SUPREME COURT OF QUEENSLAND

CITATION:	*R v Peros* [2017] QSC 97
PARTIES:	**THE QUEEN** **v** **JOHN PEROS** (Defendant)
FILE NO/S:	Indictment No 77 of 2016
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	21 March 2017 (ex tempore)
DELIVERED AT:	Mackay
HEARING DATE:	20-21 March 2017
JUDGE:	Henry J
ORDER:	**No orders made.**
CATCHWORDS:	CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – GENERALLY – Duty to call all relevant evidence – Relevant witness – Where Crown invited to reconsider – Where Crown did not call witness – Where His Honour called witness CRIMINAL LAW – PROCEDURE – POWERS AND DUTIES OF PROSECUTION AS TO CALLING OF WITNESS AND PRESENTING EVIDENCE – UNRELIABLE AND HOSTILE WITNESSES – Right of Crown to refuse to call *Coulson v The Queen* [2010] VSCA 146, cited *R v Apostilides* (1984) 154 CLR 563; [1984] HCA 38, cited *R v Plomp* [1963] 110 CLR 234, cited *R v Wilson* [1998] 2 Qd R 599, cited *Velevski v The Queen* (2002) 187 ALR 233; [2002] HCA 4, cited *Whitehorn v The Queen* (1983) 152 CLR 657; [1983] HCA 42, cited
COUNSEL:	J Phillips for the Crown C Eberhardt for the defendant
SOLICITORS:	Director of Public Prosecutions (Qld) for the Crown Robertson O'Gorman for the defendant

[1] **HENRY J:** The accused seeks a ruling that I ought invite the prosecution to reconsider its decision not to call Levii Blackman, and in the alternative, that if the

Crown will not call Levii Blackman as a witness in the accused's trial for murder, then I should. I intend to invite the prosecution, consistent with the ruling sought, to reconsider its decision and, in the event that it does not call Levii Blackman, on the presently available materials I will call him.

[2] The ruling is sought at a phase in the trial prior to the Crown's opening. The timing of the second limb of the application is, on one view, premature. Even if I were to decide to call Mr Blackman, I ought not make a final decision whether to take that course until the prosecution has closed its case. It is only then that I will be fully appraised of the case advanced and only then that the prosecution will have lost the opportunity to change its mind and call Mr Blackman in its case. However, I have concluded it is prudent to address the second limb now to give some certainty to each side.

[3] From the prosecution's perspective, my reasons on the second limb may inform its attitude to my invitation to it to reconsider its position on the first. From the defence perspective, I readily accept the conduct of the defence case during the Crown case, particularly decisions as to relevant questions to ask of those witnesses whose evidence has a rational connection with Mr Blackman and the content of his potential testimony, will be disadvantaged if the defence do not know whether Mr Blackman will be called in the trial.

[4] It is, I think, no answer to that disadvantage to say the defence can call him in any event. As will become apparent, the risk with that course is that the defence could not, in the ordinary course, cross-examine Mr Blackman and bring out important aspects of his previous statements he may not otherwise give evidence of.

[5] It seems to me, though, that the converse would be unlikely to apply if Mr Blackman was called by the prosecution or, of course, by the court. That is because, in the latter event, I would allow each side to cross-examine and in the former, the prosecution would likely elicit, in chief, Mr Blackman's more recent evidentiary stance and in cross-examination his prior evidentiary stance would be elicited and then, in re-examination, if it had not occurred in cross-examination, invariably, reasons could be sought from Mr Blackman for his inconsistency.

[6] Put differently, the sequence of Mr Blackman's changes of accounts means that the full story of those changes would likely come out through conventional means if the prosecution called him. They would be unlikely to come out through conventional means if the defence called him. In either event, they would obviously come out, were the court to call him, for cross-examination by each party would be permitted.

[7] In light of the unfairness of the defence's disadvantage in conducting their case without knowing whether Mr Blackman will be called, I accept, in the interest of a fair trial, that I ought rule on the second order the defence seek at this stage, so that the defence can cross-examine with such certainty as my ruling at this stage can allow.

[8] This heralds two important qualifications of relevance, given that I am ruling in the defendant's favour in respect of the second limb. The first qualification is that my ruling would become academic and will become academic if the prosecution changes its mind after further reflection and decides to call Mr Blackman in its case or, even after the close of its case, in the context discussed in proposition (4) in *R v Apostilides* (1984) 154 CLR 563 at 575. That context involves the judge inviting the prosecution to reconsider its decision upon the close of its case.

[9] The second qualification is that such a ruling must be subject to review at the close of the prosecution case and after the stage discussed in proposition (4), to confirm the evidence as led is generally in conformity with the facts upon which my ruling is based. Were there a variation sufficiently material to alter my view that the court should call Mr Blackman, then the consequences thereof, which could include a mistrial given the defence would have cross-examined on an erroneous understanding, would have to be considered then.

[10] The propositions generally applicable to the Crown's and court's obligations regarding the calling of witness were identified in *R v Apostilides* at 575.[1] They relevantly include:

> "(2) The trial judge may but is not obliged to question the prosecutor in order to discover the reasons which lead the prosecutor to decline to call a particular person. He is not called upon to adjudicate the sufficiency of those reasons.

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[1] (1984) 154 CLR 563, 575.

> (3) Whilst at the close of the Crown case the trial judge may properly invite the prosecutor to reconsider such a decision and to have regard to the implications as then appear to the judge at that stage of the proceedings, he cannot direct the prosecutor to call a particular witness.
>
> (4) When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
>
> (5) Save in the most exceptional circumstances, the trial judge should not himself call a person to give evidence."

[11] I consider that by the word "adjudicate" in proposition (2), the High Court meant "rule upon" as distinct from merely "express a view upon". It seems clear the latter is permissible. Indeed, it seems unavoidable that the trial judge should express a view, if one be held adverse to the sufficiency of the Crown's reasons. Were it otherwise, then by reference to proposition (3), the judge could not sensibly identify to the Prosecutor "the implications" and by reference to proposition (4), the judge could not put the parties on notice of what ought be said to the jury with respect to the consequences of the prosecution's failure on the course of the trial.

[12] Before turning to the exceptional aspect of the power I intend to rule in favour of exercising, it seems prudent to note I am not alone in this courtroom in taking an exceptional course. The learned Crown Prosecutor's present stance is itself rare. As the High Court observed in *Apostilides* at 576:

> "A refusal to call the witness will be justified only by reference to the overriding interests of justice. Such occasions are likely to be rare."

[13] Turning, then, to the nature of the exceptional circumstances identified in *Apostilides*, under which the judge ought call the witness, the court observed at 576:

> "In the formulation of the fifth proposition we have allowed for the possibility that circumstances may arise when the trial judge will be constrained to call a person to testify. The circumstances which would justify such a course would be rare. It is clear to us that more would be required to establish "most exceptional circumstances" than the refusal of the prosecutor, for reasons which the judge thinks insufficient, to call a witness. Some of the reasons for the need for the extreme reluctance with which the trial judge should even consider usurping the responsibility of the parties with respect

> to the calling of witnesses appear in the following passage from the judgment of Dawson J in Whitehorn…"

[14] Their Honours proceeded to quote from *Whitehorn v The Queen*.[2] That quote includes a number of propositions which can be briefly summarised. The judge's role, ordinarily, is to hold the balance between the contending parties and not take part in disputations. The role is not an inquisitorial one. These aspects of the role are, of course, ordinarily inconsistent with the judge calling a witness. The point is also made in *Whitehorn* as quoted in *Apostilides*, that the trial judge will frequently lack the knowledge and information about the witness or the witness's relationship to the parties and to the evidence to be presented, which is essential in making the decision whether or not a witness should be called. In short, there is a risk the judge will have to call the witness in the dark, not knowing what the witness is going to say and whether the witness can be relied upon.

[15] I pause to observe, that in the present case these are not realistic risks. There is a long written and quite reliable documented history of what this witness has had to say on various occasions in the past.

[16] Further, in *Whitehorn* the point was made, in the event that a witness is unreliable, the fact that he is called by the judge may give his evidence an undesirable aspect of objectivity. It seems to me that, again, in the present case, that risk is inherently unlikely. Indeed, in argument, it was contemplated that, should I take the course I would propose to take, the parties agree that they would be in a position to handle the examination of the witness with each being at liberty to cross-examine him without the need for me to ask the witness questions.

[17] Another point made in *Whitehorn* was that there may be no assurance that the credit of the witness will be properly tested by either side. It is quite plain in the circumstances of this case that there is no risk of a proper test of his credit not occurring either. Each side has their own interests in establishing the credit worthiness of one aspect of his account and trying to demolish the credit worthiness of another. That the full truth about what has gone on with Mr Blackman and his history of accounts would come out is, I think,

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[2] (1983) 152 CLR 657.

assured, were I to call him and the parties be at liberty, as I indicate they would be, to cross-examine him.

[18] Finally, another aspect of potential relevance identified in *Whitehorn* is the risk the calling of the witness might necessitate the calling of further evidence, something which may be difficult if it is occurring at a stage after the close of the prosecution case. Again, the parties being on notice of the likely course to be taken and on notice of the various accounts the witness has given, it is inherently unlikely that there will be a need to call further evidence, and inherently unlikely that the trial will take a turn that could not be foreshadowed as a result of the sort of testimony that Mr Blackman may give.

[19] I have been taken in argument to a large body of evidence of Mr Blackman. Speaking broadly, that is the evidence relating to some of Mr Blackman's interaction with others and also to the conduct of Mr Daniel, the man that Mr Blackman is said to have heard admit to the killing with which this case is concerned. It appears common ground that there is a body of evidence going to demonstrate the possibility of Mr Daniel's actual involvement. The parties are not at common ground, and I need not further analyse the lack of common ground for the purpose of this argument, about the force of the evidence, so far as Mr Daniel's involvement is concerned.

[20] It is sufficient for the purpose of the present ruling for me to focus upon a brief history about Mr Blackman's testimony. I preface that by noting it is apparent the deceased was the victim of a fatal stabbing attack when walking home from work at night in suburban Mackay. Her assailant robbed her of her handbag. The prosecution case that her attacker was her former boyfriend, the accused, is far from strong on the evidence identified to me. Whether it is so weak as to overcome a no-case submission, it is too early to tell. Suffice to say, there is some modest evidence of motive which is not remotely close to the force of evidence of motive sustaining a conviction in the leading High Court case on motive, *R v Plomp* [1963] 110 CLR 234.

[21] The other body of evidence is various CCTV footage said to show a vehicle consistent with the accused in the neighbourhood of the stabbing. Whether that evidence carries greater probative force than that will become more apparent when it can actually be seen in the course of the trial.

[22] Quite apart from the challenge the prosecution case has in persuasively inviting the inference from this evidence that the accused was the killer, the prosecution would also have to exclude the hypothesis consistent with innocence that the killer was an unknown robber. This hypothesis arises, inter alia, because the sole eyewitness describes an assailant, of incidentally different size and colour to the accused, an assailant he saw trying to grab the deceased's handbag, which was nowhere to be found when help arrived after the assailant had fled.

[23] A further more specific hypothesis arising on the evidence consistent with innocence is that one William Daniel was the killer. Some of the evidence giving rise to the hypothesis that Mr Daniel was the killer comes from Mr Blackman, the witness the prosecution no longer wish to call. I say "no longer" because Mr Blackman was on the prosecution witness list given on request to the defence until a quite recent change of mind. That all that has recently happened is a change of mind is an inference I draw from the reason now advanced by the prosecution for not calling Mr Blackman: that he is an admitted perjurer and that he claimed in earlier proceedings that he previously lied in incriminating Mr Daniel in witness statements.

[24] Those previous proceedings up to the time of the committal proceedings, occurred, relatively speaking, long ago. The learned Crown Prosecutor has not conferenced Mr Blackman. He refers to no other recent event relevant to his decision-making. Hence my inference that in the immediate approach to the trial, the Crown Prosecutor has changed his mind. This has the convenient consequence that I can form an informed view of Mr Blackman's accounts on the same evidence as the learned Crown Prosecutor has.

[25] Turning to those accounts chronologically, Mr Blackman's first statement to police was made on 29 April 2014. In the course of that statement, he spoke about William Daniel and his companion, Norman Dorante. He has known Mr Daniel since he was a young man. He spoke of the clothing which he saw Mr Daniel wearing, inferentially on the night of the killing, as being a hoodie jumper and a pair of trackies. He provided some further detail about that.

[26] He explained that he would see William and Norman:

> "At the flats in James Street where I live. I used to go to the flat next door to mine to visit Keiarra."

[27] He went on to say:

> "I remember one night, I think it was a Friday night and it was a night that my sister Samara Blackman got back from Brisbane but I'm not sure. We were having drinks for her at her house in James Street… I can remember that it was sometime early in the morning that I went outside to have a smoke. I'm not sure what time it was but it was dark and you could see all orange in the sky… I was on my own when I saw William and Norman. There are some bushes next to the letterbox and I remember seeing William and Norman walk towards me. I don't know from which direction they came because of the bushes. … William walked past me first followed by Norman and I said hello to him. I think I said something like, "How you going? What are youse up to?". They both said, "Nothing"… It was at that time I started hearing sirens coming from Boddington Street… I then said something like, "What happened up there?"
>
> William then said, "Someone got murdered up there". I then said, "By who?" William then said, "I did it". I was shocked by what William said. He said it with a straight face and I didn't think he was joking. Norman was still listening to music, just bopping his head. I don't know if they were on drugs or anything and I couldn't smell any alcohol or anything… I didn't get into asking about, "How did you do it and why did you do it". I was just looking at him like, "What?"… I couldn't see them holding anything except for Norman holding his phone and I didn't notice any blood on them or anything hidden in their jumpers."

[28] He went on to say later in the statement that William is a person who gets around with knives in his possession. He further explained that he told his mother at a later stage about what William had said to him. He said:

> "I remember this – that this was very emotional to me and I was crying."

[29] He provided a second statement on the 7th of May 2013. He clarified, in reference to his last statement, that on the night in question it was not the last time he had seen him, that he had seen William every day after that night until he went to Western Australia. It appears Mr Daniel travelled to Western Australia within about a month or so of the killing and the defence would seek to make something of that at trial in the same way that the prosecution sometimes seeks to make something of the flight of a suspect as being evidence of consciousness of guilt.

[30] In his second statement, he elaborated somewhat on other matters, including some of the clothing being worn on the night in question by Daniel and Dorante. He also elaborated upon some evidence of some phone call interaction as between, it seems, Daniel and/or at least persons closely connected with him at a time after he had gone to Western Australia. He went on to say:

> "I have re-read my statement that I gave to the detective last week, and everything in the statement is what I told in relation to speaking with William and Norman on the night."

[31] Notwithstanding the sloppy way in which that was put, it was obviously an attempt to confirm the accuracy of what he had said on the material issue about what occurred when he saw William on the night in question in his first statement. I should note that on the same date – and I would infer based on ordinary procedure, probably prior to the making of that addendum statement – there was an interview with him. A transcript of that is amongst the exhibit material. In the course of that interview it is noteworthy that he elaborated to a much greater extent confirming the truth of what he had said about this circumstance of William and Norman encountering him on returning to his premises on the night in question. This includes when asked what could be recalled of the conversation when the two men came upon him:

> "It was not much. It was only a few words, because I never really talked to him, because me and him had a dispute, like, before that … just said how are you going, pretty much. What is he up to? … He just said nothing – just come back from a walk. But they just said there was a whole heap of coppers and it looks like someone died up there or something."

[32] Question:

> "Did you ever ask who did it or anything?"

[33] Answer:

> "I did not go that far."

[34] He was then asked about the fact that in his statement it says they both said nothing, that Norman was playing the music. And then it makes reference to William having said someone got murdered up there. The witness responded, according to the transcript:

> "Well, yeah. Well, someone got murdered, but you cannot – I did not go into the conversation of saying who did it, you know – who did – why they –"

[35] Question:

> "Because it says here, "I then said, 'By who' and William said to me, 'I did it'"?"

[36] Answer:

> "Well, yeah, he said, "I did it", but –"

[37] Question:

> "He said he did it?"

[38] Answer:

> "Yeah. But I would – but with the face he had on, it just did not look anything. The clothes that they were wearing, like … no blood, nothing like that, can see no weapons."

[39] He affirmed in his statement that he was upset when he told his mother about the confession that had been made to him. He said that he could not remember what he said to his mum but that he remembered telling his mother what he had heard, which was, "That William and Norm did, or they have told me – I do not know if it is true or not". The reference to "did" may be a transcription error perhaps but the context, in any event, is obvious. He confirmed also in this interview his evidence of Daniel getting about carrying weapons. He was asked, one might think probably inadmissibly for the purpose of the trial, but in any event relevant for present purposes:

[40] Question

> "What is your gut feeling? What do you think?"

[41] Answer:

> "That is what I do not know. Because when William said it, it did not look like – it did not look like he actually did do it. It just looked like he was joking. But I do not know. Like, you cannot just – yeah. He did do it because he said he did it."

[42] We then move to a statement provided by Blackman on the 29th of November 2013. At this point then, it can be seen that he has maintained the truth of what he had earlier said, but there is a hint in some of the witness' way of putting things back on the 7th of May

of him starting to downplay, in a qualitative sense, the effect of what had been said, if not the actual words that had been said. I point out the obvious possibility, given his history of past association with Mr Daniel, that it would not be unknown to the human condition that, having told the truth, he was starting to water it down because of the consequences of him having incriminated Mr Daniel.

[43] In any event, turning to the third relevant date, the 29th of November 2013 and the addendum statement of that date, he clarified he made an error in his original statement about when he saw Daniel and Dorante. That varied whereabouts he was sitting when he saw them from a concrete pillar next to a letter box to sitting on the front patio out the front of the unit complex. Significantly, it was in this statement that he introduced a second admission by Mr Daniel. It is noteworthy this is an admission that Mr Blackman has never disowned in the history of material before me. In his statement he says:

> "I would like to add that I had a second conversation with William Daniel the following day. I cannot remember when it was that I spoke to him – whether it was in the morning. I remember he was sitting on the end of the bed in Keiarra's room eating goreng noodles. I went in there to say hello … during this conversation with him, Daniel told me for the second time that he was responsible for killing Shandee Blackburn. I do not recall the exact words, but I know he said words to the effect of, "I did it" when we spoke about the girl who was murdered. He appeared to be pretty calm when he said this and was not, like, boasting about it. I did not ask any more questions and went home. I found out that day that the person murdered in Boddington Street was a girl. I think I heard it from people on the street and on the news."

[44] That development was an additional piece of evidence, again unhelpful, to the building of what then was presumably only the prospect of a case against the present accused. Indeed, on one view it would have added to the body of circumstantial evidence suggesting Daniel may have been the killer. Then, we leave that high water mark and it is all backpedalling from there on.

[45] Perhaps the most material backpedalling phase was the 4th of August 2014. Mr Blackman went before the Crime and Corruption Commission ('CCC'). He made a witness statement on the same day. I infer he made that statement after he gave the testimony, so I will deal with them in that sequence.

[46] He was asked whether there was anything he wanted to change in relation to his past statements. He said he would like to change some information. Included amongst this information was the fact that on the night in question, he indulged in chopping up some marijuana and consuming it. Then he said:

> "Before I went to bed, I went out for a cigarette. I went out for a cigarette and that is when I come across – and William and Normie D. That is when I sat out there. They have come up and they have asked me, "How are you going?" I have gone, "Good", told them that my sister was back and then asked them what they were up to. They are like, "Just nothing. Just come back from down there. Just a bunch of police and whatnot. Looks like they are just everywhere". So I did not – I asked what was happening, and he goes, "Someone just got – someone got murdered, it looks like". And I have just looked at him, like, paused, had a moment of silence just staring at him. I was like, "Okay", never asked any more questions after that. I went inside."

[47] It was pointed out that what he just said was a little different – that would be an understatement – to the version he originally gave and he was asked if there was a reason for the difference. He said:

> "At the time, I had – I was – I didn't know what to say. I didn't know what to do. I felt like I was under a lot of, like, it was – everything was just coming at me at once. I just felt really uncomfortable at the time."

[48] Later it was pointed out:

> "The material difference between the evidence you've just given and your statement is that, according to your first statement, when the topic of someone having been murdered was mentioned by William, you said to him, "By who", and he then said, "I did it". Is it your evidence now that that didn't occur?"

[49] Answer:

> "No, that didn't occur – it did not occur."

[50] He was asked why he put that in the statement and answered:

> "Because at the time I didn't know that – what to say because – because that next day I went over there and they're having a conversation."

[51] He continued and it became plain he was, at this stage, talking about the conversation the following day that led to the noodle conversation, for want of a better shorthand description. He continued, in apparent reference to that conversation:

> "And that's when he was, like, yeah, rah, rah, rah away, and he's just, "Yeah, I did it", and I've just looked at him like "Woah"."

[52] He reaffirmed the truth of the noodle conversation before the CCC saying:

> "I was just reading through and then I was reading through [Facebook] … And I was just, like, I wonder who did it, and that's when he turned around, "I did it", but he's sitting there eating his noodles. I didn't want to go any further and ask, like, well, why'd you do it?"

[53] He went on to say:

> "I don't know if it was his exact words. I do remember him saying he did it."

[54] There was cross-examination about clues or factors he later considered, or at least the leading questions being asked suggested he later considered, that might have tended to confirm the accuracy of the admission, that is the carrying of knives and the behaving like a bit of a gangland criminal. Counsel returned to the question of why he told the police about the admission on the night in question if it was not true. He said:

> "I said I didn't know how to come up with it at the time. I was feeling scared. I thought that I was the one that was getting put in the shoes of because it felt like that I was the only one getting harassed."

[55] Question:

> "But the police would've told you, I'm sure, how important it was to try and be as accurate as possible, to tell the whole truth. You agree with that?"

[56] Answer:

> "Yes."

[57] Question:

> "They said that but you still felt that you had to tell them something about – that he did not say to you?"

[58] Answer:

> "Well, I thought that, if I did that, I'd – youse will – that this will be off my case with no one coming around anymore."

[59] He confirmed that the stage at which he told his mother was the stage in time after the noodles admission had been made.

[60] In ongoing testimony he further confirmed that the alleged admission made in the context of the noodle conversation was correct. He said he did not know whether Mr Daniel was being truthful or not. He was asked, when he gave the statements to police, why he told them that the night outside when he was having a smoke sitting at the cigarette box, William said, "I did it", where did the idea come from?

[61] Answer:

> "Just made up off the top of my head."

[62] He went on, later:

> "I just didn't know what to say at the time. I was getting – it felt like I was getting interrogated. All I wanted to get out – get out of the cop shop because I had – I had plans that, ah, to go with my friends and drink and go out to a mate's place and I just really wanted to get out there at the time."

[63] I pause to observe none of these are particularly convincing explanations which, of course, heralds the prospect that he told the truth initially and has been backpedalling in more recent times, although I make no final finding one way or the other about that; that is not my job.

[64] He confirmed that while he saw no blood or carrying of a knife when the two men came upon him on the night in question, that there was some peripheral light, but it was otherwise dark. He went on to say there was a bit of light shining onto him, but:

> "…not as much that I could actually visibly see everything."

[65] The witness, as I have mentioned, on the same date, made a further witness statement. In it, he said:

> "I think it's time to get the truth across."

[66] He explained he did not have a party, as he told the police on the first occasion, that he was just at home by himself. He reiterated, as I have mentioned, that there was the marijuana chopping up session and going outside. And he then, in his statement, still

confirmed that William and Norman came across him and that there was a conversation. However, he asserted that William did not, in this conversation, admit to killing the girl. He said that he had made that up:

> "…because I felt overwhelmed, and like I had to tell the police something. I felt like I was being interrogated when I gave my statement to police. I also had plans that day to go to a friend's house for drinks and I just wanted to get out of there."

[67] He affirmed that the noodle conversation had occurred.

[68] We come finally, then, to the committal proceedings on the 18th of February 2016. He was asked in chief if he wanted to change anything in relation to the various statements, and for the first statement, he spoke about the need to change the fact that he was not sitting near the letterboxes at the time, that he was out the front of the house, the bit where they had the conversation. And then he went on to say:

> "…at my door – right at the units with the door open, sitting there, having a cigarette. There was no one coming up the pathway. I never seen William or Norman. I never seen William or Norman. I made it up because I was getting interrogated by the police. I had an officer said he was going to use black magic against me."

[69] So this seems to be the final change, at least that we know of to date, in that whereas at the CCC he still maintained that he encountered the men but indicated that the admission was not made on the night in question, now at the committal he was not only disowning the admission on the night of question, but disowning even seeing the men on the night in question.

[70] I pause to point out the fact that he saw the men on the night in question in the area where he did is itself relevant to the circumstantial inference potentially arising that Mr Daniel may have had some connection with the killing, in much the same way as the prosecution rely on the arguable presence of the accused's vehicle in the vicinity of the scene on the night in question in supporting its circumstantial case that Mr Peros is responsible for the killing.

[71] He was taken through the other statements, sequence-by-sequence, and confirmed he was not making changes to some aspects but was to others. Where he was making changes,

they were consistent with the essence of the testimony that I have just identified. He asserted the police officer who threatened to use black magic on him was Hans Tuckerman. There is no suggestion before me that there has been any follow-up by way of inquiry with police revealing any confirmation that any of this is true, although in fairness to the witness, it is one of those stories that one might think, if it was true, would be most unlikely to be admitted to.

[72] It was led in cross-examination that he had told his mother on Saturday the 9th of February, the day after the murder, William Daniel had told him that he had done it and he explained he had said that to his mother, but that was sourced from the noodle conversation. He continued to say he just made up the assertion about the night in question.

[73] He was asked:

> "So in response to a threat that he would use black magic to get the truth out of you, you told a lie to him; is that right?"

[74] A not unreasonable question to ask. Answer:

> "Yep. Well, if he can get the truth out of me then he can go use his black magic because it's going to backfire on him."

[75] He went on to say:

> "I just made that up because that's the answer they wanted. They wasn't going to let me out of there until I spoke – until I started saying stuff. That's when they want me to relax and then they want to keep going, so I just kept on lying and lying until I got out of there."

[76] Paradoxically, though, he continued to acknowledge the truth of his evidence about the admission being made to him the following day. For example, question:

> "You told police that the next day you had told your mum what had happened."

[77] Answer:

> "Yep."

[78] Question:

"Now, that's true?"

[79] Answer:

"That's true."

[80] He was later asked why he had changed his mind from the original version, a change it will be recalled, which included, in the earlier stages, making reference to the admission made during the noodle conversation the following day. It is unusual that if he was so scared the first time round he would come forth with the further admission. In any event, his response was, "I don't know." As to why he did not tell the Crime and Corruption Commission about the black magic threat, he said he didn't know; that he was scared.

[81] When he was pressed about now saying that he had not even seen the two men on the night in question he eventually said:

> "Because I'm not too sure if I seen them that night. I know I seen them early hours in the morning one of those mornings. As I say, I'm not too sure. I know I seen them. I'm still trying to piece myself to this."

[82] One way or the other, then, on Mr Blackman's accounts, he has, throughout, asserted, albeit in different contexts, that Mr Daniel admitted being the killer. Initially it was said by him to be an admission on the night in question when Daniel and Dorante returned and he was nearby out the front. Then he later developed matters by saying that there was also an admission the next day, the so-called noodle admission. The next material development was that he said the admission on the night in question did not occur, which was the CCC hearing. Then later still at the committal he said he did not even see them on the night, although, by the end of the cross-examination he was less than convincing about that.

[83] There is no doubt that his variation of account is relevant to a proper assessment of his credibility and reliability. A helpful aspect about this assessment is that, unlike in some cases, the full history of the variation is laid out. It is not difficult to understand what has occurred so far as his variations are concerned. His history of inconsistency, and his explanations for it, including his admission that he earlier lied about the night in question, though not about what occurred the next day, provide a basis for it to be argued that all of his evidence, if given, ought be rejected by the jury. They also provide a basis to argue

that sequentially he told the truth, albeit if reluctantly and gradually at first, and later set about false retractions of some of it because of the potential impact of his past statements upon Mr Daniel's position. They also provide a basis to argue that his current evidence ought be accepted and his past, now inconsistent, evidence ought be rejected. All three such categories of arguments are the bread and butter of a jury's dish in a criminal trial.

[84] I well appreciate that there have been stages to Mr Blackman's changes but for ease of analysis, and putting it generally, it is reasonable to characterise his changed stance as occurring pre and post 3 August 2014. I pick that divide because 4 August 2014 was the CCC hearing and the statement made then. The mere fact that he claimed to have lied in his pre 3 August stance does not necessarily mean that claim is true. His post 3 August claim that he had earlier lied might itself be a lie.

[85] It follows the learned Crown Prosecutor's position must in effect be that Blackman admitted lying on oath – I use that term generally to include not only in court but in his statements, which were "Oaths Acted" – and if that admission is wrong then it was a lie on oath, thus, either way, he is an admitted perjurer. There is considerable cosmetic appeal, from the point of view of a lay person, to such an assertion. "Well, he admits that he's lying so either that's a lie or he lied in the past; either way he's a perjurer." It is, in my respectful view, a superficial take on what has occurred.

[86] The mere fact that someone has, in the history of a case, lied on oath in relation to relevant matters in the case may be - but it seems to me would not automatically be - a basis for not calling the witness. In my experience of criminal law it is not at all uncommon for the prosecution to call witnesses who have lied in their "Oaths Acted" statements at first but then admitted what the prosecution seek to assert is the truth.

[87] It is less common, but certainly not rare, for the prosecution to call witnesses who admitted in their "Oaths Acted" statements what the prosecution seek to assert is the truth but later disowned it in "Oaths Acted" addendums or at committal. In the latter such instance the prosecution calls such witnesses anticipating they will succeed in having them declared hostile and in getting admitted as a prior inconsistent statement, which the jury can act upon, the former statements.

[88] In either such instance it can be said the witness is an admitted perjurer but, nonetheless, the prosecution advance either their present or their past position as the truth. It is noteworthy that in both such instances though, that it is the prosecution, not the defence, who want to rely on one of the statements, and the fact that it is the other way around here ought not make a jot of difference.

[89] The point that it is common enough for the prosecution to call admitted perjurers where at least one of their assertions – one of their historical assertions – is relied upon by the prosecution, provides a good illustration of how superficial it is to simply assert a witness who has admitted lying on oath ought not be called by the prosecution. It explains my interest in what extra has happened in this case other than the bare event of the witness admitting to having lied when giving a past account or accounts. It is unsurprising, given what seems to be common enough in the course normally of the criminal jurisdiction, that I had an interest in what extra is going on here that gives the present circumstances a quality warranting a decision not to call Mr Blackman because of the proposition that he is an admitted perjurer. Nothing additional has been identified.

[90] I have already explained the obvious significance of the hypothesis that Mr Daniel is the killer, and the fact that there exists some evidentiary support for that hypothesis, so it is not a remote or speculative hypothesis such that it ought be rejected without the need for it to be properly scrutinised by the jury.

[91] I well appreciate that, as was observed in proposition (1) in *Apostilides*, the task of deciding whether to call a witness is the task alone of the Crown Prosecutor. I appreciate it can be a very lonely task, particularly in a case where the police have not provided particularly strong evidence for the prosecution.

[92] My concern though is in the particular circumstances of this case, which is after all a murder, that the over-riding interests of justice require the jury to know the full truth about what occurred with Levi Blackman and, more particularly, as to what his evidence was or now is as to the admissions said to have been by Daniel to him. It is noteworthy that, despite his various changes, even on his most recent outing on oath, Mr Blackman did not disown his past evidence that there was an admission made during the noodle conversation the day after the killing.

[93] It is difficult to see, given the competing hypotheses that reasonably arise for the jury's consideration here, how it can be in the overriding interests of justice that the jury be unaware of what has transpired so far as Mr Blackman's testimony and recollection is concerned. The overriding interests of justice dictate that the jury should hear from Mr Blackman and inevitably hear of his variation in account. I regard that as inevitable, whether he is called by the Crown or by me because of the sequential points I have earlier explained.

[94] If the jury do not hear from Mr Blackman, and are not left to consider for themselves what weight they ought give to his testimony, past and/or present, there is a real risk that they will not properly scrutinise the hypothesis consistent with innocence that Mr Daniel is the killer. That risk heralds consequences so grave it is not a risk I am prepared to sanction. For these reasons, on the facts as presently known, the circumstances are sufficiently exceptional to warrant me, should the facts as known remain as they are and the Crown not otherwise call Mr Blackman, taking the rare course of calling Mr Blackman myself.

[95] These are the reasons why I would, if necessary, call Mr Blackman. That course would only be necessary if the prosecution does not call him. In light of the reasons I have given, I invite the prosecution to reconsider its position. I require no immediate answer.

[96] I note further that even if the prosecution does not change its mind now, the topic should be revisited at the end of the Crown case. I emphasise, to remove any doubt from the defence point of view, that my view is this: if in the end result the prosecution does not call Blackman and, because of some material change I decide at the end of the prosecution case that it is not appropriate that I call Blackman, I would readily accept, if an application be made for a mistrial, that the defence would have cross-examined on an understanding that Blackman would be called, as part of the prosecution case or by the trial judge, and that such a development would almost invariably give rise to grounds for a mistrial. I say this so the defence can proceed with certainty, however long it might be the prosecution takes in considering its position further.

Associate's Note:

The prosecution did not call Levii Blackman. At the close of the prosecution's case, on enquiry by His Honour, the Crown Prosecutor confirmed he could not identify any variation in the evidence as led, compared to the evidence as foreshadowed when the above ruling was made. The Crown Prosecutor also confirmed there existed no reason for not calling the witness additional to that previously given. His Honour invited the Crown Prosecutor to reconsider his decision, referring to the reasons for that invitation as those earlier given and additionally identifying implications of the prosecution's decision not to call Levii Blackman.

The Crown Prosecutor declined to call Levii Blackman. His Honour called Levii Blackman after instructing the jury:

> "You've heard yesterday afternoon that the Prosecutor had closed his case. In the normal course, the next stage would be to call upon the charged citizen to ascertain whether or not the defence intend to give evidence. Something has to occur before that. It is necessary that I now take the rare step of calling a witness. It is rare because our adversarial system of justice is premised on the rival parties bearing the responsibility of calling and examining witnesses, not the judge.
>
> In our system in the criminal jurisdiction, the prosecution bear a particularly heavy additional responsibility regarding the calling of witnesses. Its obligation is not merely to call witnesses who support the theory of guilt the prosecution contend for in favour of convicting the charged citizen. Its obligation is to call all relevant witnesses, excluding of course the charged citizen. Sometimes, witnesses may give an account which is relevant to the case but which contradicts or otherwise undermines the theory of guilt the prosecution contend for. Nonetheless, because such witnesses are relevant, it is the prosecution's duty to call them. It is not supposed to have the right of cherry-picking only those witnesses that happen to suit its theory.
>
> In this way, the prosecution is seen to fairly lay all relevant evidence before you, leaving it to you to decide what evidence you accept or reject and not keeping from you evidence which does not suit its theory. You have seen examples of witnesses who might not be thought helpful to proving the prosecution theory already called in this case. They were most obviously witnesses relevant to a rival theory, namely, that William Daniel was involved in the killing. The prosecution, however, has decided not to call one such witness, Levii Blackman, a witness to whom William Daniel allegedly confessed killing Ms Blackburn.
>
> Giving full respect to the prosecution's traditional role, full force to the reality that there may be considerations it has regard to that are not considerations the court has regard to, and full force to the court's traditional reluctance in usurping the role of the parties, I have nonetheless concluded that the overriding interest of justice in this case require that you hear the

testimony of Levii Blackman. That is to say nothing of what view you may take of his reliability.

It may very well be that as with other witnesses the prosecution has called, it emerges that he has said conflicting things to the authorities at different times. It will not be surprising to you in this courtroom obviously, for you have already seen instances of it occurring. What you make of that, as with the other witnesses, will be for you to consider and decide after you know everything, warts and all. My action in calling him is solely concerned with my view that the interest of justice require his evidence be known to you so that you may give such weight as you see fit to his evidence and that that choice not be taken from your hands.

Because I am calling him, the traditional mode of taking evidence will not be followed. The traditional mode is the party calling a witness, asks non-leading questions in evidence in chief, things like, "What happened next," and, "Who did you see there," and, "What colour was it," and so forth, in the hope of bringing out what the witness recollects. Then the witness can be cross-examined and the cross-examiner is allowed to use leading questions to tighten in on particular topics and suggest a particular fact to ascertain whether the witness specifically agrees with it.

In this instance, since I am calling the witness, it is not contemplated that I will ask the witness questions other than having him confirm who he is. I will then leave it to the parties to be at liberty to question the witness. In respect of the sequence of events, in the circumstances I will allow Mr Eberhardt to go first, which would give him the right of re-examination.[3] Each party will be at liberty to ask questions which are either leading or non-leading – in other words, questions of a kind that could be asked in chief or in cross-examination. In this way, I anticipate you will become fully informed of all the pros and cons about his evidence so that in due course you can give it such weight as you think fit, just as it will be your decision to give such weight as you think fit to any of the other evidence adduced in the trial."

[3] This sequence was resolved without contest earlier, in the absence of the jury.