



Hilary Term
[2023] UKPC 4
Privy Council Appeal No 0047 of 2020

JUDGMENT

**Malik Cox (Appellant) v The King (Respondent) (Turks
and Caicos Islands)**

**From the Court of Appeal of the Turks and Caicos
Islands**

before

Lord Lloyd-Jones

Lord Sales

Lord Hamblen

Lord Burrows

Lord Stephens

JUDGMENT GIVEN ON

31 January 2023

Heard on 12 December 2022

Appellant

Siobhan Grey KC

Lara Maroof

(Instructed by Simons Muirhead & Burton LLP)

Respondent

Andrew Mitchell KC

Eugene Otuonye KC

Tamika Grant

(Instructed by Andrew Mitchell KC, Litigator)

LORD BURROWS:

1. Introduction

1. Andreika Stubbs was shot and killed outside the Versace Club in Providenciales in the Turks and Caicos Islands in the early hours of 23 March 2018. She was not the intended target but, tragically, happened to be in the wrong place at the wrong time. It was alleged by the prosecution that the intended target was Tyrone Smith who, in the same incident, suffered a gunshot wound to his leg. Malik Cox was charged with the murder of Andreika Stubbs and, having opted for trial by judge alone, he was found guilty of murder by Aziz J and was sentenced to life imprisonment. His appeal against conviction was dismissed by the Court of Appeal. He now appeals to the Board.

2. The Board gave Malik Cox permission to appeal on two grounds which focus on the evidence of the two main witnesses for the prosecution, Anthony Francis and Tyrone Smith. Those two grounds are as follows:

(i) That the Court of Appeal erred in concluding that the trial judge was entitled to find that Anthony Francis was a credible and reliable witness for the prosecution and/or that the trial judge's conclusions in that regard were reasonable having regard to the undertaking agreed by Anthony Francis prior to him providing the police with his first witness statement on 4 May 2018 ("Ground 1").

(ii) That the Court of Appeal erred in concluding that the trial judge was entitled to find that Tyrone Smith was a credible and reliable witness and/or that the trial judge's conclusions in that regard were reasonable ("Ground 2").

2. What test must be satisfied if the Board is to overturn the Court of Appeal?

3. In clarifying the test that must be satisfied if the Board is to overturn the Court of Appeal, it is first important to set out the statutory test that the Court of Appeal was required to apply in deciding whether to overturn Aziz J. This is contained in section 7(1) of the Court of Appeal Ordinance (Turks and Caicos Islands), which reads as follows:

"Determination of criminal appeals

7(1) ... the Court on any ... appeal against conviction shall allow the appeal if the Court considers that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before the Appellant was convicted should be set aside on the ground of a wrong decision on any point of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the Court considers that no substantial miscarriage of justice has actually occurred.”

Although this provision refers to “the verdict of the jury”, it is plain that the same approach should be applied to a conviction by a trial judge sitting without a jury.

4. Applying this provision, the Court of Appeal decided that the decision of Aziz J was not unreasonable and could be supported having regard to the evidence and that there had been no wrong decision on a point of law and no miscarriage of justice.

5. As the second appeal court, the test the Board must apply is whether the Court of Appeal was entitled to come to that decision. In answering that question, albeit at one step removed, the Board must itself focus on the reasoning and decision of Aziz J and must consider whether his conclusions were unreasonable or could not be supported on the evidence or whether there has been a wrong decision on a point of law or a miscarriage of justice.

6. In this case, particular respect or deference should be afforded to the decision of Aziz J for three closely linked reasons. First, as the trial judge, Aziz J had the great advantage over an appellate court of seeing and hearing the live evidence of the witnesses. Secondly, the appeal essentially turns on the credibility and reliability of the two main witnesses for the prosecution, Anthony Francis and Tyrone Smith. Assessment of credibility and reliability is pre-eminently a matter on which the trial judge is in a much better position than an appellate court. Thirdly, in finding the facts and assessing credibility and reliability, the trial judge (and the Court of Appeal) had the advantage over the Board of having local knowledge. So, for example, Tyrone Smith’s evidence (see para 27 below) was that the reason he did not tell the police in

his first statement, made two days after the shooting, that Malik Cox was the person who shot him in the leg was because he was letting the police do their job. Local knowledge may have helped Aziz J in deciding that that was a plausible explanation.

7. The first two of those reasons for affording particular respect or deference to the decision of the trial judge have been made clear in many past cases: see, eg, *Beacon Insurance Co Ltd v Maharaj Bookstore Ltd* [2014] UKPC 21; [2014] 4 All ER 418, paras 11-17. The comments of Lord Hughes, giving the judgment of the Board, in *R v Crawford (Cayman Islands)* [2015] UKPC 44 are particularly relevant to this case because they were given in the context of a challenge to the decision of a trial judge sitting without a jury in a criminal case. Lord Hughes said at paras 9-10:

“[9] There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper... The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone, with, of course, appropriate consideration being given to the different standard of proof.

[10] The present case is a good example of the difficulty necessarily facing an appellate court. The trial had occupied something over six working days. The judge had been immersed in the evidence in a way which could not be replicated in the Court of Appeal. He did not have merely the written words of the witnesses. He had seen the way in which the words were spoken and challenges were met, and he had been able to read the faces and body language as well as what could be put on a page. That sometimes, exaggerated general claims may be made for the ability of experienced judges to determine the truth solely by assessing the demeanour of witnesses does not alter the fact that part of the judicial function is to read the witness as a whole, nor that the demeanour may sometimes contribute very significantly to the correct conclusion. A transcript cannot provide the same opportunity. ...”

8. As regards the third reason for particular respect or deference — local knowledge — this has been stressed to be a relevant factor in several judgments of the Board explaining its practice of not interfering with concurrent findings of fact of two lower courts. For example, in *Dass v Marchand* [2021] UKPC 2, [2021] 1 WLR 1788, at para 16, Lord Burrows giving the judgment of the Board, said:

“[The] Privy Council wishes to respect factual circumstances peculiar to the country from which the case comes (especially, for example, local customs, attitudes, and conditions) and the first instance and appeal court judges in those countries are very likely to be in a better position to assess such factual circumstances than is the Board.”

See, similarly, *Sancus Financial Holdings Ltd v Holm (Practice Note)* [2022] UKPC 41; [2022] 1 WLR 5181, para 5.

9. In the light of these three reasons, and as the Board is the second appeal court, Siobhan Grey KC, counsel for the appellant, was correct in accepting that the Board would need to be satisfied that this was an exceptional case before it overturned the courts below. It was her submission that this was such a case.

3. Central facts that are not in dispute

10. At approximately 3.15am on 23 March 2018, Andreika Stubbs was shot in the left side of the abdomen while outside the Versace Club. A few hours later, she died of her injuries. She was at the Versace Club with her husband, Franklyn Saintelmon. Ira Livingston Stubbs and Ivenia Penn-Henry were also at the Versace Club before, and at the time of, the shooting.

11. Anthony Francis, whose nickname is “Heads”, was arrested on the day of the incident. His arrest arose from the identification on CCTV of his vehicle, a green Chevy Cavalier, leaving the Versace Club at 3.17am which was shortly after the shooting. He gave “no comment” interviews to the police. Gunshot residue analysis revealed that there was one particle of gunshot residue on Anthony Francis’s hand and three particles on the dashboard of his vehicle. On 6 April 2018, he was charged with the murder of Andreika Stubbs, discharging a firearm, discharging ammunition, and causing grievous bodily harm with intent to Tyrone Smith. However, on 24 April 2018, he entered into a written undertaking with the Office of the Director of Public Prosecutions. By the terms of that undertaking (“the Undertaking”), which is set out in full at para 36 below, if Anthony Francis gave information about Malik Cox, the Crown

agreed to withdraw the murder charge against Anthony Francis and to agree to his bail. If he went ahead and gave evidence at trial against Malik Cox, the other charges would also be withdrawn. Anthony Francis gave two witness statements to the police on 4 May 2018 and 14 May 2018.

12. The day after that second witness statement, and as agreed, the Crown withdrew the murder charge against Anthony Francis (by entering a nolle prosequi). On 17 December 2018, after the trial at which Anthony Francis gave evidence against Malik Cox, who was found guilty of murder, the Crown withdrew the outstanding charges against Anthony Francis.

13. Malik Cox was arrested on 24 March 2018, the day after the incident. He gave “no comment” interviews to the police. No gunshot residue was found on Malik Cox.

14. Tyrone Smith, nicknamed “Tiger”, was at the Versace Club in the early hours of 23 March 2018. During the shooting, he was shot in the back of his leg. On 25 March 2018 he provided a witness statement to the police in which he said that he did not know who had shot him. On 15 April 2018, he provided a second witness statement in which, for the first time, he named Malik Cox as the person who had shot him.

4. The main evidence at trial

15. The trial lasted for eight days (3-7, 10-12, December 2018). Malik Cox chose not to give evidence. The main evidence was given live by Anthony Francis and Tyrone Smith. Other important evidence, in witness statements that were read to the court, was given by Ira Livingston Stubbs and Ivenia Penn-Henry. Among other witness statements read out was that of Franklyn Saintelmon. In the paragraphs that follow, the Board summarises the main evidence of those five witnesses.

(1) The evidence of Anthony Francis

16. Anthony Francis’s evidence was that, with Malik Cox as his passenger, he had driven his green Chevy Cavalier to the Versace Club in the early hours of 23 March 2018. Anthony Francis said that he went to talk to a female by the jerk shack outside the club and that Malik Cox was behind him, approximately 55 feet away. Tyrone Smith was also outside with a friend. Tyrone Smith and Malik Cox then had a “hitch or bump” before Anthony Francis heard a gunshot and began to run. Anthony Francis then stated that he glanced around while he was running and saw Malik Cox some distance away with his hand extended. Francis heard two further shots and ran to his

car. When he got into his car, he heard a knock at the window and it was Malik Cox asking him for a ride home. He opened the door and let him in.

17. Anthony Francis further stated that, whilst in the car passing the NAPA building (NAPA being the name of a business), he asked Malik Cox what had happened and Malik Cox had replied, "those boys try bus' me, I bus' back". It is common ground between the parties that "bus" (or "bust") means to "shoot". Anthony Francis also stated that, while passing the NAPA building, he had realised there was a firearm in Malik Cox's hand.

18. Anthony Francis was cross-examined about the inconsistencies between his evidence on oath and his first and second witness statements given on 4 May 2018 and 14 May 2018. He stated that he had lied in his first statement when he said that he had seen the shape of the gun in Malik Cox's pocket. In fact, during evidence in chief, he had stated that he had not noticed any gun when Malik Cox got in the car but noticed a gun in his hand when they passed the NAPA building. Upon being further cross-examined about a contrary account in his second witness statement, he stated that he had seen the gun when Malik Cox first came in the car.

19. Anthony Francis was cross-examined about the Undertaking. He had been given bail and then made his first statement on 4 May 2018 which implicated Malik Cox. He claimed that he did not give any statement pursuant to the Undertaking to secure his freedom or to obtain bail but gave it to tell the truth and he had provided a detailed statement before the Undertaking was agreed. He did not feel any pressure to comply with the requirements of the Undertaking and just wanted to tell the truth.

20. Anthony Francis said that his statement to the police on 4 May 2018 was the truth and it was not a series of lies and, further, that the second statement on 14 May 2018 came about as he was initially afraid and had left out some details. Francis further stated that he understood the conditions of the Undertaking to mean that, if he strayed away from telling the truth of what happened that night, the Undertaking would be "pulled": his understanding was that, if he gave evidence in accordance with his witness statements, the remaining charges as to the firearms and shooting Tyrone Smith would be dropped within ten days.

21. Anthony Francis was shown the CCTV and recognised his car arriving at 1.15am and leaving at 3.17am. He also confirmed that he saw on the CCTV a car leaving at 1.24am which was his car but that he could not remember if he had left on his own but he knew, and he was adamant, that he did not take Malik Cox home at that time. He

re-confirmed that they both left the scene of the shooting together in his car after the shooting.

(2) The evidence of Tyrone Smith

22. Tyrone Smith stated that he knew Malik Cox from school but that this was limited to having seen him around during his first and second year, after which Malik Cox would have left as he was in a higher grade. This would have been in 2013. He stated that he remembered Malik Cox, as Cox had been a track athlete at school and had been on the senior basketball team while Tyrone Smith had been on the junior basketball team. Tyrone Smith never had any interaction with Malik Cox at school or thereafter.

23. Tyrone Smith's evidence of the events was that, on 23 March 2018, he was at the Versace nightclub. He saw Malik Cox in the parking lot of the club and bumped into him and exchanged words with him. Smith stated that he was face to face with him for three to five minutes and he recognised Malik Cox despite the poor lighting. He was able to recognise him because he had known him from school. He gave a dock identification of him.

24. Tyrone Smith stated that, after the confrontation, he had moved five to seven steps closer to the club and confirmed that Malik Cox was in the jerk shack area. Smith stated that a little while later, whilst leaning on a car, he saw Malik Cox and "the other accomplice" (presumably Anthony Francis). He stated that he saw Malik Cox take out a gun, which he pointed at him and fired. He saw sparks from the gun. He stated that he then dived in between some cars and ran into the club. Once inside the club, he realised he had been shot in the back of the leg. Smith's evidence was that he had never spoken to Malik Cox before that night, Cox had never introduced himself to him and they had never had a problem with each other.

25. Tyrone Smith was spoken to by a female police officer whilst in hospital receiving treatment for his wound, shortly after the shooting. He did not tell her that Malik Cox had shot him or that he was aware as to who had shot him.

26. On 25 March 2018 Tyrone Smith provided a witness statement to the police in which he said that he did not know who had shot him in the back of the leg as his back was to the jerk shack. There was no mention of any confrontation with Malik Cox immediately before the shooting.

27. In evidence, he stated that he had not initially told the police that it was Malik Cox who shot him as he was “just letting them do their job”. On 15 April 2018 Tyrone Smith provided a second witness statement in which he named Malik Cox for the first time. He explained, in evidence, the circumstances in which that second statement came about, namely that police officers had taken him to CID Headquarters to ask him further questions. The officers indicated to him that his first statement did not say who had shot him. Smith confirmed that by the date he gave his second witness statement (15 April 2018) naming Malik Cox, he was aware that Cox had been arrested for the shooting and had heard Malik Cox’s name from “people around the streets” and on social media. He had also seen a photograph of Malik Cox on social media prior to making his second statement.

(3) The evidence of Ira Livingston Stubbs

28. The statement of Ira Livingston Stubbs was read. He is the second cousin of the deceased. At about 12.20am on 23 March 2018, he and his girlfriend, Zshanaia Lightbourne, went to the Versace Club. After the club became packed, he went outside with Zshanaia, Andreika Stubbs (“Deika”), and Franklyn Saintelmon. His evidence was that once Deika said that they were going to leave, he heard a loud bang which was close to his ears. He then heard a second loud bang, which he said seemed to have come from close by as he could feel the breeze, and at that point Deika said that she had been shot and she held her side. She was taken to hospital. Ira Livingston Stubbs stated that the shots came from very close to him. He felt his ear ringing after the shots fired and saw someone jumping into the front of a green Chevy car. Someone was already in it because as soon as the person got in, before the door closed, the car sped off. The car had been parked, reversed in, on the right side of the jerk shack.

(4) The evidence of Ivenia Penn-Henry

29. The statement of Ivenia Penn-Henry was also read. She went to the Versace Club but said that she could not remember much as she was celebrating her birthday and was under the influence of alcohol. At the club she recognised several people including her cousin who she only knows as “Heads”. “Heads” was in the company of another guy who she recognised but did not know his name. She described him as having a little bit of a brown complexion, was slim to medium built, and had short golden dreadlocks. She saw when Deika left the club and said it would have been after 3am when they started to turn down the music. She glimpsed “Heads” from a distance as he was in front of the building walking in a western direction of the grill area, and he was in the company of the same person she saw him with in the club. She noticed Deika standing next to a red car about eight feet away. She heard three explosions sounding like firecrackers, but kind of knew it was gunshots, and coming from the

western direction of the grill area. She saw Deika fall to the ground. She then heard a vehicle speed off but did not know what colour, make or model the vehicle was. After the shooting, she did not see "Heads" or the male person that he was in company with.

(5) The evidence of Franklyn Saintelmon

30. The statement of Franklyn Saintelmon was read. He was the husband of the deceased. He went with the deceased to the Versace Club at about 2.30am. After about 20 minutes they went outside. As he was about to hold the deceased's hand to tell her that they should go, he heard three to four gunshots coming from the direction of the jerk shack, which was located to the left of where they were standing. The deceased said that she had been shot. As he was rushing to pick her up to take her to hospital, he saw a man known to him as "Heads" jump into a green Chevy car that was parked in the area that the shots were fired from. He was able to see "Heads", Anthony Francis, clearly as there were streetlights that lit up the area and there was nothing blocking his view.

5. The judgment of Aziz J

31. Aziz J found Malik Cox guilty of the murder of Andreika Stubbs (applying the doctrine of transferred malice). He considered Anthony Francis, who he regarded as the main witness against Malik Cox, to be a reliable and credible witness. In doing so, he reminded himself that he needed to exercise "special care and caution" because of the Undertaking, and had to be "particularly careful" before accepting Anthony Francis's evidence because he was an alleged accomplice. The judge commented that Anthony Francis "remained resolute that he was telling the truth" despite the vigorous cross-examination of him. Aziz J went on to say the following:

"This Court does not have any reason to consider the evidence of Mr Francis as suspect. When Mr Francis was re-examined, he was very calm and collected when asked to clarify whether he felt under pressure to stick to his statement, because of the Undertaking, and he stated that he wasn't under pressure, he just wanted to tell the truth as well as saying that he did not tell any stories."

32. Aziz J also found Tyrone Smith to be a reliable and credible witness. The judge said the following about Tyrone Smith:

“He came across as a credible and honest witness in the witness-box, not only in what he said throughout his evidence-in-chief and cross-examination, but the Court also took into account his demeanour.”

33. Aziz J summarised in several points his view of the main evidence proving the guilt of Malik Cox. The main points in that summary are the following:

- (i) Anthony Francis’s evidence that Malik Cox was at the scene of the shooting was corroborated by Franklyn Saintelmon, Ivenia Penn-Henry and Tyrone Smith who were independent witnesses.
- (ii) There was sufficient time and light for those witnesses to recognise Malik Cox.
- (iii) Anthony Francis knew Malik Cox and was clearly able to identify him.
- (iv) It was never said to be anyone other than Anthony Francis and Malik Cox in the green Chevy Cavalier.
- (v) After the shots had been fired, Ira Stubbs saw someone jump into a green Chevy being driven by someone else. And as the judge went on to say:

“There was never any evidence to contradict that Anthony Francis was always the driver of the car, which would tend to suggest that it was the shooter who jumped into the car before the car had sped off.”

- (vi) Anthony Francis’s evidence was that when they were driving away, he asked Malik Cox what had happened and he had replied that “those boys... tried to bust me and I bust back”.
- (vii) The evidence of Tyrone Smith was that Malik Cox had fired a gun at him. As to why he initially stated to the police that he did not know who had shot him, he gave what Aziz J regarded as “a plausible explanation” that he was simply letting the police do their job.

6. The judgment of the Court of Appeal

34. Malik Cox appealed against his conviction to the Court of Appeal of the Turks and Caicos Islands (Mottley P, Adderley JA, Hamel-Smith JA). The Court of Appeal, in a judgment delivered on 22 May 2020, CR-AP 20/2018, upheld the decision of Aziz J. The central reasoning of the Court of Appeal was as follows:

(i) The appeal turned on the credibility of Anthony Francis and Tyrone Smith. That was essentially a matter for the trial judge, not the Court of Appeal, because the trial judge had the undoubted advantage of seeing and hearing the witnesses and observing their demeanour.

(ii) The trial judge had correctly reminded himself of the need for special care and caution in determining whether the evidence of Anthony Francis was credible and reliable given that he had an interest to serve because of the Undertaking and because he was an alleged accomplice.

(iii) The trial judge heard the explanation that Tyrone Smith gave for not stating in his first witness statement that it was Malik Cox who shot him. Aziz J accepted that explanation as being plausible and the Court of Appeal could not say that he was wrong to do so.

(iv) The Court of Appeal repeated what the judge had said to the effect that Anthony Francis's evidence, that Malik Cox was at the scene of the shooting, was corroborated by the independent witnesses, Franklyn Saintelmon, Ivenia Penn-Henry and Tyrone Smith.

(v) Overall, applying section 7(1) of the Court of Appeal Ordinance, the Court of Appeal held that the decision of Aziz J was not unreasonable and could be supported having regard to the evidence. There had been no miscarriage of justice and, although implicit rather than being expressly spelt out, no wrong decision on a point of law. The appeal was therefore dismissed.

7. Ground 1 on this appeal: the credibility and reliability of Anthony Francis

35. Ms Grey submitted that Aziz J's conclusion that Anthony Francis was a credible and reliable witness was unreasonable and could not be supported on the evidence, and that there had therefore been a miscarriage of justice. This was for two main

reasons. The first, and more important, concerned the Undertaking, dated 24 April 2018, that Anthony Francis had given to the police prior to providing the police with his first witness statement on 4 May 2018. The second concerned the so-called independent identification evidence. She also pointed more generally to inconsistencies in Anthony Francis's evidence.

(1) The Undertaking

36. The Undertaking, which was signed by Clement Joseph, who conducted the trial in the Supreme Court of the Turks and Caicos Islands on behalf of the Office of the Public Prosecutions, by Oliver Smith, as the lawyer on behalf of Anthony Francis, and by Anthony Francis, read as follows:

"24 April 2018

UNDERTAKING

R v Anthony Francis

This serves as an agreement between the Crown on one part, and **Anthony Francis** on the other part made in pursuant of an Immunity agreement.

Upon providing the Crown with information on the following, the Crown undertakes to the terms as set out in Part II of this agreement:

PART I:

a. Detailed conversations with Malik Cox that evening prior, during, and after the incident.

b. How long has he known Malik Cox and the nature of their relationship.

c. His entire whereabouts for the day to include what time he met up with [Malik Cox] and where exactly they went from the time they met up with each other.

d. FIREARM — did you see him with a firearm prior to the incident?

(i) [did] you know where he got the firearm from?

(ii) what happened to the firearm after the incident?

(iii) did you touch the firearm throughout the said night?

e. Where did you all go after the incident?

f. Do you know the telephone number(s) of Malik Cox?

g. Do you know Tyrone Smith?

h. Do you know of any conflict between Malik Cox and Tyrone Smith?

i. Was this incident gang-related?

j. Were you in the vicinity of a firearm being discharged that night?

k. Who was the target of the attack?

PART II:

The Crown, in exchange for Anthony Francis giving a statement that satisfactorily addresses the issues listed above in Part 1, undertakes to the following:

- a. Consenting to the grant of bail to Anthony Francis.
- b. The withdrawal of the Murder Charge against Anthony Francis no later than 10 days after such agreement.
- c. Maintenance of the Firearms-related charges against Anthony Francis.
- d. If there is a trial of Malik Cox, that Anthony Francis will testify truthfully to the statement he would have provided.
- e. That should Anthony Francis deviate in any material way from his agreed statement, that this agreement becomes void.
- f. That should Anthony Francis testify truthfully to the agreed statement, [within] 10 days of so testifying, the remaining charges will be discontinued against him.
- g. For avoidance of doubt in relation to (f) above, Anthony Francis [will] have ALL charges against him withdrawn.

The Crown reserves the right for the police to pose questions which may arise as a result of the questions.”

37. Ms Grey submitted that the Undertaking meant that Aziz J should not have treated the evidence of Anthony Francis as credible and reliable and that the Court of Appeal was therefore not entitled to regard Aziz J’s conclusion on this as reasonable. The Undertaking was entered into prior to Anthony Francis having given any statement to the police let alone one implicating Malik Cox. The terms of the Undertaking were unsatisfactory because leading questions were being put to Anthony Francis in Part I; and he was being incentivised, by the dropping of the charges against him, to provide false evidence, both in his statements to the police and at trial. In accordance with the Undertaking, the murder charge against Anthony Francis was dropped the day after his second witness statement dated 14 May 2018; and on 17 December 2018, after the trial at which Anthony Francis gave evidence against Malik Cox, the Crown withdrew the outstanding charges against Anthony Francis.

38. Ms Grey had two more specific points about Aziz J's treatment of the agreement to withdraw the charges. The first was that, as regards what Anthony Francis stood to gain at trial by giving evidence against Malik Cox, Aziz J confined his attention to the withdrawal of the firearms charges and, in this context, did not mention the more serious charge of inflicting grievous bodily harm with intent in respect of the injury to Tyrone Smith. The second was that Aziz J did not take into account that, in fact, by reason of clause (e) in Part II of the Undertaking, Anthony Francis still had the murder charge hanging over him at trial because the whole agreement would become void if he deviated from his witness statement. The essence of this submission on these two points was that Aziz J had failed to take into account that the graver the charge still hanging over Anthony Francis, the greater the risk that he would fabricate evidence.

39. Ms Grey also drew the Board's attention to the unsatisfactory way in which the Undertaking had been admitted as evidence at the trial. After a dispute about whether the Undertaking was privileged or not, the Undertaking was not disclosed by the prosecution to the defence until the morning of the trial. There was no disclosure of any information surrounding it (eg how it came to be made). Indeed, apart from Anthony Francis, there was no prosecution witness who could deal with these questions: the investigating officer, PC Rory Burke, who took the statements from Anthony Francis, did not know about the Undertaking at the time he took the first statement and had never seen the Undertaking.

40. The Board accepts that the Undertaking did contain leading questions and that the promises made by the prosecution provided a clear incentive for Anthony Francis to turn "Queen's evidence". But the judge was well aware of the dangers of admitting and relying on such evidence and directed himself more than once as to the need for special care and caution (see para 31 above). Ms Grey accepted that the judge's self-direction on the requirement for caution could not be faulted. The Board does not detect any error of law in his decision to admit the evidence of Anthony Francis or in the reliance he placed on it. In particular, as past cases have made clear (see para 7 above), it was pre-eminently a matter for him to assess the credibility and reliability of Anthony Francis. The Court of Appeal was correct that in this case it was not entitled to interfere with the trial judge's assessment of that all-important matter. It follows that it is not for the Board to overturn the decisions on this matter of the two lower courts.

41. However, the Board wishes to make clear that the Undertaking obtained in this case should not be used as a precedent in future cases. The Board accepts that immunity agreements may be necessary in order to obtain correct convictions. But care must be taken lest leading questions and the immunity promised undermine the validity and weight of the evidence obtained. The judge in this case was alive to the

dangers and directed himself accordingly and was entitled to conclude that, despite the Undertaking, the witness was credible and reliable. That will not always be the case.

42. As regards the two specific points made by Ms Grey regarding the withdrawal of the charges, while it was legally correct that Anthony Francis still had a murder charge hanging over him (because that charge could be reactivated), that point was not directly put to Anthony Francis in cross-examination and, in any event, the important question is what Anthony Francis himself regarded the position as being when he gave his evidence at trial; and his understanding was that the relevant charges hanging over him were the firearms and GBH with intent charges (see para 20 above). True it is that, in his judgment, Aziz J mentioned only the firearms charges and not the charge of GBH with intent. But alongside the firearms charges, the charge of GBH with intent was put in cross-examination and was mentioned in the closing speech of defence counsel and, in the overall context, Aziz J's failure to mention that charge was a relatively minor omission and is understandable because the firearms offences were themselves serious offences with a mandatory minimum sentence of five years.

43. In relation to the trial, the prosecution's approach to its obligation to disclose the Undertaking and the circumstances surrounding its making was unacceptably lax and is not excused by a possible misunderstanding of the law on disclosure. The defence was placed at a disadvantage in not being allowed to see the Undertaking until the morning of the trial. It was also unacceptable that the relevant witness put forward — the investigating officer, PC Rory Burke — was unable to answer questions about the Undertaking because he had never seen it and knew nothing about it at the time when he took the first witness statement from Anthony Francis.

44. As the prosecution has a continuing obligation in relation to disclosure, the Board asked for, and obtained, an assurance in open court from Andrew Mitchell KC, counsel for the prosecution on this appeal to the Board, that, even at this late stage, he was instructed that there are no relevant documents to disclose in relation to the obtaining of the Undertaking. But in the Board's view the procedural failing of the prosecution in relation to disclosure, although unacceptable, did not undermine the fairness of the trial. Furthermore, this was not one of the grounds of appeal to the Board.

(2) Independent identification evidence?

45. Ms Grey pointed to an error by Aziz J, which was repeated by the Court of Appeal, that Franklyn Saintelmon had identified Malik Cox as being with Anthony

Francis at the Versace Club. The Board accepts that that was an error by the trial judge and cannot be dismissed, as Mr Mitchell submitted, as a mere slip of the tongue. Franklyn Saintelmon identified only “Heads”, Anthony Francis, as being at the Versace and said nothing at all about a second person, let alone the identity of a second person.

46. However, in the overall context, that mistake is not of great significance. Franklyn Saintelmon’s evidence was relevant not in identifying Malik Cox but rather in seeing Anthony Francis jump into his car and driving away immediately after the shooting.

47. The Board rejects Ms Grey’s submission that this was a serious mistake by Aziz J and the Court of Appeal because, in her submission, there was no other independent identification evidence supporting Anthony Francis’s evidence. On the contrary, there clearly was other evidence identifying Malik Cox from independent witnesses, most importantly, Tyrone Smith but also, albeit less clear-cut, Ivenia Penn-Henry. Tyrone Smith recognised Malik Cox because he had been at school with him and confirmed, by an acceptable dock identification (acceptable because he already knew him), that he was the person at the Versace Club (see para 23 above). Ms Grey was incorrect to submit that, because he was a victim, Tyrone Smith was not an independent witness. It is plain that the fact that a person is a victim is compatible with that person being an independent witness (ie without an interest to serve) and there is no other good reason to regard Tyrone Smith as not being an independent witness in this case. Ivenia Penn-Henry saw Anthony Francis in the company of the same man, inside the club and after 3.00am outside the club, whom she described as having a little bit of a brown complexion, was slim to medium built, and had short golden dreadlocks (see para 29 above). Albeit arguably somewhat generic, the trial judge observed that that description was consistent with the appearance of Malik Cox.

48. It follows that, although Aziz J made a mistake in relation to Franklyn Saintelmon’s evidence, and that was repeated by the Court of Appeal, that mistake does not undermine the judge’s assessment that there was credible and reliable identification evidence of Malik Cox from independent witnesses.

49. It is worth adding here that, although not identification evidence, the evidence of Ira Livingston Stubbs, who was an independent witness, was also relevant as supporting the prosecution case. He saw someone jumping into the front of a green Chevy car. There was already someone driving because as soon as the person got in, before the door closed, the car sped off.

(3) General inconsistencies in Anthony Francis's evidence

50. More generally, Ms Grey pointed to some inconsistencies between Anthony Francis's evidence at trial and his witness statements. In particular, he was inconsistent as to whether and when he had seen Malik Cox with a gun and, at trial, admitted that he had earlier lied about this in his witness statements. He further contradicted himself in his evidence at trial, as to when he first saw that Malik Cox had a gun (see para 18 above). At trial he also initially denied having signed the Undertaking until he was shown his signature on the document.

51. However, Aziz J explicitly mentioned the inconsistencies concerning the gun and yet formed the view that, looked at as a whole, Anthony Francis was a credible and reliable witness. There was no mistake of law in his analysis and, as the Board has already made clear, he was in a much better position than the Board to assess the credibility and reliability of Anthony Francis.

(4) Conclusion on Ground 1

52. The Board concludes that the appellant fails on Ground 1. It was not unreasonable of Aziz J to decide that Anthony Francis was a reliable and credible witness and the Court of Appeal was therefore entitled not to interfere with that assessment.

8. Ground 2 on this appeal: the reliability and credibility of Tyrone Smith

53. The principal submission of Ms Grey in respect of Tyrone Smith was that, in his first witness statement on 25 March 2018, he denied knowing who had shot him and made no mention of a confrontation with Malik Cox. It was only in his second witness statement, on 15 April 2018, that for the first time he named Malik Cox as the person who had shot him. That was after the police had brought him in for further questions because he had not identified who had shot him. That was also after he had heard the name of Malik Cox from more than one person around the streets and on social media where, furthermore, he had also seen a photograph of Malik Cox (see paras 26-27 above). Ms Grey submitted that these facts meant that Aziz J should not have treated Tyrone Smith's evidence against Malik Cox as credible and reliable. She also submitted that Tyrone Smith's explanation for why he did not initially mention Malik Cox, because he was letting the police do their job, should not have been treated by the trial judge as a plausible explanation.

54. These are again matters that are pre-eminently for the trial judge to assess. Aziz J decided that Tyrone Smith was a credible and honest witness. And equipped with local knowledge, it was essentially a matter for him to decide whether Tyrone Smith's explanation for the delay in naming Malik Cox was plausible or not. Certainly, the Board can understand that, in a relatively small community, a person who has been shot at might be reluctant to name the shooter for fear of reprisals.

55. Ms Grey also relied here on the mistake of the trial judge in treating Franklyn Saintelmon's evidence as identifying Malik Cox. The Board's rejection of that submission in respect of Ground 1 (see paras 46-47 above) applies equally to rejecting that submission in respect of Ground 2 and will not now be repeated.

56. The Board concludes that the appellant fails on Ground 2. It was not unreasonable of Aziz J to decide that Tyrone Smith was a reliable and credible witness and the Court of Appeal was therefore entitled not to interfere with that assessment.

9. Three general features

57. Standing back from the detail, there are three general features of this case that are worthy of mention as supporting the decisions of the lower courts.

58. First, there was no evidence at all put forward by the defence. Malik Cox gave a "no comment" interview and chose not to give evidence at trial.

59. Secondly, the evidence of the prosecution's witnesses at trial was consistent as between one another. In contrast to some trials, there was no conflict within the prosecution evidence given at trial.

60. Thirdly, Aziz J decided that both Anthony Francis and Tyrone Smith were credible and reliable witnesses independent of each other. Even if the Board had decided (contrary to what we have actually decided) that Aziz J's assessment had been unreasonable in respect of one of those two witnesses, there would still have been the evidence of the other which in itself, alongside the other evidence in the case, would have been sufficient to convict Malik Cox.

10. Overall conclusion

61. The Board concludes that this is not an exceptional case where it should depart from the decisions of the trial judge and Court of Appeal. The conclusions of Aziz J in respect of the evidence of Anthony Francis (Ground 1) and Tyrone Smith (Ground 2) were reasonable and were supported on the evidence and there has been no wrong decision on a point of law and no miscarriage of justice. The Court of Appeal was therefore entitled to uphold the decision of Aziz J.

62. For all these reasons, the Board will humbly advise His Majesty that the appeal should be dismissed.