IN THE COURT OF APPEAL

TURKS AND CAICOS ISLANDS

CR-AP 6 & 7/2021

BETWEEN:

Andrew Parker

and

Shavez Musgrove

Appellants

Versus

REX

Respondent

Before: **The Hon. Mr. Justice K. Neville Adderley, JA, President (Ag.) (Presiding)**

The Hon. Mr. Justice Stanley John, JA

The Hon. Mr. Justice Bernard Turner, JA

Appearances: Ms. Sheena Mair, for the Appellant Musgrove

Ms. Lara Maroof, for the Appellant Parker

Ms. Mickia Mills, for the Respondent

Hearing Date: 19 October 2023

Date Handed Down: 29 February 2024

JUDGMENT

Rape – Kidnapping - Robbery – Possession of Imitation Firearm – Taking a Motor Vehicle without authority- Appeal against Conviction and sentence – Evidence – Admissibility - DNA Evidence – Intimate Samples – Use of previously collected Intimate Samples - Whether the Trial Judge erred in refusing to exclude DNA Evidence - Submission of No Case to Answer– Whether the Trial Judge erred in refusing the submission of No Case to Answer – Procedural Irregularities - Whether the trial was unfair due to procedural irregularities - Directions to the jury – Misdirection - Whether the Trial Judge misdirected the jury

Cases considered:

Delancy and others v R 2020 TCACA 22; *R v Alan Grant* 2008 EWCA Crim 1890; *R v Galbraith* (73 Cr. App. R. 124 CA); *R v Jogee and R v Ruddock* 2016 UKSC 8 & UKPC 7; *R v Lawrence (Stephen)* [1982] A.C. 510; *R v Robert Ogden* 2013 EWCA Crim 1294*; R v Sang* 1980 A.C. 402; *S and Marper v United Kingdom* (2008) ECHR 1581; *The Queen v Albert Rosa De La Rosa* BVIHC 22/2014; *R v Tsekiri* 2017 EWCA Crim 40.

TURNER JA:

1. The Appellants Andrew Parker and Shavez Musgrove were convicted on 3rd December 2021 after a trial by jury before His Lordship Mr. Justice Carlos Simons, on an Information charging them as being concerned, together with others (who were not before the court), with:
    1) 3 counts of rape, contrary to section 29 of the Offences Against the Person Ordinance, chapter 3.08;
    2) 3 counts of kidnapping, contrary to the common law;
    3) 2 counts of robbery, contrary to section 10(1) of the Theft Ordinance chapter 3.10;
    4) 3 counts of Possession of Imitation Firearm with Intent to Cause Fear, contrary to section 22(1) of the Firearms Ordinance, chapter 18.09; and

5) a single count of Taking a Motor Vehicle without authority, contrary to section 14(1) of the Theft Ordinance chapter 3.10.

2. On the 8th December 2021, they were each sentenced as follows:

1) 15 years imprisonment for each of the three counts of rape, to run concurrently;
2) 10 years for each of the three counts of kidnapping, to run concurrently with each other but consecutively to the 15 years for rape;
3) 10 years for each of the two counts of robbery, to run concurrently with the 10 years for kidnapping;
4) 15 years for each of the three counts of possession of an imitation firearm with Intent to Cause Fear, to run concurrently with the 15 years for rape, and
5) 3 years for taking a motor vehicle without authority, to run concurrently with the 10 years for kidnapping.

Effectively therefore, taken together, each of the two appellants was sentenced to a term of imprisonment of 25 years.

3. Each of the two appellant's filed a *Pro Se* Notice of Appeal against conviction in the Court of Appeal on 12th December 2021.

4. Amended grounds of appeal were filed by counsel on behalf of the appellant Parker on the 11th of September 2023. Those grounds read as follows:

1) The learned judge erred in refusing the submission of no case to answer in circumstances in which there was simply no evidence upon which a properly directed jury could safely convict.

2) The Learned Judge fundamentally misdirected the jury in relation to the forensic DNA evidence in the following ways:

i. *By advising the jury that the appellant's DNA was found in the vehicle used to commit the crimes which was contrary to the evidence of the forensic scientist;*

ii. *By failing to remind them of the evidence of the forensic scientist that there was only slight support for the assertion that the appellant's DNA had contributed to the sample;*

iii. *By failing to advise the jury on how to approach the DNA evidence and it's relevant to determining their verdict.*

3. The learned judge as directed the jury on the issue of alibi and its significance to that deliberations

4. Alternatively, the appellant seeks leave to appeal the sentence of 25 years imprisonment on the ground that the sentence is manifestly excessive in all the circumstances."

5. It is not readily apparent from the record if, or when counsel on behalf of the appellant Musgrove applied for or filed amended grounds of appeal, however the grounds upon which his appeal was advanced were as follows:

1) *The Learned Judge erred in refusing to exclude the DNA evidence.*
2) *The Learned judge erred in refusing the no case to answer submission.*
3) *The trial was unfair due to a number of procedural irregularities and non-disclosure/absence of evidence.*
4) *The learned judge failed to direct the jury properly on the law relating to the offences, the evidence and the defence case.*

5) The sentence imposed was manifestly excessive."

6. The appeal was heard on 19th October 2023 and upon the completion of submissions by counsel on behalf of each of the Appellants, counsel on behalf of the Respondent very properly conceded that the appeal of the appellant Parker should be allowed and his conviction and sentences quashed. The court upon that concession and after a consideration of the evidence, for the reasons contained hereafter, allowed the appeal of Parker and set his convictions and sentences aside, with no order for a retrial.

7. After consideration of the submissions on behalf of the appellant Musgrove, I consider that the appeal of Musgrove must be allowed, for the reasons which follow.

Factual Background

8. The incidents the subject of the charges took place on the evening of the 18th July 2017. At around 11:30pm. that night, the three Complainants hereafter referred to as C (a female) F, (a female) and P (a male) were together in a black Chevrolet jeep coming from a nightclub in downtown, Providenciales and headed to the home of C in Boddle Way, Blue Hills. Upon driving into the yard, P exited the vehicle to relieve himself. Shortly thereafter, three masked men (the assailants), dressed in black and armed with guns ran from the street into the yard. Two entered the vehicle in the back and pointed the guns at C and F. P was forced back into the vehicle.

9. One of the assailants sat in the driver's seat and demanded money. He took the handbag belonging to C and passed it to one of the assailants in the back who emptied it onto the ground and took a cell-phone, $900 cash and a bank card belonging to C.

10. The driver/assailant then drove the vehicle away with the three complainants together with his two assailants. He drove to the First Caribbean Bank on the Leeward Highway where C was forced to withdraw cash from the ATM cash machine. She was only able to withdraw $20, since she only had a few dollars in her account.

11. Thereafter he drove to the Lower Bight, where C was forced to purchase condoms from a store in *"Brother Will's Plaza"*. She purchased a packet of Trojan Fire and Ice condoms. He then drove to an area known as Grace Bay Village where additional items were taken from the complainants and C and F were each sexually assaulted by each of the assailants. The sexual assaults took place both outside and inside of the vehicle, the assailants using the condoms earlier purchased. One of the assailants then forced P to have sex with F.

12. After the sexual assaults (the subject of the rape charges), the complainants were driven away in the vehicle by the assailants, along the Highway and eventually pursued by a police vehicle. The vehicle came to a stop and the assailants made good their escape.

13. Neither of the Appellants was identified by the Complainants but, vaginal and body swabs were collected from the Complainants. The vehicle was also swabbed, as were a number of items recovered from the location at Grace Bay Village where the sexual assaults took place.

14. On 31st July 2017 the swabs were sent to DNA Labs Florida (the Lab).

15. The appellant Musgrove was arrested at Parrot Cut on 6th November 2017 and on 7th November 2017 he consented to provide the police with a sample of his DNA, which was later collected.

16. The appellant Parker was arrested by the police at his workplace on 9th November 2017 and he consented to provide a sample of his DNA to the police, which was later collected. That resulted in a buccal swab being sent to the Lab on 15th November 2017.

17. The Crown's case against both appellants depended solely on the DNA evidence of the forensic scientist, there being no identification of either of the appellants, nor any confessions or admissions to the commission of any of the offences charged. No DNA evidence incriminating either appellant was obtained from any vaginal swab of any of the complainants, there being evidence of the use of condoms by the assailants.

18. The DNA evidence in relation to Parker came from swabs of the gear stick of the vehicle.

19. In relation to Musgrove, the DNA evidence came from swabs of portions of a torn condom box, found at the scene at Grace Bay Village; and from swabs of a torn condom box recovered from the trunk area of the vehicle, said to have been one of the loci in the vehicle where sexual assault took place.

20. The case was prosecuted on the basis that the various pieces of a condom box recovered from the vehicle and from the location where the vehicle was said to have been parked at Grace Bay Village were all a part of one torn up condom box, which was the box which C had been forced to buy; however there was no evidence led to show that the pieces were scientifically proven to have constituted one box, or that anyone had attempted to put the pieces together to determine if in fact they constituted pieces which fit together would make a complete box.

Appeal of Andrew Parker

21. As indicated earlier, the Respondent conceded the appeal of the appellant Parker. The evidence from the Forensic DNA analyst, Rachel Oefelein, of DNA Labs Florida in relation to the appellant Andrew Parker was that he was excluded as a contributor to the mixed DNA profiles found on the following items:

    1. Pieces of a torn Trojan Fire & Ice condom box;
    2. The swabs from the steering wheel;
    3. The swabs from C's neck;
    4. The swabs from C's arm.

22. ln relation to a torn piece of Trojan Fire & Ice condom pack found on the road, although he was not excluded as a possible contributor, the DNA evidence indicated that there was strong support that two unknown persons contributed to this DNA sample, rather than the appellant Parker and an unknown person.

23. ln relation to the swabs from the gearshift stick of the jeep, the DNA expert Rachel Oefelin, in her evidence said that Andrew Parker could not be ruled out as a possible contributor to the mixed DNA profile obtained from the swab. Accordingly the swab was reanalysed utilizing probabilistic genotyping methods, which indicated that the DNA profile obtained was 2.2 times more probable if the sample originated from Andrew Parker and three unknown persons than if it had originated from four unknown persons.

24. She further testified, that there was only slight support that Andrew Parker and 3 unknown persons contributed to the mixed DNA profile, rather than 4 unknown persons. In seeking to explain what this statistic meant, the witness stated as follows:

"It is not that meaningful of a statistic. So although it's giving more support to one scenario over the other, this is an incredibly low statistic."

And:

"Ultimately, it means Mr. Parker was not excluded, however, there is only slight support favouring inclusion of Mr. Parker to this DNA profile."

25. Since that was the only evidence against the appellant Parker, counsel for the respondent's concession that the appeal should be allowed was entirely proper. Per the *locus classicus* on this issue, **R v Galbraith (73 Cr. App. R. 124 CA)** where it was stated:

"if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case… Where the judge concludes that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made, to stop the case."

26. We were satisfied that no jury properly directed could convict on that evidence. Taken at its highest that evidence could not satisfy the legal standard of proof of 'beyond a reasonable doubt' and therefore the appellant's no case to answer application at the trial ought to have succeeded.

27. For that reason the court accepted the concession and quashed the appellant Parker's convictions and sentences at the hearing on 19th October 2023.

Appeal of Shavez Musgrove

28. As indicated, counsel for the Appellant argued four main grounds of appeal against the conviction. They will be addressed as presented.

Ground One: The Learned Judge erred in refusing to exclude the DNA evidence.

29. At the trial, prior to the commencement of the evidence of the DNA Analyst Rachel Oefelein, counsel for the Appellant made an application to exclude that intended evidence, which consisted of three separate DNA reports of the results of the analysis of swabs taken from a number of items retrieved from various locations, inclusive of the vehicle, the alleged crime scene, the bodies of the alleged sexual assault victims, and DNA samples from a number of suspects.

30. The application, complete with written submissions by then counsel for the Appellant, was refused by the Trial Judge without any reasons being provided[1].

31. The Appellant submitted that the Trial Judge erred in law in that decision, resulting in highly prejudicial evidence, as they described it, being admitted into evidence. The following timeline is germane to the points which they sought to make in relation to this issue:

- 1st August 2017 – samples of DNA of 3 complainants (E, F and P) arrive at DNA Labs International, together with other DNA swabs from crime scenes and buccal swabs of other suspects, but no buccal swabs of appellant.
- 2nd November 2017 – First DNA report produced by DNA Labs International advising of a match to the appellant with:
    1) item AS 18 (a swab from a torn condom box found in vehicle identified as being a loci of the incidents),

[1] Page 2327 Ruling: "The application is refused. We shall hear from the DNA expert tomorrow."

2) CG 3 (a swab from a part of a torn condom box found at Grace Bay Village), and

3) CG 6 (a swab from another part of a torn condom box also found at Grace Bay Village).

- 6th November 2017 - Appellant initially arrested and interviewed in relation to present allegation.
- 7th November 2017 - consent of Appellant obtained for DNA sample to be taken.
- 7th November 2017 - DNA sample taken from Appellant in relation to current allegations.
- 8th November 2017 - Appellant charged with current allegations.
- 1st December 2017 -Second DNA Labs International report produced (second report).
- 7th June 2019 - Appellant's DNA sample collected in 2017 received at DNA Labs International for testing, having been sent earlier that month.
- 14th June 2019 - Third DNA report produced confirming that Appellant's DNA found on items AS 18, CG3 and CG6.

32. In relation to that matter, the appellant's DNA was first collected on 7th November 2017. From the first DNA report, it is apparent that the appellant's DNA had been previously collected in relation to some other matter, and that that DNA profile (of the appellant) was stored in the records at DNA Labs International. It was that profile, which resulted in the Lab being able to make a comparison with the DNA identified on the items submitted in

August 2017 to the Lab to produce a statistical match as described in the First Report, dated 2nd November 2017.

33. The appellant submitted that the sample taken from the appellant in relation to the first, unrelated, 2017 investigation and the information derived from it should have been destroyed as soon as practical after the appellant was no longer a suspect. Counsel submitted that whereas the investigation may still be open, it is the status of the suspect in the investigation that is required to be determined in relation to when the sample ought to be destroyed, not the status of the investigation.

34. The legislation covering the taking of what are referred to as intimate samples is found in the Police Force Ordinance Chapter 18.01. Relevant sections read as follows:

> *Intimate samples*
>
> *39. (1) An intimate sample may be taken from a person in police detention only—*
>
> *(a) if there is a court order for it to be taken; or*
>
> *(b) if the appropriate consent is given in writing.*
>
> *(2) The court may only make an order if there are reasonable grounds—*
>
> *(a) for suspecting the involvement of the person from whom the sample is to be taken in a serious arrestable offence; and*
>
> *(b) for believing that the sample will tend to confirm or disprove his involvement.*
>
> *(3) The court may order the use of reasonable force for the purpose of taking the intimate sample.*
>
> *(Inserted by Ord. 19 of 2009 and amended by Ord. 21 of 2009)*
>
> *(4) Where—*

(a) a court order has been made; and

(b) it is proposed that an intimate sample shall be taken under the court order, an officer shall inform the person from whom the sample is to be taken—

(i) of the court order; and

(ii) of the grounds for making it.

(5) The duty imposed by subsection (4)(b)(ii) includes a duty to state the nature of the offence in which it is suspected that the person from whom the sample is to be taken has been involved.

(6) If an intimate sample is taken from a person—

(a) the court order by virtue of which it was taken and the grounds for making the order; or

(c) the fact that the appropriate consent was given, shall be recorded a soon as is practicable after the sample is taken.

(7) If an intimate sample is taken from a person detained at a police station, the matters required to be recorded by subsection (6) shall be recorded in his custody record.

(8) An intimate sample other than a sample of urine or saliva, may only be taken from a person by a medical practitioner.

…….

Destruction of samples

41. (1) If—

(a) measurements, photographs, finger prints and palm print impressions under section 37 or samples under section 39 or 40 are taken from a person in connection with the investigation of an offence; and

(b) he is cleared of that offence,

they shall be destroyed as soon as is practicable after the conclusion of the proceedings. (2) If—

(a) measurements, photographs, finger prints and palm impressions under section 37 or samples under section 39 or 40 are taken from a person in connection with such an investigation; and

(b) it is decided that he shall not be prosecuted for the offence and he has not admitted it and has been dealt with by way of being cautioned by a police officer, they shall be destroyed as soon as is practicable after that decision is taken.

(3) If—

(a) measurements, photographs, finger prints and palm impressions under section 37 or samples under section 39 or 40 are taken from a person in connection the investigation of an offence; and

(b) that person is not suspected of having committed the offence,

they shall be destroyed as soon as they have fulfilled the purpose for which they were taken.

(4) Proceedings which are discontinued shall be treated as concluded for the purposes of this section.

(5) If fingerprints are destroyed, any copies of them shall also be destroyed.

(6) A person who asks to be allowed to witness these destructions shall have a right to witness them.

35. Counsel submitted that the results of the DNA analysis contained in the DNA Labs International report for the first (unconnected) 2017 allegation presumably provided no forensic link with the offence/items tested and the appellant.

36. There was no actual evidence presented as to what that suspected offence may have been or the status of the matter, but it is clear that the appellant's DNA information was at the Lab. Counsel from Bar Table asserted that the Appellant was not charged with any offence, indeed during the course of the submissions, counsel had requested sight of the court order or the consent form that the Appellant should have signed in order for the Police to be compliant with the Ordinance.[2] That information was not forthcoming.

37. In these circumstances, counsel submitted that the Appellant fell within section 41(2) of the Ordinance[3] and that the appellant's profile should have been destroyed, with the result that the information should not have been within the system of DNA Labs International on behalf of the Royal Turks and Caicos Islands Police Force, as the appellant was no longer a suspect in that investigation.

38. It was further submitted that the retention and storing of the appellant's DNA at the DNA Labs International was unconstitutional and against the fundamental right to respect for private life[4]. That argument was partially predicated on the decision of the Eastern Caribbean Supreme Court from the territory of the British Virgin Islands in the case of

[2] Page 2323 line 20 to 2324 line 8.
[3] '(b) that person is not suspected of having committed the offence,'.
[4] The TCI Constitution, Schedule 2, Part 1 - Fundamental rights and freedoms of the individual section 9.

The Queen v Albert Rosa De La Rosa[5]**,** a ruling on the admissibility of DNA evidence. While it is not clear whether that ruling flowed from an application prior to the commencement of the actual criminal trial of the alleged murder in that case, or it was an in-trial ruling by the trial judge, it is nevertheless a reasoned, written decision on a challenge to the admissibility of an important, but actually not crucial, aspect of the intended evidence in a trial. This is mentioned because notwithstanding that the challenge to the admissibility of the evidence in the instant matter in the court below was a substantial challenge to the critical (in this case) evidence, as noted above, the court provided no reasons for its ruling, which may have assisted this court in understanding the court's rationale for admitting the evidence. It is of course appreciated that the pace of a criminal trial does not always permit of detailed written reasons, an oral ruling however or a post-trial decision, is required should there be a challenge to an important issue during the course of the trial.

39. In **Rosa** (ibid) there was an altercation resulting in a murder in November 2012, after which a suspect fled Tortola before being seen by the police and only returned after the commencement of extradition proceedings, in 2014. In April of 2012 he had voluntarily given his DNA sample in relation to an unconnected matter. When the murder scene samples were sent for analysis a 'hit' was discovered as a result of the profile obtained from the April 2012 matter which had been retained and stored. Upon the suspect's return in 2014, no further samples were taken from him, although he was arrested and charged with the murder. At paragraph 19 of the judgement the Court, cited by counsel for the appellant, (Elllis J.) stated:

[5] BVIHC 22/2014,13th October 2015.

"In light of the compelling persuasive judicial authorities, the Court has no difficulty in concluding that in the absence of a legislative framework expressly authorizing retention and reuse DNA samples and the storage of the DNA profiles acquired from an un-convicted individual and where no evidence has been presented that that at the time that the individual consented to the sample, he was informed by the police that the sample or profile can be used for any subsequent investigation and that he explicitly consented to the use of the sample for the investigation of other crimes, such retention, re-use or possession of his DNA profile is inconsistent with Article 19 of the BVI Constitution and constitutes a disproportionate interference with that un-convicted individual's right to respect for private life"

40. That reference to *'compelling persuasive judicial authorities'* was a reference to the decision cited earlier in **Rosa,** a decision of the European Court of Human Rights in **S and Marper v United Kingdom**[6] where the ECHR considered whether the indefinite retention of samples from a suspected but un-convicted person struck a proportionate balance between the right to privacy and the interests of society to detect crime. The court stated, at paragraph 119:

"ln this respect, the Court is struck by the blanket and indiscriminate nature of the power of retention in England and Wales. The material may be retained irrespective of the nature or gravity of the offence with which the individual was originally suspected or of the age of the suspected offender; fingerprints and samples may be taken - and retained - from a person of any age, arrested in

[6] (2008) ECHR 1581.

connection with a recordable offence, which includes minor or non-imprisonable offences, The retention is not time-limited; the material is retained indefinitely whatever the nature or seriousness of the offence of which the person was suspected. Moreover, there exist only limited possibilities for an acquitted individual to have the data removed from the nationwide database or the materials destroyed (see paragraph 35 above); in particular, there is no provision for independent review of the justification for the retention according to defined criteria, including such factors as the seriousness of the offence, previous arrests, the strength of the suspicion against the person and any other special circumstances."

And at paragraph 125:

"…the Court finds that the blanket and indiscriminate nature of the powers of retention of the fingerprints, cellular samples and DNA profiles of persons suspected but not convicted of offences, as applied in the case of the present applicants, fails to strike a fair balance between the competing public and private interests and that the respondent State has overstepped any acceptable margin of appreciation in this regard. Accordingly, the retention at issue constitutes a disproportionate interference with the applicants' right to respect for private life and cannot be regarded as necessary in a democratic society."

41. The context of these decisions is required to be considered. **S and Marper** itself sets out that context very clearly, beginning at paragraph 105 where it states:

"105. The Court finds it to be beyond dispute that the fight against crime, and in particular against organised crime and terrorism, which is one of the challenges

*faced by **today's European societies,** depends to a great extent on the use of modern scientific techniques of investigation and identification. The techniques of DNA analysis were acknowledged by the Council of Europe more than fifteen years ago as offering advantages to the criminal-justice system (see Recommendation R(92)l of the Committee of Ministers, paragraphs 43-44 above). Nor is it disputed that the **member States** have since that time made rapid and marked progress in using DNA information in the determination of innocence or guilt.*

106. However, while it recognises the importance of such information in the detection of crime, the Court must delimit the scope of its examination. The question is not whether the retention of fingerprints, cellular samples and DNA profiles may in general be regarded as justified under the Convention. The only issue to be considered by the Court is whether the retention of the fingerprint and DNA data of the applicants, as persons who had been suspected, but not convicted, of certain criminal offences, was justified under Article 8, paragraph 2 of the Convention."

*107. The Court will consider this issue with due regard to **the relevant instruments of the Council of Europe and the law and practice of the other Contracting States.***

The core principles of data protection require the retention of data to be proportionate in relation to the purpose of collection and insist on limited periods of storage (see paragraphs 4I-44 above). These principles appear to have been consistently applied by the Contracting States in the police sector in accordance with the Data Protection convention und subsequent Recommendations of the Committee of Ministers (see paragraphs 45-49 above)."

(Emphasis added)

42. Applied to Caribbean societies, those principles present unique challenges, since most Caribbean jurisdictions, like the Turks and Caicos Islands, the British Virgin Islands and The Bahamas, to name a few, do not have the scientific resources to conduct their own DNA analysis for the purposes of the presentation of evidence in criminal trials related to the comparison of potential DNA material taken from swabs of evidential items and buccal and other DNA material taken from suspects. Indeed, it is striking that in **Rosa,** the very same DNA testing facility, DNA Lab International, was used for the purposes of the comparison in that matter, as was used in the instant matter.

43. That presents unique jurisdictional issues as to the retention policies of a private facility in a foreign jurisdiction. One of the challenges would be whether the contracting parties with that facility, the respective Caribbean based police agencies who use their services, are able to set parameters for the retention of information derived from the samples which are submitted from these several jurisdictions. This issue was highlighted in the submissions of both counsel for the appellant and counsel for the respondent.

44. The Police Force Ordinance makes provisions for the destruction of samples, as detailed in section 41 (ibid). In fact, three 'destruction' scenarios are envisaged:

> 41(1): if he is cleared of that offence, they shall be destroyed as soon as is practicable after the conclusion of the proceedings;
>
> 41(2): if it is decided that he shall not be prosecuted for the offence and he has not admitted it and has been dealt with by way of being cautioned by a police officer, they shall be destroyed as soon as is practicable after that decision is taken.
>
> 41(3): if the person is not suspected of having committed the offence, they shall be destroyed as soon as they have fulfilled the purpose for which they were taken.

Clearly each of these scenarios is fact sensitive. However, no information was provided to the trial Judge in this matter as to which of those factual scenarios constituted the matrix of the earlier collected DNA sample of the appellant Musgrove. As indicated, counsel for the Appellant requested the consent form or court order, but even that was not produced. Counsel for the Appellant submitted that is was a matter which fell under 41(3)[7] but the evidential basis for that submission was not established before the court below.

45. In that context, it was impossible to determine the fact scenario for further consideration of the second and crucial aspect of the application, a consideration as to whether that information, collected in relation to a presumably separate matter, was admissible as evidence itself or whether any evidence discovered as a result of that information was admissible in the proceedings.

46. Counsel for the appellant submitted that Musgrove's DNA sample in the present case was obtained and sent for analysis after the (first) report dated 2nd November 2017 was received. It was further submitted that had the DNA sample from the first unconnected matter not been stored on the DNA Labs International database it would not have produced the findings in the report of 2nd November 2017 prompting the RTCIPF to obtain and submit the DNA sample (albeit at the defence request) which resulted in the alleged finding of the Appellant's DNA linking him to the condom box/pack. As the sample was not destroyed and removed from the DNA Labs International database, it caused the information in the 2nd November 2017 report to occur. That first report, it was submitted,

[7] The submission reads: "*14. is respectfully submitted that the retention of the first unconnected DNA sample of the appellant after the DNA report of 2017, was in direct contravention of the Police Force ordinance s41(3) and is a breach of the right encompassed within the TCI Constitution Schedule 2, Part 1, section 9".*

directly caused the police to detain the Appellant and obtain his DNA sample (obtained in November 2017).

47. The challenge with that submission is that whereas the sequence of events as detailed in paragraph 32 above, as extracted from the submissions of counsel for the Appellant, is accurate, the Appellant was in fact a suspect in relation to this matter since at least the 26th July 2017. According to the evidence of the Investigating officer DPC Godwin Charles, he saw the Appellant at CID Headquarters and questioned him, during which time he was provided with alibi information by the Appellant.

48. The officer also indicated[8] that he received a watch from the appellant, which was sent off as a part of the exhibits[9]. It is noted in the first DNA report of the 2nd November 2017 that a white G-Shock wrist watch (GDC 6) and a white and black G-Shock wrist watch (GDC 7) were submitted to the Lab on 1st August 2017.

49. The critical issue, as to the exclusion of this evidence, is not determined merely on the question as to whether the Police Force Ordinance has been breached, and if so, which section was breached (as already stated, an issue which cannot be factually determined on the available evidence) but also, if there was a breach, whether the effect of the breach meant that the evidence should be excluded.

50. The case cited by the appellant, **Rosa,** also acknowledged that that was the critical issue and that a finding of a breach of any applicable retention and destruction legislation does not result in an automatic finding of inadmissibility. At paragraph 20 of **Rosa** it was stated, (referencing **S and Marper)**:

[8] Transcript of trial, page 2646.
[9] Transcript of trial, page 2773 lines 23 to 25.

"20. Notwithstanding the clear and unequivocal guidance provided by the ECHR on issues related to the fundamental rights of the individual, it is clear that the judgment did not concern the admissibility of evidence at a trial. In the Court's view it would be an error to treat the definitive conclusions drawn as an implication that any evidence obtained must consequently and inevitably be inadmissible, The Court considers that it must still have regard to provisions of the Evidence Act, 2006 - in particular and to Section 125 which provides:

"Evidence that was obtained

(a) improperly or in contravention of a law, or

(b) in consequence of an impropriety,

shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained.

(2) Without limiting subsection (1), where

(a) a confession was made during or in consequence of questioning, and

(b) the person conducting the questioning knew or ought reasonably to have known that

(i) the doing or omission of an act was likely to impair substantially the ability of the person being questioned to respond rationally to the questioning, or

(ii) the making of a false statement was likely to cause the person who was being questioned to make a confession,

but nevertheless, in the course of that questioning, the person conducting the questioning did or omitted to do the act or made the false statement, evidence of the confession, and evidence obtained in consequence of the confession, shall be taken to have been obtained improperly.

(3) For the purposes of subsection (1), the court shall take into account, among other things, the following matters:

(a) the probative value of the evidence;

(b) the importance of the evidence in the proceeding;

(c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;

(d) the gravity of the impropriety or contravention;

(e) whether the impropriety or contravention was deliberate or reckless;

(f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;

(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law,

21. The Court must therefore weigh the factors in s.125 (3) in considering the critical issue of whether the evidence relating to the sample taken from the Defendant Alberto Rosa De La Rosa on 28th April 2012, is admissible.

22. Given the conclusions herein, the Court finds that the evidence obtained as a consequence of the April 2012 sample falls within Section 125 of the Evidence Act. Further, having considered the factors prescribed by Section 125 (3) of that Act, the Court finds that this evidence is not admissible and should be excluded.

23. First, the Court has considered that the 2012 sample was obtained with the consent of the Defendant, The Court is satisfied that the retention of the sample and the storage of the DNA profile invoked his fundamental rights guaranteed under the Constitution. The Court has also considered the relevant timeline. The Court is not persuaded by the Prosecution that the lapse of 7 months could justify the admission.

24. The Court is also not persuaded that the Defendant's flight would without more have precluded a second and fresh and lawful sample taken with the consent of the Defendant upon his return to the Territory in July, 2014. There has been no evidence led that the Defendant refused to submit to a fresh sample. As such, the court is not satisfied that there was any real difficulty in obtaining the evidence without interference with his fundamental rights.

25. Further, the Court is satisfied that the existing lacuna has been well known for some time. Concerns have been raised in previous proceedings which should have

cautioned the investigators against the indiscriminate and arbitrary unregulated retention and use of DNA samples of un-convicted persons.

26. The Court has also considered the importance of the nature in these proceedings as well as the probative value of the material. They correctly contend that the evidence is probative of a connection to the offence before the Court. The Prosecution has advanced that the case is partly circumstantial. However, it is not disputed that the Prosecution's case is also grounded on the direct evidence of eyewitnesses. It follows that the circumstantial connection raised by the DNA evidence is by no means the fulcrum of the Prosecution's case."

51. It is to be noted that the Evidence Ordinance does not have an equivalent provision to section 125 of the BVI legislation. The closest equivalent provision, section 145 indeed points in the other direction:

"145. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision."

52. Counsel for the Respondent submitted that in fact the common law discretion to exclude evidence, as amplified in **R v Sang**[10] prevails in this situation, in the absence of similar legislative provisions to those found in the BVI, and that the discretion to exclude is not triggered in this matter, distinguishing the circumstances in Rosa from the present case.

[10] 1980 A.C. 402.

53. As already noted, the Appellant was a suspect in advance of any information coming to the attention of the police authorities in TCI from the first DNA report. Further, the police did collect a consensual DNA sample from the Appellant in relation to this matter (unlike the police in the BVI in Rosa) and even though the earlier reports refer to the previously acquired DNA sample for Musgrove, the Third Report, dated 14 June 2019, explicitly states that *"Only those items discussed in the results above were examined for this report."* Those listed items were:

    GDC 27 Buccal swabs from Shavez Musgrove

    AS 18 A torn Trojan Fire & Ice condom box

    CG #3 Torn piece of a Trojan Fire & Ice condom pack

    CG #6 Torn piece of a Trojan Fire & Ice condom pack

    The Police therefore had a report confirming from a consensual sample that the Appellant was a match in respect of certain of the items, as detailed in the Third Report, collected from the crime scene.

54. In those circumstances, despite the absence of any reasons for the Trial Judge rejecting the application to exclude the DNA evidence against the appellant Musgrove, this court finds that the decision to admit the evidence, despite a potential breach of the provisions of the Police Force Ordinance, was reasonable. Accordingly that ground of appeal therefore fails.

Ground two: The Learned judge erred in refusing the no case to answer submission.

55. This ground can be dealt with shortly, despite the detailed submissions provided by counsel for the appellant. The first submission on this issue was that the

DNA evidence ought to have been excluded. Had it been excluded then it would follow that there would have been no case for the appellant Musgrove to answer.

56. However, the DNA evidence not being excluded, that evidence must be considered, and in the evidence from Rachel Ofelein, it was indicated that the appellant's DNA was found on three separate items, each item being a part of a torn up Trojan Fire & Ice condom box. One piece was found in the vehicle, and two pieces were found at the scene at Grace Bay Village. In relation to each of these items the statistical probabilities given for each item are as follows:

AS 18 A torn Trojan Fire & Ice condom box (found in the vehicle):

Major profile. Probability of someone else being a major contributor to the profile is 1 in 76 decillion individuals.

CG #3 Torn piece of a Trojan Fire & Ice condom pack (found at Grace Bay Village)

Mixed profile. The DNA profile is approximately 880 billion times more probable if sample originated from Musgrove and an unknown person than if it originated from two unknown persons.

CG #6 Torn piece of a Trojan Fire & Ice condom pack (found at Grace Bay Village)

Single profile. The chance that an unrelated person, chosen at random from the general population, would be included as a contributor to this DNA profile is approximately 1 in every 76 decillion individuals.

57. In this fact scenario, we do not agree with counsel's submissions that this evidence falls within the second limb of **Galbraith**[11], nor do the cases cited by counsel, **R v Alan**

[11] R v Galbraith 73 Cr. A. R. 124.

Grant[12]**, R v Robert Ogden**[13] or **R v Tsekiri**[14] provide any assistance to counsel's submissions. The presence of the appellant's DNA on the items in this matter detailed above required some explanation, it could not be said to be weak or inconsistent.

58. It bears repeating however, what was stated in paragraph 39 (ibid) that reasons should be provided for the court making certain rulings, including rulings on no case to answer submissions. In this matter, once again the court provided no reasons for its ruling, which was given fifteen minutes after submissions which occupied over 100 pages of a 3,000 page transcript of evidence were completed[15]. But for reasons given, that ground must also fail.

Ground three: The trial was unfair due to a number of procedural irregularities and non-disclosure/absence of evidence.

59. Counsel for the appellant Musgrove raised a number of different issues related to the overall conduct of the trial under this ground. Because of the disposition of this appeal, only a few of the various issues raised require any detailed consideration.

60. The complaints about procedural irregularities, in relation to the Trial Judge interrupting counsel in their questioning, whereas there was some element of that taking place, are insufficient to constitute any basis for interfering with the verdict in this matter. Neither is the compliant in relation to the decision of the Trial Judge to not edit out the name 'Vez' from an exculpatory out of court statement by the co-accused Parker a sufficient basis to upset the conviction.

[12] 2008 EWCA Crim 1890.
[13] 2013 EWCA Crim 1294.
[14] 2017 EWCA Crim 40.
[15] Transcript page 3052 line 14 to page 3053 line 6.

61. Counsel also submitted that the prosecution ought to have exhibited the three DNA reports of the witness Rachel Ofelein, notwithstanding that the reports tended to suggest that samples of the appellant Musgrove were in the possession of the police, and indeed DNA Labs International, before he had his DNA sample taken in relation to this matter.

62. A review of the transcript would show that the Trial Judge[16] inquired of prosecuting counsel whether she was exhibiting the reports; upon her indication that the prosecution did not intend to put them in, there was no objection or other issue raised at the trial with the decision. There is in law no legal requirement that a report referenced by a witness has to be exhibited in a matter, in particular if it contains prejudicial material.

63. A more concerning aspect of the evidence of Ms. Ofelein was that there was no application to have the witness specifically declared an expert. Prior to the witness being called, the Trial Judge referred to her as an expert[17], in the presence of the jury, on several occasions. After she was called, evidence was led by the prosecution as to her qualifications[18]. From that evidence, it seems clear that she had the qualifications to be considered an expert (having indicated that she had given expert testimony in over 50 cases and having conducted examinations in thousands of cases) and the evidence seemed to be headed in that direction. However, after an adjournment of her evidence for the court to hear submissions as to the admissibility of aspects of that evidence, upon the resumption of the trial no application was ever made, even though the trial judge continued to refer to her as an expert.

[16] Transcript, page 2428.
[17] Transcript, pages 2039 and 2040.
[18] Transcript, pages 2091-2094

64. The importance of that issue is that, as the (un-exhibited) reports make clear, the substance of the reports and hence the evidence of any DNA analyst is an opinion. Each of the reports, immediately before the signature of the analyst, reads:

> *"This report represents the opinion and interpretation of the undersigned analyst."*

And therefore constitutes the quintessential instance of opinion evidence which should only be given by an expert.

65. On that issue the respondent submitted that there is no requirement in Turks and Caicos Islands law that in order for an expert's evidence to be deemed admissible that the expert must be so deemed. The Evidence Ordinance Chapter 2.06 addresses the issue of expert witnesses, section 28 reads:

> *"Expert evidence*
>
> *28. When the Court has to form an opinion upon a point of foreign law, or of science or art, or as to identity or genuineness of handwriting, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity or genuineness of handwriting are relevant facts. Such persons are called experts."*

66. That is to be contrasted with, for instance, the provision of the Evidence Act of The Bahamas on the subject of expert witnesses. Section 22 of the Bahamian Evidence Act reads similarly to the TCI provision but with a crucial difference; it reads:

> *22. (1) Where the court has to form an opinion on the identity or genuineness of handwriting, or upon a point of foreign law, or of science, art, trade, manufacture*

or any other subject requiring special skill or knowledge, evidence may be given of the opinion of ***persons who in the opinion of the court are experts*** *in such subjects and of any facts which support or are inconsistent with such opinions.*

(emphasis provided)

67. The provisions of the Bahamian section 22 explicitly require the court to deem or declare the witness to be an expert, whereas section 28 of the Turks and Caicos Islands Evidence Ordinance has no such clear requirement, although it is at least arguable that it is an implicit requirement that the person giving the opinion is accepted by the court as having that special skill.

68. It should be noted that the issue was raised by the defence during the course of no case to answer submissions, after the prosecution had closed their case, and the court seemed to have invited the prosecution to apply, at that stage, to have the witness specifically deemed an expert. At page 3009 of the transcript, the Trial Judge asked:

"...are you applying to the Court for her to be deemed an expert witness, having said what I said?."

After prosecuting counsel asked for a moment, the Trial Judge continued:

"Do you want time to consider it, let me explain the position again. The position from the Bench….

This witness gave evidence as to DNA analysis of certain items.

..

Before giving evidence, you elicited from her, her qualifications, experience…workplace and all of that

I take no note of the objection that she – that the Prosecution did not apply for her to be deemed or declared or regarded as an expert witness.

...

Let me carry on, let me just finish. The evidence that she gave is not diluted in any way…by the fact that she was not declared or deemed or otherwise regarded as an expert witness.

…Very well, so let's put that aside."

69. Despite a discussion of the issue at that stage, at no point during that discussion did the prosecution actually apply for the witness to be declared an expert, and at no point did the court declare the witness an expert. In any event, at that point that would have been a declaration after the witness had already given her testimony. There was no application nor any finding by the Trial Judge that the witness was specially skilled, a finding which on the evidence, was clearly available to him.

70. The submissions of counsel for the appellant Musgrove on that point did not go so far as to assert that the issue of the non-designation of the DNA witness as an expert of its own justified the quashing of the conviction, but pointed to it as one of a series of what were asserted as procedural irregularities by the Trial Judge. Cumulatively the issues raised in this ground do not rise to the level to justify setting aside the convictions and sentences.

Ground four: The learned judge failed to direct the jury properly on the law relating to the offences, the evidence and the defence case.

71. It is the complaint raised in this ground of appeal which, after careful analysis and a detailed consideration of the three thousand plus page transcript, the court considers sufficient to lead to a conclusion that the convictions of the appellant Musgrove are

unsafe and that the appeal against those convictions ought to be allowed and the convictions and sentences quashed.

72. Under this ground counsel for the appellant Musgrove attacked the directions of the Learned Trial Judge in respect of the offences, the evidence and the defence case. Under offences, the submissions were further concentrated on issues related to asserted inadequate directions on joint enterprise and the elements of the offences charged. Whereas on those issues the directions were pithy, having regard to the evidence in the matter, the directions were adequate on the offences and on the issue of joint enterprise, the submissions of counsel, relying on **Delancy and others v R**[19] **and R v Jogee and R v Ruddock**[20] were misguided.

73. The concerns of the court were found in the complaint of the treatment of the evidence and the treatment of the defence case. In **R v Lawrence (Stephen)**[21], Lord Hailsham of St. Marylebone L.C. provided the following guidance on the requirements of a direction to a jury, (at page 519F):

> *"The purpose of a direction to a jury is not best achieved by a disquisition on jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's note book. A direction to a jury should be custom build to make the jury understand their task in relation to a particular case. Of course it must include*

[19] 2020 TCACA 22.
[20] 2016 UKSC 8 & UKPC 7.
[21] [1982] A.C. 510.

references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts..."

74. That was a matter in which the totality of the evidence against the appellant Musgrove consisted of the evidence of the presence of his DNA on swabbings taken from parts of a condom box (see paragraphs 21 and 22 above). That being the evidence, the case against the appellant was necessarily circumstantial, depending on the jury to draw such inferences from the presence of the DNA on the box parts as were reasonable in the circumstances.

75. The authorities have established[22], particularly in relation to movable items, that careful directions are required to focus the jury's attention on the issue of the transferability of the item itself on which DNA material is found. These are all a part of the necessity for a correct statement of the inferences which the jury is entitled to draw from the primary facts (the presence of the DNA on the condom box pieces) being made to the jury.

76. There was evidence in the prosecution's case that a condom box was purchased that night at the behest of the assailants from a store in Brother Will's Plaza, as it was described, by one of the virtual complainants. The DNA analyst was questioned about whether DNA could be left on an item by touching it, which she affirmed, and the questions were also asked of prosecution witnesses as to whether there was a Bar in this plaza, and whether the store itself was generally accessible, intended, as stated in the closing submissions of

[22] R v Tsekri (2017) 1 EWCA Crim 40.

counsel for the appellant to confirm whether it would have been possible for the DNA of a person to have been deposited on the condom box at the store at some other point and transferred on that box, to the vehicle and the scene when it was purchased, without the appellant necessarily being present.

77. No matter how farfetched, the theory of the case by the defence should be adequately put to the jury for their consideration. On this issue, the Learned Trial Judge in his summation did not summarise the evidence of the circumstances of the discovery of the condom box parts, which led to the ultimate discovery of the DNA material. There was no assistance provided to the jury as to what reasonable inferences they could draw from the primary facts of the case, in particular the presence of the DNA on the condom box pieces, and no directions on circumstantial evidence.

78. The Learned Trial Judge was certainly alive to the issue of the need to provide directions on reasonable inferences. Early in the summation[23] he stated:

> *"As matters of law, which you must take from me, I will tell you what inferences you may properly draw from the actions and/or circumstances as these may arise in the case,…"*

but shortly thereafter, in that same sentence he began to fall into error, when he continued:

> *"...but please note that proof of either, either statements or circumstances that you believe….or the statements that you believe to have been made by the defendants or inferences that you may reasonably draw from his actions. Either of those are sufficient to convict."*

[23] Transcript page 3187.

This constitutes a substantial misdirection on the evidence since neither defendant made any statements which could possibly be interpreted as implicating themselves, nor was there any evidence of any actions by them, besides the presence of their DNA, from which any proper inference could be drawn.

79. Shortly thereafter, the Trial Judge added to the misdirection on the evidence when he stated, in giving directions on the ingredient of the absence of consent for the offence of rape, when he stated:

> *"And the absence of reasonable belief in consent may be determined from anything said or done by the defendant or may reasonably be inferred from the circumstances. And this harks back to what I told you earlier, about the legitimacy of drawing proper inferences from circumstances, statements, and inferences properly drawn from circumstances can anchor a conviction."*

80. When summarizing the evidence, the Learned Trial Judge further prejudiced the appellant, as complained of in the submissions, by stating, in relation to the issue of the taking away of the vehicle:

> *"if you think that the defendants might have thought that Miss Maldonado might have consented, then they may be excused, but if they hadn't addressed their minds under these circumstances…"*

Again misdirecting the jury on the facts by suggesting to the jury that the Appellant was definitively shown to have been present at the scene, instead of focusing the jury's mind on the critical issue in the case, the presence of the DNA on the condom box pieces, and whether from that evidence, the jury could safely conclude that the appellant was present that night and participated in the armed robbery, rape and kidnapping.

81. The Learned Trial Judge also indicated, in his summation:

> *"Now, in this case there is no visual identification or fingerprint evidence. The Prosecution aims to prove the defendants guilty by DNA evidence that places them at the scene of the crime, or crimes, and by other circumstantial evidence that supports their presence there."*

Not only does the Trial Judge not identify the other circumstantial evidence, (of which there is none), he gives no legal directions on the issue of circumstantial evidence. That amounts to a serious misdirection on the facts and non-direction on a legal issue which the court purported to leave for the jury's consideration.

82. The summation continues with the statement:

> *"Without DNA the Prosecution... and I will come back to this. Without DNA the Prosecution's evidence is weak to say the least."*

And then continues:

> *"So the three areas that I think are in dispute in this case are:*
>
> *One, the condom count.*
>
> *Two, alibi.*
>
> *Three DNA analysis.*
>
> *And so the remainder of this summary of the evidence will focus on these areas.*
>
> *As I have said before, and I say now, you must take note of and obey the instructions that I give you on the law, but you may choose for yourself the inferences I suggest you may draw from the facts and circumstances, or you may choose your own inferences, or you may choose none at all. You are the judges of the facts.*

83. The Learned Judge then addresses these identified areas, dealing with the issue of the condom count as it was described. Despite the complaints on this issue, no real challenge can be raised on the directions on what the defence asserted as a critical issue, as to how many condoms came out of a pack (of which there was no direct evidence) and whether the apparent inconsistencies, if in fact a pack contained three condoms, between the amount in the pack and the amount apparently accounted for in the evidence amounted to any serious inconsistency in the evidence.

84. The second issue addressed, the issue of alibi, led to, unfortunately, further misdirection by the Learned Trial Judge. On that issue it is important to note that neither of the then defendants testified or called any witnesses. They therefore did not seek to lead alibi evidence. Their statements to the police were put into evidence, each of which indicated that they were elsewhere at the material time, but that evidence was led by the prosecution.

85. The Learned Trial Judge however referred the jury to the provisions of the law as to the steps required in order to lead alibi evidence and then informed the jury that because those steps were not taken, the issue of alibi was not before them:

> *"...None of these steps have happened in this case. And so the alibi defence is not before you, and you may set it aside."*

There was then a reference to the position of the appellant when taxed with the allegations by the police and the information which he provided at that point. However the court continued by stating what the police officer had said on that issue, namely:

> *"...he checked out both alibis, and they were not confirmed by the persons who would have been able to do so."*

That was impermissible hearsay which the court repeated in the summation.

86. The court returned to that issue at the very end of the summation and further compounded the errors on this issue by purporting to give a reasonable inference direction on alibi. The Learned Trial Judge stated:

> *"I said earlier that in relation to alibi I will give you directions as to reasonable inferences that might be drawn, and those are as follows: In relation to Mr. Musgrove, he said to the investigating officer that it wasn't him, he was with his girlfriend. The officer said gal, not girlfriend. He hasn't led any evidence of the alibi, and that must not be held against him. ...But you may consider what evidence, if it was not him, what evidence do you have to weigh in the other side of the scales…"*

Not only is that not a reasonable inference issue, it is a clear and egregious misdirection because it is effectively indicating to the jury that if it is not the appellant, what evidence is there to that effect. That effectively places an unwarranted evidential burden on the appellant, inconsistent with the presumption of innocence.

87. To borrow the language of Lord Hailsham in **Lawrence** (ibid) it cannot be said that after that concatenation of misdirections and non-directions, that there was in substance a succinct but accurate summary of the issues of fact which warranted a decision. What was required was a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury was entitled to draw from their particular conclusions about the primary facts in this summation.

88. For these reasons, the convictions and sentences of the appellant Musgrove are quashed. Having regard to the passage of almost seven years since the incident the subject of the

charges are alleged to have taken place, and the destruction of some of the physical evidence due to a fire at the exhibit room, it would not be in the interest of justice for a new trial to be ordered.

_____

Turner, JA

I agree

_____

Adderley JA, President (Ag)

I also agree

_____

John, JA