[2012] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 16/2009

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MRS JUSTICE McINTOSH JA
THE HON MR JUSTICE HIBBERT JA (Ag)

CHRISTOPHER EDGEHILL v R

Gladstone Wilson for the applicant

Mrs Nadine Atkinson-Flowers for the Crown

29 February and 13 July 2012

McINTOSH JA

[1] The applicant, Mr Christopher Edgehill, otherwise called Garth, was convicted on 30 October 2008, in the Home Circuit Court, before the Honourable Mrs Justice Beswick, on an indictment containing two counts. Count one charged him with the murder of Winston Chin, in the course or furtherance of a robbery and count two charged him with the murder of Aileen Chin. He was sentenced, on 23 January 2009, to imprisonment for life, on each count, with parole being a possibility only after he had served 40 years. Aggrieved by this outcome, he applied for leave to appeal his conviction and sentence and his application, having been unsuccessful before a single

judge of this court, was renewed before us, as is his right. Accordingly, we heard arguments on 29 February 2012, after which we dismissed his application, affirmed his conviction and ordered that his sentence run from 23 April 2009. We seek now to fulfill the promise made then to give written reasons for our decision.

[2] The incident which gave rise to the applicant's conviction occurred on 3 July 2004 in the parish of Saint Mary, where Winston Chin and his wife Aileen Chin were gunned down on arrival at their residence in Jones Lane, Claremount, at the end of their day's labours in the supermarket they owned and operated at Annotto Bay, in the said parish. When the dust had settled, so to speak and the police arrived on the scene, they were rushed to the Annotto Bay hospital where they were pronounced dead. Dr Ere Sheshaiah, the forensic pathologist who performed post mortem examinations on their bodies, testified that he observed two gunshot injuries to the body of Mrs Chin, one of which was to her abdomen, causing her death, while Mr Chin, on whose body he observed a total of nine gunshot wounds, died as a result of multiple gunshot injuries.

[3] The prosecution had indicted the applicant and two other men for the murders but the jury was unable to arrive at a verdict in relation to the other men, returning a unanimous verdict of guilty against the applicant only. The learned trial judge ordered that the two other men face a second trial, but submissions disclosed that at their retrial the learned director of public prosecutions entered a nolle prosequi, opting to discontinue the case against them. This formed the basis of one of the applicant's complaints and will be discussed later.

[4] The prosecution's case relied heavily on the testimony of Miss Lorraine Thompson, who described herself as a mason and a carpenter. It was while she was engaged in her calling, on the night of 2 July 2004, remodeling a bathroom in a burnt down building at Shiloh in St Mary, that she saw the applicant in the living room of the building. He was a person she was accustomed to seeing regularly in the 10 years that she had known him prior to 2 July 2004 and that night, although it was about 7:00pm, there was electric lighting in the building sufficient to enable her to see and to recognize his face. Miss Thompson testified that the applicant was joined by three other men, whom she had also known before and whose faces she was similarly able to see and recognize. She heard the applicant and the men talking and her attention was particularly drawn to words used by the applicant concerning a person he called 'Eileen', which she took to be a reference to Mrs Aileen Chin, one of the operators of Pennies Supermarket in the Annotto Bay Square.

[5] Miss Thompson said the applicant and the other men left the building at about 3:00 o'clock and she left for home at about 4:00 o'clock on the morning of 3 July 2004. That afternoon she returned to Shiloh where she saw the applicant and overheard him in a telephone conversation in which it appeared to her that reference was being made to plans for that evening in furtherance of the conversation she had overheard the previous night. She was moved to make efforts to alert Mrs Chin and her husband at their supermarket but she was unable to speak to them. Then she tried to speak to the police at the Annotto Bay Police Station, but, on being denied access, she returned to the supermarket where she was again unable to speak to Mr and Mrs Chin because she

saw the applicant watching her. Later that same evening she heard something and went to the Annotto Bay hospital where she saw Mr and Mrs Chin. She had gone there "to look at them".

[6] On the afternoon of Sunday 4 July 2004, between 3:00 to 4:00 o'clock, she saw the applicant in Shiloh. They both listened to the news of the double murder in St Mary, on a radio, after which they went again to the burnt out house. The applicant went to the back of the house and she heard him talking to someone, describing how Aileen died. She had recognized that it was the applicant speaking because over the 10 years she had known him, he had spoken to her "uncountable" times. She heard him recounting how Mrs Chin was running and had stumbled and fell. He then went over her and held a gun on her reminding her how she had called the police when he had stolen her lotion and "him just gi har two inna har [expletive deleted]." Later, she saw the applicant and two of the men come to the living room and saw them with an "undetermined" sum of money, "thousand dollars five hundred dollars like wow…", "[the] money dem lie down flat like how the book leaf…" The money was in bags and "dem lie down and full to the brim". Miss Thompson said the men were smiling and throwing up the money "like when you a throw up rice grain after a wedding." Cross-examination of this witness requires separate treatment, as it formed the basis of another of the applicant's complaints and will be addressed in the discussion on his grounds of appeal.

[7] Several other witnesses were called in support of the prosecution's case including Cornell Green who was employed to Mr and Mrs Chin as a gardener for 17 years. He was present at their residence that fateful night, had heard the explosions sounding like gunshots and saw the bodies of his employers lying mortally wounded on the ground. Another of the witnesses, Mrs Melaine Chin Randle, was the daughter and step daughter of Mr and Mrs Chin, respectively. She gave evidence of her knowledge of their mode of operation in the conduct of their business affairs especially their practice of tallying up the day's sales and taking the proceeds home at the end of the day. Evidence was also adduced from the pathologist, Dr Ere Sheshaiah, to whom reference has already been made; six police officers and the applicant's girlfriend, Denise Maragh, with whom he lived at the relevant time.

[8] One of the police witnesses, Detective Sergeant Donovan Hutchinson, testified that on 5 July 2004 he had gone in search of the applicant whom he knew before. His search led him to the home of the applicant and while he was not seen at the house he was observed coming from an adjacent property, walking towards the officer. The applicant looked in his direction and ran making good his escape, though the sergeant had given vigorous chase. Sergeant Hutchinson testified that during the pursuit he observed the applicant remove a black object from the front of his pants and drop it to the ground. When the sergeant was able to retrieve the object, he observed that it was a 9mm pistol bearing serial number VJE 8789, neatly wrapped in a blouse with a cut off sleeve. The pistol was loaded with a magazine containing seven rounds of ammunition and there was another magazine wrapped in the blouse which also contained seven

rounds. Sergeant Pollyana Brown Mullings testified that the firearm bearing the serial number VJE 8789 was registered to Mr Winston Chin and his daughter Melaine Chin Randle did testify that he was a licenced firearm holder. Additionally, there was evidence from Corporal Desrene Chambers as to the apprehension of the applicant who, upon being accosted by a police party while a passenger in a motor vehicle, on 5 July 2004, alighted and ran. He was chased by the officer and this time he was held. When asked why he was running away from the police, he responded "Me hear sey police want me."

[9] Later that same day, Denise Maragh was taken to the station where she positively identified the blouse in which the firearm was wrapped as hers and, when called as a witness by the prosecution, she confirmed this ownership, although in cross-examination she purported to be uncertain since her blouse had only one sleeve cut off and the blouse she was shown in court was missing both sleeves.

[10] The prosecution also adduced evidence from Deputy Superintendent Robert White, who recorded a statement from the applicant under caution which was witnessed by two police officers and an attorney-at-law, Mr Ernest Davis, on 8 July 2004. In the statement, the applicant revealed that he was a party to the enterprise from its inception and may even have set the train in motion, as in his own words:

> "Friday the 2nd of July 2004 I was at a house at Shiloh which is unfinished along with Bryan, X and Y. I told them that we can eat a food from the Chiney man Mr Chin in Annotto Bay and we agree and go and rob him on Saturday …"

He gave details of their journey to the residence of Mr and Mrs Chin and about the actual shooting which he said was done by the other men:

> "I saw them start to shoot at the van and rob Mr Chin, I took out my gun just in case and Mrs Chin ran from the van ..."

He stated that he saw the other two men chase and shoot her, taking up a yellow and green bag she was carrying. Then they all ran back to the vehicle which had taken them there and went to a house controlled by one of the men. The applicant said he was the "look out" man – "Bryan told me to go and hold the front with my gun…" - while the others were in the house, presumably with the bag and its contents. At some point, he stated, Bryan gave him a gun in a brown holster to hide and he took it to his house and used his girlfriend's blouse to wrap it up. He never saw or heard from the men and so he was heading to town with the gun when he saw the police approaching. He ran, the gun fell and he continued running. He got into a car, intending to travel to town, but the police stopped the vehicle and he was apprehended. His closing words were "Mi nuh kill Mr Chin or him wife. Mi did only want to eat a food and mi end up a loser".

[11] Deputy Superintendent White further testified that on 17 July 2004 he arranged for the applicant to answer questions in the presence of Mr Davis. The applicant willingly answered the 77 questions asked of him, under caution, stating "Ah same like how mi tell you it go. Mi just goh fi goh eat a food". He was questioned about his friends in Annotto Bay with whom he had the agreement to rob Mr and Mrs Chin. He was also asked about the firearm taken from Mr Chin, which he said had been given to

him to "pree" [free?] the front of the house where they went after the shooting, while the others were inside, explaining that that meant he was to keep a look out on the outside to see if anyone was approaching, as they counted the money they had robbed. He had not received a share of the money, he said, because one of the robbers had told him that, since he was not "active on the move", he would get nothing. The applicant maintained in the answers he gave that he did not shoot Mr and Mrs Chin and did not know who did.

[12] In the presentation of his defence the applicant elected to give evidence on oath. He denied all the material aspects of the prosecution's case in his evidence in chief and maintained that he had absolutely nothing to do with the murders of Mr and Mrs Chin and did not know who was responsible for their deaths. He did not even know the area where they resided, although he had heard of it. He did not have a gun and did not drop any firearm on the approach of the police as alleged by the prosecution. Furthermore, he was beaten by the police to give the statement relied on by the prosecution and had answered none of the questions asked of him by the police.

[13] He maintained his denial of the prosecution's case in cross-examination, though, at times, with some difficulty and the members of the jury were afforded the opportunity to observe how he dealt with the questions put to him. He called witnesses to impugn the credibility of the prosecution's witnesses, particularly challenging the evidence of Miss Lorraine Thompson and the words she attributed to him. A passing mention of these witnesses is all that is necessary, however, in light of the thrust of the applicant's complaints.

The grounds of appeal

[14] With the leave of the court, the applicant's attorney-at-law, Mr Gladstone Wilson, abandoned the four grounds of appeal originally filed by the applicant and argued instead three grounds which he referred to as the revised grounds of appeal.

Ground One - "**That the behavior of Miss Lorraine Thompson whom the prosecution relied on to convict the Appellant [sic] was disruptive, disrespectful and abusive of Defence Counsel resulting in a prejudicial tarnish on the conduct of the Appellant's [sic] defence.**"

[15] Counsel addressed this complaint by reference to a lengthy extract from the cross-examination of Miss Thompson which, he submitted, demonstrated utter contempt for the court proceedings. According to Mr Wilson, the extract was replete with instances which clearly showed Miss Thompson's disrespect for the accused men and their attorneys. She described questions put to her at times as "pure foolishness" and in one instance she refused to answer a question which she termed "outta order" stating that "it look like yu [that is, the attorney] pass yu place ……mi nah answer dat outta order one". Counsel also highlighted in the extract Miss Thompson's reference to one attorney and his client as a "none skull like from himself" which caused the attorney to protest to the court about her lack of respect. To the female attorney who also appeared in the matter, Miss Thompson said "… Yu a try help yourself as a junior lawyer and mek dah eediot Rasta a tun you in a eediot". Counsel showed how in one instance the learned trial judge was moved to say to her, "Miss Thompson don't speak like that to the lawyer".

[16] Mr Wilson conceded that, for the substantial part of the cross–examination, Miss Thompson's disrespect was directed at the attorneys for the applicant's co-accused and the two co-accused themselves, an example of which was to be found in the following section of the extract:

> "Witness: Your Honour, Is Mr ….. a har client, him a whisper to her him a di senior and she a di junior from senior to di junior a eediot.
>
> Her ladyship: Mr … and Miss … together appears [sic] for the two men on the two sides.
>
> Witness: Just say the two murders."

When asked by one of their attorneys to apologize to the two men, she stoutly refused saying that she "nah apologize. I rather step out", after which the learned trial judge did excuse her.

[17] Notwithstanding that no direct aim was taken at the applicant and his then attorney-at-law, Mr Wilson submitted that it was not possible to separate the applicant from the disrespectful behavior, as all three men were on trial for the same murder and Miss Thompson's contemptuous, disparaging and insulting remarks, would spread equally to the professional integrity of all the attorneys in the matter, undermining the defence of their clients. According to Mr Wilson, the accumulated effect of Miss Thompson's behaviour, which the trial judge had failed to control, had a deleterious effect on the applicant and his trial.

[18] Counsel cited the case of **Wesley Patterson v R** [2010] JMCA Crim 69 as authority for the proposition that in situations where a witness' behavior is in the nature of that exhibited by Miss Thompson, the trial judge has two options, namely to discharge the jury or to give a strong warning to them, cautioning them to ignore the witness' offensive remarks. The option exercised was in the discretion of the learned trial judge, Mr Wilson submitted and would be dependent on the nature of the case. He referred also to **R v Weaver** [1967] 1 All ER 277, submitting that if the words used by the witness clearly showed a preconceived notion that an accused is of bad character it would be proper for the trial judge to discharge the jury. Counsel argued that the offending utterances in the instant case were no casual remarks, as in **R v Coughlan** (1976) 63 Cr App Rep 33 and the effect of the disparaging and prejudicial words of Miss Thompson could not be cured by the trial judge in her directions to the jury. Mr Wilson further submitted that the learned trial judge, having elected not to discharge the jury, was obliged to give the strong warning referred to by Harris JA in **Wesley Patterson** and that was not done.

[19] In her response on behalf of the Crown Mrs Atkinson-Flowers submitted that the general conduct of Miss Thompson was not so overbearing as to result in an unfair trial of the applicant. Counsel argued that it was clear from the record that the learned trial judge did seek "to contain the vituperative nature of the witness' outbursts" and the very extract relied on by the applicant's attorney indicated this. Counsel contended that it revealed the learned trial judge's reminder to the witness that she was to "talk to the lawyers with respect" and that she (the witness) had not been shown any disrespect as

she also was to be treated with respect (page 172 of the transcript). Another instance of the efforts made by the learned trial judge as revealed in the extract was to be found at pages 98-99, counsel submitted, where the learned trial judge told the witness that she was being out of order in her response to a question put to her.

[20] Additionally, counsel argued, the learned trial judge did bring the jury's attention to the witness' behavior in her summation, "without revisiting it in all its colour". Miss Thompson had given evidence for which there was some support in relation to the commission of the offence, Mrs Atkinson-Flowers submitted and in her summation the learned trial judge directed the jury to consider whether, notwithstanding her behaviour during cross-examination, Miss Thompson was lying in the evidence she gave. Counsel also asked the court to note that the main thrust of the witness' derogatory remarks was not directed at the applicant or his counsel. It was counsel's contention that the jury would have been able to assess the witness' evidence against all three accused individually as directed and make up their minds in relation to each. Consequently, counsel submitted, this ground was without merit.

[21] Two issues require the court's determination in this ground of appeal, namely, (i) whether, faced with the behaviour exhibited by Miss Thompson, the learned trial judge correctly and judicially exercised her discretion in not discharging the jury and (ii) whether the learned trial judge, having decided to continue the trial, gave a sufficient warning to the jury concerning their treatment of the witness' behaviour.

Issue (i)

[22] In the words of Harris JA in **Wesley Patterson**:

> "Every case of course, is dependent on the facts and the decision as to whether a jury ought to be discharged is exclusively within the trial judge's discretionary powers."

It is well settled by the authorities that an appellate court will not lightly interfere with the exercise of that discretion. The trial judge will be guided by a number of factors in coming to a determination of the correct course to be adopted. It bears repeating that each case will depend upon its own particular facts and much depends upon the nature of what has been admitted into evidence (or, in the instant case, what was said by the witness) and the circumstances in which it has been admitted (or said), looking at the case as a whole (see **Weaver**; **Coughlan** and **McClymouth v R** (1995) 51 WIR 178).

[23] We are unable to agree with Mr Wilson that in the circumstances of the instant case, the learned trial judge should have discharged the jury. It was for her to determine how she should exercise her discretion, bearing in mind that the witness had given evidence which was supported by other evidence for their consideration. It was for the jury to decide whether Miss Thompson was a witness upon whose word they could rely and the learned trial judge clearly opted to direct the jury's attention to that evidence and to the need for them to assess her credibility rather than her behaviour.

[24] Miss Thompson had been in the witness box for approximately three days and was cross-examined by three attorneys-at-law. It seems clear to us from the transcript of the cross-examination that she became indignant at some of the questions and

suggestions put to her and reacted by uttering rude remarks, but she remained consistent in the material areas concerning what she had told the court that she had seen and heard. At one stage in the cross-examination she complained that she did not feel well and it appeared that there were some visible signs of that. It also appears that she was having a difficulty with the speech pattern of the attorney who then represented the applicant and the learned trial judge assisted counsel by patiently repeating the questions to aid Miss Thompson's understanding of what was being put to her. In our view, contrary to Mr Wilson's complaint, the transcript showed that the trial judge successfully controlled the proceedings as she defused the reaction to the witness' remarks by her own attitude towards them and her assurance to the attorneys that although she agreed with them that the witness' behaviour was inappropriate the matter could and should proceed.

[25] In our opinion, the reliance placed on **Wesley Patterson** is misconceived. In that case Harris JA, who delivered the judgment of the court, had this to say:

> "The real issue in this case is whether the portrayal of the applicant by the complainant as a person of bad character is so devastating that it can be said that the applicant received an unfair trial."

The complainant had launched what was described as a sustained attack against the applicant and, to a lesser extent, against his attorney and at paragraph [19] of the judgment Harris JA said as follows:

> "It cannot be denied that the denigrating comments … tend to show that the applicant is of disreputable character. These comments must be viewed as being capable of causing some harm to the applicant."

Further, the learned judge of appeal continued:

> "If the impugned words used by the witness clearly show a preconceived notion that an accused is of a bad reputation, in such a case it would be proper for the trial judge to discharge the jury."

It was therefore the derogatory remarks concerning the character of the applicant and their impact on the fairness of his trial that quite understandably were of concern to the court and not only the "disruptive, disrespectful and abusive" behaviour of the witness, which is the subject of the complaint in the instant case. This was hardly a case where, as acknowledged by Carey JA in **McClymouth**, the court could feel that the applicant would be justified in saying that what occurred was devastating so as to warrant interference with the exercise of the trial judge's discretion.

[26] Additionally, the witness in **Wesley Patterson** was the sole eye-witness. The prosecution's case rested upon her testimony and once it was determined that the witness' evidence was tainted, there was nothing else to consider. Accordingly, Mr Wilson's submission that the principle to be extracted from **Wesley Patterson** did not call for any consideration of the evidence as a whole, or part thereof, in the judge's determination that the jury should be discharged, is entirely misconceived as there was no other evidence to consider. In the instant case, however, there was other evidence for the jury's consideration, hence the Crown's submission that the learned trial judge had to look at the evidence as a whole and not just the utterances of the witness. The case against the applicant was strong. The statement given by him under caution provided support for Miss Thompson's evidence that he was in that house at Shiloh and

that there was talk of a robbery. There was also her evidence of the conversation in which she recognized the voice of the speaker as the applicant's, describing how Mrs Chin was shot twice. It was open to the jury to assess that evidence along with the evidence of Dr Sheshaiah that Mrs Chin had indeed received two gunshot injuries. Miss Thompson had also spoken about seeing the applicant and the other two men with money after the event and in his statement to the police in the presence of Mr Ernest Davis, attorney-at-law, he spoke of his colleagues counting the money. Additionally, the jury had for their consideration the evidence of the applicant's possession of the gun registered to Mr Winston Chin, after the murders and the robbery. In our opinion the strength of the evidence was an important factor for the learned trial judge's consideration in the exercise of her discretion not to discharge the jury and we found no fault with her decision to continue the trial.

Issue (ii)

[27] The court in **Wesley Patterson** had concluded that:

> "… where the offending words although prejudicial, are not so objectionable as to warrant the discharge of the jury, then the judge must issue a firm warning to the jury in order to disabuse their minds of the fact that the words were used. They should be cautioned that they should ignore the offending words."

However, those words were followed by further guidance from the court:

> "There are however situations where the trial judge may in the exercise of his or her discretion deem it prudent to avoid making reference to the repugnant words. It could be that in referring to the words the jury may be reminded of them, when in fact they may well not have remembered them."

It seems to us that the learned trial judge may well have had similar considerations in mind when crafting her summation. She clearly saw a need to show restraint in dealing with Miss Thompson's behaviour and saw no need to rehearse that part of Miss Thompson's testimony which could only distract the jury from their task of assessing her credibility, giving only such direction as was necessary in the circumstances of this case.

[28] At page 1216 of her summation the learned trial judge had this to say:

> "You saw on several occasion [sic] Mr Foreman and your members, when the witness became what appeared to me irritable with [sic] the lawyer and everybody she spoke about. The lawyer asking her questions 77 times … Was she exasperated or irritated when she was making these answers? Did she have reason to be irritable? But in all of this the bottom line is, is she someone on whom you can rely?"

At pages 1215 and 1218 she told the jury that what Miss Thompson had to say about cocaine and guns being stored in the house at Shiloh were not matters for their consideration. Nor were they to be concerned with any activity which they may regard as illegal or be affected by her use of the word murderers. Then at page 1223 the learned trial judge told the jury:

> "On one occasion Miss Thompson would not even look at the papers being put to her and I think you will remember this part where she says 'science comes to court' and she didn't want to look at the paper because she didn't want to lose her sight. Well, is she reliable Mr Foreman and your members? She was in the witness box for days. Was she fatigued? She is such an important witness, we really have to spend time looking at her and deciding whether she was credible or not."

Again, at page 1226, the learned trial judge said:

> "Now as you wrestle with Lorraine Thompson and her reliability, I invite you to confer [sic] her demeanour because … you can learn so much from a person [sic] demeanour."

[29] It seemed to us that she put the matter squarely before them when at page 1228 the learned trial judge said:

> "Now I can think of many adjectives to describe Miss Thompson. For my part, one of them is unforgettable; one of them would be difficult, one of them would be irreverent. I would also think disrespectful might fit her, and I think I would put in passionate about what she is saying. That is my view, you might add some more or you might subtract some more, but as you describe her in whatever way you describe her, you consider if that attribute affects her credibility. Because a person is disrespectful doesn't mean that he or she is lying. Because a person is passionate, a person is rude doesn't mean that they [sic] are lying…"

and at page 1229:

> "We have to take her as she is. We cannot mold her into a respectable person; she is what she is, and frankly I don't think we need to concern ourselves with changing her into the person that we think she ought to be. But what we must concern ourselves with – not we – you are the ones with the job, you have to concern yourselves with her credibility. Is she a liar or not? I can't tell you that often enough, use everything in the evidence to assess her. Is she a liar?"

[30] The learned trial judge also reminded the jury that the witness had used some unkind terms in reference to one particular attorney but she was not going to repeat them as they had all heard them. She reminded them that the lawyers had asked her to

prevent the witness from behaving in a disrespectful way and that she had responded to them. Unlike **Wesley Patterson** where the witness had begun her offensive behaviour from her evidence in chief right into her cross-examination, there was no sustained attack on the applicant's character in the instant case. The jury had seen and heard Miss Thompson as she testified and would have been able to assess the circumstances surrounding her outbursts.

[31] This was not the strong warning scenario contemplated by the court in **Wesley Patterson** and it was our considered opinion that the above excerpts from the learned trial judge's summation clearly demonstrated that she dealt adequately with the witness' behaviour and her evidence. Mrs Atkinson-Flowers, in our view, correctly submitted that the applicant could not justifiably say that what was said by Miss Thompson was devastating to him, resulting in an unfair trial. Nothing was said that could not and was not cured by the learned trial judge's treatment of the matter and we certainly did not accept Mr Wilson's submission that the disparaging remarks, though for the most part not directed at the applicant, affected the conduct of his defence. The jury clearly followed the judge's direction to disabuse their minds of the outbursts and to focus on the evidence and was able to return a verdict of guilty against the applicant, where the evidence was strongest and no verdict in the case of his two co-accused where they could not make up their minds about the quality of that evidence. Accordingly, for all of the above reasons, ground one was unsuccessful.

Ground two - "**That the Appellant [sic] should benefit with equal measure from the decision of the Director of Public Prosecution [sic] as all three defendants were charged for the same murders on the basis of a common enterprise**."

[32] In this ground it was Mr Wilson's contention that an unconditional nolle prosequi had been entered in the case of the applicant's co-accused, discontinuing their retrial, because the Crown recognized the impact of Miss Thompson's behaviour and the quality of her evidence against them on the prosecution's case and this recognition ought equally to inure to the benefit of the applicant inasmuch as all three men were charged as part of a joint enterprise.

[33] Mrs Atkinson-Flowers, though not called upon by the court to respond orally to this complaint, pointed out in her written submissions that the course adopted by the prosecution in October 2011, was based on the view that the case against the applicant's former co-accused was tenuous. The evidence against the applicant, however, was overwhelming, counsel submitted, involving a statement he gave to the police and answers to questions subsequently put to him, in which he admitted to participating in the joint enterprise and afterwards being in possession of the licenced firearm belonging to Mr Chin. Additionally, counsel submitted, the applicant had given evidence on oath, affording the jury the opportunity to assess him and on the totality of the evidence the jury had clearly been satisfied that the prosecution had made out its case against him.

[34] This ground of appeal is entirely without merit for all of the reasons advanced by Mrs Atkinson Flowers. It was clear that the jury assessed the case of each of the men on trial separately and while they were satisfied with the prosecution's case as it related to the applicant, they could not make up their minds in relation to the other two men. There was no admission by the applicant's co-accused, whether in the form of statements or otherwise and nothing that equated to the strength of the evidence against the applicant which involved much more than the evidence of Miss Thompson. His trial came to a conclusion in January 2009 when he was sentenced and the course adopted by the learned director of public prosecutions at the retrial of the two other men in October 2011 had no bearing on the applicant's already concluded trial. Ground two simply could not succeed.

Ground three - "**That the evidence adduced from the Q & A Conducted with the then suspect Christopher Edgehill did not show that the Appellant [sic] had a gun in his possession; shot any of [sic] both the deceased or that he participated in robbing or fatally shooting Mr & Mrs Chin.**"

[35] Mr Wilson submitted that inasmuch as the prosecution used the evidence contained in the question and answer document to convict the applicant, that evidence was not consistent with his complicity or participation in the murders. Counsel contended that the only evidence about the incident was from the applicant and he maintained that he took no active part in the killing and he was not in possession of a firearm because his only intention was to rob and "eat a food". It was his further

contention that the killing went beyond what the robbers had planned so that only the actual trigger man would be guilty of the murders. The applicant, he argued, would only be guilty of robbery but there was no proof that he had participated in the robbery. Counsel submitted that there is a rebuttable presumption of law that if the applicant was present to aid and abet the commission of a specified offence, then his accidental presence would not be evidence of aiding and abetting. In a case of joint enterprise, counsel submitted, his voluntary presence would normally be sufficient to raise a prima facie case, but it was a question to be determined on the facts in each case. He submitted that in the instant case there was no evidence as to who was the actual shooter and no evidence that the applicant was in possession of a firearm so that there was nothing to support a conclusion that he was an aider and abettor and in this regard, he relied on the case of **R v Clovis Patterson** SCCA No 81/2004, a judgment delivered on 20 April 2007.

[36] In her written submissions, not having been called upon to respond orally, Mrs Atkinson-Flowers contended that the evidence from the question and answer document showed that the applicant played a role in the deaths of Mr and Mrs Chin. She referred to the very extract from the transcript relied on by the applicant's attorney to show that it did not disclose any complicity or participation in the incident, which made it clear that he was involved in the commission of the crime, in that the applicant indicated that he got none of the proceeds of the robbery because it was said that he was not active on the move. This, counsel submitted, showed that he was present as part of the operation. According to Mrs Atkinson-Flowers, the totality of the prosecution's case,

which included the question and answer document, the caution statement, the evidence of Miss Thompson and of Dr Sheshaiah, demonstrated the role played by the applicant and showed that he was no mere aider and abettor. This ground, counsel submitted, should also fail.

[37] Clearly, in our view, this complaint failed to appreciate the totality of the evidence adduced by the prosecution. It was entirely erroneous to contend, as Mr Wilson did, that outside of the question and answer document it would have been difficult for the prosecution to sustain a conviction against the applicant. As noted above, the prosecution's case was not hinged on the contents of the question and answer document alone. More compelling evidence was contained in the applicant's statement to the police given under caution. Admittedly, he did say that his intention was to rob, but that clearly had changed as indicated by the evidence of his account of how Mrs Chin was shot, which the jury was entitled to accept. Mr Wilson's written submission that "there is no evidence of who shot the Chins or [sic] was there evidence that the appellant [sic] was the actual possessor of a firearm that was discharged on that fateful night" was unsustainable.

[38] Further, reliance on the case of **Clovis Patterson** is decidedly unhelpful. The charges which that applicant faced were illegal possession of a firearm and shooting with intent and the court was concerned with the provisions of section 20 of the Firearms Act with particular reference to section 20(5)(a), which raised a presumption that a person was present to aid and abet the commission of an offence under the section, in the absence of a reasonable excuse. The court held that the mere

association with the possessor of a firearm is not sufficient to establish a prima facie case against the possessor's companion. It must be established that his association was non-accidental thereby giving rise to the rebuttable presumption that he was there to aid and abet the commission of the specific offence. In any event, the presence of the applicant in the instant case, at the scene of the murders and robbery, was non-accidental and the evidence disclosed that he was a main participant in the commission of the offences.

[39] This ground also failed with the result that the application was refused as noted in paragraph [1] above.