

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

IN THE FEDERATION OF ST CHRISTOPHER & NEVIS

IN ST CHRISTOPHER CIRCUIT

CASE SKNHCR 2023/0061

REX

V

EF

APPEARANCES

Ms Azuree Liburd and Ms Shantrice Dorsett, assisted by Mr Teshaun Vasquez, for the Crown.

Mr Craig Tuckett for the defendant.

2024: FEBRUARY 12

RULING

On admissibility of identification by cctv and purported admission

- 1 **Morley J:** EF aged 49 said also known as 'D'¹, is being tried for burglary, called on St Kitts 'housebreaking and larceny' contrary to **s28(a) Larceny Act** Cap 4.16, of domestic premises at White House Gardens on 12.04.20, stealing goods to the value of \$9770.64ec. There has been much argument on the admissibility of evidence, lasting three days 06-08.02.24, in what has been a poorly prepared case. This is my ruling on the defence application the relevant evidence should not be admitted.
- 2 During the early days of covid lockdown, cctv at the home premises of Shaiela Wilkinson on the night captured an African-Caribbean male with black headcover and what resembles

¹ The defendant will not be formally named, as on 15.03.24 his case was finally formally discontinued by the Crown.

a covid mask tampering with the camera. A colour still shows about one-third of the face, from just above the eyebrows to over the nose cartilage. A one-inch span of forehead, eyebrows, brown eyes, nosebridge, a lock of hair to the left side, and left side of face and ear, with left sideburn becoming a beard are visible; the mouth, chin, neck, shape of beard, full forehead, hairline, and headhair are not. The general body size and shape of the burglar were also apparent on screen.

- a. The cctv was circulated on social media and someone identified EF to Wilkinson, whom she reported, and he was arrested on 14.04.20.
- b. By a statement dated 20.04.21, OIC Anita Norford purported to record an admission by EF on 01.05.20: *'I'm not going to give a statement, a guilty.'*
- c. The defence application is neither the admission nor cctv should be admitted before the jury.

3 The case has been pre-trial before the court on six occasions: 30.11, 08, 15, 22.12.23, 19.01 and 05.02.24, with the identification evidence discussed as problematic during the last four. A jury was then sworn on 06.02.24, though sent away pending outcome of legal argument.

4 In his background, EF has previous convictions of weight, notably:

- a. In 1995, 30 months prison for burglary; and
- b. In 1999, concurrently, for unlawful carnal knowledge 20 years, wounding with intent 1 year, rape 15 years, and inflicting grievous bodily harm 15 years.

5 As the case evolved before the High Court, it was apparent there were identification challenges which ought to have been spotted long ago.

- a. On 15.12.23, the Crown realized they did not have the cctv to exhibit, and of course which needed to be disclosed on dvd.
- b. On 22.12.23, the cctv was reviewed by the court, with the extent of the masking now clear, begging how would evidence be offered to show the burglar was EF.
- c. On 19.01.24, the Crown had hoped to put forward OIC Norford to say she could positively identify EF from the cctv, having been told by Wilkinson being informed by a

non-witness it was him, being hearsay, which as part of case management had then been discussed would not be allowed as leading Norford to make the identification of a person she had already been told was on the cctv.

- d. On 05.02.24, the Crown suggested they would try to find an officer who knows EF well, coincidentally and without notice to view the cctv and see if recognition might arise, though this begged how will it be established if the officer knew EF without tipping off who it was desired identified, leading to the court deciding to list the case next day for trial, knowing there was no admissible identification evidence, despite the case originating almost four years earlier.
- e. On 06.02.24, after the jury sworn, the Crown was emphatic there was no other evidence than the cctv, and so:
 - i. the Crown asked to put into evidence two police mugshots of EF from 2016 and 2017, for comparison with a still from the cctv, where in the mugshots he then had a beard, though had no photos from when arrested on 14.04.20, nor anyone to attest to when the mugshots were taken, or where, or technically of who, which would be late evidence in any event as the jury was sworn that day and the evidence only then being offered, yet neither provenanced nor the subject of formal notice, while there was no thought as to how mugshots may prejudice the jury as to previous offending, so the photos were ruled not allowed on 07.02.24; and
 - ii. the Crown argued in any event it would suffice to ask the jury to look from the cctv and still to EF 25ft away in the dock, from their different seats, and make a comparison of his unmasked unbearded face, thereby to create their own dock identification, about which the court expressed unease.
- f. Also further on 07.02.24, midway through more argument on dock identification, one of the three crown counsel realized there appeared to be an admission on p16 of the bundle, as above, not seen before, despite trial preparation by three and a jury sworn, so the Crown case shifted to being he admitted the offence and the cctv looks like him, meaning there was mutually supportive evidence of cctv and an admission, so the case was no longer an invitation to convict on sureness of dock identification alone.

- 6 At this point, the court became embroiled in the admission and OIC Norford was called on 07.02.24 on a *voir dire* as to its reliability under **s84 Evidence Act** Cap 3.12.

- a. In her statement of 20.04.21, she had typed:

On 12 April 2020, I visited White House Gardens where ...the complainant wrote her own statement and handed it to me. One suspect EF was named. On 14 April 2020, I saw and spoke with EF...From the looks of him I identified him to be the same person that was on the video surveillance...On 1/5/220 EF was taken into police custody....I told him I was making inquiries into a report that was made...by Sheila Wilkinson where she alleged that you were seen on her premises and her house was broken into. I cautioned him and told him of his rights to have his lawyer, a friend or a family member present before he say anything. He replied 'Officer, this is the first time that any police ever tell me what you telling me. I am not going to give you any statement, a guilty. Me aint even know how to get down there. I did not meditate'. He was then placed back in this cell. I later charged him for another offence. I continued my investigation and he was bailed. On 1st May 2020 I took the accused into police custody...I told him I was making investigation into a report ...he broke into Wilkinson's house. I cautioned him and told him of his right to have his lawyer, a friend or family member present before he said anything...He replied, 'I have nothing to say to you, talk to my sister or my lawyer...' Later that same day, I arrested and formally charged and cautioned the accused on a warrant on the first instance for the present charge.

- b. Counsel Tuckett admitted EF had said *'I'm not going to give you any statement a guilty'*, emphasizing there was no comma, meaning the sentence was a denial, not an admission, which the officer had reversed by putting in the comma, thereby mischievously isolating the expression 'a guilty' from the earlier clause.

- c. In evidence on 07.02.24, OIC Norford said:

- i. In chief, the admission was on 14.04.20, changing the date from 01.05.20, and the 'other' charge was breaching covid curfew;
- ii. Under cross-examination, being an officer since 1996, she agreed the conversation had become an interview, though not audio recorded, while alone, not following usual procedures, she had stopped it when she realized he was talking without a lawyer, at the time he was angry and stubborn as a mule, he 'hates' her, the meaning of the admission had not been reversed by her inserting a comma, as he had meant to make an admission, and she could be trusted as to her word, though EF had not been asked to sign any note; and

iii. To the judge -

1. She denied talking to Counsel Dorsett earlier in the morning about the admission, (which Counsel Dorsett had reported to the court had occurred);
2. She reversed the dates again, so the admission was on 01.05.20;
3. The meeting on 14.04.20 was just her identifying EF from the cctv;
4. She had made notes of the admission in a notebook still at the station;
5. The admission had arisen while talking about breaching curfew;
6. The breach of curfew was said to him by being at the burgled premises;
7. The effect of 5 and 6, to the mind of OIC Norford, had therefore been he was saying he was guilty of being in breach of the curfew by being on the burgled premises, meaning he was admitting to be being the burglar;
8. She agreed in her statement she had not mentioned anything about curfew breach; and
9. When typing the seeming interview in the statement on 20.04.21 she had just typed how she 'remembered in my mind how he was talking'.

d. Two pages of handwritten notes by OIC Norford from a 2020 diary were then later during 07.02.24 produced as pictures on email, showing:

- i. On the page with 09.04.20 in the top left, at the bottom in blue ink, *'Friday 1st May 2020, D EF was taken into custody, he stated that he has nothing to say, he';* and
- ii. On the next page with 13.04.20 in the top left, in the top left in black ink, *'On 1/5/2020, D tell me he guilty, don't know how he get down there, didn't meditate. D.'*

e. On 08.02.24, expecting further information on the voir dire from OIC Norford as to when the notes were written, she was absent from court, having reported illness to Counsel Liburd and she was going to the doctor, which led to Counsel Liburd, with court encouragement, sending texts to Norford asking on what date were the notes made, to which she texted *'can't say'*, and then asked what period of time passed between the conversation and the notes being written, she texted *'not the same day'*,

but 'sometime after' during updating because the inspector and sergeant had wanted the case file.

- f. When pressed for when the case file had been sought, there was answer she was visiting the doctor and would call later, but after two hours merely sent by text a medical note she was certified sick, though with no cause, until 18.02.24.
- g. In parallel, Counsel Liburd now discovered from her file:
 - i. EF was not charged with burglary and curfew breach on 01.05.20, but with curfew breach on 16.04.20, while that day an information was laid before the magistrate he was the burglar, leading to a court warrant executed on 02.05.20.
 - ii. There is a report to Police Commissioner Brandy via Inspector Wallace and Sergeant Audain, undated though signed by OIC Norford, so when written is unclear, in which the admission is said to have been on 14.04.20, and in terms almost line-by-line identical to what is in her statement of 20.04.21, except there is reference to the curfew in the report (as underlined below), excised from the statement -

On the 14th April 2020 I saw and spoke with EF....I told him I was making inquiries into a report that was made...by Sheila Wilkinson where she alleged that you were seen on her premises and her house was broken into. I cautioned him and told him of his rights to have his lawyer, a friend or a family member present before he say anything and reminded him that a curfew was in effect, the federation observing a complete lockdown. He replied 'Officer, this is the first time that any police ever tell me what you telling me. I am not going to give you any statement, a guilty. Me aint even know how to get down there. I did not meditate'. He was then placed back in his cell and was later charged for breaching the curfew and was bailed.

- 7 Counsel Liburd then sought the discharge of the jury as OIC Norford is unwell until 18.02.24, and in addition, when recovered Counsel Liburd wants to continue to probe the story of the purported admission, seeking further evidence from OIC Norford, particularly to better establish when the notes were written. Counsel Tuckett asked there be no discharge so the case is forced on, meaning the Crown's case must likely fail as there would be no evidence from Norford as ill, and in any event argued the court can rule on the admissibility of the admission and dock identification, as no further information is needed, with

encouragement the evidence ruled out, so whether or not the officer is ill, Counsel Tuckett reasons with no admissible evidence and trial under way the case must stop.

- 8 As to discharge being requested by the Crown, the court reported itself in the seeming invidious position that to refuse, and to force the case on, as understandably sought by the defence, meaning it may then fail as OIC Norford would not be available to give evidence, could lead to private complaint the court has been insensitive to the sudden medical needs of a female officer arising overnight, midway through giving evidence on voir dire, putting the court unfairly into the spotlight as possibly sexist to refuse to discharge, drawing the Bench implicitly into the fray, personalizing the court process, which it is not, and irrespective of what are plainly the other problems in this case.
- 9 This case has become like a tangle of fishing line which needs unpicking concerning a man with serious previous convictions and who may have committed this burglary. Counsels Liburd and Dorsett, as the primary prosecutors, are both very junior, called in 2022, doing their best, and have been conspicuous as to their honesty, admitting where preparation has been poor or points overlooked. To continue the fishing analogy, grappling the issues has been like trying to catch a little fish barehanded, which wriggles free as each issue morphs into another, so the fish darts in different directions, never neatly captured.
- 10 Indeed, the case is a striking example of why there must always be a pre-trial case conference between the OIC and counsel prosecuting, reviewing all the materials, because here if there had been:
 - a. More thorough case preparation would naturally have occurred to ready for the case conference;
 - b. Crown counsel would have been made aware by OIC Norford of the purported admission, and would not have discovered it two days into legal argument and after swearing the jury;
 - c. The notes would have been inspected early, and their date established;
 - d. Inconsistencies between the notes, statement, and report may have been resolved;
 - e. The identification conundrum could have been discussed, with a view to
 - i. Provenancing the EF mugshots of 2016 and 2017;
 - ii. Finding a photo more contemporaneous to the burglary on 12.04.20;

- iii. Seeking a statement possibly from the original person who identified EF from the circulation of the cctv on social media;
- iv. Finding someone who knows EF well to look unprompted at the cctv to see if identification might follow; and
- v. Finding possibly an expert to compare pictures of EF with the cctv still to raise sureness of identification by facial mapping.

11 As matters stand, concerning the purported admission, the court is uneasy about the following:

- a. The admission turns on the placing of a comma, as appears in the report and statement, where implicitly something as slight as a change in nuance or tone in what was said by EF would change the meaning from 'I'm guilty' as OIC Norford wishes it thought, to 'I'm not guilty' as EF asserts.
- b. The purported admission was never shown to EF for him to agree or disagree or refuse to sign, so at least he might have been able to speak to the reliability of the record made.
- c. The language of the notes is noticeably different to the language of the statement and report as to which captures accurately exactly what was said, lending further concern as to the reliability of what was said being an admission correctly recorded.
- d. And moreover, in the report the conversation embracing the admission is set in the context of discussion about the curfew, not clearly the burglary, rendering it ambiguous and therefore unreliable he admitted to the burglary, as distinct from curfew breach, reinforced by how it may appear to avoid that very ambiguity OIC Norford has then excised reference to the curfew context of the conversation from the statement.
- e. Finally, there is no clarity as to the date any conversation was first written down, except per text on 08.02.24 it was 'not the same day', being instead 'sometime after' when the case was being updated and case file was requested by the Inspector and Sergeant, suggestive of being the notes being made more contemporaneous to the undated report to the Inspector and Sergeant, meaning long after charge, and therefore at a time OIC Norford may have had a vested interest in suggesting there had been an admission, not an exculpation, so misplacing the comma.

12 Considering the **Evidence Act** supra, it reads:

Reliability of confession by accused in criminal proceedings.

84. (1) In any proceedings, a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained—

(a) by oppression of the person who made it; or

(b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof,

the court shall not allow the confession to be given in evidence against the accused except in so far as the prosecution proves to the court beyond reasonable doubt that the confession, notwithstanding that it may be true, was not obtained as aforesaid.

(3) In any proceedings where the prosecution proposes to give in evidence a confession made by an accused person, the court may of its own motion require the prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2).

13 The critical feature here is under **s84(2)(b)**, in mandatory terms, the court shall not allow a confession to be admitted into evidence unless sure it was not obtained in consequence of anything said or done likely in the circumstances existing at the time as to render it unreliable.

14 In my judgement, reviewing the material, irrespective of hearing further from OIC Norford as desired by the Crown:

- a. There was no contemporaneous note of what was believed said;
- b. The black ink note was made later than the day said;
- c. It is not clear whether said on 14.04.20 or 01.05.20;
- d. What was believed said has never been offered to EF to verify;
- e. The note is different to what is in the statement dated a year later, 20.04.21;
- f. The statement is different to the report, as to date said and in excising from context reference to the conversation about curfew; and
- g. The admission turns on a comma, which if excised makes what was said exculpation.

15 In consequence, in light of these inconsistencies and vagaries, I cannot be sure the purported admission was likely to be reliable, as I cannot be sure its words and context were likely accurately recorded. As such, the admission shall not be admitted into evidence, and so it is ruled inadmissible.

- 16 Left over is the admissibility of the cctv and still for dock identification by the jury as the only evidence to prove the burglar EF.
- 17 There are two problems:
- a. The cctv shows a masked man, not full facial features; and
 - b. There is now no supporting evidence, meaning the case wholly relies on whether the jury are sure they can see by looking at the dock the defendant is the burglar.
- 18 Submissions have been plagued with personal opinion. Counsel for either side have expressed firm contrary views; counsel prosecuting say they can see it him; defending says it is not. This is unhelpful. Neither can give their personal opinion as evidence, nor in closing argument; instead each must invite the attention of the jury to features which are consistent or inconsistent between the defendant and cctv.
- 19 Moreover, EF as the defendant is not 'an exhibit', so the prosecution cannot require the jury to inspect him, or that he mask better to resemble the burglar, or that they get closer than the jury box, or that each gets the same view, or see him in better lighting outdoors, or under nighttime lighting, or they take his picture for their phones or be photographed by the court or in court to provide an image for deliberation to compare with the cctv still, nor that he walk about to compare his movements with the burglar, or be measured as to height and width, nor is it presently expected will they have any data on whether he has similar siblings, who else looks like him locally, or how exactly he looked in 2020 as to weight or hair. Instead, the prosecution ask in the case the twelve jurors from different angles merely look at him across about 25ft.
- 20 Such an invitation is already a challenge if an image is unmasked, as it invites the jury to rely on their own observation, in a sense as witnesses to the crime by watching the cctv, and by being in court they are then being asked to conduct an identification procedure, that having 'witnessed' the crime they can make an identification. But usually if a witness saw a crime, the identification procedure would require a choice of persons, not one alone lit up as the suspect by being placed in the dock, which can amount to an explicit bias pressing upon the jury the authorities already think him guilty and seek they agree, improperly leading the witnesses, being the jurors, to identify who the authorities want identified.

- 21 The problem is evidently more acute where the image is masked, as here with more than half the face not visible, redoubling the dangers the jury will wrongly identify a person the authorities are implicitly urging them to confirm.
- 22 The answer to this danger, say the Crown, is robust directions not to be influenced by the bias created by being in the dock, and to apply rigorously the directions in the case of **R v Turnbull 1977** QB 224, as to how long the suspect is seen on the cctv, at what distance, in what lighting, and what features can be observed, in what quality or quantity, warning of the especial dangers of mistaken identification. A peculiar feature of such a warning in this case is it is against the jurors making a mistaken identification, but which is untested, none being a witness under examination and defence cross-examination in the witness box, all the better for a jury to weigh how reliable is the identifying witness, namely each of themselves. Put simply, there is no opportunity for the defence to test the witnesses, who here are the jurors.
- 23 On a case-by-case basis, there will of course be many examples where it is probably unarguable cctv has captured images of a suspect who is plainly a defendant, unmasked, and in addition usually there will be supporting evidence.
- 24 But here there is a masked suspect and nothing in support.
- 25 Assessing how to proceed, legislation and various authorities have been considered.
- 26 To start, there was reference by defence counsel to **ss111-112 Evidence Act** supra.

Exclusion of identification evidence.

111. (1) Subject to subsection (2), identification evidence adduced by the prosecutor is not admissible unless—

- (a) either an identification parade that included the accused was held before the identification was made and there is no evidence that the witness was intentionally influenced to identify any particular person in that parade; or
- (b) identification was made in accordance with section 112.

Exclusion of evidence of identification by pictures.

112. (1) This section—

- (a) applies in relation to identification evidence adduced by the prosecutor where the identification was made wholly or partly as a result of the examination of pictures, kept by the police for that purpose, by the person who makes the identification: and
- (b) applies in addition to section 111.

(2) Where the accused is in the custody of a police officer in connection with the investigation of an offence at the time when the pictures are examined, the identification evidence is not admissible unless—

(a) the picture of the accused that was examined was made after the accused had been taken into that custody; or

(b) the pictures examined included a reasonable number of pictures of persons who were not, at the time when the pictures were made, in the custody of a police officer in connection with the investigation of an offence, and the identification was made without the person who made it having been intentionally influenced to make that identification.

(3) In any case other than that mentioned in subsection (2), the identification evidence is not admissible unless the pictures examined included a reasonable number of pictures of persons who were not, at the time when the pictures were made, in the custody of a police officer in connection with the investigation of an offence.

- 27 There has been no identification parade, under **s111**, nor an identification procedure using a selection of pictures of others including one of a suspect taken after arrest, under **s112**. This is because these identification procedures do not arise in the current case, as there is no witness to attend the procedure to identify a person from memory seen at a crime; instead here there is no witness, just the jury to view cctv. However, of interest is the expectation if comparing what is a memory with an image, the image has to be as contemporaneous as possible to the memory, meaning the picture used of a suspect has to be from around the time of the crime, most likely the arrest.
- 28 There was also reference by the defence counsel to **R v Marcus 2004** EWCA 3887, but this was a case where a pictures identification procedure had been ruled flawed because there was first a parade of pictures with masking, which when they produced no identification result, led to the pictures being adjusted as removing the masking, but then leaving too many of the persons in the pictures being notably dissimilar to the defendant as to make the parade of pictures fair; in short, the case is not relevant as being about a pictures parade not cctv.
- 29 Prosecution counsel referred to various cases:
- a. In **R v Ali 2008** EWCA 1522, concerning a robbery, a conviction was quashed where there was video identification by a witness saying 'I'm not 100% sure' supported by an identification from cctv stills by a police officer said to be recognition, but where the jury

directions on recognition were inadequate, emphasizing the especial caution mistaken identification cases raise, where in that case there was more evidence than here.

- b. In **William Penn v Regina 2009** HCRAP 2006/0001 from the BVI, a burglary conviction was upheld where there was fingerprint evidence supported by stills from cctv of a masked person whom the Crown asked the jury to see was the defendant. Of interest, the headnote observes, pointing to how the cctv should not be the primary evidence but instead can be supporting:

There is no evidence more directly relevant than a video tape showing the commission of a crime. Though this circumstantial evidence could not be used as the primary basis for establishing the guilt of the appellant, its probative value existed in the fact that the jury could properly find that it supported the fingerprint evidence...

- c. In **R v Dodson 1984** 1WLR 971, conviction for bank robbery was upheld where the only evidence was of cctv stills, novel then, of unmasked suspects who the Crown asked the jury to see were the defendants, with Watkins LJ saying at p979D:

Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence or the absence of it of a change in the defendant's appearance, and the opportunity the jury has to look at the defendant in the dock and over what period of time are factors among other matters of relevance...

30 In addition, prosecution counsel referred to **Blackstones 2024** at F19.19 as follows:

In **A-G's Ref (No.2 of 2002) [2002]** EWCA Crim 2373, Rose LJ summarised (at [19]) the correct approach to the use of photographic and video images at trial:

... there are ... at least four circumstances in which, subject to the judicial discretion to exclude ... and subject to appropriate directions in the summing-up, a jury can be invited to conclude that the defendant committed the offence on the basis of photographic image from the scene of the crime:

(i) where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (*Dodson* (1984) 79 Cr App R 220);

(ii) where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (*Fowden* [1982] Crim LR 588, *Kajala v Noble* (1982) 75 Cr App R 149, *Grimer* [1982] Crim LR 674, *Caldwell* (1994) 99 Cr App R 73 and *Blenkinsop* [1995] 1 Cr App R 7); and this may be so even if the photographic image is no longer available for the jury (*Taylor v Chief Constable of Cheshire* (1987) 84 Cr App R 191);

(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the

scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (*Clare* [1995] 2 Cr App R 333);

(iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury (*Stockwell* (1993) 97 Cr App R 260; *Clarke* [1995] 2 Cr App R 425; *Hookway* [1999] Crim LR 750).

31 In sum, the cases cited by the prosecution have either supporting evidence or the faces were unmasked, while the court must be satisfied if asking the jury merely to compare a defendant in the dock with cctv that the images are sufficiently clear, per the AG 2002 reference, and examine the extent of the exposure of the facial features, per *Dodson*.

32 Weighing the cctv and the authorities, I am concerned images of a masked suspect without more, being a limitation on the extent of '*the exposure of facial features*', are not '*sufficiently clear*' to allow the jury to be invited to make a comparison with the defendant sitting in the dock, with there being the added danger the jury will conclude they can see the suspect is the defendant because the authorities suggest it by putting him in the dock.

33 In the UK, there is **s78(1) Police and Criminal Evidence Act 1984**, which though not directly applicable in the Caribbean region nevertheless is helpful in how to approach admissibility of evidence, and it states:

Exclusion of unfair evidence.

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

34 In my judgement, the cctv should not be admitted to allow the jury to compare the defendant with the cctv, because '*in all the circumstances*', being here it is the only evidence and the burglar is masked, '*the admission of the evidence would have an adverse effect on the fairness of the proceedings*', meaning the proceedings would become unfair, being not curable by robust direction, for the jury to be invited to conclude the defendant is the burglar when he sits in the dock under the spotlight of bias created by the authorities

signaling they believe the burglar him, with there being no one else to compare as would arise if there was a live or pictures identification parade, and where the jurors cannot be tested by defence counsel asking them questions as to the reliability of their making an identification of the suspect as the defendant.

35 In these circumstances, I am not going to allow the procedure suggested by the Crown and therefore will not allow the cctv to be admitted for the purpose of the jury making a dock identification.

36 I am further reminded of my duty at the close of a Crown case concerning identification as reflected in **Blackstones 2020** at D16.59, which reads:

The correct approach to submissions of no case to answer in prosecutions turning upon identification evidence was laid down in *Turnbull* supra, namely that if the quality of the identification evidence on which the prosecution case depends is poor and there is no other evidence to support it, the judge should direct the jury to acquit.

37 In this case, with no other evidence than a masked burglar for comparison for dock identification, meaning the evidence is 'poor', the trial would have to be stopped at the conclusion of the Crown case, as in my judgment it would not be reasonable for a properly directed jury to convict here, which reinforces my view to refuse admission of the cctv for dock identification.

38 All this means the Crown cannot run the trial as wanted.

39 However, the matter does not end there.

40 In parallel, there is an application to discharge the jury sworn on 06.02.24 owing on 08.02.24 to sudden undiagnosed illness on the part of OIC Norford, said to last until 18.02.24. There ought not to be adjournment of the case until then, with a sitting jury unoccupied, at home, in danger in so small a community as St Kitts of undue influence either deliberate or inadvertent.

41 Decision was taken on 08.02.24, if EF was to continue to be tried, then they would indeed have to be discharged rather than wait so long up to 18.02.24 for the case to resume.

42 The choice before the court now is this: should the case be allowed to continue by discharging the jury.

- 43 At this point, I have ruled the cctv is inadmissible for dock identification, but reflecting on the *AG reference 2002*, the cctv could be used for items 2 to 4, namely if someone knowing EF might unprompted explain how he is recognised on the cctv, or not knowing EF can show indicia it is him by reference to a contemporaneous picture around 12.04.20 with detailed analytical comparison, or by using an expert facial mapper.
- 44 The exceedingly strong undercurrent in this case is the burglar is EF but the Crown have simply not garnered the evidence in the correct way, despite earlier case management appearances flagging identification issues, and so have not set up how to use the cctv in a way which is admissible. The plan as the trial began had been on 06.02.24 to punt for comparison, without warning, unprovenanced pictures from before the burglary or just invite dock identification, which for the reasons explained will not do.
- 45 Weighing matters, primary prosecuting counsel are very junior, and in my judgment their innocent inexperience ought not in the public interest be cause a case of seeming practiced burglary fails as imperfectly presented. For this reason, being a first trial listing, of a case only recently in the High Court list since 30.11.23, discharge is appropriate for the Crown to garner the evidence properly, and not because OIC Norford is suddenly ill and not at court. This shall be an adjournment of the proceedings to allow further proper inquiry, while the participation of more senior Counsel Vazquez had been largely to support the flawed dock identification argument, relying on *Dodson* supra, not preparing the case himself. Balancing the interests of the community with the interests of the defendant, who has been and will remain on bail, the case will go to a new date, and will therefore be traversed to a new jury pool in the next term after Easter. In the interim, the Crown can have the case conference so sorely needed, meeting OIC Norford in person, not texting, or talking on the phone, to see if from the cctv EF can be admissibly and reliably identified, though the purported admission has today been excluded.
- 46 I direct any further evidence is to be served within 28 days by 11.03.24.
- 47 There will then most likely follow arguments on the admissibility of any such further evidence as its production will be so very late in these proceedings, which first began against EF on 14.04.20.

48 After much reflection, though all counsel have argued their positions with commendable vim, this ruling means the case continues, it does not stop today, the jury will be discharged with one final opportunity for the Crown to put their house in order, admissibly, and fairly, failing which the court anticipates the prosecution will have to be discontinued.

The Hon. Mr. Justice Iain Morley KC

High Court Judge

12 February 2024