened gunfire on them killing Emelio Richards o/c 'Biggs' and Omar Watson o/c 'Blacks' o/c 'Lotto', also injuring Andy Richards leaving them there in the car?

Answer: Mi nuh know nothing about that."

[8] Mr Andy Richards, who was at the scene of the crime, gave a statement to the police on 29 May 2006 and one on 5 June 2006. Unfortunately, Mr Richards died prior to the trial. His statements were admitted into evidence after a voir dire was conducted. The statement of 29 May, so far as relevant, is as follows:

"Some of the places I have known is [sic] Portmore, in St. Catherine, Ochi and Montego Bay, St. James. I also know several people, some of whom I have

known by real names, alias names and some by faces. I also know all of my brother Louis Richards [sic] children to include Emelio Richards who was my nephew and residing at 4 Meadowvale Drive, Gregory Park, St. Catherine. I also know a man call [sic] 'Lotto' for the past three years living in Newlands, St. Catherine. He operates a little shop on the Hellshire Beach, St. Catherine. 'Lotto' is a good friend of mine and I also met with him whenever it is necessary.

I am the owner of a white Toyota motor car, wagon shape [sic], tinted and registered 3202 EJ. I use this motor car to do any private business.

About three weeks ago, a man who I knew only by the name of 'Kam Bull' of an Old Harbour Bay address gave me some cocaine, which he found at sea. 'Kam Bull' is known to me over the past ten years, and he and I always have a good relationship. When 'Kam Bull' gave me the cocaine, which is about 7½ ounces, I put same at my home and contacted my nephew, Emelio Richards and told him about it. He told me that he will seek a buyer for it. Sometime last week, I received a telephone call from 'Lotto' and we talk for a time and I told 'Lotto' about the cocaine, 'Lotto' told me that he is going to check someone and call me back.

On Saturday the 27th day of May, 2006 [sic] about 7:00 a.m., 'Lotto' called me on my cell number, 884-4270 and told me that I must come and check him at Newlands.

That said day [sic] about 8:00 p.m, I drove my private motor vehicle to Lot 34 Meadowvale Drive, pick up my nephew and then drove to Newlands to pick up 'Lotto'. 'Lotto' to take us to West Bay Housing Scheme in Portmore. We reached at the home about 12:00, midday and there I saw a man who 'Lotto' introduce to me as 'Biggs'. 'Biggs' is of fair complexion, stout-built about 5'9" in height. He look to me like somebody in his 40's. At the time I met him, he was wearing a short pants, sleeveless ganzi also a [sic] slippers. All three of us speak with 'Biggs' about the cocaine and informed him of the amount that it was, 7½ ounces, and he value [sic]

the cocaine for One Hundred and — 119,000.00. He took us upstairs in his house and all of us talk about

...

Talk until about 10:00 p.m. we left his house. During the time speaking with 'Biggs' he showed us a gun which he had in his waist. I thought it was a licence [sic] firearm. I only saw the black handle.

On Sunday the 28th day of May, 2006 about 12:00 midday, my nephew, "Lotto", and I went back to 'Biggs's' house in West Bay. I drove my private motor vehicle, and I had in my possession the cocaine. On reaching there, I saw 'Biggs'. He was dressed in a short pants and a merino. 'Biggs' was sitting on his veranda and he told us that we must pull the gate and come inside. I took the cocaine with me and give it to 'Biggs' inside the house. The cocaine is a white powdery substance, and it was in a black scandal bag.

On reaching upstairs of 'Biggs' house, he took us to a section of his house, the kitchen, and he told us to wait there on him. 'Biggs' went downstairs and returned with another man whom I was seeing for the first time. This man is of fair complexion, medium built, about 5' 6". He was wearing a jeans pants and a T-shirt. He had a scandal bag in his hand and he went across to my nephew Emelio and shook his hand as if he knew my nephew before. As we were there sitting there -- as we were sitting there, I suddenly saw three other men alighted [sic] from the living room with three guns in their hands. All three guns were short guns. The men ordered us to get down on our belly [sic] and then use a shoe lace to tie my hands. They began to tie up all of us with duct tape, which they put over all of us mouth, eye and tie our hands behind us. While we were there I heard the man who shook my nephew's hand said [sic] to him don't worry, everything will [sic] all right.

The men who alighted from the living room with guns, I can remember two of them. The first one is of dark complexion, medium-built about 5'6" wearing a blue jeans pants and T-shirt. He is in his early 20s. The other man is of a black complexion,

slim built wearing also a white T-shirt, blue jeans pants. He seem [sic] to be in his early 30s. He had bumps in his face and he is the said — the said man who used a duct tape to ...

Used the duct tape to tie us up.

The men then took me downstairs and then drove my car into 'Biggs' drive way and ordered me to get in the trunk. The men told me to lay down. The man then took Emelio my nephew next and then they took 'Lotto' and placed both of them on the rear seat. Two of the men came into the car. One sit in the driver seat and the other sit in the right side of the rear seat. The man who sit in the rear seat had a gun, and he constantly used it to hit me in my head saying I must keep it down. The car drove out of 'Biggs' premises. I heard two of the other vehicles start and I peep up and notice that one of the vehicles was 'Biggs's' vehicle. 'Biggs' was driving his vehicle. The vehicle drove for about ten minutes until it stopped. Suddenly as the vehicle stopped, I heard one of the men said, 'Come duh weh yuh ah duh and mek we move fast.' Immediately I heard several explosions and I then felt a hit to my forehead, and I lean my head lower. ... in the car. After the explosions ceased I heard vehicles drove [sic] off and I suddenly turned around and kick my car trunk to open same, but it did not open. I then climbed over and there I saw my nephew and 'Lotto' lying with their heads on either side of the car. I then rolled out of the vehicle as my hands were still tied. I found myself in a trench in a cane-field and I get up and began to walk, and I saw a car passing on the roadway, and I then realized that I can walk that direction. On reaching the end of the road – on reaching the ending of the road I saw a man with a 'bill' or cutlass and I ask him to cut off the duct tape but he refused to cut it off. I tried to stop several vehicles but they did not stop. I then run out into the road and the vehicles started to stop and a man then pulled off the duct tape off my mouth and I started to explain to them what took place. I was also released of the duct tape that bound my hands behind me.

Whilst there I saw a police radio car drove up [sic] and I told the police what happened, and they drove to where my nephew was; I saw my nephew. And they drove to where my vehicle was. I saw my nephew bleeding from his head also 'Lotto' bleeding from his head. Both men appeared to be dead. I was then taken to the Spanish Town Hospital where I was treated and sent home. I then took the police to 'Biggs' house in West Bay, Portmore where I explained to them about the transaction and what took place.

I was robbed of \$5000.00 my cellular phone also my nephew was robbed of his gold rings and cash. 'Lotto' was also robbed of his properties. If I happen to see all these men that I have identified as described in this statement, I will [be] able to identify them to include 'Biggs' who I spoke with as it relates to the buying of the cocaine.

I see all these men clearly as it is midday when all these incident [sic] took place. I have all these men under observation for a period of five minutes.

For a period of five minutes from the time they came from the living room until the time when I was last tied up. I did not receive no money for the cocaine from 'Biggs' although I gave him the cocaine. ...

That on Sunday the 28th day of May, 2006, I remember the type car that I saw 'Biggs' driving, is a Champagne colour Honda Civic. I don't remember the licence number. I also remember that I saw 'Biggs' with a gun holding over my nephew [sic] head and this was before the men put the tape over my face. I also remember that when they took me to the motor vehicle and I was inside the trunk, I saw one of the men pulling my nephew back to the house, because he was making noise and it was 'Biggs' I saw carry a tape and wrapped [sic] my nephew [sic] face with same preventing [sic] from crying out.

As I said before that it was on Saturday the 27th day of May, 8:00 p.m. was the first time I met 'Biggs'. I did not have any transaction with him before and it was 'Biggs' whom arranged with us to bring the cocaine to him.

I had no reason to tell a lie on 'Biggs', because I did not know him before also I did not have any fuss or quarrel with him. The voice that I heard in the cane-field – in the cane field and while I was in the trunk of the car before the men fired the gunshot on us, I recognize this voice to be 'Biggs' voice saying, 'Duh weh unno ah duh make wi move fast.' I am very positive that these words were said by 'Biggs' and it was done in a command [sic] manner.

I am saying that my nephew and my friend 'Lotto' [sic] death was the cause of 'Biggs' [sic] command by doing and telling the men what to do.

'Biggs' house is a upstairs and downstairs house. 'Biggs' occupied the upstairs and I also see the photograph of a horse with 'Biggs' and his brother leading a racehorse in the winning enclosure. There are a lot of more photographs with 'Biggs' sitting inside a Benz and other vehicles."

Mr Richards' statement of 5 June 2006, indicates that he pointed out the appellant at an informal identification parade on that date.

[9] On 2 June 2006, Dr Kadiyala Prasad carried out a post-mortem examination on the bodies of the deceased men. Mr Norman Palmer, who had known Omar Watson (called 'Lotto') for over 20 years identified his body to Dr Prasad. Emilio's body was identified to the doctor by his father, Mr Louis Richards.

[10] The post-mortem examinations revealed that Emilio died from a gunshot wound to the left temporal region of his head, while Watson died from multiple gunshot wounds.

[11] Three 5.56 mm expended cartridge shells, seven 9mm luger expended cartridge cases and one piece of copper jacket lead bullet were found at the scene. These were analysed by the forensic expert. The 5.56 cartridges were fired from a rifle. The 9mm luger cartridges were fired from the chamber of an automatic pistol.

[12] The palms and the back of the appellant's right and left hands were swabbed. The analysis of the swabs showed trace level of gunshot residue on the palm of his right hand. No evidence of gunshot residue was found in the left palm or on the back of his right hand.

[13] On 8 June 2006, Miss Tamara Hoilett, the common law wife of Mr Andy Richards, identified his body to the doctor at the time of the post-mortem examination. Mr Louis Richards, brother of Mr Andy Richards, gave evidence of attending Mr Richards' funeral. A copy of the funeral programme was shown to him. He was asked to identify a photograph on the funeral programme. The photograph was tendered into evidence for identity.

The appellant's case

[14] The appellant made an unsworn statement. He stated that he lived at Lot 105 Miramar Close, West Bay, Portmore and having heard that he was wanted by the police, he went to the police station with his attorney-at-law. He further asserted that at about 2:30 pm on the day of the incident he went to Union Gardens to play football.

[15] Christopher Russell, brother of the appellant, testified on his behalf. The appellant drove a 2001 brown Honda Civic motor car before his incarceration, he said. It was a left hand drive vehicle. During his incarceration, the appellant asked him to sell the vehicle in order to pay his bills. As a consequence, he obtained a valuation and an appraisal of the vehicle which was done by MSC McKay. Thereafter, the vehicle was sold by Mack D's Auto.

[16] He said the appellant was called Andrew, David or Bigga and that he had never heard the appellant being called Bigga Pang. He stated the appellant's occupation involves the training of racehorses and music. The appellant did not own a firearm. He further stated that the appellant once owned a 1987 Mercedes Benz and a white Toyota Land Cruiser.

[17] Mr Marlon Fearon, a valuator at MSC McKay, was also called as a witness for the appellant. He stated that in August 2006, he met with Christopher Russell who brought a left hand drive brown Honda Civic motor car for which he prepared a valuation.

Grounds of Appeal

[18] After abandoning the original grounds of appeal, Mrs Neita-Robertson sought and obtained leave to argue three supplemental grounds. They are as follows:

"1. That the Learned Trial Judge erred in not directing that the statement of the witness, Andy Richards, and the

Question [sic] and Answer [sic] of the Appellant be edited to exclude those aspects of it which were highly prejudicial and not probative.

This failure denied the accused a fair trial in that it would have been impossible for a jury not to weigh the elements of common design and identification in the context of the offending sections of the statements (i.e. the drug dealings)

2. That the Learned Trial Judge erred in inviting the jury to speculate on the issue of motive as advanced by the Prosecution, thereby compounding the prejudice and denying the Appellant a fair trial.

3. That the Learned Trial Judge erred in allowing the Prosecution to tender in evidence a photograph of the deceased witness Mr. Andy Richards from his funeral programme as that was more prejudicial than probative."

Submissions

[19] The brunt of Mrs Neita-Robertson's attack, in respect of the trial, was with reference to the inclusion of prejudicial matters in the evidence. She argued that certain aspects of the witness statement of Mr Andy Richards and of the questions and answers administered to the appellant, being highly prejudicial, far outweighed their probative value and ought to have been excluded. The learned trial judge's failure to have excluded them rendered the trial unfair, she contended.

[20] Further, she argued, on a reading of Mr Richards' statement in its entirety, the material discloses dealings in illegal drugs and the appellant, having implicated himself in relation to the sale of cocaine in answering the questions

posed, this, she contended, being highly prejudicial to the appellant, would have been deeply ingrained in the minds of the jury. Those areas of the witness statement and the questions and answers, admitting drug dealings by the appellant, ought to have been edited, she argued, as the editing would not have affected the "smooth flow" of the evidence in the prosecution's case. Although the learned judge, in admitting the statement into evidence, gave warnings to the jury, the material being so highly prejudicial to the appellant, the mischief could not have been cured by a warning, she argued. The warning, she submitted, undermined and reduced the desired effect of the questions and answers.

[21] The prejudice, she contended, was compounded by the learned judge advancing a motive in endorsing the prosecution's address that "this was a drug deal gone sour ... because the accused was licky licky and you remember, the wanga gut song that was referred to". The learned judge, by so doing, she argued, would support a motive by showing that the persons were killed because of the appellant's greed. Further, she argued, Mr Richards stated that no money had passed and there is no evidence that payment was made to the appellant, or that a payment would have been made on the day of the incident.

[22] Counsel further argued that prejudice was also shown by the learned judge permitting a photograph appearing on the funeral programme of Mr Andy Richards to be admitted into evidence as this would have moved the jury to

entertain sympathy for him. Mr Richards had been identified by the investigating officer and by his relatives, therefore, it was unnecessary for him to have been identified through the photograph, it being of no probative value, she contended.

[23] Mrs Neita-Robertson pointed out that, during the voir dire, counsel for the appellant had made a request of the learned judge that the statement be excluded under section 31L of the Evidence Act for the reason that its inclusion would have been unfair to the appellant. In these circumstances, the judge's failure to have directed that the offending areas of the documents be removed, operated prejudicially to the appellant.

[24] Miss Findlay, for the Crown, argued that the prosecution is obliged to put before the jury matters which are necessary to establish the commission of the offence and the background material relating to the drug transaction was highly relevant in order to give the jury an intelligible, comprehensive view as to what transpired. This is a case based on circumstantial evidence, which requires the pieces being put together to form the foundation of the case, she submitted. The statement of Andy Richards, coupled with the questions and answers in relation to the appellant in respect of the negotiations in the drug deal, are not incidental to, but are an integral part of the murder, she argued.

[25] The relationship between the appellant and the witness related only to the drug transaction as the witness was not previously known to the appellant when he was taken to the appellant's home on 27 May, she contended.

[26] The learned judge being charged with the responsibility of putting forward the case for the prosecution and the defence spoke of motive with reference to the Crown's case, she submitted. In assisting the jury to understand the case, the learned judge gave them proper instructions and did not fail to inform them how they should deal with the evidence, she argued. The issues were outlined to them by the learned judge who gave them a strong warning, she submitted. The following authorities were cited by counsel in order to bolster her submissions: ***Orville Brown v R*** [2010] JMCA Crim 74 and ***Bruce Golding and Another v R*** SCCA Nos 4 & 7/2004, delivered on 18 December 2009.

[27] It was also her submission that the funeral programme was tendered into evidence to close the nexus to show that Andy Richards was the person who was identified as the witness.

Analysis

[28] The evidence of the witness, Mr Andy Richards, was admitted under section 31D(a) of the Evidence Act which empowers the court to do so, provided certain conditions are satisfied, one of which is that the witness is dead. There was proof of Mr Richards' death.

[29] Section 31L of the Evidence Act grants to a trial judge the discretion to exclude evidence which is prejudicial to an accused. It states:

“31L. It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court,

the prejudicial effect of that evidence outweighs its probative value.”

[30] During the trial, counsel for the appellant made an unsuccessful application to have the witness statement given by Mr Andy Richards, excluded. Before this court, Mrs Neita-Robertson does not seek to have the statement excluded. Her main complaint is that the learned judge erred in not editing the offending parts of the statement and the questions and answers, thus rendering the trial unfair.

[31] The appropriate editing of statements or recorded interviews is a matter for a trial judge’s discretion – see - ***R v Jefferson and Others*** (1994) 99 Cr App Rep 13. Although, in the present case, at the trial, the learned judge did not accede to counsel’s request to exclude the witness statement, the question now arising is whether she ought to have excluded such parts of the witness statement and the questions and answers as were potentially prejudicial to the appellant.

[32] It is true that a trial judge may exclude evidence if its prejudicial effect outweighs its probative value. However, every case is dependent upon its own facts. Where the complaint relates to the improper admission of evidence, in making a determination as to the proper course which ought to be adopted by the trial judge, this court is under a duty to examine the case in its entirety. In its review of a case, the task of the court is to satisfy itself that, at trial,

no miscarriage of justice had occurred and if the court is so satisfied, a conviction will not be disturbed.

[33] It is well settled by the authorities that an appellate court is reluctant to interfere with a trial judge's exercise of his or her discretion except it is plain that such discretion had been wrongly exercised. The court, however, will only interfere in circumstances where an accused would be justified in asserting that that which had transpired at trial was severely overwhelming, incurably wrong and unfair to him or her. Where the subject matter of the complaint relates to the exclusion of evidence, the court will take into account whether failure to exclude the evidence would have adversely affected the fairness of the proceedings and whether the effect was so devastating, that it would render the admission of the evidence incapable of curative action by the trial judge.

[34] It cannot be denied that the impeached areas of Mr Richards' witness statement show that the appellant was involved in dealing in illegal drugs. Nor can it be disputed that certain aspects of the appellant's questions and answers also reveal his involvement in activities relating to cocaine. Clearly, the foregoing raises the issue of prejudice against the appellant.

[35] Evidence prejudicial to an accused may be adduced where its admission is essential in establishing the background of an alleged offence. The learned

author of Blackstone's Criminal Practice 2007, at paragraph F12.7, places this proposition in the following context :

"Where an offence is alleged it may be necessary to adduce evidence of the background, against which the offence is committed even though to do so will reveal facts showing the accused in a discreditable light."

[36] In ***Bruce Golding and Another v R*** this court considered, among other things, the question of the admission of evidence which is prejudicial to an accused. In that case the applicants were charged with the offence of murder. There was evidence from a witness, Andre Blake, that earlier on the day of the incident, the applicant Golding and others, armed with cutlasses, had chased the witness and the deceased. Counsel for the applicant raised a challenge to this evidence on the ground of its irrelevance, or, in the alternative, that its prejudicial effect outweighed its probative value. The challenged evidence was held to be admissible. At page 46, Morrison JA, made reference to the principle as to the admissibility of prejudicial evidence laid down in ***R v Pettman***, unreported, delivered 2 May 1985, in which, he cited Purchas LJ as saying:

"... where it is necessary to place before the jury evidence of part of a continual background or history relevant to the offence charged in the indictment, and without the totality of which the account placed before the jury would be incomplete or incomprehensible then the fact that the whole account involves including evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

Morrison JA went on to say:

"R v Pettman was specifically approved in **R v Sawoniuk** [2000 2 Cr App R 220] where Lord Bingham CJ, as he then was, said this (at page 234):

'Criminal charges cannot be fairly judged in a factual vacuum. In order to make a rational assessment of evidence directly relating to a charge it may often be necessary for a jury to receive evidence describing, perhaps in some detail, the context and circumstances in which the offences are said to have been committed'."

[37] After making reference to Blake's evidence, the learned judge continued by saying:

"... that the evidence of Andre Blake, to which no objection was taken by either of the applicants at the trial, was clearly relevant and admissible, not only for the purpose of showing context and motive, but also as a factor which the jury would have been entitled to bear in mind when considering whether they could safely act on the evidence (particularly with regard to identification) of the later events of 3 December 2001. We therefore consider that the trial judge was correct when she told the jury that this was evidence which, if they accepted it, 'may provide some background information of the circumstances leading up to the incident on the night of December 3, 2001' and that it was for them to decide "whether it offers any support to the evidence of identification given by Mr Hall and Mr Bowes'."

[38] In **Orville Brown v R** this court also considered the question of the admission of prejudicial evidence. In that case, the appellant was charged with the offences of illegal possession of firearm and robbery with aggravation. There

was testimony from a witness who stated that he had, previously seen the appellant “do dem something deh” and that he had observed his [the appellant’s] behaviour “all the while”. These statements were admitted in evidence, despite a challenge that their prejudicial effect outweighed their probative value. The admission of the evidence was approved by this court as furnishing the background to the commission of the offences. Phillips JA, at paragraph [30], said:

“It is therefore patently clear that evidence can be led and will be considered relevant and admissible if providing a background against which the offence was committed and particularly if it is adduced to strengthen the visual identification.”

[39] In the present case, Constable Anderson spoke of observing a brown Honda Civic motor car followed by a white Toyota and a blue motor car travelling in a convoy at about two o’clock on the afternoon of 28 May 2006. All three cars went in the direction of the Salt Pond Housing Scheme which is near to a cane field where the bodies of the deceased men were found. Constable Anderson said he had known the driver of the Honda Civic motor vehicle as Bigga Pang (the appellant).

[40] Mr Richards spoke of being taken to a West Bay Housing Scheme on 27 May 2006 where Lotto introduced him to the appellant. An arrangement was made between the appellant and Mr Richards for the delivery of cocaine to the appellant. On 28 May, Mr Richards, accompanied by Emilio and Lotto,

returned to the appellant's house. Mr Richards delivered the cocaine to the appellant who invited them into his house. Mr Richards, Emilio and Lotto were bound by men, armed with guns. They were placed in Mr Richards' car and taken to the cane field where Emilio and Lotto were shot and killed.

[41] The appellant, in the questions and answers, stated that he is also called Bigga Pang. He knows Lotto who would bring cocaine to sell him but he, the appellant, does not sell cocaine. However, if someone known to him "wants something" he would "tell them a price and make a money off it". He asserted that Lotto and two other men who were not previously known to him visited his house on 27 May 2006 and that he last spoke with Lotto on 28 May 2006. He also related that he did not make any arrangement to purchase cocaine from these men.

[42] There is, on one hand, the appellant's case in which he raised the defence of an alibi. He stated that at 2:30 on the afternoon of the incident, he was at Union Gardens where he played a game of football. If the jury accepted his alibi, then undoubtedly, he would have been acquitted. On the other hand, there is the evidence of the prosecution. We would hasten to make it clear that the evidence of the appellant's involvement in the illicit drug transactions would not be the driving force which would make the impugned evidence admissible. What is of importance is whether, in the circumstances of this particular case, it would have been fair to have admitted the unedited

witness statement and questions and answers, notwithstanding the admission would have been prejudicial to the appellant.

[43] The present case is one in which the prosecution substantially relies on circumstantial evidence. The evidence contained in the impeached areas of the documents was intrinsically tied to the event and could have been properly introduced into evidence as a part of the narrative of the background of the prosecution's case. The deceased men were shot and killed after they and Mr Richards had gone to the appellant's house in keeping with an arrangement between Mr Richards and the appellant on the previous day. Clearly, the inclusion of the impeached evidence would have been necessary in order to fortify the prosecution's case to show that the appellant could have been one of the possible killers, he being in the company of other men who had kidnapped Mr Richards and the two deceased men.

[44] A further complaint of Mrs Neita Robertson was that the tendering of Mr Andy Richards' photograph appearing on his funeral programme, as an exhibit in the trial, despite the existence of evidence from a witness in proof of Mr Richards' death, was prejudicial to the appellant as it could have evoked some sympathy for Mr Richards. The photograph was admitted into evidence for identity and was shown to Sergeant Morant for the purpose of identifying Mr Richards as the person who attended the identification parade. The transcript of the proceedings does not disclose that the jurors had been afforded an

opportunity to view the photograph. It follows therefore, that no prejudice would have been suffered by the appellant in this regard. However, it is obvious that there was no necessity for the photograph to have been tendered as proof of Mr Richards' death. Miss Hoilett had given evidence identifying him to the doctor who performed the post-mortem and there was also the evidence of Mr Louis Richards who spoke of attending his funeral. In the interest of good practice, we would suggest that, at trials, the use of funeral programmes with photographs in proof of the death of a deceased person be discontinued.

[45] It was also Mrs Neita Robertson's contention that the learned judge's directions to the jury on motive were prejudicial to the appellant. We are constrained to disagree with this challenge advanced by her. At page 717 of the summation, the learned judge had this to say on motive:

"And just a few words on motive, because I think, Counsel for the prosecution had mentioned about the motive in this case. Although the prosecution do not have to prove motive, evidence of motive is always admissible, in order to show that it is more probable that the accused committed the offence charged."

It is clear that the learned judge was not drawing the jury's attention to evidence showing motive on the part of the appellant. She was merely drawing to their attention to the fact that the prosecutor had raised the issue of motive and went on to inform them that evidence of motive is admissible, despite the fact that the Crown is not required to prove it. She explained to them that motive may go to show the commission of an offence with which an accused is charged. It was

undoubtedly permissible for the learned judge to have given these instructions to the jury.

[46] The learned trial judge went on to make mention of the prosecutor's comments that it was "a drug deal gone sour". Although this would in fact point to motive, significantly, she addressed the comments by issuing a comprehensive warning to the jury. At page 651 of her summation, she said:

"And when counsel for the prosecution was making her submissions to you, she had mentioned about [sic] that this case is all about a drug deal gone sour, and about wanga gut, liki, liki and all that sort of thing, but let me say to you that, have no prejudice in your minds about the transaction which these persons, if you find that they were involved in these undertakings. Their morals are not on trial, and I would say to you, especially, do not use that as a basis to determine the guilt of this accused even if you accept that there was a drug deal that had gone sour. That is not the basis upon which you are to conclude that the counts of this indictment which charges [sic] him for murder has [sic] been proved. As I said, people's morals are not on trial and even if the activity was a reasonable activity you have to look at the totality of the evidence and bear in mind what I told you that the Crown was required to prove as it relates to the charge of murder and see if it falls in the elements that I told you about has [sic] been established. So have no prejudice for the accused if you find it is a drug deal that had gone sour or against persons who had gone to his house. In relation to this 'drug deal' have no prejudice against them. On that basis you have to look at the totality of the evidence because bear in mind the indictment charges for the offences of murder. Okay. So I will just give you that warning as it relates to that aspect."

[47] Later, the learned judge drew the jury's attention to the potential risk of relying on Mr Richards' statement, it having not been tested under cross-examination. At page 715, she said:

"I must, however, warn you that these statements have not been verified on oath, nor has the author, Mr. Andy Richards, been tested under cross-examination. I must, therefore, point out to you the potential risk of relying on his statements when you, the jury, have not been able to assess his evidence, and the fact that you have not seen him being cross-examined, and you must - - I must warn you to scrutinize the statements, and the evidence contained in the statements, with particular care, you will have to give it such weight as you think fit, always bearing in mind that these statements have not -- well, the maker of the statements have [sic] not come before this Court for you to see, hear and assess him."

[48] As can be perceived, the learned judge, with scrupulous care, instructed the jury as to the approach they should adopt in dealing with Mr Richards' evidence. She did not fail to inform them that they should disabuse their minds of the evidence in respect of the appellant's dealing in illicit drugs. She specifically impressed upon them that they were not assessing the morals of the appellant and that they should look to the evidence to satisfy themselves of the appellant's guilt and should not convict unless they were sure that he had committed the offences.

[49] It cannot be disputed that some degree of prejudice would have been occasioned by the admission of the impeached areas of the witness statements and questions and answers into evidence. The learned judge directed her mind

to the issue of prejudice. She was mindful that this was a case in which a warning would have been an effective safeguard in assuring a fair trial. It could not be said that the prejudice had not been cauterized and eradicated by the very clear instructions given by the learned judge.

[50] There is absolutely no reason to disturb the learned judge's exercise of her discretion in allowing the trial to proceed without editing the relevant documents. She was perfectly entitled to admit the unedited documents into evidence and leave the case for the jury's deliberation. Her warning to them, being expressed in powerful terms, demonstrates that she was undoubtedly focused on the fairness of the proceedings and the interests of justice. As a consequence, the admission of the unedited witness statement and the questions and answers into evidence would not have affected the safety of the conviction.