COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp No. 272 of 2018

BETWEEN

LAVARDO FORBES

Appellant

AND

REGINA

Respondent

COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp No. 73 of 2019

BETWEEN

SHIRVON STUBBS

Appellant

AND

REGINA

Respondent

BEFORE:	**The Honourable Madam Justice Crane-Scott, JA** **The Honourable Mr. Justice Roy Jones, JA** **The Honourable Mr. Justice Milton Evans, JA**
APPEARANCES:	**Ms. Marianne Cadet, Counsel for the Appellant Forbes** **Mr. Glendon Rolle, Counsel for the Appellant Stubbs** **Mr. Algernon Allen Jr., Counsel for the Respondent**
DATES:	**28 April 2021; 14 September 2021 (Forbes)** **31 March 2021; 1 & 8 June 2021; 14 September 2021 (Stubbs)**

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Criminal Appeal – Appeal against conviction – Appeal against sentence - Extension of Time Application - Possession of a Firearm with Intent to Endanger Life – Damage – Joint enterprise - Sections 33 & 66 (4) of the Evidence Act, Ch 65 –Hostile witness – Identification evidence –Whether there was a failure to withdraw the case from jury - Whether there was material irregularity affecting the fairness of the case – Safety of the conviction

On 7 May 2014 there was a shooting in yellow Elder Gardens. Witnesses to the shooting indicate that a blue Honda Civic pulled up outside a house on Lightbourne Street and a man came out of the passenger side armed with a firearm and fired several shots at Jaquan Rolle who was standing outside of the house. During the shooting a 2008 Nissan Altima parked in the yard was damaged. The intended appellant Forbes was identified during an identification parade as the driver of the blue Honda vehicle and the intended appellant Stubbs was identified as the person who discharged the firearm in the direction of Jaquan Rolle. The two were charged, tried and convicted of possession of a firearm with intent to endanger life and one count of damage. They have both appealed their convictions and intended appellant Forbes appeals his sentence also. They have appealed on numerous grounds inter alia that, the "learned Judge erred in law and in fact when she allowed the statement of Trevor Campbell & Jaquan Rolle to be admitted via section 66 of the Evidence Act, which were more prejudicial than probative and adversely affected the fairness of the Appellant's trial", the Judge failed to give directions on Joint Enterprise, and that the learned Judge failed to withdraw the case from the jury on the basis that the quality of the identification evidence was poor. Intended appellant Forbes appealed his sentence on the ground, "that the Appellant is not receiving the benefit of his remand time which the Judge reduced from his sentence." The Court heard both appeals (separately) and reserved its decisions.

Held: application for extension of time for intended appellant Stubbs is denied and his convictions and sentences affirmed. Application for extension of time with respect to intended appellant Forbes' conviction and sentence for possession of firearm with intent to endanger life and damage are also affirmed. However, we direct the Registrar of the Supreme Court to correct the intended appellant Forbes's Certificate of Conviction to correctly reflect the sentence by the trial court.

Counsel for the intended appellants Forbes and Stubbs contends that the contents of the statements of Trevor Campbell and Jaquan Rolle unfairly prejudiced their client. There was nothing wrong with the police investigators getting several statements from the witnesses and there was no suggestion from the evidence that the police compelled the witnesses to give statements. Also, the trial judge took the view that the inconsistencies between the statements of the witnesses were a matter of credibility to be determined by the jury after giving them appropriate directions. We are of the view that the trial judge properly exercised her discretion to admit the evidence of the absent witnesses, Trevor Campbell, and Jaquan Rolle, and adequately directed the jury on the caution required in considering their evidence. The judge warned them of the risk involved in using that evidence and the special need for caution as they have not seen the witnesses in the witness box and that they should give it such weight as they deem fit. We see no error in the directions given by the trial judge and accordingly find that there is no merit on this issue in these grounds of appeal.

As it relates to the identification evidence, the judge took the view that the quality of the identification regarding both intended appellants Forbes and Stubbs was not deficient. He was of the view that the evidence involved eyewitness testimony, issues of credibility and were matters for the jury. Second, there was an identification at the identification parade of the (intended appellant Forbes) which supported Trevor Campbell's visual identification. For these reasons, the judge was not in error in refusing to withdraw the case from the jury.

Attorney General v Omar Chisholm MCCrApp No. 303 of 2014 followed
Kevano Musgrove v Regina SCCrApp. No. 140 of 2012 followed
Rodriguez Jean Pierre v Regina SCCrApp No. 110 of 2019 considered
Stubbs Davis Evans v Queen [2020] UKPC 27 applied

J U D G M E N T

Judgment by the Honourable Mr. Justice Roy Jones JA,

INTRODUCTION

1. The prosecution began proceedings against Lavardo Forbes ("the intended appellant Forbes") together with Shirvon Stubbs ("the intended appellant Stubbs") on information for one count of Possession of a Firearm with Intent to Endanger Life and one count of Damage. On 21 February 2017, the trial started before Grant-Thompson J, and a jury and they convicted the intended appellants Forbes and Stubbs of the offences. On 9 November 2017, the judge sentenced the intended appellant Forbes to ten (10) years for the possession count and eight (8) years for the Damage count. In sentencing, the court took into consideration the time spent on remand, which was three (3) years and six (6) months. Taking the time on remand into account, the actual sentence was six (6) years and six (6) months for the possession of firearm count. On 23 February 2018, the judge sentenced the intended appellant Stubbs to eleven (11) years for the possession count and eight (8) years for the Damage count.

2. The intended appellant Forbes filed a Notice of Appeal on 22 November 2018, giving notice of his appeal against conviction and sentence. On 12 December 2018, the Court of Appeal Registry received a Notice of Application for Extension of Time to Appeal. The intended appellant Forbes amended his Notice of Appeal on 19 March 2019, appealing conviction alone.

3. On 7 March 2019, the intended appellant Forbes signed a Notice of Application for Extension of Time to Appeal Form. The Court of Appeal Registry received this application on the same date. The intended appellant Forbes is one year and thirteen days out of time from the first Notice of Appeal being received into the Court of Appeal Registry.

4. On 26 February 2018, the intended appellant Stubbs filled out a Notice of Appeal, but there is no record of that document at the Registry of the Court of Appeal. The Court of Appeal Registry received the Notice of Appeal on 4 September 2019, setting out seven (7) grounds of appeal against conviction and sentence. They gave it a reference Criminal Appeal No. 73 of

2019. The intended appellant Stubbs filed an amended Notice of Appeal on 1 June 2021, appealing conviction alone.

5. The court did not hear the appeals together, but as both appeals arise out of the same set of facts, we have merged the judgments.

BACKGROUND

6. In brief, the facts are that on 7 May 2014, a blue Honda Civic pulled up outside a house on Lightbourne Street, in Yellow Elder, and a man came out of that blue Honda vehicle on the passenger side with a firearm. The man fired several shots at Jaquan Rolle, who at the time was standing outside of the house. The shots also damaged a 2008 Nissan Altima parked outside the house. Police officers, after reviewing the matter, arrested the intended appellants Forbes and Stubbs for the offences. Witnesses identified the intended appellant Forbes during an identification parade as the driver of the blue Honda vehicle and the intended appellant Stubbs as the person who discharged the firearm toward Jaquan Rolle.

APPLICATION FOR EXTENSION OF TIME

7. The Court of Appeal Act section 17 (1) provides as follows.

> **"Where a person convicted desires to appeal to the court or to obtain the leave of the court to appeal under the provisions of this part of this Act, he shall give Notice of Appeal or of his application for leave to appeal in such manner as may be prescribed by rules of court within twenty-one days of the conviction."**

8. In **Attorney General v Omar Chisholm MCCrApp No. 303 of 2014**, the Court of Appeal identified four factors to be analysed when hearing an extension of time application. They are.
    a) The length of the delay
    b) The reason for the delay
    c) The prospect of success on appeal and
    d) Prejudice to the Respondent

9. To prevail in their application, the intended applicants must show that they have an acceptable excuse for the delay, and a reasonable prospect of success on appeal. The intended appellant Forbes filed and served an amended affidavit on 29 January 2021, outlining eight prospective grounds of appeal. With the intended appellant Stubbs, he filed his affidavit on 1 June 2021, outlining seven prospective grounds of appeal.

The length and reason for the delay

(a) Intended Appellant Forbes

10. Counsel for the intended appellant, Forbes contended that his delay in filing his Notice of Appeal within the 21 days window was because of matters involving the prison authorities which were beyond his control. First, he had to wait to meet with prison officials prior to being able to be provided with his form. Second, the prison officials failed to send the Notice of Appeal to the Court of Appeal Registry until 22 November 2018 and the Application for Extension of Time on 12 December 2018. The intended appellant contends he did not have the means to hire an attorney to assist him with this process.

(b) Intended Appellant Stubbs

11. Counsel for the intended appellant Stubbs contended that his delay in submitting his Notice of Appeal within the required time was because of matters beyond his control. The intended appellant Stubbs said in his affidavit dated 1 June 2021, that on 26 February 2018 he received the appeal forms from the prison officials, filled them out and returned them to be sent to the Court of Appeal. A year later, when he heard nothing from the court, he made an enquiry and was told that he needed to fill out an Appeal Court Form two for an extension of time. On 7 March 2019, he filled out and signed an application for Extension of Time and returned it to the Court of Appeal Registry. The intended appellant Stubbs says that he also did not have the means to hire an attorney.

Prospects of success

12. As to their prospects of success, counsel for the intended appellants Forbes and Stubbs contends that the intended appellants have a reasonable prospect of success in their applications, given the facts of this case. However, in **Rodriguez Jean Pierre v Regina SCCrApp No. 110 of 2019**, Barnett P said at paragraph 10.

> **"I do not think the court intended that no matter how long the delay in appealing and notwithstanding the absence of any reasonable excuse, a court will grant an extension of time if the prospects of success on its merits are good. That would be inconsistent with the purpose of the time limit imposed by Parliament."**

13. Counsel for the intended appellants Forbes and Stubbs challenges the fairness of the trial and the trial judge's exercise of her discretion in admitting the identification evidence. The first challenge is to the quality of the identification evidence of Trevor Campbell and Jaquan Rolle. Second, the propriety of the identification parade which, with the intended appellant Forbes, included an allegation that relatives of the witness attended the parade. Third, failure of the judge to withdraw the case from the jury based on the identification evidence from the eyewitnesses.

(a) *Intended Grounds of Appeal for intended appellant Forbes:*

14. The intended appellant Forbes in Amended affidavit dated 29 January 2021, set out his intended grounds of appeal as follows.

> **(1) The learned Judge erred in law and in fact when she allowed the statement of Trevor Campbell & Jaquan Rolle to be admitted via section 66 of the Evidence Act, which were more prejudicial than probative and adversely affected the fairness of the Appellant's trial.**
>
> **(2) There was a material irregularity when the learned Judge placed the identification evidence of Trevor Campbell before the jury as it was unfair and unreliable, pursuant to section 178 of the Evidence Act based on the circumstances in which it was done, it could not be said to be free from concoction or distortion.**
>
> **(3) The learned judge erred in law and in fact when she failed to give an adequate direction on how the jury is to treat the evidence of the hostile witness.**
>
> **(4) There was a material irregularity affecting the fairness of the case when:**
>
> > **(a) When the prosecutor discredits the hostile witness with irrelevant and prejudicial information, specifically the fact that he is incarcerated.**
> >
> > **(b) The learned Judge decided to not fully redact Jaquan Rolle statement to remove prejudicial statement such as "I am a key witness in my father's case" which suggest that the Appellant had involvement in his father's case.**
>
> **5. The conviction is unsafe and unsatisfactory and cannot be supported based on the evidence.**
>
> **6. That the learned Judge erred in law and fact when she failed to give an adequate direction to the jury in relation to joint enterprise.**
>
> **7. That the learned Judge failed to withdraw the case from the jury on the basis that the quality of the identification evidence was poor.**
>
> **8. Moreover that the Appellant is not receiving the benefit of his remand time which the Judge reduced from his sentence.**

(b) *The Intended Grounds of Appeal for intended appellant Stubbs*

15. The intended appellant Stubbs in Amended affidavit dated 1 June 2021, set out his intended grounds of appeal as follows.

"(1) That in the course of the trial some specific illegality and or material irregularity occurred that substantially affected the merits of the case and in consequence adversely impacted the fairness of the trial; namely but not limited to the following:

> **(a) The learned Judge erred in law and in fact when she allowed the statement of Trevor Campbell & Jaquan Rolle to be admitted via section 66 of the Evidence Act, which were more prejudicial than probative and adversely affected the fairness of the Appellant's trial.**
>
> **(b) The learned Judge erred that the quality of the Evidence was not safe to go before the Jury.**
>
> **(c) There was a material irregularity when the learned Judge placed the identification evidence of Trevor Campbell before the jury as it was unfair and unreliable, pursuant to section 178 of the Evidence Act based on the circumstances in which it was done, it could not be said to be free from concoction or distortion.**

(2) The learned Judge erred in law and in fact when she failed to give an adequate direction on how the jury is to treat the evidence of the hostile witness which the Judge failed to give directions. (s. 151, s 152)

(3) There was a material irregularity affecting the fairness of the case when:

> **(a) The prosecutor discredited the hostile witness with irrelevant and prejudicial information, specifically the fact he is incarcerated.**
>
> **(b) Further the Judge in her summing up reminded the jury of prejudicial and irrelevant information relating to the hostile witness which derived from the prosecution examination only. Hence, No balance of the Interest of Justice.**

(4) The learned judge decided to not fully redact Jaquan Rolle statement to remove prejudicial statement such as "I am a key witness in my father's case" which suggest that the Appellant had involvement in his father's case.

(5) That the Judge failure to give directions on Joint Enterprise.

(6) That the learned Judge failed to withdraw the case from the jury on the basis that the quality of the identification evidence was poor.

(7) The conviction is unsafe and unsatisfactory and cannot be supported based on the evidence.

DISCUSSION

16. Grounds 1, 2, 5 and 7 in the intended grounds filed by intended appellant Forbes and Grounds 1,4,6 and 7 in the grounds filed by intended appellant Stubbs both complain about the fairness of the trial; the quality of the identification evidence; and the safety of the conviction. These grounds will conveniently be considered together.

Grounds–Grounds 1,2,5 and 7 in relation to intended appellant Forbes; and Grounds 1,4,6 and 7 in relation to intended appellant Stubbs

(a) Quality of the identification evidence; the fairness of the trial and safety of the conviction

17. Section 66 (1)(2) and (3) of the Evidence Act provides.

> **"(1) Subject to section 67 a statement in a document shall be admissible in any criminal proceedings as evidence of any fact stated therein of which direct oral evidence would be admissible if–**
>
> > **(a) the document is, or forms part of a record compiled by a person acting under a duty from information supplied by a person (whether acting under a duty or not) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information; and**
> >
> > **(b) any condition relating to the person who supplied the information which is specified in subsection (2) is satisfied.**
>
> **(2) The conditions mentioned in paragraph (b) of subsection (1) are–**
>
> > **(a) that the person who supplied the information–**
> >
> > > **(i) Is dead or by reason of his bodily or mental condition unfit to attend as a witness;**
> > >
> > > **(ii) Is outside The Bahamas and it is not reasonably practicable to secure his attendance, or**
> > >
> > > **(iii) Cannot reasonably be expected (having regard to the time which has elapsed since he supplied or acquired the information and to all the circumstances) to have any recollection of the matters dealt with in that information;**

(b) that all reasonable steps have been taken to identify the person who supplied the information but that he cannot be identified; and

(c) that, the identity of the person who supplied the information being known, all reasonable steps have been taken to find him, but that he cannot be found.

(3) Subsection (1) shall apply whether the information contained in the document was supplied directly or indirectly but, if it was supplied indirectly, only if each person through whom it was supplied was acting under a duty; and applies also where the person compiling the record is himself the person by whom the information is supplied."

18. Counsel for the intended appellants Forbes and Stubbs contends that the contents of the statements of Trevor Campbell and Jaquan Rolle unfairly prejudiced their client for two reasons. First, the identification evidence of Trevor Campbell in his two statements was inconsistent with each other and counsel at the trial could not cross-examine the witness on the inconsistencies. Second, the statement of Trevor Campbell was more prejudicial than probative and so was unfair to the appellants. So then, let us have a look at the evidence of Trevor Campbell contained in his statement given on 7 May 2014.

"I am Trevor Campbell of twenty-seven Lightbourne Street, and the nephew of Tasmin Astwood who is of the same residence. On Wednesday, the 7th of May 2014, at about 9:30 p.m., I, along with my cousins, were opening the curtains of my home when I observed a blue Honda Civic drive past the front of our home along Lightbourne Street. I then noticed the vehicle had stopped some ways up the road and one the passengers who I know to be called by the nickname Noonks to exit the vehicle carrying a gun large enough that it had to be held with both hands. I cannot say exactly what type of gun it was. He walked towards our home and pointed the gun and opened fire. After he had finished shooting, he ran back to the Honda Civic, which he initially exited. It was then that I called my aunt Tasmin Astwood to have a look at her car as it was parked in front of the yard when the shooting started. After checking the car, she verified that the car had been shot and I decided to accompany her to the station so that I can help by saying what I had seen. I do not personally know Noonks, but I can recognise him well enough to identify him after seeing him numerous times from living in the neighbourhood. I also know that he lives on Old Cedar Street, opposite a green and yellow house located on the bend at the end of the street in a light blue and white house with a white railing gate in front of the yard."

19. It is apparent in this statement that Trevor Campbell did not identify by name the intended appellant Forbes. However, the following day on 8 May 2014, he identified the intended appellant Forbes at an identification parade by pointing him out as being the driver of the car. He also identified him by his name and alias "Duckie." Trevor Campbell identified the intended appellant Stubbs, whom he called "Noonks" as the passenger in the car. Trevor Campbell said that he saw the intended appellant Stubbs many times in the neighbourhood.

20. On 23 May 2014, Trevor Campbell provided a further statement in which he said that he knew the intended appellant Forbes by name for two years. Here is what he said in the statement.

> **"On Wednesday, the 7th of May 2014, at around 9:40 a.m. while at my residence and in the front room opening the eastern window, I noticed Lavardo Forbes, a.k.a. Duckie, who I have known for about two years, driving past our house in his blue Honda Civic and stop midway through. I then noticed Lavardo continue driving his vehicle and he slightly turned onto Seymour Street and his rear bumper was on Lightbourne Street. I then noticed a male I have known for about two years, Shirvon Stubbs, a.k.a. Noonkie, came out the passenger seat of Lavardo vehicle wearing all black and walk through the neighbour yard. "About three minutes later, Shirvon came in the front of the neighbour yard and lift up a black gun with two of his hands and started firing gunshots in our yard. After Shirvon finish shooting up the house, he went back through the neighbour yard. He came in and I notice he went back into Duckie car and the car turned east on Graham Drive Road. Duckie and Noonkie always used to come by us to hang out and talk to my grandmother."**

21. Counsel for the intended appellant, Forbes contended that this second statement by Trevor Campbell was inconsistent with his first statement, as the first statement made no reference to him knowing "Duckie." Further, there is no other evidence supporting the witness's identification of the intended appellant Forbes. In this statement, Trevor Campbell says that he knew "Noonks" for two years. This would make this effectively a recognition case. The essence of the complaint on this ground by both intended appellants is that the judge denied them an opportunity to cross-examine the witness on these important issues going to identification as the two witnesses were both deceased at the time of trial. They argue that in those circumstances, given the facts of the case, the interest of justice demanded that their statements should not have been admitted into evidence by the trial judge. Section 166 (4) of the Evidence Act provides.

> **"(4) Where–**
>
> **(a) a document setting out the evidence which a person could be expected to give as a witness has been prepared for the purpose of any pending or contemplated criminal proceedings; and**

(b) the document falls within subsection (1), a statement contained in it shall not be given in evidence by virtue of this section without the leave of the court, and the court shall not give leave unless it is of the opinion that the statement ought to be admitted in the interests of justice having regard–

(i) to the circumstances in which leave is sought and in particular to the contents of the statement, and

(ii) to any likelihood that the accused will be prejudiced by its admission in the absence of the person who supplied the information on which it is based."

22. The trial judge in considering whether it was in the interest of justice under S. 66 (4) of the Evidence Act for the statement of witness Trevor Campbell and Jaquan Rolle to be admitted into evidence said.

"…in the first statement, he failed to identify her client and in the latter two statements he purports to identify her client; The court is of the view that in this instance the public interest is paramount and so I will allow the two statements to go in pursuant to Section 66(a)(2)(a)(1) in relation to the evidence of the witnesses. The court is of the view that it can be cured by giving the jury the appropriate directions: That even though they cannot see these witnesses and there is no ability on behalf of defence counsel to cross-examine the witnesses, there is a particular way that they ought to regard the evidence of those witnesses.

23. In **Stubbs Davis Evans v Queen [2020] UKPC 27** [*Delivered 2 November 2020*] the Privy Council in considering the admission of evidence in the witness's absence under S.66 of the Evidence Act and S. 178 of the Criminal Procedure Code had this to say at paragraph 92.

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

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

24. Was it a proper exercise of the judge's discretion to allow the statements of Trevor Campbell and Jaquan Rolle into evidence? First, there was nothing wrong with the police investigators getting several statements from the witnesses. Second, there was no suggestion from the evidence that the police compelled the witnesses to give statements. Third, the trial judge took the view that the inconsistencies between the statements of the witnesses were a matter of credibility to be determined by the jury after giving them appropriate directions. The trial judge's directions to the jury were as follows.

"Mr. Foreman and ladies and gentlemen of the jury, the prosecution relies on what is referred to as a direct evidence of the eyewitnesses Jaquan Rolle and Trevor Campbell. Direct evidence is evidence which proves or tends to prove a fact directly. Usually, direct evidence is found in the sworn evidence of a witness. For example, the witness would come into the witness box and say, "I saw the man who shot the deceased." Or you can get direct evidence from a hidden camera, which captures an image which shows the face of the person who is alleged to have committed the offence clearly.

The prosecution relies on the direct evidence of the two witnesses, Jaquan Rolle, and Trevor Campbell. These witnesses though did not come before you to give evidence. They gave evidence through their statement which were given to the police

and read into evidence in this court by the clerk of the court, Mr. Artis. I remind you, Mr. Foreman, and ladies of the jury, that these witnesses did not come to give evidence before you on oath or affirmation as the other witnesses in the trial did.

I remind you that the authors of the statements have not had their evidence tested by cross-examination. The evidence of Jaquan Rolle and Trevor Campbell, the sole eyewitnesses for the prosecution, their evidence was contained in written statements. And so, I would warn you of the special need for caution in considering their evidence. And that there is a potential risk, as the dangers relying on the statements of such witnesses whom you have not seen, not been able to assess and their evidence has not been tested in cross-examination. You will scrutinise their evidence with care, give it such weight as you deem fit, remembering that you are the sole judges of fact it is of the.

However, if having carefully considered my warning, you find their evidence to be reliable in relation to Jaquan Rolle and Trevor Campbell, then you can act on their evidence. And you can use their evidence to assist you, in deciding the innocence or guilt of these accused men. You should consider that evidence in the context of all of the other evidence. There may be discrepancies between their statement and the oral evidence of the other witnesses, particularly the accused man which I will bring to your attention."

25. From these directions, we are of the view that the trial judge properly exercised her discretion to admit the evidence of the absent witnesses, Trevor Campbell, and Jaquan Rolle, and adequately directed the jury on the caution required in considering their evidence. The judge warned them of the risk involved in using that evidence and the special need for caution as they have not seen the witnesses in the witness box and that they should give it such weight as they deem fit. We see no error in the directions given by the trial judge and accordingly find that there is no merit on this issue in these grounds of appeal.

b) Failure to withdraw the case from jury and safety of the conviction.

26. On the withdrawal of the case from the jury, the intended appellant Forbes and Stubbs contend that the judge's failure to withdraw the case from the jury based on poor identification evidence was an error. They argue that the three statements given by Trevor Campbell were inconsistent and, on that basis, the identification evidence was poor. The trial judge ruled on the no case submission on behalf of the intended appellants as follows:

"I find that the standard is one of a prima facie case made out at this stage, one that it's such that I could send this case to the jury.

I have overruled the no case submission made by Mr. Bain on behalf of Shirvon Stubbs. I do not accept that there is no evidence in this case against Mr. Stubbs. It is my view that it will turn on the jury's view of the number of statements which we have before us in relation to Jaquon Anthony Rolle, and also the many statements that were given on behalf of Trevor Campbell in relation to this matter. And so that would be a matter for the jury as to whether or not they accept the alleged nickname of this individual, and also whether they accept that he was indeed brandishing a gun and he did use it as the Section 66 witnesses allege that he did…. I am referring particularly to the statement of the 23rd of May of Trevor Campbell when he seeks to relate that nickname to this defendant if the jury accepts it.

In relation to the case of Lavardo Forbes, there is some evidence before the court, and it is my view that the Crown has satisfied a prima facie case. It really is going to turn on the jury's view of these facts and what they believe to be the involvement or not of this particular defendant. But it would appear, if they accept the statements together, I understand Ms. Galanos' submission on the separation, but if they accept it, there may be evidence that a jury properly directed could find that Lavardo Forbes would have gone to the area where this incident is alleged to have occurred in a vehicle that is identified as belonging to him, and that the second accused man would have come out of that vehicle with a firearm in one case and some three minutes later with a firearm. Whether or not both statements read the same or we read them on their face, as it appears on the 23rd of May, to be some three minutes later that he is alleged to have come into the yard, and then the evidence of the witnesses that he would have gone back into the vehicle after the incident is alleged to have occurred, the jury will have to decide what they believe is the nature of the involvement of this particular defendant. They would, of course, be advised in relation to mere presence and what that means. And also, they will find whether or not they believe that the involvement was deeper."

27. The judge took the view that the quality of the identification regarding both intended appellants Forbes and Stubbs was not deficient. He was of the view that the evidence involved eyewitness testimony, issues of credibility and were matters for the jury. Second, there was an identification at the identification parade of the (intended appellant Forbes) which supported Trevor Campbell's visual identification. For these reasons, the judge was not in error in refusing to withdraw the case from the jury.

28. Counsel for the intended appellant Forbes and Stubbs contended that there is a lurking doubt about the safety of their convictions, as their counsel at trial could not cross-examine on the inconsistencies in the statements of Trevor Campbell and Jaquan Rolle. The judge admitted

those statements under S.66 of the Evidence Act. As we said before, the inconsistencies between the statements were matters for the jury and the trial judge gave adequate directions to enable them to resolve the various issues for consideration. This has no merit.

Ground (Three) for Intended Appellant Forbes and Ground (Two) for Intended Appellant Stubbs: The learned judge erred in law and in fact when she failed to give an adequate direction on how the jury is to treat the evidence of the hostile witness.

29. Counsel for the intended appellant Forbes and Stubbs contends the judge told the jury that they can rely or act upon the witnesses out of court statement. In addition, they contend the judge was in error when she failed to direct the jury that Robeldo and Mr. Smith's *vivo voce* evidence can be unreliable, but their alleged statements to the police were not evidence upon which they could act.

30. In **Kevano Musgrove v Regina SCCrApp. No. 140 of 2012** at paragraph 9, Barnett P had this to say:

> **"In R v Golder [1960] 3 All ER 457 Lord Parker CJ delivering the judgment of the English Court of Criminal Appeal said at page 459:**
>
> > **"A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein."**

31. Here is what the trial judge said.

> **"What is an adverse witness? As you know Ashton Robeldo and Travon Smith were all witnesses for the prosecution. And they have now given evidence which does not support, to a certain extent, particularly in the case of Travon Smith, the prosecution's case.**
>
> **The prosecution was, therefore, permitted to treat them as an adverse witness. In essence, it is a witness who has in effect changed sides. And so, Mr. Algernon Allen was able to cross-examine his own witness to show that he gave one account to the police in his witness statement in 2014 and now in this trial he gives a different statement.**
>
> **The prosecution is inviting you to find that Mr. Robeldo and Mr. Smith has changed sides and you may treat their evidence in this trial as suspect. And treat as truthful, what they wrote in their witness statement in 2014. I have to say to you that the witness statements of Mr. Robeldo and Mr. Smith gave to the police is**

not evidence of the truth of its contents, except for those parts which they told you were true. It is put before you by the prosecution to throw doubt on the reliability of these witnesses' evidence in this court."

32. The trial judge directed the jury that the unsworn statements given were not evidence of the truth of its contents. The judge asked them to decide whether they accept any part of the witnesses' evidence given during the trial. They were also told not to rely on anything said by the witnesses out of court on a previous occasion. We cannot find fault with this direction and so take the view that there is no merit in this complaint.

Ground (Four) for Intended Appellant Forbes and Ground (Three) for Intended Appellant Stubbs: There was a material irregularity affecting the fairness of the case when:

(a) The prosecutor discredited the hostile witness with irrelevant and prejudicial information, specifically the fact that he is incarcerated.

33. Section 33 of the Evidence Act, Ch 65 provides.

"Evidence may be given in both civil and criminal proceedings of the bad character of any person called as a witness in order to impeach his credit as a witness."

34. During their evidence, the prosecution witnesses Travon Smith and Ashton Robeldo said that they are currently living at the Bahamas Department of Correctional Services, i.e., the prison.

35. We cannot see where this evidence could have prejudiced the intended appellants Forbes and Stubbs's case. In fact, Travon Smith denied knowing the intended appellants and said that he essentially made up the facts in his statement to the police and denied all the suggestions made to him under cross-examination. This complaint has no merit.

(b) The Judge, in her summing up, reminded the jury of the prejudicial and irrelevant information relating to the hostile witness, which was derived from the prosecution examination.

36. Counsel for the intended appellant Forbes and Stubbs contends the judge reminded the jury of irrelevant and prejudicial evidence from the witnesses Travon Smith and Ashton Robeldo, whose evidence assisted his case. On page 524, line 2-10–of the summing up, the judge referring to the evidence of Travon Smith said.

"He said in relation to the person who he refers to as Camuel Rolle, that that person does not exist. He just pulled that name out of the clear blue. And he said he made that name up. He said he made up the name Malik Rolle. He pulled it out of the clear blue. He did not know anything about anybody by the name of

Ducky. And he told you that he currently resides at the Bahamas Department of Correctional Services, which he refers to commonly as 'the jail'."

37. At page 524 line 24 to 29 the judge then referred to the evidence of Ashton Robeldo as follows.

> **"Ashton Robeldo also came to you from the Bahamas Department of Correctional Services, and he says that he is currently 16 years old. And in May he would have been 13 years old. And he would be sixteen and currently in the Remand Centre, at the Bahamas Department of Correctional Services."**

38. Both statements made by the judge in the summation simply reminded the jury of negative information about the prosecution witnesses. This information was irrelevant, and we cannot see how this would have prejudiced either of the intended appellants' case.

Ground (Four) for the Intended Appellant Stubbs and (Four b) for Intended Appellant Forbes: The learned Judge decided to not fully redact Jaquan Rolle statement to remove the prejudicial statement "I am a key witness in my father's case" which suggest that the Appellant Forbes was involved in his father's case.

39. Counsel for the intended appellant Forbes contends that the judge's failure to redact the words **"I am a key witness in my father's case"** from the statement of Jaquan Rolle, which was admitted under S. 66 of the Evidence Act prejudiced his case. The prosecution made an application under section 4 (e) of the Evidence Act, Ch 65 to adduce evidence of motive. The section provides as follows.

> **"In any proceeding evidence may be given of facts relevant to any fact in issue, including any fact which shows or constitutes a motive or preparation for any fact in issue."**

40. Jaquan Rolle was a key witness to the murder of his father. The trial judge, in fact, recognised the need to edit a portion of the statement. This is what the judge said.

> **"If he were here, he could say it, possibly, but it really only forms his belief as to why it is he believes something happened. But the first statement on page 1 and the second statement that he is a key witness, those are facts that were relevant in his mind and may very well constitute the motive that the Crown alleges under the sections they have brought to the attention of the court...So, when the evidence is read in, I will speak to the jury at that time and I will also, if it becomes relevant at a later stage beyond the midway point, I will speak to them again at the closing in relation to not drawing any conclusions in relation to the truth or otherwise of the statement, but merely the fact that**

this individual was a witness for the Crown, it forms part of their motive. So, the statement is to be edited to remove the first line on page 2 but otherwise, the remainder of the evidence will be allowed in."

41. We are of the view that this was a proper exercise of the judge's discretion. Proof of motive is admissible evidence, and in the trial judge's view, the evidence was more probative than prejudicial. There is no merit here.

Ground (Six) Intended Appellant Forbes; and Ground (Five) Intended appellant Stubbs: Failure to give an adequate direction to the jury in relation to joint enterprise.

42. Counsel for the intended appellant Forbes and Stubbs contends that there was no evidence to establish that the intended appellants were engaged in a joint enterprise. They argue it was an essential requirement for the prosecution to prove that there was a plan between the two intended appellants to commit the crime. The judge directed the jury as follows.

> **"What is *'being concerned together'*? The words plan or agreement do not mean that there has to be any formality to it. An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made by a nod or a wing or even a knowing look. An agreement can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence, is that each defendant shares the intention to commit the offence and took some part in it, however great or small their part was to achieve that objective. Your approach to this case should therefore be as follows: If looking at the case for each defendant you are sure of their intention which I have just directed you on, and you are to decide whether or not you believe that they committed it, on the case of the prosecution they are saying that these two defendants were acting together. As I indicated to you earlier, mere presence at the scene of a crime is not enough to prove guilt. But if you find that a particular defendant was on the scene and intended by his presence alone, to encourage the other in the commission of the offence, then he would be guilty. But if you find that he was merely present and did nothing else, then he would not be guilty."**

43. From the above extract, the trial judge explained the principle of "being concerned together" to the jury and what constitutes an agreement or plan to commit an offence. She explained the essence of joint responsibility, which is that each person shares the intention to commit the offence. This was an appropriate direction and hence, there is no merit in this ground.

Ground (Eight) Intended appellant Forbes: The intended appellant is not receiving the benefit of his remand time, which the Judge reduced from his sentence.

44. The intended appellant Forbes contends he is not receiving the benefit of his remand time given to him at the sentencing hearing. The intended appellant Forbes's Certificate of Conviction follows:

> **"I HEREBY CERTIFY THAT LAVARDO FORBES of New Providence was on the 215th day of March 2017 convicted by a jury of the following offences that is to say:**
>
> **POSSESSION OF FIREARM WITH INTENT TO ENDANGER LIFE: Contrary to Section 33 for the Firearms Act, Chapter 213;**
>
> **AND**
>
> **DAMAGE: Contrary to Section 3280) of the Penal Code, Chapter 84.**
>
> **and was sentenced on the 9 November 2017 by Her Ladyship The Honourable Madam Justice Mrs. Cheryl Grant-Thompson to a term of ten years imprisonment for possession of firearm with Intent to Endanger Life and 6 Years Imprisonment for Damage.**
>
> **These sentences are to run concurrently from 21st March 2017.**
>
> **DATED this sixteenth day of February 2018".**

45. But this is what the trial judge had to say during the sentencing phase of the trial:

> **"I hereby sentence you Lavardo Forbes to ten years imprisonment for Possession of a Firearm with Intent to Endanger Life. My original contemplated sentence was eight years which was aggravated by a previous conviction that you had to add on two years hence the sentence of ten years. I sentence you to eight years for damage. Both sentences are to run concurrently from the date of conviction which is the 21st of March 2017.**
>
> **MS. GALANOS: My Lady, is the court taking into the account his time on remand?**
>
> **THE COURT: What is the period?**

MS. GALANOS: Three years and six months.

THE COURT: The time on remand will be removed from the higher sentence since they were both run running concurrently. Mr. Allen, you agree with that?

Mr. ALLEN: My Lady, may I crave the court's indulgence?

MS. GALANOS: My Lady, he has been remanded since May of 2014.

THE COURT: He has been on remand since?

Mr. ALLEN: That is agreed, my lady, three years, and six months.

THE COURT: And if you take that from 10 years that is minus to six years and six months.

MS. GALANOS: My Lady is the court minded to take off for both. Because–

THE COURT: I would then reduce the eight years for damage to six.

MS. GALANOS: Yes, my lady, and he would serve that concurrently?

THE COURT: It would be served concurrently."

46. From the above transcript, the trial judge correctly reduced the intended appellant Forbes' sentence from ten (10) years to account for his time spent on remand. So, for the possession of firearm offence, after the remand reduction, the judge sentenced him to 6 years and 6 months. Regarding the offence of Damage, the judge sentenced the intended appellant Forbes to 8 years less 3 years and 6 months for time spent on remand. This would make his sentence on the Damage 4 years 6 months after considering his remand time.

CONCLUSION AND DISPOSITION

47. For all the above reasons, there is no prospect of success in the applications to extend time regarding intended appellant Forbes and Stubbs on all their intended grounds of appeal. Regarding intended ground eight (8) by intended appellant Forbes on taking his remand time into account, this is an administrative matter for the Registrar of the Supreme Court.

48. We deny the application for extension of time for intended appellant Stubbs and affirm his convictions and sentences. Regarding intended appellant Forbes, we deny his application for extension of time concerning his convictions and sentences for possession of a firearm with intent to endanger life and damage and affirm his convictions and sentences. However, we

direct the Registrar of the Supreme Court to correct the intended appellant Forbes's Certificate of Conviction so that it accurately reflects the sentence by the trial court.

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The Honourable Mr. Justice Jones, JA

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The Honourable Madam Justice Crane-Scott, JA

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The Honourable Mr. Justice Evans, JA