COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp No. 94 of 2019
SCCrApp. No. 85 of 2019

B ETWEEN

DON BRENNEN

Appellant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

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BETWEEN

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

AND

DON BRENNEN

Respondent

BEFORE: **The Honourable Sir Michael Barnett, P.**
The Honourable Mr. Justice Jones, JA
The Honourable Mr Justice Evans, JA

APPEARANCES: **Ms. Krysta Mason-Smith, Counsel for Don Brennen**

Mr. Rodger Thompson, Counsel for the Director of Public Prosecutions

DATES: **4 February 2021; 3 March 2021: 21 April 2021; 18 May 2021; 18 August 2021**

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Criminal appeal – Manslaughter - Appeal against conviction – Appeal against sentence - Pathologist identification of deceased – Nexus between Pathologist and the body of the deceased

- Hearsay – Inadmissible evidence - Evidence of accused bad character – Motive – Intention to commit murder - Whether sentence unduly lenient - Sections 4 & 10 of the Evidence Act - Section 166 of the Criminal Procedure Code Act

Brennen (the appellant) and Christina Adderley were in a relationship which had ended at the time of the offence. Adderley, at that time, was in a relationship with the deceased. The evidence revealed that on the day of the incident Adderley and the deceased had plans to attend dinner and a movie. However, before she left home the appellant came to her home. She asked him to leave but he did not. Shortly thereafter the deceased arrived at Adderley's home. An altercation ensued between the deceased and the appellant resulting in the deceased being stabbed. There were three eyewitnesses to the stabbing, one of whom was a neighbour, FK. The appellant was charged with the murder of the deceased. Although the appellant did not give evidence at trial, his case, as put through the prosecution witnesses during cross-examination, appeared to be one of self-defence or accident. The appellant called one witness that gave evidence relative to his good character. The jury found the appellant guilty of manslaughter. He was sentenced to nine years imprisonment, less the time spent on remand.

The appellant appeals his conviction on the grounds that the judge erred: in not withdrawing the case from the jury as there was insufficient nexus between the deceased and the medical pathologist; in allowing evidence of the appellant's bad character and in allowing the evidence of FK to be adduced as she gave her first statement to the police five years following the incident. The DPP appeals the appellant's sentence as being based on a wrong principle of law and unduly lenient.

Held: appellant's appeal against conviction dismissed; conviction affirmed. DPP's appeal against sentence dismissed, sentence affirmed.

The body of the deceased was identified at the morgue by his wife. The pathologist performed an autopsy on the body which had been identified as that of the deceased. The pathologist was able to identify the deceased by his driver's license and postmortem number. In these circumstances the jury could reasonably find that the person whose body the pathologist performed the autopsy on was that of the deceased and therefore there was no basis for the judge withdrawing the case from the jury.

The evidence of bad character complained of related to previous incidents between the appellant and the deceased. This evidence was never challenged and was therefore not disputed evidence which required a specific warning or direction by the trial judge. While a direction to the jury that they ought to be satisfied that the previous incidents were not evidence of the offence with which the appellant was charged, the lack of such a direction did not make the verdict unsafe.

The five-year delay in obtaining a statement from FK may affect the weight given to the statement but it does not affect its admissibility.

Regarding the DPP's appeal against sentence, the DPP has not identified the wrong principle of law being attributed to the trial judge. Further, while a 9-year sentence may considered lenient, it is not so lenient as to warrant interference by this Court.

Miller v R [2015] 1 BHS J 16 considered
R v. Florence Bish (1978) 16 JLR 106 (CA) distinguished
R v Mitchell [2016] UKSC 55 considered
R v Shyback (2018) ABCA 331 considered
R v Smith [1991] BHS J. No. 71 considered
R v Thompson [1994] BHSJ 69 applied
The Attorney General v Claude Lawson Gray SCCrApp. No. 115 of 2018 considered
The Attorney General v Larry Raymond Jones et al SCCrApp. Nos. 12, 18 and 19 of 2007 mentioned

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JUDGMENT

Judgment delivered by the Honourable Sir Michael Barnett, P:

1. These two appeals were heard together.

2. The first is an appeal by Don Brennen ("Brennen" or "the appellant") against his conviction for manslaughter. The other is an appeal by the DPP against the sentence of nine (9) years which was imposed upon his conviction.

3. Brennen was charged with the offence of murder. The particulars were that he on 24 November 2011 he did murder Dwayne Jackson ("Jackson" or "the deceased"). He pleaded not guilty. His trial commenced on 2 February 2019. It was his second trial.

4. At the trial the prosecution called several witnesses.

5. The primary witness was, Christina Adderley, who was in a relationship with the deceased, Jackson. She testified that on Thursday, 24 November 2011, Thanksgiving Day, she and Dwayne Jackson planned dinner and a movie. As she was coming out of the shower, she heard the doorbell ring, and her dog started to bark. She said to the person that she was not ready yet because she thought it was Jackson. When Brennen said, "you ain't ready yet?" she said that she realized it was Brennen and not Jackson. She told Brennen to leave her house as he is always causing confusion. Some twenty minutes later, Jackson pulled up. She went out the door and closed the door to lock it. Before she got to lock the door, she said Brennen slapped her in the face. She hit him back and pushed him against the shutter. Jackson ran out of his truck and was trying to pull them apart. Brennen, she said, punched Jackson and they "went at it". Jackson,

she said, tried to run away, but he fell, and she heard him say, "he stabbed me." She said she saw when Brennen "jook" him in his back. She said that Brennen said if he cannot have Christina, no one could. She said that she saw Brennen spin Jackson over and "juck" him in his chest. Brennen started walking up and down, saying "Christina cause this because she didn't leave this man alone". She said Brennen then threw the knife in the garbage, jumped in his truck, and pulled off.

6. Walter Gaitor, Christina Adderley's next-door neighbour, testified that on Thursday, 24 November 2011, whilst he was washing his car Brennen arrived around 5:30 pm. Brennen, he said, tried to get Christina outside, but she told him to leave her alone. Brennen did not leave right away, but after a while, he got fed up and left. Around 7:30pm, he said he heard a commotion outside. When he went outside, he said Brennen was on top of Jackson, punching him on the side of his chest. Gaitor said that he went over and stood over Jackson's head and that Brennen was in the area of Jackson's feet. He said that when Brennen got up off Jackson, a kitchen knife was in his hand. He asked Brennen what did he just do. Brennen, he said, responded "he caused it on his F-ing self". Gaitor said that he checked Jackson for a pulse, but that Jackson did not have a pulse. Gaitor said he told Brennen "you done kill this F-ing man what you could do". Brennen responded, "he cause it on himself, and he doesn't give a F if he goes to jail". He said Brennen started pacing around with the knife in his hand.

7. Florence Kemp, another neighbor of Christina Adderley, also gave evidence. She said that the police never questioned her until about five years after the incident and she did not think she had an obligation to go to them to tell them what she saw. She said that on Thursday, 24 November 2011, she was sitting in her bedroom when she heard a vehicle pull up. It was a red truck. About half an hour later, another vehicle pulled up. She heard scuffling, and when she looked through her bedroom window, she saw Jackson jump out of a silver truck. She heard a voice say, "Christina, he stab me." She said that Brennen punched Jackson in his back, and Jackson fell on his face. Brennen, she said, grabbed Jackson's shoulders and turned him over. Brennen was kneeling on Jackson's leg. She saw Brennen's hand come up and then went back down again. As Brennen got up, she saw a kitchen knife flashing from the streetlight. She heard Brennen say "if anybody come out here, I'll F them up", so she went back on her porch. She saw Brennen started walking up and down the street. She had an opportunity to see his face, and it was not swollen. She said that when she first saw Brennen, his shirt was on, but when he threw the knife into the garbage, he was bareback.

8. The prosecution also lead evidence from PC 3554 Smith who said that upon Brennen being arrested by him Brennen said that he was waiting on the police because he knew what he had done. Smith said that Brennen told him that he was tired of that woman. He said that when asked about the weapon, Brennen said that he threw it in the garbage bin in the yard.

9. The other relevant witness was the pathologist, Dr. Caryn Sands, but I will deal with her evidence when I consider the first ground of appeal.

10. Brennen did not give evidence. The questions put to the prosecution's witnesses suggest that his defence was either self-defence or accident. The witnesses he called on his behalf testified as to Brennen's good character.

11. Brennen was convicted of manslaughter. For that he was sentenced to 9 years imprisonment.

12. Brennen now appeals his conviction as being unsafe. The Director of Public Prosecutions appeals the sentence as being unduly lenient.

13. I will consider first Brennen's appeal against his conviction. He has three grounds, and I will consider them in turn.

Ground One - The learned Judge erred in fact and/or law in not withdrawing the case from the jury based on the not being a sufficient nexus between the deceased and the body on which Dr. Caryn Sands performed the postmortem

14. The appellant argues that there was an insufficient evidential link to establish that body that the pathologist, Dr. Caryn Sands, performed the autopsy on was in fact the body of the deceased Jackson, who was stabbed by Brennen. He contends that there is no nexus between the body identified by Doris Jackson, the wife of Dwayne Jackson, and the body that Dr. Sands performed the autopsy upon.

15. The evidence led was that Doris Jackson identified her deceased husband's body to a different doctor and that Dr. Sands was only able to testify that the body she performed the autopsy on was Dwayne Jackson by virtue of a driver's licence issued by the Bahamas Government which contained a photo of Dwayne Jackson.

16. Of course, the burden is on the prosecution to prove that Jackson died within one year and a day from the unlawful harm inflicted upon him by Brennen.

17. In my judgment this ground is wholly without merit.

18. There is no doubt that the evidence led showed that Brennen stabbed Jackson, who was the husband of Doris Jackson. The evidence also showed that the incident occurred on Thursday, 24 November 2011. The stabbing was witnessed by three persons who gave evidence. Officer Smith also gave evidence that Brennen admitted to him that he stabbed Jackson. Brennen's case as put to the prosecution's witnesses was that the stabbing was either an accident or in self defence.

19. There is no dispute that Doris Jackson gave evidence that she identified her husband's body at the morgue. That identification was made to another doctor at the morgue, not Dr. Sands. Bodies are not put in the morgue unless a person is dead. Dr. Sands whose duty it was to determine the cause of death was able to say that she performed the autopsy on a body at the morgue and that the body was a person named Dwayne Jackson who had a driver's licence with his photo on it. Her evidence as to the procedure at the morgue was as follows:

> **"Dr. Caryn Sands was deemed an expert in forensic medicine. And she told us that in 2011 Dr. McKinney was the senior house officer. She also told us that the body of the accused (sic) was given a postmortem number at the morgue. She had the file assigned as postmortem number 546 of 2011. When he did the autopsy, a driver's license was presented, which had the name attached Dwayne Jackson. The driver's license had a picture on it. The person she did the autopsy on was the person that was identified as Dwayne Jackson by the file document.**
>
> **The autopsy was done on the 30th of November, 2011. And the cause of death was stab wound to the chest. Jurors, I know I had said previously a stab wound to the heart, its chest. I correct that please. And two other stab wounds which were noted to the back of the body.**
>
> **In cross-examination by the defence counsel, Dr. Sands confirmed that she first saw the body on the 30th of November, 2011. In which she did not assign (sic) postmortem number. The doctor admitted that the photo shown to her in Exhibit DB1 that it was photo nine, did not have a postmortem number and that she performed an autopsy on a body presented to her, with a name and a postmortem number."**

20. In my view it was reasonable for the jury to find that the person whose body Dr. Sands performed the autopsy was Dwayne Jackson, the person stabbed by the appellant. There was no basis for withdrawing the case from the jury on that ground.

21. The appellant relies on the decision of the Court of Appeal of Jamaica in **R. v. Florence Bish** (1978) 16 JLR 106 (CA). In that case the appellant was convicted for the offence of murder. Evidence by two prosecution witnesses at the trial was that they saw a man walking with the

appellant on the sidewalk; that the appellant was addressing the man in a boisterous manner and that as soon as the appellant finished speaking she (the appellant) brought out an object from her bosom and stabbed the man in his chest and then threw the object under a parked car nearby; that the man fell to the ground and was removed from the scene in an ambulance. The appellant in her defence at the trial testified that she was set upon by three men who attempted to rob her; and that in the process, she (the appellant) chucked the man away with her hand and was unable to say if by accident the kitchen knife caught him. There was evidence that a policeman retrieved the knife from under the car after the incident and went to see the deceased at the hospital, but he was not called at the trial to give evidence as to the identification of the body on which the post-mortem examination was performed at the hospital. The appellant was convicted. On appeal, the court found from the record, that there was no evidence at the trial to link the man that was stabbed and the man upon whose body the post-mortem examination was performed; and that if the trial judge had correctly appreciated the evidence he would have withdrawn the case from the jury. The court held the prosecution has a duty to prove that the body of the deceased was the person actually murdered by the accused person. The court found that the body of the deceased on whom the post-mortem examination was done was not identified as the person on whom the appellant inflicted the stab wound.

22. **Bish** is clearly distinguishable from this case. In **Bish** none of the eyewitnesses could identify the man who was stabbed by the appellant. The court said **"there was no evidence that the man wounded at [the corner] was taken to the Kingston Public Hospital"**. In that case there was simply no evidence linking the man stabbed to the person who was at the morgue and on whom the autopsy was performed.

23. In this case there was credible evidence that the appellant stabbed Dwayne Jackson, the husband of Doris Jackson, in the presence of at least three eyewitnesses and that the appellant admitted that he had stabbed Jackson because he was having a relationship with Christina Adderley. Jackson's body was identified by his wife at the morgue. His photo at the trial was accepted by all the witnesses as being Jackson. Dr. Sands performed the autopsy on the body at the morgue which had been identified as Jackson and assigned a postmortem number. She was also able to identify him from his driver's licence.

24. I accept that there was no evidence that any person who had identified Jackson's body was present when the autopsy was performed, but Dr. Sands performed the autopsy on the body at the morgue which had been identified by Doris Jackson and which she was able to identify by the driver's licence and the postmortem number assigned to it by the staff in the morgue. In my judgment ground one has no merit.

Ground Two - The Learned judge erred in fact and/or law in relation to allowing the evidence to be adduced of the bad character of the Appellant (i.e. previous alleged attempt to run the deceased off the road and alleged threat to kill the deceased). Further and/or in the

alternative, the learned Judge erred by not adequately addressing the issue in her summing up to the Jury

25. In the evidence of Christina Adderley, who was the previous girlfriend of the appellant and with whom he had a relationship for three years, she said that appellant had previously threatened to kill Jackson and had tried to run him off the road.

26. The evidence of Ms. Adderley was as follows:

> **"Q. What were you saying about August?**
>
> **A. In the month of August is when -- well, we had like (sic) series of events things napping (sic). In August is when Dwayne was at my home and when he left about 1:00 a.m., about one o'clock in the morning. And as I locked the door, I heard like a crash like a thumb (sic). So I look out the window when I look I saw Dwayne truck reversing and Don truck coming through the corner. I opened the door and Dwayne shouted to me to call the police because Don just tried to run him off the road.**
>
> **Q. Where was Don when this statement made?**
>
> **A. He was right in his truck. He had opened his truck door.**
>
> **Q. Was he in hearing distance?**
>
> **A. They were side by side. Don reverse and Don was through the corner. Side by side. Then Don open --then he shouted from his truck, he tell Dwayne say, I ga kill you for interfering with my relationship. And after that Dwayne -- Don turn around and went out the corner, Dwayne reverse in the yard. And we called the police…**
>
> **…**
>
> **Q. And was that the only incident?**
>
> **A. No, it wasn't. Also in September Don came to the house again, which in because Dwayne use to be there every day. He came and he knocked to the door. He knew we were in there. He started shouting words. And I just told him to leave. And if he don't leave I ga call the police for him,**

which I call the police. But time as the police came he had already left.

Q. Did it stop there?

A. No, it didn't stop there. We also had an incident in October, when he came to the house and he exchange words -- he and I exchange words and I told him to leave me alone let me live my life. I told him I am free to choose and be with whomever I want to be. He say how could you choose a married man over a single man. And then he went and he disconnect (sic) the meter box. And he started making noise. And when he was walking away, I don't know what he had in his hand he went to Dwayne truck, the tire. I don't know what he did, then he jumped in his truck and he left."

27. The appellant argues two points. First, he asserts that the evidence was inadmissible. He argues:

"14. It is first the Appellant's contention that this evidence is inadmissible hearsay. More specifically, given the fact that by evidence of the Respondent's own witness (page 99 line 22) is the fact that she was aware of the Appellant's hearing loss as was confirmed by the Appellant's medical report. As such, we submit that there was not a sufficient inquiry made to determine whether the alleged statement made by the deceased to Christina Adderley was "made in the presence and in the hearing of the person against whom the evidence is tendered ..." in accordance with section 39 (d) of the Evidence Act.

15. Further and/or in the alternative, the evidence of a previous threat and/or altercation is irrelevant to the issue that was at hand before the Court. It is trite law that murder is an offence which requires specific intent and the occurrence of actus reus and mens rea.

16. From the facts of this case (taking the Respondent's own evidence of the altercation at its highest), the acts that led to the death of the deceased were a spontaneous altercation between Christina Adderley and the Appellant for which the deceased was not even present for in the beginning but rather DURING that altercation

> **the deceased inserted himself in a violent attack on the Appellant.**
>
> **17. Having regard to the foregoing, it is submitted that the contested Bad Character evidence of Christina Adderley would only be relevant to a planned murder, but not a spontaneous altercation like the present in which the deceased involved himself.**
>
> **18. In those circumstances it is submitted that the evidence admitted by Christina Adderley can be properly characterized as bad character evidence admitted to show that the Appellant had the propensity to behave badly and in fairness this evidence ought not have been allowed to be adduced as its prejudicial effect outweighed its probative value in addition to being contrary to section 29 of the Evidence Act which provides that "In criminal proceedings evidence may be given of the good character of the accused person, but evidence may not be given of his bad character, unless and with leave of the court witnesses have been called or questions have been asked to show that he bears a good character."**

28. In my judgment this complaint has no merit. Ms. Adderley was testifying to matters of her own knowledge. The statement made by Jackson that Brennen tried to run him off the road was made in the presence of Brennen. The evidence was that Brennen and Jackson were "side by side". It was clearly done in his presence and within his hearing.

29. The statement **"I ga kill you for interfering with my relationship"** was made by the appellant and therefore not hearsay.

30. The evidence was not irrelevant. It was admissible on at least two bases.

31. Firstly, it was admissible under section 4 of the Evidence Act as evidence of motive. Section 4 provides:

> **"4. In any proceeding evidence may be given of facts relevant to any fact in issue, including —**
>
> **…**
>
> **(e) any fact which shows or constitutes a motive or**

preparation for any fact in issue..."

32. Secondly, it was material to the issue of intention required for murder. It was also relevant to the issues of accident and self defence. If Ms. Adderley's testimony was accepted as true, the jury could properly take it into account in determining whether Brennen acted in self defence or in considering whether the stabbing was an accident. It was also relevant to the issue of provocation.

33. Section 10 of the Evidence Act provides:

> **"10. Where the court has to enquire as to the existence of any intention, motive, state of feeling or state of mind of any person, evidence may not be given to show that such intention, motive, state of feeling, or state of mind existed generally but only that it existed with reference to the matter in question."**

34. It is my judgment that the evidence that Brennen stated that he was going to kill Jackson for interfering with his relationship with Ms. Adderley and had previously attempted to run him off the road is admissible and the complaint that the evidence ought not to have been admitted has no merit.

35. As to the summation the appellant complains:

> **"23. In the present case, it is submitted that the learned Judge appears not (sic)have addressed the evidence of disputed bad character adduced by Christina Adderley in her summing (sic), except from outlining the same (page 28 summing up, line 19):**
>
> > **'In August 2011 the accused sought to break up the relationship between she and the deceased. And he attempted to run the deceased off the road and threatened to kill him for interfering with his relationship. As I said early there were incidents where the accused interfered between the new couple. The accused was trying to end their relationship between she and the decease (sic). In October of 2011 he brought a fridge for her home.'**

24. In the circumstances, it is submitted that the learned Judge erred in addressing the allegation by Christina Adderley."

36. The appellant relies on the decision in **R v Mitchell** [2016] UKSC 55. In that case Ms. Mitchell was convicted of murder. It was accepted that Ms. Mitchell had obtained a knife and stabbed her partner, Mr. Robin. At trial, Ms. Mitchell claimed that she had acted in self-defence, had been provoked and did not have the requisite intention for murder. Evidence of Ms. Mitchell's bad character was admitted for the purpose of showing a propensity to use knives in order to threaten and attack others. None of those seven incidents had resulted in a conviction. During the course of the trial Ms. Mitchell denied that the incidents had happened, or had happened in the way alleged. The trial judge did not direct the jury on whether they needed to be satisfied as to the truth of the evidence or whether the evidence established the particular propensity. The conviction was quashed on appeal.

37. It is difficult to see why **Mitchell** is relevant. There was no challenge to the admissibility of the evidence of the previous incidents. That case was concerned with the directions a judge should give to the jury on disputed evidence as to previous incidences that may show propensity to commit an offence.

38. In this case Ms. Adderley's evidence as to the incidents in August and October was never challenged by the appellant's counsel in cross examination and the appellant never gave evidence at the trial disputing that evidence. The truth of that evidence was never challenged and so there really was no need for the judge to give any specific warning that the jury needed to be warned as to the need to be satisfied that that evidence was true and that the incidents did happen.

39. The appellant's submission is based upon the premise that Ms. Adderley's evidence as to the previous incidents was disputed by the appellant. It was not disputed evidence.

40. I do agree, however, that the judge should have directed the jury that even if they accepted Adderley's evidence as to the previous altercation and threat that was not evidence that he did in fact on the evening of the incident intend to kill the deceased. People make idle threats in the heat of anger that they do not have any intention of carrying out. As the jury found him guilty of manslaughter and not murder it is reasonable to accept that they were satisfied that he did not intend to kill the deceased. In my judgment the fact that she did not give that direction did not affect the safety of the verdict of manslaughter. The evidence was overwhelming and the defence of accident or self defence was not a credible one. The suggestion that the conviction is unsafe on this ground is without merit.

Ground Three - The evidence of Florence Kemp as against the Appellant out not have been adduced. Further and/or in the alternative, the learned Judge failed to properly direct the Jury in relation to the evidence of Florence Kemp on how to consider the lateness of the evidence and possible contamination

41. A Notice of Additional evidence was served in 2016. The statement by Ms. Kemp to the police was only given more than 5 years after the incident.

42. Section 166 of the Criminal Procedure Code Act (CPC) states:

> **"166. No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial unless the accused person has received reasonable notice in writing of the intention to call such witness.**
>
> **Such notice must state the witness's name and give the substance of the evidence which he intends to give. It shall be for the court to determine in any particular case what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and decided to call him as a witness…"**

43. There is no suggestion that the statutory requirements of the CPC were not satisfied. The appellants had been served with the Notice of Additional Evidence since 2016, well in advance of the trial which finally started in February 2019. As Hall, J. said in **R v Thompson** [1994] BHS J 69 at paragraph 6:

> **"…However, the defence was entitled to know the prosecution's case beforehand, and the Court could only prevent the prosecution from calling a witness upon a notice of additional evidence if, in all of the circumstances, the notice to the defence was unreasonable."**

44. There is a suggestion that Ms. Kemp's evidence was irrelevant. The fact that Ms. Kemp first gave her statement to the police more than 5 years after the incident may affect its reliability and the weight to be attached to it but does not affect its admissibility. In her ruling allowing the evidence of Ms. Kemp to be given the trial judge said:

> **"Two days the court heard submissions in respect to whether it should exercise its discretion to allow evidence intended to be given by one Florence Kemp a witness proposed to be called by the prosecution of whom a statement filed -- a statement dated 8 November 2016 and notice of additional evidence was filed on the 9th of November, 2016 which was served on the defendant 10th of November, 2016. The Court has considered the provisions of Section 166 of the Criminal Procedure Code, as well as all the relevant case laws presented by the parties. I am satisfied that the statutory requirements of the calling of additional witness has been complied with and that defence is given reasonable notice of the evidence to be adduced. And further that the defence will suffer no prejudice or unfairness as a result thereof. Accordingly, the court will allow the witness proposed witness Florence Kemp -will allow the woman Florence Kemp to be called as a witness herein."**

45. In my judgment that ruling cannot be challenged as improper or incorrect.

46. The appellant complains that the trial judge failed to properly direct the jury in relation to the lateness of the statement to the police and the risk of contamination. After stating the nature of Ms. Kemp's evidence, the judge in her directions simply said:

> **"…The defence took issue with two of the prosecution's witnesses: Ms. Kemp and Ms. Adderley. Ms. Kemp the proverbial Bahamian Neighbour gave an initial statement to the police some five years after the event. After having a bird's eye view of the happenings on the evening of the 24th of November. She said that she was waiting for the police them to come to her. She did not see it as her civic duty to go to them and say I saw something I was a witness. Should you believe her or more importantly, how it was it that five years later the police finally came to her. The defence put it to her that Ms. Adderley was her friend and that she had created the evidence that she told to the court. The defence position is that because of this she is not a credible witness and you are not to accept her evidence."**

47. The trial judge did point out the fact that the statement was given five years after the incident and Ms. Kemp's explanation for the delay. That direction was accurate.

48. The judge did not give any direction to the jury that because it was late, and that Ms. Kemp was Ms. Adderley's neighbor, there was a risk that her evidence could be "contaminated" or "unreliable" by the risk of discussing her evidence with Ms. Adderley or by faulty memory. This was put to Ms. Kemp by the appellant's counsel during cross examination during the following exchange:

> **"Q. Madam, I'm going to leave you right now. But you have come here with a total fabrication with snippets of what Ms. Adderley told you, but you couldn't remember everything. That's my suggestion to you.**
>
> **A. Well, I was there.**
>
> **Q. All of this was contrive -- you may have been at your house, but that's the extent to which it goes. But you have contrived all of this with Ms. Adderley and this is how you ended up giving a statement five years after the incident?**
>
> **A. I am not responsible for when the police come to take a statement from me.**
>
> **Q. Exactly 5 years.**
>
> **A. They came when they were good and ready, and I gave the statement.**
>
> **Q. Police aren't responsibility (sic) for you coming here and telling us fibs.**
>
> **A. I was there. I took an oath on the Bible and I was there."**

49. I agree that it would have been helpful if the judge in her summation drew to the attention of the jury that there was a risk that Ms. Kemp's evidence may be unreliable because it may be a combination of what she actually observed and what she may have gleaned over the years from other sources, including her neighbor Ms. Adderley.

50. However, I have no doubt that this failure did not affect the safety of the verdict. There was ample evidence which the jury heard which led to their guilty verdict including the evidence of Ms. Adderley, Mr. Gaitor and the admission to Officer Smith.

51. In my judgment this appeal against conviction must be dismissed.

DPP's appeal against sentence

52. The DPP complains that in imposing the 9-year sentence the trial judge passed a sentence that was based on a wrong principle of law and was unduly lenient.

53. As to the wrong principle in law, the DPP has not identified the principle of law which it asserts was violated save that it appears to repeat the argument advanced in **The Attorney General v Claude Lawson Gray** SCCrApp. No. 115 of 2018 that the sentence was outside the guidelines given in **The Attorney General v Larry Raymond Jones et al** SCCrApp. Nos. 12, 18 and 19 of 2007. I do not propose to rehash the judgment in **Claude Lawson Gray**. The DPP has not sought to appeal that decision to the Privy Council and for the reasons set out in that decision the argument of error of principle cannot be sustained.

54. In considering if a sentence is unduly lenient the court must consider whether the sentence is so lenient that no reasonable judge could have imposed such a lenient sentence.

55. In **Claude Lawson Gray,** where the Crown appealed against a sentence of seven years imprisonment for manslaughter, this Court set out a number of cases where courts have imposed sentences for manslaughter which were in the range of nine years, more or less. I do not propose to repeat them in this judgment. The Court in that case found that the seven-year sentence was not unduly lenient so as to warrant being set aside by this Court on an appeal, considering case law in The Bahamas and the Commonwealth region.

56. I do note, however, that in **R v Smith** [1991] BHS J. No. 71, this Court imposed a sentence of 8 years for manslaughter. In that case the appellant lived with the deceased and her two children. Their relationship was a turbulent one with a history of physical abuse by the appellant. After a fuss between the parties, the appellant administered a beating with either a stick or a piece of baseball bat to the deceased. The deceased was taken to the hospital where she died the next day. The appellant was convicted of murder and on appeal this Court reduced the conviction to manslaughter and imposed a term of imprisonment of 8 years.

57. In Canada, in the case of **R v Shyback** (2018) ABCA 331 an accused was convicted of manslaughter after he caused the death of his domestic partner during a fight with her. The trial judge sentenced him to five years imprisonment for manslaughter. The Crown appealed that sentence and the Alberta Court of Appeal increased the sentence to seven years.

58. In **Miller v R** [2015] 1 BHS J 16, the complainant, visited the home of his female friend. While the complainant was waiting outside his friend's home the appellant, arrived at the residence and there was a verbal exchange between both men. As a result of the exchange the appellant drew a firearm and shot at the complainant who was hit in the stomach. After being shot the complainant attempted to run away and while running he was hit twice more: once in his left buttocks and once in his left foot and ankle. The victims could have died from the gunshot wounds. He was sentenced to six years for attempted murder.

59. While a 9-year sentence may be lenient, and may not have been one which this Court may have imposed, it is not so lenient that no reasonable judge applying the principles of sentencing would impose a similar sentence. I am satisfied that the 9-year sentence was not unduly lenient as to warrant the interference by us an appellate court.

60. I would dismiss the appeal against sentence.

The Honourable Sir Michael Barnett, P

61. I agree.

The Honourable Mr. Justice Jones, JA

62. I also agree.

The Honourable Mr. Justice Evans, JA