[2014] JMCA App 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 61 and 62/2012

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

SEIAN FORBES
TAMOY MEGGIE v R

Miss Velma Hylton QC and Mrs Jacqueline Samuels-Brown QC for the applicants

Miss Meridian Kohler and Alwayne Smith for the Crown

30 September; 1, 2, 3, October; 14 November 2013 and 16 May 2014

BROOKS JA

[1] Messrs Seian Forbes and Tamoy Meggie were both convicted on 18 June 2012 in the High Court Division of the Gun Court where they had been tried for the offences of illegal possession of a firearm, burglary, robbery with aggravation, buggery and shop-breaking and larceny. Mr Forbes was acquitted of the charge of buggery but was convicted on all the other charges. Mr Meggie was convicted of all the offences. On 22 June 2012, they were both sentenced to various terms of imprisonment. The details of the sentences are not relevant for these purposes.

[2] They have both applied for permission to appeal against their convictions and sentences. In pursuance of their applications, both have also applied for permission to adduce fresh evidence before the court. It is their application to adduce fresh evidence, with which this judgment is concerned. Before examining the application in detail, however, an outline of the circumstances of the commission of the offences and the initial investigation by the police would be helpful.

Factual Background

[3] On 10 February 2010, sometime between 8:30 and 9:00 pm the complainant was at her home in the parish of Clarendon when two men broke into the house by kicking open the front door. She said that she recognised them as they entered as being persons that she knew before as "Tammy" and "Jay". They, however, covered their faces as soon as they entered the house. She said that Tammy had a gun and Jay was armed with a knife.

[4] The men then tied her up and blindfolded her. They ransacked the house and, upon failing to find any money, asked her for the keys to the bar that she operated nearby. She surrendered the keys to them. When the ordeal ended sometime later that night the complainant had been robbed and buggered, and her bar had been broken into and looted of several bottles of liquor.

[5] The police were summoned and two police officers, Constable Jason Ricketts and Corporal Zena Harrison, attended at the complainant's home, did preliminary investigations and took her to the hospital where she received medical treatment.

Other police investigations continued on the following day and beyond. The investigations led to the arrest and charge of Messrs Forbes and Meggie as well as a third man, Mr Kemar Gayle.

[6] All three were arraigned in the High Court Division of the Gun Court which was held in Mandeville on an indictment charging them for the offences mentioned above. They all pleaded not guilty, but during the trial before Simmons J, Mr Gayle pleaded guilty to four of the offences and the prosecution offered no further evidence on the counts of robbery with aggravation and buggery. The trial continued in respect of Messrs Forbes and Meggie and resulted in their respective convictions.

The grounds of appeal

[7] In order to place the application for permission to adduce fresh evidence in context, it would assist in noting the supplemental grounds of appeal that have been filed on behalf of the applicants. They, with the permission of the court, replaced the original grounds filed by the applicants (described therein as "the appellants") and are as follows:

> "1. The evidence as to the identification relative to the two appellants have [sic] been so discredited and/or rendered unreliable that the appellants ought not to have been convicted on the said evidence; whereupon there has been a miscarriage of justice.
>
> 2. In her summing up the learned trial judge failed to have regard to and/or to demonstrate that she took into account patent weaknesses in the identification evidence, whereupon the appellants' chances of acquittal was [sic] impaired.

3. The learned trial judge failed to apply the law as it relates to alibi evidence tendered on behalf of the appellants whereby the appellants' chances of acquittal was [sic] impaired.

4. The learned trial judge erred in convicting the appellants as she ought to have accepted the evidence of alibi tendered on behalf of the appellants and thereby find [sic] them not guilty.

5. There has been no evidence tendered to support the charge of robbery with aggravation as set out in count 3 of the indictment and accordingly verdicts of not guilty ought to have been arrived at with respect to both appellants on this count.

6. The learned trial judge erred in convicting the appellant, Tamoy Meggie of the offence of buggery as there was no evidence or not sufficient evidence to support the charge.

7. The appellants were deprived of the benefit of the law relative to character evidence in that the learned trial judge failed to apply the said law to the evidence and rejected evidence of character in the absence of any or any sufficient basis for doing so.

8. The fact of discovery of the co-accused, Kemar Gayle's fingerprints on a cup found in the virtual complainant's house, the absence of any fingerprints of any of the appellants on any part of or item found in the virtual complainant's premises and the guilty plea of the co-accused Kemar Gayle while the trial proceeded are all matters that the learned trial judge ought to have taken into account in the appellants' favour and as supportive of their defence and/or innocence. The learned trial judge failed to do so whereby their chances of acquittal was [sic] impaired.

9. The learned trial judge erred in finding the appellants guilty as there is no evidence that they acted in concert with Kemar Gayle whose guilty plea was accepted by the learned trial judge.

10. The summing up is unbalanced and/or unfair as the learned trial judge has overlooked inconsistencies and weaknesses on the prosecution's case disregarded evidence favourable to the defence and rejected the appellants' defence for reasons which are inadequate and/or unsupportable in law.

11. The appellants did not receive a fair trial as material which impacted on the credibility of the prosecution's case and which was in the possession of the prosecution and as well [sic] was not available to the appellants during the trial.

IN THE PREMISES THERE HAS BEEN A MISCARRIAGE OF JUSTICE RELATIVE TO BOTH APPELLANTS (sic)." (Capitals as in original)

Several of the grounds, especially ground 11, speak to the issue of the credibility of the prosecution's case. That issue would, undoubtedly, be affected by any evidence which called into question the credibility of the main witnesses for the prosecution.

The application to adduce fresh evidence

[8] The evidence that Messrs Forbes and Meggie seek to place before the court is in respect of two aspects of the case. The first is in respect of the identity of the individuals involved with Mr Gayle in the commission of the offence and the second concerns whether the complainant told the police, when they first attended her home, the names of her attackers. The application seeks the admission into evidence of the following documents:

"(i) Extract from the Station Diary of the Porus Police Station being entry number 27 made on February 11, 2010 by Constable J. Ricketts.

(ii) Statement made by Detective Sergeant Owen Hyatt, [in] the form of a note handed to Queen's Counsel Velma Hylton and as referred to in her affidavit sworn

to on July 16, 2012 and affidavit of Lorenzo Eccleston sworn to on September 25, 2013.

(iii) Statement of Kemar Gayle dated June 22, 2012 and referred to in affidavit of Lorenzo Eccleston dated September 25, 2013.

(iv) Evidence contained in the affidavits of Queen's Counsel Velma Hylton sworn to on June 21, 2012, July 16, 2012 and July 31, 2012."

[9] The aspect concerning the complainant's identification of the attackers would be addressed, the applicants say, by an entry made in the station diary of the Porus Police station made by Constable Ricketts on 11 February 2010, that is, the day following the incident. The aspect of the application concerning the persons involved in the crimes is addressed in Mr Gayle's statement and testimony to this court. These are to the effect that Messrs Forbes and Meggie were not involved in the offences committed against the complainant, and that his accomplices were men other than these applicants. He also made a statement to that effect to the investigating officer in the case, Detective Sergeant Owen Hyatt.

[10] Miss Velma Hylton QC was counsel for the applicants at the trial and her affidavits mainly speak to what Mr Gayle told her during and after the trial. Mr Lorenzo Eccleston is a member of Mrs Samuels-Brown's office staff. His affidavit merely exhibits these various statements and affidavits. He has no first-hand knowledge of these matters.

[11] After hearing submissions in respect of the application for the admission of the fresh evidence, the court decided to look at the diary entry and to hear Mr Gayle's testimony for what they were worth (*de bene esse*).

The evidence

a. The diary entry

[12] The court was informed that Constable Ricketts was no longer a member of the police force. The entry in the station diary, in his handwriting, was produced, in his stead, by Sergeant Robert Young, the sub-officer in charge of the Porus Police Station. He testified that all occurrences, including the movement of personnel, are recorded in the station diary. Entries in the diary should be as accurate as possible, he said, and a certificate as to the accuracy of the entries in the diary is made at least once per day. If there were any inaccuracy identified it would be highlighted.

[13] Sergeant Young testified that each entry concerning a reported offence should record the date and time of the offence, the name of the person reporting it and the name of the person responsible for committing the offence, if the identity of that person is known. He said that, from his experience and his understanding of the police manual, there was no basis on which the name of the perpetrator of an offence, if known, would be omitted from an entry in the station diary.

[14] The contents of the entry were viewed by the court. Nowhere in the entry does Constable Ricketts state the name or names of the perpetrators. This is despite the fact that he testified at the trial, as the complainant and Corporal Harrison also did, that

the complainant did tell the police the names of the perpetrators at the time that the police first visited her home.

b. Mr Gayle's evidence

[15] The evidence of Mr Gayle's presence in the complainant's house that fateful night, included testimony that his fingerprints were found on an item in the house. Mr Gayle testified before this court that he had been charged along with Messrs Forbes and Meggie with the offences in this case, but that he did not know them before being apprehended in respect of these offences. He said that, when he was in court, he had been placed in the prisoners' dock with them. After he had pleaded guilty, however, he was removed from the prisoners' dock and he left them there. He said that they were not involved in the commission of the offences.

[16] He said that he was taken to the prison at Spanish Town and it was some time after that that Miss Hylton QC approached him to give a statement, and he did so. It is the import of that statement that he communicated in evidence before this court in pursuance of the present application.

[17] He testified that on the night of the incident he had gone into the complainant's premises with two other men, namely, Scott Morris and Robert. He said that Robert was in possession of a firearm at the time. It was his firearm, he said, but he had loaned it that night to Robert. In his statement, he said that all three had covered their faces before entering the house.

[18] He testified as to the discussions had with the complainant and his decision to go to her bar and there to steal the items. He went to the bar along with Robert and left Scott Morris with the complainant. According to him, there was no sexual activity prior to the time that he and Robert left the house. He said that the things that were stolen from the bar were put in a car. That car was driven by a fourth man who was involved in the joint enterprise, but who did not enter the complainant's home.

c. A note from the investigating officer

[19] There was a third bit of evidence that the applicants referred to, which is somewhat allied to Mr Gayle's statement and testimony. It is a note written, it is said, by the investigating officer in the case, Detective Sergeant Hyatt, and given by him to learned Queen's Counsel, Miss Hylton, on 22 June 2012. In that note, Detective Sergeant Hyatt stated that Mr Gayle told him on 21 June 2012 that the applicants were not involved in the commission of the offences. According to the Detective Sergeant Hyatt's note, Mr Gayle's explanation for not having divulged that information earlier, was that he thought the applicants, "would a get away".

The submissions

[20] Counsel on both sides made substantial submissions in respect of this application. Mrs Samuels-Brown submitted that the bits of evidence sought to be admitted satisfied the four criteria for the admission of fresh evidence, namely, that:

(a) None was available at the time of the trial.

(b) Each is relevant.

(c) Each is credible.

(d) Each may have caused a reasonable doubt to arise in the mind of the tribunal of fact.

[21] In respect of the station diary, learned Queen's Counsel submitted that, not only was it not discoverable through reasonable diligence by the defence, at the time of the trial, but that, in failing to produce it to the defence prior to, or during the trial, the prosecution had breached the duty of full disclosure that is imposed on it. For these reasons, learned counsel submitted, the application should be granted.

[22] She cited a number of authorities in support of her submissions, including **R v Page** (1967) 10 JLR 79, **R v Robert Cairns** [2000] CLR 473; [2000] Times 8 March, **Shawn Allen v R** SCCA No 7/2001 (delivered 22 March 2002), **R v Collin Mann** SCCA No 1/2003 (delivered 30 July 2004) and **Lincoln Bowen v R** [2013] JMCA Crim 66.

[23] Miss Kohler, on the other hand, submitted on behalf of the Crown that the evidence sought to be admitted was available at the time of the trial and therefore the first criterion established by the authorities had not been met. She argued that, in any event, the diary entry was not admissible because it was not tendered through its maker, Constable Ricketts, and that Mr Gayle's testimony should be rejected because Mr Gayle was not a credible witness.

[24] Learned counsel also relied on several authorities in support of her submissions, including **R v Alfred Parks** [1961] 3 All ER 633, **Brian Bernal v R** RMCA Nos 30 and 31/1995 Motion No 1/1996 (delivered 6 November 1997), **Mario McCallum v R** SCCA

No 93/2006 App No 78/2008 (delivered 18 June 2008) and **Kevin Mayne v R** SCCA No 193/1999 App No 43/2006 (delivered 4 July 2008).

The analysis

a. The law

[25] In analysing this application, it may be best to start with the statutory authority given to this court to admit fresh evidence at the stage of an appeal. The relevant provision is section 28 of the Judicature (Appellate Jurisdiction) Act. The section authorizes this court, in determining an appeal, to order the production of documents and the examination of witnesses, which production or examination is necessary for the determination of the appeal. The section states, in part, as follows:

> "28. For the purposes of Part IV and Part V [which deal with the jurisdiction in criminal cases], the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and
>
> ..."

[26] There has been ample guidance from the decided cases as to the way in which this authority is to be exercised. The most often-cited authority in respect of this guidance is that contained in the judgment of Lord Parker CJ in **R v Parks**. In construing the authority given to the court by legislation, similar in terms to section 28, Lord Parker stated:

> "As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." (Emphasis supplied)

It was pointed out by Harrison JA in this court, in **Mario McCallum v R** that the requirements identified in the above extract "are cumulative hence the applicant must satisfy each one" (page 3).

[27] The principles set out in **R v Parks** have been accepted and applied by this court in many cases, including **R v Page**. In more recent times, there has been a refinement of the third principle that was cited by Lord Parker. The Privy Council in **Clifton Shaw and Others v The Queen** PCA No 67/2001 (delivered 15 October 2002) cited, with approval, from the judgment in **R v Sales** [2000] 2 Cr App Rep 431, in which Rose LJ

categorised fresh evidence for the purposes of its reception. Rose LJ stated, in part, at page 438:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness *de bene esse* in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court."

The principles set out by Rose LJ were also adopted in **Kenneth Clarke v The Queen** PCA No 93/2002 (delivered 22 January 2004). Both **Clifton Shaw and Others v The Queen** and **Kenneth Clarke v The Queen** are decisions of the Privy Council in respect of appeals from this court.

b. Mr Gayle's evidence

[28] In applying all those principles to the present case, the first question to be asked is whether the evidence that the applicants seek to tender was available, with reasonable diligence, at the trial. Miss Kohler submitted that Mr Gayle, as soon as he had pleaded guilty, in addition to being a competent witness, became a compellable witness. Mrs Samuels-Brown, on the other hand, contended that Mr Gayle was not sentenced until after the applicants and therefore his conviction was not secured until after their convictions. The implication of Mrs Samuels-Brown's submission is that Mr Gayle was not a compellable witness at the trial. It must be noted, however, that section 28 only speaks to this court hearing witnesses who were compellable at the

trial. If Mr Gayle were not a compellable witness then his evidence is not available as fresh evidence.

[29] The relevant principle in examining these contending submissions is that, by virtue of section 9 of the Evidence Act, a person, who is charged along with another, is not a compellable witness in the trial of the case against them. The relevant portion of the section states:

> "9. Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided as follows-
>
> (a) A person so charged shall not be called as a witness in pursuance of this Act, except upon his own application...."

[30] It is true that Mr Gayle, having pleaded guilty during the course of the trial, was not formally found guilty or sentenced, at that time, by the learned trial judge. He was, therefore, entitled to apply to change his plea back to one of not guilty, although it is unlikely that the learned trial judge, in the exercise of her discretion in that regard, would have allowed him to do so. He may, therefore, be said not to have been a compellable witness, although he was, undoubtedly, a competent witness (see section 9 of the Evidence Act and **James MacDonnell (or MacDonald)** (1909) 2 Cr App R 322). Once he had pleaded guilty, however, it was open to the applicants to request him to give evidence on their behalf.

[31] The applicants' counsel at the trial was aware that Mr Gayle was denying any prior knowledge of these applicants. She deposed to that fact in an affidavit sworn to on 27 June 2012. Nonetheless, she did not attempt to have Mr Gayle called as a witness, although it was apparent that his importance, as a witness, was recognised. The transcript, at pages 343-345, demonstrates this when it reveals that after Mr Gayle had pleaded guilty, learned counsel for the applicants requested the learned trial judge to have Mr Gayle "made available if and when the events of the other two [accused] is needed [sic]". The learned trial judge reminded counsel that Mr Gayle's whereabouts were known and he could be located if required. The learned trial judge, upon Mr Gayle requesting to be excused from sitting in the dock for the rest of the trial, granted his request. It did not however, prevent him from being called as a witness if the defence had sought his testimony. He, of course, was not called. His explanation for not volunteering the information earlier, namely that he thought that the applicants would have been acquitted, does not constitute an acceptable reason for that omission.

[32] That analysis reveals that Mr Gayle was not technically a compellable witness and there is no evidence that he was willing, but was prevented, from testifying on behalf of the defence. His testimony would not, therefore, fall within the ambit of section 28.

[33] In addition, and also based on the above discussion, Miss Kohler is correct in saying that the evidence that the applicants seek from Mr Gayle, in their application for permission to appeal, was available at the time of the trial. Mr Gayle did not refuse to give evidence on behalf of the defence. He was, simply, not asked so to do. Although

his status was well known to the applicants, no effort was made to secure his testimony. The opinion of the court in **R v Boal and Others** [1964] 3 All ER 269, in similar but not identical (the co-accused pleaded guilty prior to the trial) circumstances, is instructive. Widgery J, in delivering the judgment of the court said at page 275G:

> "This court takes the view that the appellant Cordrey was a competent and compellable witness at the trial and that, not being charged with an offence actually within the consideration of the jury at the time, he was not to be regarded as a person charged within the meaning of s 1 of the Act of 1898 [in similar terms to section 9 of the Evidence Act]. **In our judgment, the fact that the appellant Cordrey may have been unwilling to testify at the trial and is willing to testify now is not in itself sufficient to make his evidence fresh evidence within the well-known principle on which this court acts**. Accordingly, the court refuses the application of counsel for the appellant Boal to call the appellant Cordrey on the ground that his evidence was available..." (Emphasis supplied)

[34] Mr Gayle's evidence was, therefore, available and discoverable with reasonable diligence at the time of the trial. In failing to clear this first hurdle set out in **R v Parks**, the application to have Mr Gayle's testimony admitted into evidence would falter.

[35] Out of completeness, however, it may be said that, having seen and heard Mr Gayle testify, it cannot be said that his evidence was totally incredible. His demeanour, however, did leave a lot to be desired, especially when ascribing certain acts to Mr Scott Morris, who, he said, was one of the persons with him at the complainant's house. Some of his evidence in that regard did, also, come across as a rehearsal. There were also some discrepancies in his testimony concerning the use of the key to open the

complainant's bar and who it was that had used the key. Mr Gayle's evidence could not be said, therefore, to be plainly credible in respect of the identities of his cohorts in the commission of those offences.

[36] Based on the fact that his evidence was available at the time of the trial, this aspect of the application must, however, fail.

c. The entry in the station diary

[37] As was mentioned above, the submissions in support of the admission of the station diary entry are that it was not available with reasonable diligence, and that, in any event, the prosecution ought to have disclosed it. It was stated in **R v Jones and White** (1976) 15 JLR 20 at page 22D that a station diary is not a public document and that entries therein are not evidence of the truth of their contents. Despite that status, however, an entry in a station diary may be used at a trial for the purpose of contradicting a witness' testimony (see **Shawn Allen v R** and **R v Collin Mann**).

[38] It is fair to say that the entry would not have been readily available to the defence before or during the trial. Undoubtedly, some defence counsel routinely seek to secure such entries, but it cannot be properly said that entries in station diaries are available with reasonable diligence. Not being public documents they may not be readily available to defence counsel. Additionally, in any given case, it may not be easily discoverable if, when, or how many relevant entries were made in a station diary. The applicants have, therefore, satisfied the first requirement for having the station diary adduced as fresh evidence.

[39] The second requirement established in **R v Parks** is that the entry should be relevant to the issue. The reason for seeking to have the entry adduced into evidence is to show that, despite Constable Ricketts' evidence that the complainant had previously told him the names of the perpetrators, he did not include the names in the report of the incident that he made in the station diary.

[40] The transcript of the evidence reveals that whereas the complainant was extensively cross-examined on the issue of whether she did tell the police the names of the perpetrators, Constable Ricketts was not tackled at all in cross-examination, concerning his evidence to that effect. Corporal Harrison was, however, cross-examined as to the inclusion of names in the complainant's initial report. She was questioned as to the reason for the absence of the names from her statement concerning the complainant's initial report. Corporal Harrison agreed that it was not in that portion of the statement but pointed out that the names were mentioned later in her statement. This assertion was not disputed, neither was it suggested to either police officer that the complainant did not tell them any names for the perpetrators.

[41] It may well be said that if learned defence counsel at the trial was aware of the existence and the contents of the diary, the cross-examination of Constable Ricketts would have taken an additional, if not different, tone. For that reason, it may be said that the document is also relevant to an important issue in the appeal. This was recognised in **Shawn Allen v R**. In an application to have an entry in a crime diary

entered as fresh evidence, Panton JA (as he then was) stated at page 4 of the judgment:

> "That the entry is relevant is easily seen as there is confirmation that it contains a note of the report made to the investigating officer. The entry is also signed by the investigating officer and describes the perpetrator of the murder."

Constable Ricketts' entry in the station diary, therefore, satisfies the second requirement laid down in **R v Parks**.

[42] The requirement of credibility is applied somewhat differently in this case from the way it was contemplated in **R v Parks** and **R v Sales**. These applicants do not seek to use the diary entry for the truth of its contents. They seek to adduce it to throw doubt on Constable Ricketts' assertion that the complainant told him the names of the perpetrators. They would have been entitled to use it in that way at the trial. This court so ruled in **Shawn Allen v R** and **R v Collin Mann**. It may, therefore, be considered at the appellate level in that context. That it is an entry made by Constable Ricketts, is however, not in dispute. That is a fact plainly capable of belief. The third requirement of **R v Parks** has also been satisfied.

[43] The fourth requirement is whether the contents of the entry could have raised a reasonable doubt in the mind of the tribunal of fact. It is agreed that, in the absence of a credible explanation from Constable Ricketts, the absence of the names from the station diary entry could have caused the learned trial judge to doubt Constable Ricketts' testimony. The fourth requirement has, therefore, been satisfied.

[44] Based on that analysis the application to have this court consider the entry contained in the station diary should be granted. For it to be used with effect, however, it will be necessary to have Constable Ricketts present at the time of the hearing of the appeal in order for the court to decide what effect the admission of that evidence could have had. That is an administrative matter which will be addressed in the orders made below.

d. The note from Detective Sergeant Hyatt

[45] Detective Sergeant Hyatt's note of Mr Gayle's stance in respect of the applicants, does not satisfy the requirements set out in **R v Parks**. Not only was Sergeant Hyatt's information available before the applicants were sentenced, but it is clearly comprised of hearsay and therefore not available as evidence at all. The substantive evidence would have been Mr Gayle's direct testimony and that has already been assessed.

Summary and conclusion

[46] Application of the guidance provided by **R v Parks**, to this case, reveals that the testimony of Mr Gayle is not admissible at the hearing of the appeal. Mr Gayle was a competent although, technically, not a compellable witness at the trial. In any event, his evidence was available at the time of the trial and there is no indication that he was refusing to testify on behalf of the applicants. His testimony failed the first requirement of **R v Parks**.

[47] The entry in the station diary has satisfied all four requirements set out in **R v Parks**. It was not available to the defence at the time of the trial, it is relevant to an

important issue on appeal and it is not disputed that it was made by Constable Ricketts. It calls for an explanation from Constable Ricketts and in the absence of such an explanation could have raised a reasonable doubt in the mind of the learned trial judge as to Constable Ricketts' credibility.

[48] In conclusion, it is found and ordered as follows:

a. The application to adduce into evidence, at the hearing of the appeal, the statement of Mr Kemar Gayle made on 22 June 2012, is refused.

b. The application to adduce into evidence at the hearing of the appeal, the note written by Sergeant Hyatt, is refused.

c. The application to adduce into evidence, at the hearing of the appeal, the entry made by Constable Jason Ricketts on 11 February 2010 in the station diary of the Porus Police Station, is granted.

d. Constable Ricketts shall be summoned to attend the hearing of the appeal in order to be cross-examined.

e. The sub-officer in charge of the Porus Police Station shall be summoned to produce the said station diary at the hearing of the appeal.