APPEAL COURT, HIGH COURT OF JUSTICIARY

[2024] HCJAC 48
HCJ/2024/257/XC

Lord Justice Clerk
Lord Matthews
Lord Beckett

OPINION OF THE COURT

delivered by LORD MATTHEWS

in

appeal following a reference from the Scottish Criminal Cases Review Commission

by

DARREN HUGHES

Appellant

against

HIS MAJESTY'S ADVOCATE

Respondent

Appellant: S Collins (sol adv); George More & Co LLP
Respondent: E Campbell, AD; the Crown Agent

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3 December 2024

Introduction

[1] On 3 February 2022 at the High Court in Glasgow, the appellant was convicted of two charges. The first was of assaulting his sister Ashley Hughes by entering her flat

uninvited, punching her on the head and kicking her on the body, all to her injury. The second was of assaulting and attempting to murder Ryan Farrer there, by punching and kicking him on the head and body and stabbing him repeatedly, all to his severe injury, permanent disfigurement and danger to his life. A co-accused Mark Mitchell was also convicted of both charges but, in relation to Mr Farrer, under deletion of the aggravations and the libel of attempted murder. Both assaults occurred on 7 December 2019.

[2] The appellant was sentenced *in cumulo* to imprisonment for 9 years. An appeal against conviction on the attempted murder charge, based on a purported error by the trial judge in refusing to admit testimony from the complainer's sister, on the ground that she had been present in court, was refused on 9 November 2022 (*Hughes* v *HM Advocate* 2023 JC 40).

[3] In April 2024, the SCCRC referred the case back to this court on the basis that there may have been a miscarriage of justice because of the existence and significance of evidence which was not heard at the original trial (Criminal Procedure (Scotland) Act 1995, s 106(3)(a)). The evidence which is said to be new is from Chantelle Tant, the ex-wife of Mark Mitchell. She testified before us on 21 November, having failed to appear the day before, as a result of which a warrant was issued for her arrest. We shall deal with her evidence in due course but in summary she spoke of threats made by Mr Mitchell to stab Mr Farrer and, on the following day, to admissions made by him.

The trial

[4] There was no serious dispute that someone had attempted to murder Mr Farrer. Each accused blamed the other and the principal evidence was as follows.

Mr Farrer

[5] Mr Farrer died in advance of the trial for reasons unrelated to the crime libelled. His evidence was thus led in terms of section 259 of the 1995 Act, using a statement he had given to a police officer. On Saturday 7 December 2019, he had been staying with his friend Ashley Hughes at the locus. They had been drinking heavily together on the afternoon of Friday 6 December and continued to drink all the way through Saturday. At some point on Saturday night he fell asleep. The next thing he knew was that he was awake with someone "battering him." He felt someone on top of him hitting him in the face and chest like he was being punched. He opened his eyes and saw Mr Mitchell above him. Mr Mitchell kicked him in the face and said "I fucking warned you." Mr Mitchell then kicked him again in the face. He was unaware that he had been stabbed in the chest. He did not see Mr Mitchell with a weapon. He had been lying on the bedroom floor between the two beds. He saw Ashley in the room with the appellant. The latter jumped in and also attacked him by punching him in the face once or twice. He then heard Mr Mitchell say something and felt another kick, which he thought was delivered by the appellant. He tried to fight back but could not as he was stuck on the floor, edged between two single beds. Mr Mitchell and the appellant then left the flat together.

[6] DC Joyce Gunderson spoke to taking Mr Farrer's police statement from him and to showing him two separate sheets of photographs from which Mr Farrer identified both Mr Mitchell and the appellant as those who assaulted him. She said that Mr Farrer had said that Mitchell had "grassed" him and that he would, in turn, "grass" him. She said that there were several comments made by Mr Farrer when she showed him the images. Mr Farrer had said that Mr Mitchell had stabbed him. He said that Mr Hughes had not stabbed him but had kicked and punched him.

Ashley Hughes

[7] Ms Hughes confirmed that she had been drinking heavily in her flat with Ryan Farrer throughout the weekend. The appellant and Mr Mitchell came to her flat just after 8.00pm on the Saturday. She answered the door and the appellant punched her as soon as he came into the house. Ryan Farrer was sleeping at the time. Mr Mitchell said "Where is he?" She and the appellant engaged in a scuffle in the living room. The appellant pulled her hair and she fell to the ground. She and the appellant fought for a few minutes and then Mr Mitchell came to attack her. Mr Mitchell had been in the bedroom and she had heard a bang while he was in it. On Mr Mitchell's arrival in the living room he kicked her in the stomach and said "You'll get what he just got." The appellant had left the flat before Mr Mitchell kicked her. Mr Mitchell then left the flat. She went into the bedroom and saw Mr Farrer on the floor, between two single beds, covered in blood. She told the police in a 999 call that Mr Farrer had been slashed and that she thought he had been stabbed. When asked if the attacker was still nearby, she responded "They'll be well gone."

[8] Ultimately it was held that there was sufficient evidence that Ms Hughes had adopted a statement given to the police. In this she had said that when she was on her knees the appellant had kicked her on the ribs a couple of times and that he had gone into the bedroom with Mr Mitchell. They were both with Mr Farrer for 2 or 3 minutes.

[9] In cross-examination by counsel for Mr Mitchell, Ms Hughes was asked whether she wanted the jury to accept that everything had been done by Mr Mitchell. She agreed with that proposition. She said that Mr Mitchell was angrier and went into the bedroom and she was positive the appellant had never gone into the bedroom. She was asked whether she remembered telling the police that Mr Mitchell had pointed to her and said "I'll kill you as

well." Ms Hughes said that she could not remember saying this but accepted that her memory would have been fresher when she had given the statement as opposed to at the date of trial. She accepted that if the police had written that down then she must had said it. She was asked whether Mr Mitchell said that he would kill her as well. She said that he had.

Lisa Mitchell

[10] Lisa Mitchell is the sister of Mark Mitchell. According to her, both Mr Mitchell and the appellant had been within her house on the evening in question. They were also in the house the next morning when she woke.

[11] Under reference to statements which she too ultimately adopted, she said that on the Sunday morning she had heard the appellant on the phone, possibly to his mother, when he said "that Ashley had stuck us in".

[12] Further excerpts which she adopted read:

> "I heard him saying that he had been arguing with someone on Facebook and that this had been a long time coming. I was asking [the appellant] "what are you talking about?" and [the appellant] walked away into the kitchen still talking on his phone."
>
> and
>
> "I asked both of them what had happened. Mark and [the appellant] started having a conversation and I heard [the appellant] say "You don't have to worry, Mitchell, it was me."

[13] She also accepted that she would have told the police that Mr Mitchell told her in the morning that it was nothing to do with him and that he "had been here all night".

Mark Mitchell

[14] Mr Mitchell said that he had been staying with his sister, Lisa Mitchell, on the weekend of the incident. The appellant had come to the house and he, the appellant and

Ms Mitchell were all drinking together. The appellant had wanted to go to his sister, Ashley's, flat later in the evening and Mr Mitchell had joined him.

[15] When they arrived at the locus, the appellant punched Ms Hughes twice as soon as she opened the door and she began to scream. Ryan Farrer was lying between the beds in the bedroom to the left of the hallway and he saw the appellant going into that room. The appellant punched Mr Farrer two or three times in the face and was straddling him. Mr Mitchell went into the bedroom and bent over the bed for a couple of seconds to see if he could help Mr Farrer. The appellant then came back into the bedroom and said "fucking leave him." Mr Mitchell got up, ran past the appellant and left the flat. He and the appellant stopped in at a local pub before returning to Lisa Mitchell's house. The next morning there was a discussion between him, the appellant and Lisa Mitchell. At this point, he knew that the police were looking for him. The appellant had told him that he had nothing to worry about as he had not done anything. Ashley Hughes and the appellant had lied about his involvement. Ms Hughes was protecting her brother and the appellant was closer to Ryan Farrer than had been admitted.

The appellant

[16] The appellant spoke to staying overnight with Lisa Mitchell on 7 December 2019. At some point Mr Mitchell had joined them. He agreed that he and Mr Mitchell had gone to his sister's house later on the Saturday evening. He did not accept that he had assaulted his sister in any way. He said that his sister saw Mr Mitchell and started screaming. She was pushing, shoving and pulling. She was pulling at the appellant and he said that he had hit her on the face accidentally. He denied ever kicking Ms Hughes. Mr Mitchell was the only one who went into Ryan Farrer's room. The appellant said that he was with his sister

arguing about Mr Mitchell being in the house. Their argument was in the living room and they were scuffling. At that point, Mr Mitchell was in the bedroom, screaming and shouting. He overheard Mr Mitchell say "I'm going to fucking kill you." Thereafter, he saw Mark Mitchell kicking Ashley Hughes in the hallway of the flat. Both he and Mr Mitchell left the flat together. He did not know that Mr Farrer had been stabbed and he did not see a weapon. He disputed that he made any confession in either Mr Mitchell's or Ms Mitchell's presence. The appellant blamed Mr Mitchell for the stabbing.

The judge's charge

[17] The trial judge reminded the jury that the Crown's principal case was that the two accused had acted in concert, with Mr Mitchell being the primary actor. Mr Mitchell could be convicted alone if concert was not proved. Their secondary case was said that even if the jury could not say who the principal actor was, both should be convicted as they had acted in concert.

[18] Later in his charge, the trial judge gave a further direction. This was a third "route to conviction" and not one which the Crown had advanced. If the jury believed the account of Mr Mitchell and disbelieved the evidence of Mr Farrer, Ms Hughes and the appellant, they could acquit Mr Mitchell and find the appellant guilty of charge 2 on his own, provided they could find corroboration in the evidence of other witnesses. There was, of course, evidence of admissions by him.

Verdict

[19] The jury convicted the appellant of charges 1 and 2 as libelled. They found Mr Mitchell guilty of charge 1 and guilty of charge 2, under deletion of attempted murder and all aggravations.

The Discovery of Chantelle Tant

[20] Chantelle Tant did not give evidence at the trial. According to an affidavit from the appellant's solicitor, there was no mention of her within the Crown disclosure in advance of trial. The appellant had not mentioned her as a person of interest prior to the trial. On 28 January 2023, some eleven months after the conclusion of the trial, the solicitors received a message from the appellant's brother. He explained that Ms Tant might be someone of interest to defence enquiries. A statement was taken from her on 3 February 2023. That statement was subsequently passed to the Scottish Criminal Cases Review Commission for consideration.

[21] The SCCRC wrote to Ms Tant in May 2023 but she did not initially engage with them. A petition was lodged at Edinburgh Sheriff Court seeking warrant to cite her to give evidence on oath before a sheriff. She failed to appear in that process and a warrant for her apprehension was sought and granted. She contacted the SCCRC on 28 November 2023 to advise that, due to ongoing personal issues, she had been unable to engage but she was ready and willing to provide a statement and the SCCRC interviewed her thereafter.

Ms Tant's evidence

[22] The appellant was a friend of her ex-husband, Mark Mitchell, but Ms Tant knew him anyway from the local area. She was aware that they had been on trial for stabbing Mr Farrer but she had not known the complainer, although she had seen him. The only thing she knew about the incident was what Mr Mitchell had told her. She did not go to the police about it, thinking that they would come to see her because Mr Mitchell had had care of the children at the time. A mutual friend, a female called Dee who lived in Muirhouse, had told her the outcome of the trial, perhaps a week after sentence had been passed. Dee

was the appellant's ex-partner and she had known her for about 15 years. They spoke briefly about what Mr Mitchell had done and Ms Tant told her how she felt about the discrepancy in sentencing in view of what Mr Mitchell told her he had done. Dee passed her details to the appellant's solicitors and she was contacted by them, giving them a statement in due course before eventually speaking to someone from the SCCRC.

[23] Mr Mitchell called her on the evening of the incident about 9pm. He told her that he was going to stab Mr Farrer. He was at a pub in Davidson's Mains and she thought he was with the appellant, although it sounded like he was outside when he called. She was not aware of any animosity between Mr Mitchell and Mr Farrer and Mr Mitchell gave no reason for his proposed course of action. She was not particularly surprised by what he said because he was drunk and would say things like that when in that condition. She did not think he was going to do it and hung up on him. In fact she hung up on him numerous times and estimated that he called her 250 times that day.

[24] Later on, perhaps about midnight, he called her again and she could hear him saying "Ho ho ho" and "I've just stabbed him". Whether these were calls meant for her or just pocket calls she was not sure. He was having a conversation with someone else when he said he stabbed him. She was not clear on times but was sure about what Mr Mitchell said.

[25] Early next morning, about 8 or 9, he contacted her to say that he had been in touch with the police because he had stabbed Mr Farrer. He asked her to pick up the children, who were at his sister's in Clermiston. She duly went there, in a state of panic, and, on arrival, saw Mr Mitchell in the garden, crying.

[26] She called him an idiot and told him to put the children in the car and get their stuff. He said he was sorry, he had made a mistake and he should not have stabbed Mr Farrer. He kept apologising and saying he should not have done it. He did not really tell her anything

about how things had happened. His sister was at the patio doors and he was at the gate. Ms Tant saw the appellant just as the children were getting into the car. He had come from the house. The appellant asked if the witness could drop him off at a friend's house. Mr Mitchell was standing beside them at the gate and was still crying. The appellant did not ask him why he was crying. When the appellant came out of the house Mr Mitchell was still apologising and saying he should not have stabbed Mr Farrer. It was possible that the appellant heard this.

[27] Under reference to her interview for the SCCRC she confirmed that Mr Mitchell said he had been wearing a Santa hat at the time and that Mr Farrer had been lying down when he had stabbed him. He panicked afterwards and got his sister to wash his clothes. He made no mention of the appellant being in the room but said that he had been in the house.

[28] In cross-examination she said that the appellant was present for about one minute of the time that Mr Mitchell was speaking. The appellant did not say anything but shook his head at Mr Mitchell as if he (Mitchell) was off his head. She accepted that she told the interviewing officer that the appellant was saying to Mr Mitchell that he should not have stabbed Mr Farrer. She was telling the interviewer the truth.

The appellant's position

[29] The appellant did not give evidence before us but relied on an affidavit. According to this he was not aware of any contact between Mr Mitchell and Ms Tant on the evening of the incident. He did not discuss with Mr Mitchell any calls he might have made and was not aware of anything he might have said to Ms Tant. On the following day he woke up in Lisa Mitchell's house. He could hear Mr Mitchell and his sister speaking and laughing. Mr Mitchell's children were somewhere in the house. Having been to the toilet, he joined

Mr Mitchell and his sister in the kitchen. The former said he had been told that Mr Farrer had been stabbed and started laughing. The appellant told him he better not have stabbed him. He was unhappy with Mr Mitchell. Ms Tant arrived at the house and the appellant thought he might have bumped into her as he was leaving. He was going to the house of his friend Joe, who lived nearby.

[30] At some point Ms Tant was in the company of Mr Mitchell and his sister but he was not next to Mr Mitchell when he was speaking to Ms Tant. He was out of the house by that time and they were at the front stair door. There was a garden area between them. He asked Ms Tant for a lift and was in the car with her and the children for one or two minutes. Neither Mr Mitchell nor his sister was in the car. Ms Tant did not tell him that Mr Mitchell had made any admissions. He had not had any direct contact with her since. After his appeal Ms Tant got in contact with his brother and told him what she knew. His brother contacted his lawyers.

Submissions

The appellant

[31] There was a reasonable explanation why the evidence had not been placed before the court at trial. The appellant was unaware that Mr Mitchell had had conversations with Ms Tant either prior to or after the incident. He was unaware that she could say that Mr Mitchell had expressed an intention to stab Mr Farrer prior to the incident, or that he had admitted to stabbing the complainer and asking Ms Mitchell to dispose of his clothes. Ms Tant had not provided a statement to the police at the time of the incident, nor was it known to the appellant that she was a witness to Mr Mitchell's confessions. This explanation satisfied the requirements of s 106(3A) of the 1995 Act. The appellant

incriminated Mr Mitchell and would have told his solicitors had he been aware of his admissions. Even if he had seen that Mr Mitchell was upset that would not have meant anything unless he knew the reason why. The court should adopt a broad and flexible approach. *Razzaq* v *HM Advocate* 2018 JC 21, para 43.

[32] The crucial issues for the jury were those of credibility and reliability. In returning their verdict, the jury clearly accepted Mr Mitchell to be a credible witness and preferred his evidence to the evidence of the appellant and Ms Hughes. The evidence of Ms Tant was directly relevant to the credibility of Mr Mitchell. Ms Tant's evidence was independent and of such significance that it met the test set out in *Al Megrahi* v *HM Advocate* 2022 JC 99. It would be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, was a miscarriage of justice.

The Crown

[33] The evidence of Ms Tant would have been admissible evidence which could have been led by the Crown against the co-accused, which would have been of "incidental benefit" to the accused (per LJC (Ross) in *McLay* v *HM Advocate* 1994 JC 159 at page 165). The evidence may also have been admissible at the instance of the appellant either to put to Mr Mitchell as a prior inconsistent statement or, in the event that the co-accused had not given evidence by virtue of section 261 of the 1995 Act.

[34] However, there was no reasonable explanation why the evidence had not been adduced at trial. The correct test to be applied could be found in *Razzaq,* where Lord Turnbull said, at para 43:

> "If there is not a reasonable explanation of why the evidence was not heard at the trial then questions as to the effect which it might have had at the trial do not arise for consideration. Secondly, the onus is on the appellant to provide a reasonable explanation for the failure to call that evidence at trial. Thirdly, it is not sufficient for

> an appellant to state that he was not aware of the existence of the witness, or where he was aware of the existence of the witness, that he was not aware that the witness was able or willing to give evidence of any significance. It may be sufficient for the appellant to show that he had no good reason for thinking that the witness, or, as the case may be, that he would give the evidence in question. Fourthly, the court should have regard to the interests of justice according to the circumstances of the particular case and the underlying intention of the legislation is that the court should take a broad and flexible approach. Fifthly, it is enough for the appellant to persuade the court to treat the explanation as genuine and he does not require to show by full legal proof that it is true."

[35] The appeal should fail on a proper application of this test. The evidence of Ms Tant was that the appellant was present when the admission was made. She said that he possibly heard what was said. He must have heard or at least understood the nature of the exchange. He contributed to it by telling Mr Mitchell that he should not have stabbed Mr Farrer. It was quite clear that he would have been in a position to identify her as a potential witness and could have told his solicitors.

[36] In the abstract, the evidence might be capable of being regarded as credible and reliable. However**, e**ven if the fresh evidence had been admitted the jury would not have been bound to acquit. It was not conceded that the evidence of Ms Tant was so significant that a miscarriage of justice had necessarily occurred. There was already significant evidence in the course of the trial which implicated Mr Mitchell as being responsible for the stabbing and which undermined his credibility and reliability. It was the evidence of Mr Farrer himself that it was Mr Mitchell who stabbed him. The evidence of Ms Hughes supported this account. Notwithstanding all of this, the jury must have rejected this evidence and accepted the evidence of Mr Mitchell.

Analysis

[37] In *Al Megrahi* v *HM Advocate,* at para 219, the court said the following.

> "(1) The court may allow an appeal against conviction on any ground only if it is satisfied that there has been a miscarriage of justice.
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> (2) In an appeal based on the existence and significance of additional evidence not heard at the trial, the court will quash the conviction if it is satisfied that the original jury, if it had heard the new evidence, would have been bound to acquit.
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> (3) Where the court cannot be satisfied that the jury would have been bound to acquit, it may nevertheless be satisfied that a miscarriage of justice has occurred.
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> (4) Since setting aside the verdict of a jury is no light matter, before the court can hold that there has been a miscarriage of justice it will require to be satisfied that the additional evidence is not merely relevant but also of such significance that it will be reasonable to conclude that the verdict of the jury, reached in ignorance of its existence, must be regarded as a miscarriage of justice.
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> (5) The decision on the issue of the significance of the additional evidence is for the appeal court, which will require to be satisfied that it is important and of such a kind and quality that it was likely that a reasonable jury properly directed would have found it of material assistance in it consideration of a critical issue at the trial.
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> (6) The appeal court will therefore require to be persuaded that the additional evidence is (a) capable of being regarded as credible and reliable by a reasonable jury, and (b) likely to have had a material bearing on, or a material part to play in, the determination by such a jury of a critical issue at the trial."

[38] However, before the cogency of any alleged fresh evidence can be tested under reference to the above questions, the court must be satisfied that there is a reasonable explanation why the evidence was not adduced at the original trial. Only if there is such an explanation will it be necessary to go on to consider the effect it might have had if it had been led at first instance: *I(N)* v *HM Advocate* [2018] HCJAC 66, para 31; *Razzaq*, para 43.

[39] The dicta in *Razzaq* were a summary of the guidance in *Campbell* v *HM Advocate* 1998 JC 130. It is quite clear from *Campbell* that the test is an objective one. It is also clear that full legal proof is not necessary. It is enough if the court is persuaded to treat the explanation as genuine. However, as the Lord Justice Clerk (Cullen) said, at page 146: "… an explanation cannot be 'a reasonable explanation' if it is not adequate to account for the fact that the witness's evidence was not heard".

[40] At page 147 he went on

> "Likewise, if the explanation were merely that the appellant was not aware of the existence of the witness; or, where he was aware of the existence of the witness, he was not aware that he was able or willing to give evidence of any significance, this would hardly provide "a reasonable explanation". But it might be different if the appellant also could show that at the time of the trial he had no good reason for thinking that the witness existed or, as the case might be, that he would give the evidence in question. Thus much might depend on the steps which the appellant could reasonably be expected to have taken in light of what was known at the time. The underlying intention of the legislation is that the court should take a broad and flexible approach in taking account of the circumstances of the particular case".

[41] The reference to the steps which the appellant could reasonably be expected to have taken in light of what was known at the time is missing from the summary in *Razzaq.* It is an important consideration and tends to undermine any suggestion that the "broad and flexible "approach should be taken too literally and result in the bar being lowered.

[42] Examples of what could reasonably be expected to have been done can be found in two authorities which we invited the parties to consider.

[43] In *Barr* v *HM Advocate* 1999 SCCR 13, there had been an issue at trial as to whether the complainer and a witness had been too drunk to be able to give reliable evidence. Having been convicted of assaulting the complainer in a caravan, the appellant sought to rely on fresh evidence from three witnesses, G, Mrs G and her brother B. They were the occupiers of a neighbouring caravan. The defence were aware that G had been in the caravan where the assault took place and had he been precognosced it was likely that he could have led them to Mrs G and her brother, all of whom now seemed able to give evidence about the drinking. In these circumstances, there was no reasonable explanation for not adducing their evidence at the trial.

[44] In *Burzala* v *HM Advocate* 2008 SLT 61 the appellant challenged his conviction of rape on a number of grounds. One of these was the existence of fresh evidence from the owner

of a club that the appellant and the complainer were kissing there. It is not necessary to discuss whether or not such evidence would be admitted nowadays. The appeal was refused on the basis that an obvious line of investigation prior to trial would have been to question members of staff. Even if the appellant did not know of the owner's existence, he was a member of a class of potential witnesses whose ability to confirm the appellant's position could readily have been investigated.

[45] There is no reason for us to believe one part of what Ms Tant says and not another part. There is no clear evidence that places him in a position where he would be aware of the telephone calls made so we are really looking at what happened when Ms Tant arrived at the house. If she is not telling the truth about what Mr Mitchell said, either then or in his calls, then there is nothing on which to base this appeal. However, assuming she is telling the truth, Mr Mitchell was apologetic and crying and the appellant saw and heard that, or at least part of it. The appellant spoke to Mr Mitchell and told him he should not have stabbed Mr Farrer, which clearly implies that he must have heard what was going on. Even if he did not hear it but only saw the appellant crying in Ms Tant's company, that should have alerted him to the strong possibility that Ms Tant had something to say about Mr Mitchell. It is fanciful to suggest he might not have known the reason for it. However, on any view of matters, even if the appellant could not see and hear precisely what was going on, on his own account he was aware of an interaction between Ms Tant and Mr Mitchell in the morning after the incident. In these circumstances, applying *Barr* and *Burzala*, particularly the former, it seems very strange for Ms Tant not to have been in the mind of the appellant. There is no reasonable explanation why he did not alert his solicitors to her existence so as to allow them to carry out investigations, which, if she gave a similar account, would have led them to the earlier telephone calls as well.

[46] In light of that, it is not necessary for us to consider the potential significance of Ms Tant's account. The appeal is refused.

Postscript

[47] The SCCRC were perfectly entitled to reach the conclusion that the proposed fresh evidence might have been material. However, we were concerned that, given the clear evidence of Ms Tant about the presence of the appellant when she was talking to Mr Mitchell, the analysis of the reasonable explanation was superficial, and, in fact, mistaken. At para 52 of the Statement of Reasons, it is said that, on the Commission's reading of the interview, the appellant did not witness or hear the admission. This seems to us to ignore what Ms Tant said in two parts of her interview. The first is when she told the interviewer that the appellant came out from the stair and Mr Mitchell was still at the path talking and crying his eyes out. The second is when she said the appellant was looking at Mr Mitchell like he had totally lost it and telling him that he "should not have stabbed Ryan and that he made a big mistake". This raises the clear inference that the appellant heard at least some of the content of the conversation. It was a matter which merited more inquiry in the course of the interview, and thereafter a detailed assessment by the SCCRC of the question whether the threshold test could be met.