REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 44 and 45 of 2004

BETWEEN

LESTER PITMAN **APPELLANTS**
DANIEL AGARD

AND

THE STATE **RESPONDENT**

PANEL:

S. John, J.A.
I. Archie, J.A.
P. Weekes, J.A.

APPEARANCES:

Mr. L. Gokool for the Appellant Pitman
Mr. B. Dolsingh for the Appellant Agard
Ms. Dana Seetahal for the Respondent

DATE OF DELIVERY: 15th April 2005

JUDGMENT

Delivered by S. John, J.A.

1. The appellants Lester Pitman and Daniel Agard were jointly charged for the murders of Maggie Lee, Lynette Pearson and John Cropper, which took place during the

evening of December 11 2001. They were convicted of the murders on July 14 2004 and sentenced to death.

We granted them leave to appeal and treated the hearing of their applications for leave as the hearing of the appeals.

The case for the State

2. Maggie Lee was the mother of Lynette Pearson and the mother-in-law of John Cropper. John and his wife Angela lived on a hillside at Second Avenue, Cascade. During the afternoon of December 11 2001 Lynette Pearson hosted a tea party at the home of the Croppers. Present at the tea party were several of Lynette's friends. John Cropper and Maggie Lee were also there. Angela was abroad in Indonesia.

3. Around 5:30p.m. that very afternoon, Anjanie Maharaj was visiting her mother Jacqueline Maharaj who lived just below the Croppers on Second Avenue. Anjanie saw two men, relatively short in height, on the grass verge to the bottom of the hill near the Croppers' home. One was fairer than the other with short-cropped hair. She observed that the fairer of the two men walked up the hill, turned and looked around, further, the darker man was either stooping or sitting. She spoke to her mother. Jacqueline put on her 'long distance' glasses, looked up the hill and saw a 'mixed' young man about 5' 5" in height.

4. The last of the guests left the home about 7:30p.m. leaving Maggie, Lynette and John alive. About 8:30 that evening one of the guests, Sandra Montano, called the home but got no reply. Angela Cropper called her husband from abroad on both the 11th and 12th December and she too got no reply.

5. On Thursday December 13 about 9:00a.m. Agnes Williams, the housekeeper at the Croppers' household arrived to take up her duties. She observed that the outside gate was open, all the lights were on and the family car was not there. The home was ransacked and food and dirty dishes were strewn on the floor. She went into the

bedrooms and immediately saw that they too were ransacked. When she went into the master bedroom, files and other items were strewn around the floor. She answered the phone, it was a call from Mrs. Cropper's sister-in-law Maria.

6. Shortly afterwards, several persons including Elizabeth Solomon and Couri Jaye came to the house. They discovered the bodies of the deceased in a bathtub in the bathroom. The police were summoned and several police officers including Inspector Nedd, Sergeant Dick and fingerprint experts attended the scene. Each of the deceased was found gagged and their hands bound with electrical cord. The post-mortems subsequently performed by Dr. Hughvon Des Vignes showed that each died as a consequence of incised/chop wounds to the neck.

7. On Saturday December 15 2001 Angela Cropper returned to Trinidad and at the request of the police she prepared a list of the articles that were missing from her home. She subsequently identified two television sets, a laptop, items of jewellery, cellular phones and her husband's bankcard. These items were allegedly stolen from the home and handed over to third parties for safekeeping. They were subsequently recovered by the police.

8. The case against the appellants rested mainly on:

(i) cautionary statements given to the police by each appellant;

(ii) oral admissions made to the police by the appellant Agard;

(iii) a fingerprint on a wooden jewellery box found on the scene, that matched a print taken from the appellant Agard;

(iv) identification of appellant, Pitman by Jacqueline Maharaj; and

(v) recent possession of items stolen from the scene.

The Evidence Against Pitman

9. Pitman was arrested on December 19 2001. Upon arrest he said that he wanted to give a written statement. He subsequently gave a cautionary statement later that day in the presence of a Justice of the Peace.

10. In that statement, Pitman admitted that he went with a friend to the Croppers' residence to collect some things. While there, he held Lynette Pearson and his accomplice held John Cropper. His accomplice had a short cutlass and took them into the bathroom where he bound and gagged them. Later Maggie Lee was also taken to the bathroom where she too was bound.

11. He and his accomplice took items from the premises and packed them in a car. When he was finished he told his accomplice that it was time for them to leave and his accomplice said he was coming now and went into the bathroom with a knife in hand. Pitman claimed that when he got tired of waiting he went into the bathroom where he saw the three victims lying on the ground and he saw blood. His accomplice told him that he had killed them. They then left the premises with the loot.

12. Pitman denied killing the victims or playing any part in their deaths. He further said he went with the accomplice to Champs Fleur where they dropped off the stolen items. He went home with $500.00, which he had taken from the Croppers' home.

13. On Thursday December 20th he was placed on an identification parade where he was pointed out by Jacqueline Maharaj as the man she had seen on the afternoon in question. Later that day he was charged with the three murders.

The Evidence Against Agard

14. Agard was arrested on the night of December 14th by Inspector Nedd and Sergeant Dick at San Juan. Upon arrest he was questioned by Sergeant Dick, but only admitted that he had worked at the Croppers' residence in 1999. He denied any involvement in the murders.

15. On the morning of Sunday December 16th Agard told Inspector Nedd that the police had no case against him as they did not have a murder weapon nor did they recover the stolen items. Agard also told Inspector Nedd that one of the men with whom

he had worked at the Croppers' residence had told him that "they" were planning to rob the place and "they" wanted to get him involved but he refused. Inspector Nedd taped that conversation.

16. On Tuesday December 18 2001, Agard had a further conversation with Inspector Nedd. He told him that he knew he was going to be charged for the murders and he wanted to tell the truth. He then gave a lengthy oral statement to Inspector Nedd in the presence of Sergeant Corbett who made detailed notes. Later that night Agard took the police to several locations referred to in his oral statement. One was the 'look out' on the Lady Young Road where the police party searched for the murder weapon without success. Agard agreed to give a written statement the following day. On Wednesday December 19 2001, he too was charged with the three murders. Later that day he gave the written statement.

17. In that statement which was witnessed by Sergeant Corbett and Marisa Singh, a Justice of the Peace, Agard admitted to a plan to rob the Coppers' home. He explained that he in company with one 'Cudjoe' had gone to the Croppers' residence for that purpose and waited until the guests had left.

18. He that having entered the house 'Cudjoe' grabbed one of the women and he (Agard) went in search of John Cropper who was outside bringing the car into the yard. As Cropper entered the house he held him, brought him inside and 'Cudjoe' started to 'planass' Cropper asking him "*where de money*." 'Cudjoe' tied up Cropper and the woman and he went into the kitchen for the other woman and brought her to the bedroom. Agard started to dig up the house and while he was doing that Pitman overheard Cropper bawl out and he ran and told 'Cudjoe' that he should not hit him again. Thereafter, with the assistance of 'Cudjoe' who was wearing surgical gloves he took things from the house and packed them into a motor vehicle. He and 'Cudjoe' went through the house to see if *"we leave anything."* He then told 'Cudjoe' *"let we go from here"* and 'Cudjoe' told him to go ahead and drop the things, his ride will come back for him, as he had some things to finish up.

19. He left the scene to take the loot to "small Mickey" in Champs Fleur but before reaching there he received a telephone call on his cellular phone from 'Cudjoe' telling him to come and meet him at the 'look out' (an area off the Lady Young Road) after he had dropped off the loot. Having dropped off the loot he went to the 'look out' where he met 'Cudjoe' who told him that he "*had fixed the scene*" and had thrown the knife over the hill. When he asked 'Cudjoe' what he was speaking about 'Cudjoe' replied, "*dead people tell no tales*". He told 'Cudjoe' that they never discussed anything like that and 'Cudjoe' told him to shut his f…ing mouth and if he said a word about it he too would end up the same way. At the end of his statement Agard said, *"Mr. Nedd ah want yuh to write this. Mr. Nedd nowhere in de planning anything ever talk about killing anybody. Nobody was suppose to dead. I tell him doh even hit dem really nah because how ah know them nah."*

20. Dion Jones was a PH driver (the owner of a private vehicle used for hire as a taxi). On Wednesday December 12 2001 Pitman hired him to do a job. They were known to each other prior to that date. Jones accepted the job and later that evening he met both appellants who directed him to a house off Mendes Drive, Champs Fleur where the appellant Agard retrieved two television sets along with two bags and asked Jones to keep them for him. Jones obliged and accompanied by both appellants went to the home of his brother, Daryl Mc Donald, to whom he gave the items.

21. On Thursday December 13 2001 Jones was hired by the appellant Agard to take him to, among other places, the Republic Bank ATM, Promenade Centre Branch, Port of Spain. The following day, Jones was again hired by Agard to take him to Maracas beach but before going there Agard asked to be taken to a jeweller. They went to Kazim's jewellery shop in Maraval where Agard spoke to one Abdul Mohammed to whom he handed over a bag of jewellery, which had been taken from the Croppers' residence. All the jewellery was subsequently retrieved by the police and identified by Angela Cropper.

22. In January 2002, the complainant, Inspector Nedd, obtained two video cassettes from Republic Bank, one from the Tunapuna Branch and the other from the Promenade Centre Branch. The Tunapuna video showed an ATM transaction being conducted by the appellant Agard, which took place at about 2:05a.m. on December 12, 2001 while the Promenade Centre video showed Agard conducting another transaction the following day around 4:45p.m.

Pitman's Defence

23. Pitman did not give evidence at the trial but in cross-examination his counsel suggested to the police that he had not given any statement. He called two witnesses, one of whom was Police Corporal Levi Morgan. He testified that he was the custodian of the official telephone message register at the Homicide Bureau and there was a single record in the register of a telephone call having been made to Mr. Mottley De Peiza Justice of the Peace on the morning of December 19, 2001 at 9:15a.m. That evidence served to contradict the State's evidence that two calls had been made to Mr. De Peiza.

24. The other witness was his aunt, Mary Pitman Gilkes, who testified of having several telephone conversations with Sergeant Dick on December 19, 2001 and Sergeant Dick telling her that her nephew did not need a lawyer. She further testified that the appellant did not pass the common entrance examination and he was *"slow from small."*

Agard's Defence

25. Agard gave evidence on his own behalf and raised the issue of alibi. He alleged that the statement had been a fabrication by the police. Whilst he admitted using the Republic Bank Card to withdraw money from John Cropper's account he claimed that the card had been given to his sister Jamie by John Cropper. He called his sister as a witness. She said that she had received the card from John Cropper had gave it to her housemate, Inca, about 8:00p.m.-9:00p.m. on the night of December 11th, in the presence of the appellant Agard, to make a withdrawal.

26. Agard also gave evidence of being involved in a fight with one Louis Goodridge also called 'Badang' on December 11th, around the time that the robbery was alleged to have taken place. That gave rise to his alibi. He denied knowing Dion Jones or having had any dealings with him or his brother. He acknowledged that he knew Pitman but only by seeing him in Maitagual. However, he later admitted that Pitman used to visit his sister Jamie who lived next door to him.

Pitman's Grounds of Appeal

Fourteen grounds of appeal were filed on behalf of Pitman.

Ground 1

27. *"A material irregularity constituting a substantial miscarriage of justice occurred during the course of the trial, owing to the failure of the prosecution to disclose to the defence on or before the preliminary inquiry and continuing up to the submission of no case to answer the Legal regime on which their case was founded."*

This argument as set out in the skeleton proceeded upon the following assumptions:

1. That there is a continuing obligation on the prosecution to disclose the Law upon which the charge is founded;
2. That in the absence of any evidence that the appellant inflicted the fatal wound/s the only option for the prosecution was to proceed on the basis of the felony-murder rule;
3. Alternatively, that the failure to inform the appellant of the legal basis on which the case was founded prejudiced the preparation and/or conduct of his defence.

28. The argument is best appreciated if the sequence of events is briefly recounted: The appellants were arraigned on an indictment for murder, the particulars of each count (as is normal in such cases) simply alleging that they *"on a day unknown, between the 10th day of December, 2001, and the 14th day of December, 2001, at Cascade, in the County of St. George, murdered [the deceased]."* During the course of his brief opening speech, prosecuting counsel made no mention of whether the state was proceeding on the

basis of the felony-murder statute or the doctrine of joint enterprise. This appellant's argument proceeds on the premise that they are mutually exclusive. That premise is addressed later in this judgment.

29. At the conclusion of the prosecution's case, counsel for Agard enquired about the basis of the prosecution case. State counsel replied that on the facts both the felony-murder rule and the doctrine of joint enterprise could be relied upon to establish the offence of murder and if there was an evidential basis for a direction on joint enterprise, the Court could give it. When pressed, he eventually said that the prosecution was proceeding on the basis of the murder-felony rule. This discussion took place in the absence of the jury.

30. The trial judge was concerned to give the accused the benefit of what he regarded as the most favourable direction. He eventually decided to sum up on the basis of joint enterprise as this left open the possibility of a lesser verdict of manslaughter. It also required the jury to be satisfied not merely that the appellant had embarked upon the commission of a felony (i.e. a robbery) in furtherance of which (or any other arrestable offence), someone had been killed (felony-murder rule), but additionally, that the appellant foresaw that his accomplice might inflict the fatal wounds with the intent to kill or cause grievous bodily harm.

31. We return now to the first assumption. There is no such thing as a continuing duty on the prosecution to disclose the legal basis on which the state is proceeding where an offence may be established in more than one way. The continuing duty of disclosure relates to the evidence. It would clearly be unfair if the appellant had been committed on the basis of certain evidence and then during the course of his trial a different set of facts emerged, but nothing of that sort happened in this case. It is the duty of the trial judge to direct the jury on the law and he may do so on a basis not advanced by the prosecution. Indeed, in some instances, such as where the issue of provocation arises on the evidence, he is obliged to do so even if neither side requests it.

32. The duty of the prosecution, so far as the law is concerned, is to prefer an indictment in conformity with the Criminal Procedure Act Chap. 12:02. Section 4(4) of that Act relates to the requirement for particulars:

> *"After the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary; but where any rule of law or any Act limits the particulars of an offence which are required to be given in an indictment, nothing in this rule shall require any more particulars to be given than those so required"*

Section 4(5) then states:

> *"The forms set out in the Appendix to these rules, or forms conforming thereto as nearly as may be, shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as nearly as may be shall be used, the statement of offence and the particulars of offence being varied according to the circumstances of in each case"*

The form in the Appendix relating to murder sets out the prescribed particulars in terms almost exactly the same as the indictment in this case (which was appropriately modified to reflect the joint charge and the uncertainty as to the time of death):

> *"A.B., on the …day of….,19.., in the County of…., murdered J.S."*

33. This form was in use before the distinction between felonies and misdemeanours had been abolished and the felony-murder rule was very much a part of the common law of Trinidad and Tobago. It is difficult to see how particulars framed in accordance with the prescribed form can be held to be deficient. If one follows counsel's argument to its logical conclusion, then the prosecution would also be required to indicate whether it was relying on an intention to kill or an intention to cause grievous bodily harm in every case of murder.

34. The argument fails to distinguish between the creation of a new statutory offence and alternative ways of committing an existing offence. Counsel may have misunderstood section 4(3), which states:

> *"The statement of offence shall describe the offence shortly in ordinary language, avoiding as much as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and, if the offence charged is one created by Act, shall contain a reference to the section of the Act creating the offence"*

35. Finally on this ground, the appellant has failed to demonstrate how, in any event, he could have been prejudiced since at no stage was the jury ever told that the prosecution was proceeding on the basis of felony-murder. The evidence for the prosecution would have been the same whatever the basis of criminal liability. In the context of his defence, which was that he was not there and had not given the confession statement, it is difficult to see how the cross-examination could have differed.

36. Counsel made the shocking submission that, as a matter of strategy, defence counsel at the trial may have put the appellant in the witness stand to adopt his statement if he had known the case was based on joint enterprise. While there is no evidence that that was actually the attitude adopted by Counsel who conducted the defence at trial, we cannot pass on from this without comment. The alleged confession was a clear admission to participation in a robbery at the scene of the murder. Counsel's instructions cannot vary according to the prosecution's theory of the case. It would therefore mean that on one or other of the alternative defences, counsel would have had to be prepared to advance alternative and inconsistent defences. That is dishonest, unprofessional and in complete dereliction of his duty to the court. Conduct of that nature, in our view warrants serious censure.

We find no merit in this ground.

Ground 2

37. *"A grave material irregularity resulting in a substantial miscarriage of justice attended the trial consequent upon the prosecution proceeding against the applicant on the basis of Act No.16 of 1997. This Act had the effect of abolishing constitutional guarantees and was therefore required to be enacted by a special majority and to have contained a constitutional recital provision that it shall have effect notwithstanding its inconsistency with directions (sic) 4 and 5 of the constitution."*

38. Counsel presented this ground on the following bases:

1. The reinstatement of the felony-murder rule was designed to alter the liability of secondary parties to a common unlawful enterprise where death resulted;
2. The liability of a secondary party for acts foreseen but not necessarily intended was a doctrine developed to protect a secondary party who was present at the scene of a killing but not directly involved;
3. Certain benefits by way of directions by the trial judge accrued to an accused person as part of his right to a fair trial in accordance with the principles of fundamental justice;
4. Parliament had no power outside of the constitution to alter these provisions.

Implicit in all of this was the assertion that the reinstatement of the felony-murder rule automatically resulted in the implied repeal of the doctrine of joint enterprise as it applies to secondary parties. We mean no disrespect by declining to recite the very extensive written submissions on this ground. The underlying premises are faulty for the reasons that now follow.

39. The felony-murder rule and the liability of secondary parties under the doctrine of joint enterprise, though overlapping, are separate and distinct concepts[1]. The felony murder rule is not restricted to secondary parties and does not require more than one

[1] See Brown & Isaac v The State [2003] 62 W.I.R. 440 at 442

party for its application. For example, a single defendant who embarks upon a robbery with a loaded firearm intending only to use it to threaten, would be guilty of murder if, during the course of the robbery, the firearm discharged without him intending to kill or cause grievous bodily harm.

40. Far from being a restriction of the felony-murder rule designed to protect secondary parties, the introduction of the concept of foreseeability as a part of the doctrine of joint enterprise represented an extension of liability to actions, which fell outside the scope of the enterprise specifically agreed. It created a situation where a secondary party could be held liable for actions that he did not intend or may even have wished not to be perpetrated. The doctrine of joint enterprise is not restricted to the offence of murder. It is simply the case that where certain fact patterns exist in a case of murder the facts may fit both concepts. That does not provide any a fortiori justification for saying that the two concepts cannot co-exist so as to provide alternative bases for grounding liability.

41. The remaining submissions on this ground are inconsistent with Ground 1 in so far as they assert that the amendment to the law that reinstated the murder-felony rule was unconstitutional. Ground 1 proceeded on the assumption that there was no other option than to proceed on the basis of the murder-felony rule. Counsel sought to distinguish the case of ***Haroon Khan v The State*** [2]in which the challenge to the constitutionality of section 2A of the Criminal Law Act (which reintroduced the felony-murder rule) was rejected. He formulated an attack based on a perceived difference between a challenge to constitutionality based on deprivation of the right to due process (Haroon Khan) and a challenge based on the failure to pass the amendment by a special majority.

42. The necessity for a special majority only arises when a proposed law is inconsistent with section 4 and/or 5 of the Constitution. It was therefore necessary for the appellant to establish such an inconsistency. Counsel was driven to submit that the

[2] [2003] UKPC 79

passage of section 2A had the effect of depriving the appellant of his right to a fair trial. The logic of the submission is not easy to follow but appears to be that when the murder-felony rule was abolished, the right of an accused to have his subjective state of mind, as opposed to mere participation in a felony, considered in determining criminal liability for murder, became entrenched as a part of the right to a fair trial (or procedural fairness).

43. That argument misses the point that the law that would have become entrenched with the passage of the 1976 Constitution was the law existing at that time. The felony-murder rule was a part of the common law in 1976 so there was no derogation from "existing law" as that expression is defined in the Constitution, when Act No. 16 of 1996 was passed. Subject to sections 4,5 and 54 of the Constitution, Parliament has a broad legislative discretion, including the power to create new criminal offences. The right to a fair trial, which is encompassed in the concept of "due process" is not infringed merely because criminal liability is incurred where it did not previously exist. Due process is concerned primarily with procedural fairness although it is conceivable *"that a law which altered the substantive criminal law…might be so unreasonable and oppressive as to be subject to challenge on grounds of unconstitutionality"*[3]

44. The Board in Haroon Khan specifically rejected that argument, in relation to section 2A. It held that in circumstances where Parliament had acted to restore the substance of a rule, which had long formed part of the law and had only been abolished unintentionally, no such challenge could be reasonably mounted.

45. Counsel further argued that section 2A had been held in ***Haroon Khan*** to be unconstitutional *in regard to sentencing* because it imposed a disproportionate penalty (i.e. death) in circumstances where there was no intention to kill or cause grievous bodily harm. There was, he then submitted, no "Doctrine of Constitutional Severability" which could save its constitutionality in relation to liability. That argument proceeds from a fundamental misunderstanding of ***Haroon Khan.*** That case was not concerned with the constitutionality of section 2A at all. It was about the constitutionality of section 4 of the

[3] Per de la Bastide C.J. in Haroon Khan quoted with approval by the Board [2003] UKPC 79

Offences against the Person Act 1925 in so far as it imposed a mandatory death sentence *in circumstances where section 2A applied* (i.e. it resulted in a disproportionate penalty). In any event, after the later decision in ***Charles Matthew v The State*** [4] it is now indisputable that both the felony-murder rule and the mandatory death penalty are the law in Trinidad and Tobago.

This ground is also unsustainable.

Ground 3

46. *"The applicant was deprived of a fair trial because the trial proceeded upon the felony-murder rule and the learned trial judge summed up the case to the jury on the basis of the doctrine of joint enterprise. This was a material irregularity of significant proportion resulting in a fundamental miscarriage of justice."*

This ground is an extension of Ground 1. It assumes that the evidence led by the prosecution and the cross-examination and defence evidence would have been different depending upon whether guilt had to be established under the felony-murder rule or the law relating to secondary parties in a joint enterprise. This has already been dealt with under Ground 1 and all that needs to be added is that in any event there could have been no prejudice to the appellant since he received the benefit of a more favourable direction.

Ground 4

47. *"The trial of the applicant was conducted in contravention of the applicant's constitutional right guaranteed by section 5(2)(F) of the Constitution of the Republic of Trinidad and Tobago that is to 'a fair and public hearing'. Those who conducted the trial operated under a flagrant misunderstanding of the Law and therefore, the factual and evidential issues fundamental to determining the criminal liability of the applicant were left unexplored before the jury."*

[4] [2004] UKPC 33

This ground is really grounds 1 and 3 formulated in a different way and warrants no separate treatment. We find no merit in it.

Ground 5

48. *"A material irregularity constituting a substantial miscarriage of justice occurred during the course of the trial. That is, the learned Trial Judge elected to direct the jury that they were to determine the case against the applicant on the basis of the law relating to joint enterprise in the face of the unequivocal pronouncement by the prosecution that they were proceeding against the applicant on the law relating to felony-murder. In such a case the appellant was deprived of his constitutional right to a fair hearing in accordance of (sic) the principles of fundamental justice for the determination of his rights and obligations."*

This ground encapsulates a number of submissions, which were partially dealt with earlier in this judgment. Before we address the question of the duty of the trial judge in circumstances where criminal liability may arise on more than one basis, one observation must be made. No criticism can be made of prosecuting counsel for opening the case in a neutral manner and leaving the State's options open. He could not be expected to foresee what the defence would be.

49. The purpose of a summing up is to assist the jury. So far as the facts are concerned, if different inferences can arise depending on the view taken of the evidence, the trial judge is not confined to the arguments advanced by the prosecution or the defence[5]. However, he should not put the case on a factual basis other than that advanced by the prosecution if to do so would amount to the addition of a new count or it would result in a different case from the one which the defence had been led to think it had to answer[6]. So far as the law is concerned, he has a duty to apply the whole of the law, not just that advanced by counsel. There are some cases where his role is more complex because the picture presented by the prosecution and defence is incomplete and does not

[5] see e.g. R v Evans 91 Crim. App. R 173
[6] R v Falconer-Atlee 58 Crim. App. R 348 and see R v Warburton-Pitt 92 Crim. App. R. 136

reveal the full range of options open to the jury. He may be under a duty to direct the jury on a version of facts not advanced by either side[7], especially where it may afford a possible defence[8].

50. Fairness requires that when a judge proposes to direct the jury on a point of law which has not been relied on by either counsel, he should so indicate and give counsel the opportunity to persuade him that he should not do so or to call further evidence if necessary[9]. In this case, defence counsel was aware at the stage of the submission of no case to answer, that the judge proposed to sum up on the basis of foresight/joint enterprise. He made no application to recall any prosecution witnesses for further cross-examination. The appellant chose not to give evidence. In so far as the direction on joint enterprise afforded him a possible defence that would not be available on the strict application of the murder-felony rule (lack of foresight that the principal party would kill the deceased with the intention of causing death or grievous bodily harm), the learned trial judge cannot be faulted. Once his confession statement had been admitted into evidence it was a possibility that the jury were required to consider.

Accordingly we reject this ground of appeal.

Ground 6

51. *"An additional miscarriage of justice took place during the course of the trial owing to the failure of the learned trial judge to rule on the submission by Counsel on behalf of the applicant that the law on which the prosecution ostensibly mounted its case was unconstitutional, null and void. This irregularity went to the root of the applicant having a fair trial, in that the prosecution was allowed the (sic) change regimes by commencing on one and having the benefit of a summing up based on another."*

All the arguments, which can be advanced on this ground, have already been dealt with in the previous grounds. It adds nothing to the appellant's case.

[7] Williams (Winston) v R 99 Crim. App Rep. 16;
[8] R v Kachikwu 52 Crim. App. R 538; R v Bashir 77 Crim. App. Rep.59
[9] R v Lunn 1985 Crim. Law Rev. 797

Ground 7

52. *"The Learned Trial Judge misdirected the jury when he directed them on the law relating to orthodox murder in the face of his intention to direct them on the doctrine of joint enterprise. This was fatal to the proceedings for having already told them that there was intention, the direction that they were to determine foresight was, in the circumstances, inconsequential."*

Counsel for the Appellant contended that, where the Prosecution's case is based on joint enterprise (secondary participation), a direction on "orthodox murder", in defining the offence, amounted to a fatal misdirection since "intention" was an element of the definition of murder but that it was foresight rather than intention that was relevant in such a case.

53. In respect of any offence a jury must be directed as to the ingredients of the offence since it is their duty to find whether those ingredients have been proven. A simple failure to direct a jury fully on those issues is a ground for quashing a conviction[10]. In this regard, the Learned Trial Judge told the jury.

> "*They are charged with the murder of these three persons. And what is murder? "Murder", put very simply, is the unlawful killing of one human being by another, and at the time, and accompanying that act which leads to that killing, there is the intention either* ***to*** *kill that person, or to cause that person grievous or serious bodily harm. Now, that is murder."*

He therefore defined for them the offence which was the subject of the indictment.

54. The fact that the case against accused is predicated on the principle of joint enterprise in no way derogates from this position. A judge having given this basic direction must go further to explain the mens rea necessary in the secondary party. A later direction on foresight is in no way inconsistent or incompatible with an earlier direction on intention. Counsel contends that a jury would be bound to mistake one for the other but they are clearly distinguishable concepts.

[10] Archbold 2005 page 1002 para.7-60

55. After defining murder in his summation the trial judge went on to explain how the State's case against the accused was posited and there raised with the jury for the first time the question of foresight, explaining how it related to intention. He said:

> *"I propose, Members of the Jury, later on in the course of this summation, to give you certain directions on how it is you are able to find the element of the intent for murder, because in this trial there is no direct evidence that either or both of these men did the actual act itself, because you would recall how the Prosecution's evidence has come about, on what basis the Prosecution is asking you to find the culpability of these culpable men. That would be if I may give you a glance into what is to come, that these two men, for their respective parts and for their own reasons, admitted to the police, during the course of the investigations, that they were there; that they were there not on a social visit, but that they were there to rob; that they were in one mind to rob, and that during the execution; of that robbery they aided one another as part of this unlawful joint enterprise, and with the foresight of either of those men, insofar as they make their respective admissions in statements said to have been given by them to their respective confederates, would or might do the act from which one or more of these persons died, or were killed. So that is how that element of "with the intention accompanying the act" arises on the facts of this case, Members of the Jury."*

56. What is of importance and was made clear to the jury was that it was foresight and not intention that founded liability in the appellant. Later in his summation the trial judge returned to this issue. He clarified the distinction between intention and foresight and the fact that the former was to be found in the principal and the latter in the secondary party (that is the appellant) when he said:

> *"The essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence and took some part in it so as to achieve that aim. Your approach to the case should, therefore, be as follows: If looking at the case of either of the accused you are sure*

that, with the intention I have mentioned, he committed the offence on his part, or that he took part in committing it with another, then he is equally guilty. Now, bear in mind that even if there was a plan, for example, to rob, if what one of the confederates did in executing that plan went beyond anything that the other had agreed, or realised he might do, then that person alone is responsible for the act and is, therefore, guilty of that offence. The other would be not guilty of the offence. But if you are sure that the other did realise that his confederate might go on to commit a further offence, the law is that by taking part in the lesser offence with that knowledge, he is taken to have accepted the risk that his confederate would act in that way, and so he adopts those acts and is responsible for them. So in this particular case, Members of the Jury, it is the foresight that matters. So if you give weight to his admissions in that regard, then you are entitled, depending on what view you take of what had crossed his mind, that is, Agard's mind, as I have directed you, it will be open to you to find him guilty of Murder as charged, if he had foresight of murderous intent by his confederate, or manslaughter, if he had foresight that his confederate might have gone on to do some less than grievous bodily harm, like give him a beating without having the intention to do grievous bodily harm, even if he died afterwards. You see, it is not the fact of death that grounds the culpability. It is what was, Members of the Jury, the intention of the Primary offender, the man who actually did the act. Because if you find that Accused No. 1 foresaw that that other person Might have had, at most, the intention to do less than serious grievous bodily harm, less than grievous bodily harm, and but the deceased, in fact, died, then the accused would be guilty of Manslaughter, because it is what he foresaw and what he participated in, and continued to participate in, if you so find, that grounds his culpability, that is, his continued participation with that foresight."

The distinction between intention in the principal and foresight in the secondary party having been explained to the jury there was no *"fundamental misdirection that went to the root of the appellant receiving a fair trial."*

We therefore find no merit in this ground.

Ground 8

57. *"The learned trial judge wrongly and to the prejudice of the applicant directed the jury that the applicant, on his statement alleged to have been given to the police, acknowledged that he had the requisite foresight that his confederate will use the knife with intention to kill or cause grievous bodily harm"*

Counsel complained that the Trial Judge directed the jury that the Appellant had admitted in a statement to the police that he had contemplated that his confederate might use a knife that he (the confederate) carried with the intention to kill or cause grievous bodily harm. A passage is cited from the Judge's summation to support this contention.

> *"I propose, Members of the Jury, later on in the course of this summation, to give you certain directions on how it is you are able to find the element of the intent for murder, because in this trial there is no direct evidence that either or both of these men did the actual act itself, because you would recall how the Prosecution's evidence has come about, on what basis the Prosecution is asking you to find the culpability of these culpable men. That would be, it I may give you a glance into what is to come, that these two men, for their respective parts and for their own reasons, admitted to the police, during the course of the investigations, that they were there; that they were there not on a social visit, but that they were there to rob; that they were in one mind to rob, and that during the execution; of that robbery they aided one another as part of this unlawful joint enterprise, and with the foresight of either of those men, insofar as they make their respective admissions in statements said to have been given by them to their respective confederates, would or might do the act*

from which one or more of these persons died, or were killed. So that is how that element of "with the intention accompanying the act" arises on the facts of this case, Members of the Jury."

58. A reading of the passage makes it clear that the trial judge was at that stage explaining to the jury the nature of the prosecution's case against both accused. Within the impugned passage one sees the words *"you would recall how the prosecution's evidence has come about, on what basis the prosecution is asking you to find the culpability"*. The trial judge went on to explain the interpretation of the evidence relied on by the prosecution in proof of its case against the accused. At no point did he say that which is the subject of complaint in this ground. He simply told the jury that it was the state's case that each accused's admission acknowledged foresight of the possibility of his confederate acting in a manner that might cause death. One need only read the passage to determine that this ground is without merit.

Grounds 9, 10, 11

59. These may be conveniently taken together as they all deal with similar criticisms of the judge's summation in particular that:

(i) the judge failed to direct the jury as to the manner in which they were to treat the inconsistencies and contradictions in the prosecution evidence; and

(ii) the judge treated with the inconsistencies and contradictions in such a manner that it created the impression that the witnesses for the prosecution had to be seen in a more favourable light than those for the defence.

60. The first complaint related to the judge's comments with respect to the failure of the appellant to give evidence. The trial judge made the following comments to the jury:

> *"I dare mention and I dare suggest to you that it is passing strange that he made all kinds of suggestions to police officers and to a retired public officer, the Justice of the Peace, suggesting impropriety on their part in the execution of their public functions; subjected them to days upon days of cross-examination where they were told that they were liars and made up all sorts of things, but called himself, or on his behalf, no evidence to back up these suggestions that were made to these witnesses. However, it is his right to have elected to remain silent, as he did, and you cannot hold it against him."*

61. In ***Francois v The State***[11] the Court of Appeal addressed a similar problem. In that case the appellant, Michael Francois, was convicted of armed robbery of Sue Jadoonanan at San Fernando on August 25, 1979. It was alleged that he had robbed her of a handbag valued $16.00, $443.00 T.T. currency and $225.00 Canadian currency. Jadoonanan had said in evidence that she had known Francois quite well before the date of the incident. She was never challenged about this in cross-examination. Some three weeks later Jadoonanan attended an identification parade held in a closed room at the San Fernando Police Station and conducted by Inspector Cardinez, where she picked out the appellant from a number of persons on that parade, as the culprit. The defence was substantially one of mistaken identity.

62. At his trial very serious allegations were leveled by him against Jadoonanan and the police officer who conducted the identification parade suggesting a frame-up by them against the accused. The trial judge made it absolutely clear to the jury that the case for the prosecution stood or fell on the evidence of Jadoonanan. The appellant was convicted. On appeal, one of the grounds was:

> *"that the presiding judge erred in law in that he commented excessively on the failure of the appellant to give evidence and/or call witnesses at the*

[11] Cr. App. No. 9/1984

trial and/or commented excessively on the conduct of counsel at the trial, as to his failure to call evidence and/or witnesses to support the allegations of the appellant at the trial."

63. In summing up to the jury the trial judge said:

"Certain matters were put to the Inspector and to her by counsel for the defence in the course of cross-examination of these two witnesses. They were all denied by Sue Jadoonanan and they were also denied by Inspector Cardinez. I need not remind you of them, they were put only yesterday. One would have expected, members of the jury, in these circumstances where such matters are put that either the accused himself would have given evidence of such matters, because they are serious allegations, or whether witnesses would have been called to substantiate them. Neither the accused gave evidence nor witnesses were called. I will tell you this. When matters are put to a witness "and the witness denied it, and no evidence was called to substantiate it – you understand me – then you must disregard such matters from your mind, because it is not evidence, it is merely a suggestion coming from counsel at the Bar Table with no evidence to support it."

64. In delivering the judgment in the Court of Appeal Bernard, J.A.(as he then was) said:

"The judge was merely stating what is the correct approach when suggestions are made to a witness in cross-examination, namely, that they are suggestions only and no more, and that if one wishes any weight to be placed on an issue which a party seeks to raise by way of a suggestion, it is expected that there can be no support for the issue, unless the side which makes that suggestion calls some evidence to support it. In other words the judge was merely stating here one of the particular approaches to a case and that is that one can only judge a case or determine a matter on evidence."

65. It is clear from the above that the Learned Trial Judge may, in his discretion comment on an accused failure to give evidence, however such comment should not convey to the jury that the failure is inconsistent with innocence or that the only reasonable inference is that accused is guilty. We are satisfied that ……

66. The second passage referred to a statement made by the judge after dealing with the evidence of the tea party at the Croppers' residence. The judge said:

> *"Mr. Cropper was in and out, but he was there that evening well and alive. The old Maggie Lee, the grandmother, the matriarch of the family, was there. I am sure you still have that vivid picture of her lying on the ground with her glasses still over her face. She was there up and about, as was Lynette Pearson. They were, in other words, alive and well."*

The trial judge was here merely recapping the evidence that was led during the trial and reminding the jurors of the pictures they had earlier seen. We cannot understand the reasons. This complaint in our view is without substance.

67. The third passage complained about is the following:

> *"When they entered the place they saw a scene which was subsequently videotaped later that morning, and you have had the benefit of the technology that is now available to juries.*
>
> *While it is that it has been suggested that this was a so-called big shot case, and all this technology, I want to think that any jury in this country would be pleased to know that we have the technology now, which was probably available all the time, where the jury can, for themselves, see what the police, what Elizabeth Solomon, what Couri Jaye, what Agnes Williams saw when they entered that house that morning. So you may want to consider that all that criticism was misplaced in this court of law where you, the jury, are the ones who are to decide.*
>
> *The long and short of it is that, you saw for yourselves, these three people who were alive and well on Tuesday, were found and pronounced as dead on Thursday morning, and their bodies ordered removed to the Forensic*

Science Centre by the District Medical Officer. It is clear to you when you saw for yourself, not only the pictures that were exhibited, but also the footage of the video recording, that there were gaping wounds to the necks, the throats of these three people, and blood around those gaping wounds."

It is not in dispute that Agard was identified at the ATM through the bank's video taping machine. Video taping is a relatively modern form of technology and in this case it formed part of the circumstantial evidence.

Attorney for Agard was the person who made heavy weather of this being a "big shot" case. It was certainly a high profile case since the deceased were well-known and respected persons of the community. Counsel for Agard cannot in our view level any complaint about that passage. We fail to appreciate the nature of the complaint on this issue.

68. The fourth complaint relates to the passage that Attorney for Pitman had suggested that he, Pitman, was on the parade bareback. In that context the judge said that if that were the position he would stand out like a 'sore thumb'. He then said:

"However, Jacklyn Maharaj, under cross-examination by Mr. Wayne Sturge, the self-praised, celebrated Mr. Wayne Sturge, under cross-examination says – and, first of , all in answer to State counsel, I may point out, and then twice, or three times at the end by Mr. Sturge, he was bareback. Not according to Nero. And then she comes here and she ways that, "look, I admit I said so. When I reached home I realized I had made a mistake, and I am correcting my mistake here."

During the trial, Attorney for Pitman, Mr. Wayne Sturge, conducted himself in a manner unbecoming of counsel. A perusal of the notes of evidence shows that he on several occasions tested the patience of the trial judge. He had even referred to himself as "…." The comments, cannot in all the circumstances, be said to have caused any prejudice to this appellant.

69. The next complaint relates to a direction given by the judge when he was dealing with the identification parade. The judge said:

> *"If the result of an identification parade is to have force and to result in a conviction, the jury must be satisfied beyond all reasonable doubt that it was fairly conducted. In other words, nobody must stand out. The suspect must not be set up to stand out that he would draw the attention of the identifying witness. Everybody must look alike; similar. Not identical, but similar. And there lies the test of the witness that, that witness will see everybody looking similar and will be forced to look at the faces at what they claim to be, how they would identify the person, and then on a lineup of nine pick out the person. If that person is the suspect, then the jury can say, "yes, that is more than undersigned coincidence."*

In our view the criticism is without merit as the judge's statement was a correct principle of the law with respect to the manner in which the identification parades are to be conducted. Accordingly, the ground fails.

70. A further complaint was made of a passage later on, when the trial judge said:

> *"But I raise this at this point because it is important that you appreciate that there are times when witnesses say things on a previous occasion totally inconsistent with what they say here, and it is for you to decide whether what they are saying here is the truth. And this is just but one example that I pull out because I find that it is the most striking example in this trial. There are others, and you would recall them from time to time; a witness has been challenged as to something that witness has said on a previous occasion, and it is for you to decide whether it alters the price of oil, whether it is an important matter, or whether it is just some little nonsense as far as you are concerned.*
>
> *Because in the Magistrate's Court a lawyer could go and ask a thousand questions. "You see a lizard fall off a mango when you were standing by the mango tree? No." And the witness may forget. "There was an ant's nest by your foot? No." Ask all kinds of questions for days on end, and*

then come and repeat them in the high Court, and you catch the witness saying something different. "Oh, you are liar because look at what you said in the Magistrate's Court." But you are the judges of the facts."

We agree that the extra comments were quite unnecessary but any prejudice that may have occurred was, in our view corrected immediately when at the end of the passage he made it clear that the jurors were the judges of the facts.

71. The final complaint related to the manner in which the judge dealt with the evidence of the Justice of the Peace Mr. Mottley De Peiza. He said in part:

"However, if after considering the evidence you believe Mr. Mottley De Peiza, who, may I remind you, is a former Permanent Secretary, a man of service to his country, a man who in his retirement will still leave his home and go and do the according to him, watch the interest of persons who are suspects to ensure fairness and be present, and knowing full well that he has to go in the Magistrate's Court and fact one Mr. Wayne Sturge, perhaps, or Mr. Mario Merritt, and then come up here and repeat it. If you think that Mr. De Peiza lied and was part of this fix up, this fix up, this fabricating of this document, this statement, reject it entirely."

A judge, when directing a jury, is clearly entitled to express his opinion on the facts of the case, provided that he leaves the issues of fact to the jury to determine.

The criticism was that the judge's statement tendered to rehabilitate Mr. De Pezia's evidence some inconsistencies having arisen therein.

While the matters pointed to by the Judge might not weigh heavily, they were all matters that the jury were entitled to take into consideration in assessing Mr. De Peiza's credibility. In the final sentence the impugned passage the judge reminded the jury of their entitlement to reject his evidence not withstanding his antecedents.

We have considered in turn each of the complaints made by counsel and whilst it is important that a judge must at all times remain impartial we are of the view that the

judge's comments in this case did not go beyond the bounds of what is considered judicially permissibly and did not result in an unfair or imbalance summation.

72. Having considered the impugned passages and the authorities referred to earlier we do not think that the trial judge put forward an unfair or unbalanced picture of the facts as he saw them. As we said earlier the judge's task in this case was never an easy one and whilst it is important that a judge must at all times remain impartial we are of the view that his comments did not go beyond the bounds of judicial comment

Ground 12

73. *" The learned Trial Judge erred (sic) the law(sic) when he proceeded to impose the mandatory death sentence on the applicant. This took place in the face of the trial having commenced under the law as stated by the Privy Council in Balkissoon Roodal. The applicant therefore had a legitimate expectation that if convicted of murder the learned Trial Judge had discretion to determine whether or not to impose the mandatory death sentence"*

The submission on this point is simple as is the answer. When the appellants' trial commenced, the law in relation to the death penalty was as decided in ***Roodal v State of Trinidad and Tobago [2003] UKPC 78*.** That meant that a person convicted of murder could expect his trial to then enter a penalty phase where the judge would decide whether to impose the death sentence. The trial concluded on the 14th of July 2004, but one week before that date ***Roodal*** was overruled by ***Charles Matthew v The State [2004] UKPC 33*** which reaffirmed the position that the death penalty was mandatory and not discretionary. The Privy Council held that the effect of their decision was to withdraw from Mr. Matthew the expectation that his sentence would be reviewed and the hope of the possible substitution of a lesser sentence. In seeking to satisfy what they deemed to be a legitimate expectation, they substituted a sentence of life imprisonment. They also ruled that all persons similarly circumstanced were entitled to the same consideration. In so doing, they drew a distinction between persons sentenced to death before the date of the judgment in ***Matthew*** and those convicted and sentenced afterwards. The appellant in this

case falls into the latter category and is therefore not entitled to the same consideration as Matthew. The rationale is easily understood from the opinion of the Board:

> *"On the other hand, the same considerations do not apply to persons convicted and sentenced to death after the date of this judgment, even though they may have been awaiting trial at the time of the Roodal decision. There is again an analogy with the Pratt and Morgan principle as applied by the Board in Fisher v Minister of Public Safety and Immigration [1998] AC 673. In that case it was held that pre-trial delay did not count as part of the period after which an execution would be presumed to be cruel and inhuman. Lord Goff of Chieveley said that the state of mind of the accused before trial is not 'the agony of mind of a man facing execution' but the somewhat different anxieties of a person who faces the possibility of conviction and sentence."*

Ground 13

74. *"The learned Trial Judge erred in law in failing to construe the law relating to the death penalty and existing law, with such modification so as to bring it into conformity with the Act that bought (sic) the constitution in place"*

On this ground, Counsel tried to persuade us that the mandatory death penalty for murder might not be the law in Trinidad and Tobago. What is normally referred to as "the Constitution" is a schedule to Act No. 4 of 1976, which brought the Constitution into force as the supreme law of Trinidad and Tobago. He argued that, despite the decision in Matthew, it was possible to construe the law relating to the death penalty[12] so as to bring it into conformity with Act No. 4 of 1976 (as opposed to the Constitution which is a schedule to the Act). It is a distinction that is not apparent to us. The argument was stillborn because Counsel could point to no provision in the Act that could be construed in the way that he suggested.

Nothing further needs to be said about this ground.

[12] Section 4 of the Offences against the Person Act 1925

Ground 14

75. *"The Learned Trial Judge erred in law in directing the jury on the law of Joint Enterprise when that law was abolished by the enactment of the Criminal Law Amendment Act No. 16 of 1999 that had the effect of reinstating the Murder Felony Rule"*

The submission on this ground flies in the face of Ground 6. If Act No. 16 of 1999 was null and void then it certainly could not have been effective to abolish the law relating to joint enterprise. In any event this argument has been sufficiently addressed under Ground 2.

Agard's Grounds of Appeal

Five grounds of appeal were filed on behalf of the appellant Agard. However the fifth was withdrawn. We find it convenient to deal with the first ground last

Ground 2

76. *"The learned judge erred in law in omitting to direct the jury that mere foresight by the appellant of his confederate's actions could not justify a verdict of murder but must be accompanied by the direction that he must have foreseen that his confederate intended to kill based on the principle of constructive malice."*

The trial judge did not make the omission attributed to him by Counsel. In fact, it would have been wrong for the judge to give any direction on "intention to kill" **based on the principle of constructive malice**.

77. The law with respect to the liability of a secondary party to murder has been authoritatively laid down by the House of Lords in ***R v Powell; R v English***[13] where Lord Hutton said that it is sufficient to found a conviction for murder for a secondary party to have realized that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm. In other words the secondary

[13] [1999] 1 A.C. 1

party need only realize or foresee that the primary party might kill with intent to do so (or with intent to cause grievous bodily harm) and the secondary party did not need to have the intention to kill. Foresight of what the principal may do is sufficient *mens rea* for the secondary party even if there is no actual agreement between them.

In accordance with the well- settled principle, the trial judge gave the following directions:

> *"Now, bear in mind that even if there was a plan, for example, to rob, if what one of the confederates did in executing that plan went beyond anything that the other had agreed, or realized he might do, then that person alone is responsible for the act and is, therefore, guilty of that offence. The other would be not guilty of the offence.*
>
> *But if you are sure that the other did realize that his confederate might go on to commit a further offence, the law is that by taking part in the lesser offence with that knowledge, he is taken to have accepted the risk that his confederate would act in that way, and so he adopts those acts and is responsible for them. So in this particular case, members of the jury, it is the foresight that matters.*
>
> *So if you give weight to his admissions in that regard, then you are entitled, depending on what view you take of what had crossed his mind, that is, Agard's mind, as I have directed you, it will be open to you to find him guilty of murder as charged, if he had foresight of murderous intent by his confederate, or manslaughter, if he had foresight that his confederate might have gone on to do some less than grievous bodily harm, like give him a beating without having the intention to do grievous bodily harm, even if he died afterwards."*

78. Under this ground counsel further submitted that:

> *"The trial judge should have given a complete direction. There were parts in the summing-up where he did, however, and there were other parts where he did not. It is submitted that the jury would have been*

confused by the two directions and were handicapped in their duty to apply the law to the evidence."

79. The first relates to a passage of which complaint was made was very early in the summation where the trial judge said:

"*I propose, members of the jury, later on in the course of this summation, to give you certain directions on how it is you are able to find the element of the intent for murder, because in this trial there is no direct evidence that either or both of these men did the actual act itself, because you would recall how the prosecution's evidence has come about, on what basis the prosecution is asking you to find the culpability of these culpable men. That would be, if I may give you a glance into what is to come, that these two men, for their respective parts and for their own reasons, admitted to the police, during the course of the investigations, that they were there; that they were there not on a social visit, but that they were there to rob; that they were in one mind to rob, and that during the execution of that robbery they aided one another as part of this unlawful joint enterprise, and with the foresight of either of those men, insofar as they make their respective admissions in statements said to have been given by them to the police, they had the foresight that their confederate, their respective confederates, would or might do the act from which one or more of these persons died, or were killed. So that is how that element of "with the intention accompanying the act" arises on the facts of this case, members of the jury."*

80. The judge here gave the now classic Powell and English direction. He did complete the direction by saying *"so that is how that element of with intention accompanying the act arises on the facts of this case."*

81. Any concern that might be raised by those words was addressed later in the summation when he said:

"Because, you see, if members of the jury, you find as a fact that that man went in that bathroom and cut the people's throats, and it crossed this other person the maker of the statement mind that that person might have gone with the intention to do that, that that person might have gone there for that purpose, and without telling him that "Look, look, look, look, you see this business, you going in there with knife, I am not in that at all, you know. Where you going with the knife? I have tie up these people inside of there, you going in there with knife, what you going with knife for? You see me, I had nothing to do with this." And do something about it, seeing that he has admitted holding the people, and he acknowledged that they were tied up in there, including an old lady. If you arrive at a finding of fact on that statement that it did cross his mind, that his confederate might have gone in there with the intention to kill, or to cause grievous bodily harm to those people who are tied up there, and he still, with that knowledge, with that foresight of what might have happened, continued to participate without disassociating himself, without withdrawing himself there, and by letting it known to his confederate, "Stop it. I am not in that. Let us get out of here. Leave the people. Let us move," and that confederate, that other man goes in there with the knife and cuts their throats, he is equally guilty of murder for the killing, the unlawful killing, if that confederate goes in there and cuts their throats."

This direction was in keeping with that given by the trial judge in ***Mohammed, Ramnarace and Roach v The State Cr. App. Nos. 7, 8, 9 of 1999*** which was subsequently upheld by the Court of Appeal.

82. Later on the judge said:

"Now, accused No. 2, in relation to Pitman, the State need not prove that he intended that that was to happen to the deceased. The State is entitled to say that the accused is culpable and guilty of murder if the State, on the statement, satisfies you that the accused, far from intending the consequence, foresaw that it was a possible consequence and continued to

participate in the unlawful joint adventure without disassociating himself, without severing his part in that joint unlawful enterprise.

Were the deceased out of his sight at the time when he was still participating, loading up the car, members of the jury? Did the deceased leave his sight and were in the presence of his confederate? And did accused No. 2 foresee, reasonably foresee that some grievous bodily harm might have been suffered upon the deceased by his confederate, his confederate having the intention to do grievous bodily harm, or to kill those persons, who, to his knowledge, knew him, and would have been witnesses to the robbery against them?

If you find as a fact, having regard to all the circumstances as you find in that statement, that Pitman did have that in his mind, the risk of death, of grievous bodily harm as a result of acts of a type from which the deceased perished, and he continued to participate, and you find that whoever went on, that is, that the confederate went on to kill by cutting these people's throats, and did acts which led to the death of them, then accused No. 2 would be equally liable for the offence of murder."

This direction in our view cannot be faulted.

83. Counsel further complained about a passage in the summation when the trial judge dealt with the statement of the appellant Agard. It is as follows:

"But, you see, the law says that if all this happens in your presence, and you are participating in an unlawful joint enterprise, and you have foresight that your confederate might go on to cause grievous bodily harm to somebody there, as in their house, like, for example, if Mr. John was to put up resistance and the confederate was to kill him, and that only crossed your mind, because Mr. John is entitled to defend his sister-in-law and his mother-in-law, and you go in there and you have that in the back of your mind and you foresee that, and you still participate without

disassociating yourself, you are as guilty as Cudjoe from Febeau Village, or from wherever, members of the jury. That is the law."

84. In our view no fault can be attached to that passage. It fully encompasses the law where one or more persons participate in a joint unlawful enterprise and where a secondary party realizes that the other participant might go on to kill or inflict grievous bodily harm with the necessary intent. Although the trial judge did not in that passage use the term *"with intent to do so"*, the jury would have understood from his earlier directions that in order to find culpability in the secondary party they must be satisfied that the principal must have had the necessary intent to kill or cause grievous bodily harm.

85. Complaint was also made of a further direction given on foresight in relation to the appellant. A careful perusal of that passage shows that the judge's directions were in accordance with the existing law and can in no way be faulted. In particular in dealing with the foresight he said:

"Now, I want to give you this direction on how you treat with joint enterprise, because while I have given you how to treat foresight, members of the jury, it is important that you understand how joint responsibility arises, because the prosecution's case is that these accused committed this offence together. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are in it together as part of a joint plan, or agreement to commit it, they are each guilty. The words "plan" and "agreement" do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and a wink, or a knowing look. An agreement can be inferred from the behaviour of the parties.

The essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence and took some part in

it so as to achieve that aim. Your approach to the case should, therefore, be as follows: If looking at the case of either of the accused you are sure that, with the intention I have mentioned, he committed the offence on his part, or that he took part in committing it with another, then he is equally guilty.

Now, bear in mind that even if there was a plan, for example, to rob, if what one of the confederates did in executing that plan went beyond anything that the other had agreed, or realized he might do, then that person alone is responsible for the act and is, therefore, guilty of that offence. The other would be not guilty of the offence."

Complaint was also made of this direction to the jury:

"In relation to accused No. 1, if you reject all this evidence he has given to you of the behaviour of the police, and you find that contrary to what he says he gave that statement of his own free will, then, members of the jury, you may act on that statement, and you may treat with it, for what it is worth, assess it, weigh it carefully and consider whether it is what he is saying is that he participated in an unlawful joint enterprise to rob these people. Whether it started that way, or it became that way is of no moment. Once it is that he was aware that he was participating in an unlawful joint enterprise, and at one point in time it crossed his mind his confederate might go on to kill the people, as in the event happened that they were killed, and it wasn't him, and you are driven to the sure conclusion that it was his confederate, because he is not saying he did it, and that is how the evidence emerges against him then, members of the jury, once you find he had that foresight, then he would be liable to be convicted of murder. Matter for you."

The direction given there is, in our view, a correct statement of the law where the killing occurred during the course of the joint enterprise and the act which caused the death was within the scope of a joint enterprise. Accordingly, the direction cannot be faulted.

Ground 3

86. "The learned trial judge erred in law by admitting the evidence of Anjani Maharaj's general physical description of the accused for the sole purpose of supporting the identification of the appellant on the confessional statement."

Anjani Maharaj had testified that she had visited her mother Jacqueline Maharaj on the afternoon of December 11, 2001. Around 5-5:30-p.m. as she was leaving her mother's she observed two men some 80-100 ft away on the grass verge at the bottom of the hillside to the Croppers' home. She gave a general description of the men. She subsequently attended an identification parade but failed to identify any of them.

87. Counsel submitted that her evidence was more prejudicial than probative and the trial judge ought to have upheld the objection raised to its admissibility at the trial. Counsel for the State submitted that far from being admitted to establish the identity of the appellant Agard, Anjani's evidence was part of the circumstantial evidence adduced at the trial and went to establish that about 5:30p.m on December. 11, 2001 two young men were seen lurking around the Croppers' home. Accordingly, she submitted not only was it admissible but was also probative of the presence of the men in the area.

88. We agree that the evidence of Anjani could not establish the identity of Agard, but in considering the truth of his statement the jury were entitled to take into account the independent evidence of Anjani that there were two men at the bottom of the hill around 5:30p.m. that evening. Accordingly, we find no merit in this ground.

Ground 4

89. The Learned Judge erred in law when he directed the jury *"that a truly voluntary confession may be cogent evidence of guilt."* and the direction that*:*

> *"the law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved, you, the jury, may, if you think fit, convict him of any crime upon it."*

Those directions he submitted failed to draw the distinction between voluntariness of a confessional statement and the truth of it.

90. We think it prudent before dealing with the submissions made under this ground to remind ourselves of the classic formulation of the principle applicable to the admissibility of confessions stated by Lord Sumner ***in Ibrahim v Rex***[14] at page 609 said:

> *"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."*

91. Mr. Dolsingh submitted that the trial judge ought not to have raised the issue of voluntariness with the jury since that was a question for him. He further submitted that the sole question for the jury's consideration was whether the contents were true or false and what weight they might attach to it. He said that the direction that a voluntary statement was equivalent to guilt was wrong because a statement may be voluntary but at the same time the contents may be false and to direct the jury that the criterion of guilt was the voluntariness of the statement was a serious misdirection.

He said that the trial judge should have impressed upon the jury the need to assess in detail the circumstances surrounding the taking of the statement in order to determine whether its contents were true rather than give a direction that the voluntariness of the statement may be cogent evidence of guilt. In support of his submission he relied on ***R v Seymour Grant [1976] 23 W.I.R. 132, Guerra and Wallen v The State (1993)45 W.I.R. 370*** and ***R v Farley [1961]4 W.I.R. 63.***

92. Counsel for the respondents submitted that the trial judge was entitled to tell the jury that a truly voluntary confession may be cogent evidence of guilt. She further

[14] [1914]A.C. 599

submitted that the judge pointed out to the jury that if they thought that the confession was free and voluntary they may, if they think fit convict on it. The judge, she submitted, left to the jury's consideration the question whether the statement was true and whether any independent evidence supported it. She referred to a statement in ***Archbold (41st ed at para 15-25)***: *"A voluntary confession of guilt is sufficient to warrant a conviction without any corroborative evidence"*: ***R v Sullivan (1887) 16 Cox 347; R v Sykes (1913) 8 Cr App. R 233***. The statement continued: *"when a confession is well proved it is the best evidence that can be produced****": R v Baldry (1852) 2 Den 430 per Erle J.***

93. It is a well-settled principle of law that the issue whether or not a statement made by an accused person is voluntary is for the judge to decide (see ***R v Farley***) *(supra*) and more recently ***Teeluck and John v The State Privy Council No. 36 of 2004.***

"*Voluntariness, as a test of the admissibility of a confessional statement by an accused, is a question for the trial judge and for him alone. When, however, a statement has been admitted in evidence, voluntariness may become a question for the jury if they consider it to be a relevant factor in deciding the truth or falsity of the contents of the statement. In that circumstance the voluntariness or otherwise of the statement becomes a question for the jury and the jury alone."* [15] The truth of the confession is not relevant at the voir dire, although it will be a crucial question for the jury if the judge admits it.

The trial judge fully appreciated that the main anchor of the prosecution's case were the statements and he made that quite clear to the jury when he said:

> *"Likewise, if there is evidence before the Court, and that is before you, that an accused person made a statement in circumstances in which you, the jury, find were fair, and that that statement was given of the own free will of that person, then that statement is to be left to you to consider whether you accept it as being true, that is, anything in the statement.*

[15] R v Seymour Grant [1976] 23 W.I.R. 132
Guerra and Wallen v The State – Crim. App. Nos. 64 & 65 of 1989
R v Farley [1961] 4 W.I.R. 63

Scepticism about the reliability of confessions has increased in recent years. It is, nonetheless, the law that a voluntary confession may be cogent evidence of guilt. Its value may vary according to the facts and circumstances in particular cases

A man may be convicted on his confession alone. There is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive and is properly proved, you, the jury, may, if you think fit, convict him of any crime upon it."

94. The trial judge impressed upon the jury that they must first find that the statements came from the appellants and then what weight they attached to them depended on all the circumstances in which they were recorded. He went on to say:

"*It will then be a matter for you to decide what weight you think fit to give any statement, and in so doing, you will, in effect, have decided on the truthfulness of the statement and its probative value or effect in evidence. In deciding upon the probative effect of the statement, in terms of proving any fact, I direct you that it is the law of this land that confessions of guilt are admissible in evidence as the highest and most satisfactory proof of guilt because it is fairly presumed that no man will make such a confession against himself."*

Support for the judge's direction may be found in ***Chan Wai-Keung v Reginam***[16] where Lord Hodson said:

"The jury's consideration of the probative value of statements attributed to the prisoner must, or course, be independent of any views the judge has formed or expressed in deciding that the statements were voluntary. Moreover the question what probative value should be allowed to the statements made by the prisoner is not the same as the question whether they are voluntary statements nor at all dependent upon the answers to the latter question. A confessional statement may be voluntary and yet to act upon it might be quite unsafe; it may have no probative value. Or such a

[16] [1967] 1 All E.R. 949 p. 953

statement may be involuntary and yet carry with it the greatest assurance of its reliability or truth. That a statement may not be voluntary and yet according to circumstances may be safely acted upon as representing the truth is apparent if the case is considered of a promise of advantage being held out by a person in authority."

See too ***R v Burgess***[17]

95. We are satisfied that in his charge to the jury the judge did all that was required in clear terms and there was no question of any misdirection nor any likelihood of any misunderstanding by the jury of their role insofar as the statement was concerned. Accordingly, there is no substance in this ground.

We deal now with Ground 1.

Ground 1

96. *"The Learned Judge failed to distinguish and compartmentalize two operative 'intentions' on the confessional statement by failing to direct the jury that one of the alleged intentions of the appellant may have been outside the scope of the joint-venture to commit robbery. The Learned Judge failed to identify the sequence of events, the first being an original alleged intention of the appellant to rob in a joint-enterprise with his confederate, the other was when his confederate left him with the stolen property after the robbery and the confederate re-visited the premises of the deceased. The jury had to consider whether there was foresight by the appellant that his confederate 'intended' to kill and if there was a break in the chain of causation with the murders."*

In effect this ground makes the following criticism of the trial judge's summation; that the trial judge failed to leave to the jury the question whether the joint enterprise to rob

[17] [1968] 2 Q.B. 112

had come to an end when Agard left the premises and the consequences of it to him if they were sure or in doubt whether the enterprise had come to an end.

97. In his written statement to the police Agard said in part:

> *"When we finish pack de things from de house not in right, de green sunny come back nah well he pack up de car down de hill and walk up de hill he and Cudjoe was talking and I was finishing packing up de things in de car. Den de man leave with de sunny and gone. After we gone back through de house to see if "we leave anything". I end up telling he no he tell me yeah I tell he let we go from here and he tell me go ahead nah go ahead and drop de things and dem how he ride go come back an pick him up and he go call meh and tell me which part to meet him he have something to finish up nah. I take de car and I gone to drop de things and dem. I went and drop de things by small Mickey before I reach dey he call me hack nah and tell me when O done to come back by de look-out on de Lady Young and pick him up dey nah."* ……. ……. *Mr. Nedd ah want yuh to write this. Mr. Nedd no where in de planning anything ever talk about killing anybody. Nobody was supposed to dead. I tell him doh even hit dem really nah because how ah know them nah.*

In his direction to the jury the trial judge said:

> *"Now, bear in mind that even if there was a plan, for example, to rob, if what one of the confederates did in executing that plan went beyond anything that the other had agreed, or realized he might do, then that person alone is responsible for the act and is, therefore, guilty of that offence. The other would be not guilty of the offence."*

That direction in our view could not be assailed where the joint enterprise was a continuing one. But the question does arise. What I the joint enterprise to rob had come

to an end? And what if a completely new enterprise had been undertaken by Agard's confederate.

98. In ***R v Mitchell & King***[18] the question arose whether the defendants had ceased participation in a joint enterprise before the fatal blow was struck and whether the judge had given adequate directions to the jury.

The Court of Appeal said that when summing up a case of joint enterprise, it was incumbent on the judge, in addition to giving general instructions on the issue, to give two further directions: first, that the jury had to be satisfied that the fatal injuries were sustained when the joint enterprise was continuing and that the defendant was still acting within that joint enterprise, emphasizing the burden and standard of proof, and, second, that the jury had to be satisfied that the acts which had caused the death were within the scope of the joint enterprise. Neither of those directions was given in the instant case.

99. More recently ***in R v O'Flaherty, Ryan and Toussaint***[19] the Court of Appeal emphasized that where deaths resulted from spontaneous violence by a group jointly attacking common victims it was important that appropriate direction be given by the trial judge.

> "In that case a *gang of about 16 young men traveled ostensibly to hear a band play in a nightclub, but were refused entry to the club. Some of them managed to get in; others waited outside until everyone came out into the street. What happened then was captured either on the local authority CCTV cameras or on a video recording taken by a member of the public. The gang became involved with two men from another group, one of whom was a friend of the appellant O'F. He was pursued along a street by a number of men, one wielding a big stick. At about the same time one of the gang, the victim H, who was 18 and was carrying a baseball bat, was chasing two men along the same street with four or five others. The appellant O'F learnt that his friend was being chased by a group carrying*

[18] [1999] 163 C.L.R. 163 JP 75 p 496
[19] [2005] 2 Cr. App.R. 20

weapons and decided to go to his aid. He found a cricket bat in the boot of the stolen car in which he had traveled, which hr claimed he had not known was there. Soon after he met H and others from his group. O'F's enquiry about his friend was met with abuse and a volley of beer bottles, which he avoided. There was an exchange of blows between P'F and H but it was not clear whether any connected. The appellant T then took up a position near O'F, holding a claw hammer, which could be seen clearly on the video. H struck further blows at O'F who responded by striking out with the cricket bat. The appellant R joined in by trying to hit H with a beer bottle and T threw the claw hammer at him. The incident then moved into another street by R and T did not enter it. H could be seen in the middle of the street on the ground surrounded by a number of men. O'F advanced to within a few feet of the prone body, still holding the cricket bat but not seen to use it again. He was the first to move away from the scene. By this time H had received fatal injuries including a number of stab wounds to his back, slash wounds to his face and a fractured skull. The appellants and others were charged, inter alia, with murder. The prosecution was not in a position to prove conclusively what had been the cause of death or where the fatal injuries had been inflicted. The judge discussed the terms of his proposed directions with counsel, and counsel all agreed that a central issue for the jury to decide was whether there was one continuing event or two incidents. The jury was furnished with written directions in respect of the charge of murder which, inter alia, directed them that, if they decided that they were dealing with two separate events, they were to consider the evidence as to the cause or causes of death, when and where the injuries were caused and what part the particular defendants played. The appellants and others were convicted of murder and of violent disorder. O'F was also convicted of common assault. The appellants appealed on the ground that the judge should have it clear to the jury that, irrespective of whether there were one or two incidents, they should determine which injuries brought about the death of H, where those injuries took place, and whether the particular appellant played a part in causing those injuries; further they should

consider whether actions in the second street, involving the use of a knife, were of a wholly different type to the attack in the first street."

100. In allowing the appeal in that case the court pointed out that it was for the jury to decide in every case whether what was done was part of the joint enterprise or went beyond it. Where there was no pre-arranged plan but spontaneous violence by a group who jointly attacked common victims and the "enterprise" arose on the spur of the moment, in many cases the scope of the joint enterprise would be ascertained by considering the knowledge and the actions of those participating, and juries would usually have to make inference.

101. Where, however, death had resulted, the jury should be directed that they must be satisfied (a) that the fatal injuries were sustained when the joint enterprise was continuing and that the defendant was still acting within the scope of the joint enterprise and (b) that the acts which caused the death were within the scope of the joint enterprise. A person who unequivocally withdrew from the joint enterprise before the moment of the actual commission of the crime by the principal should not be liable for that crime, although his acts before withdrawing might render him liable for other offences. The question whether the violence which caused the fatal injury formed one evolving incident or two separate and discrete incidents was only relevant in helping to decide whether a particular defendant disengaged before the fatal injuries were caused, or joined in after they had been caused.

<u>The Judge's directions:</u>

102. On the issue of joint enterprise the judge's directions were impeccable. The State's position both at the trial and before this court was that the deaths had occurred during the course of the joint enterprise to rob.

103. The issues whether the joint enterprise to rob ever came to an end or whether there was a second enterprise in which only the confederate participated were never

canvassed at the trial. Although the judge invited the views of counsel before he began his summation the issue was not raised by either of the attorneys.

As the court said in Stewart and Schofied[20] it is always a question of fact not law whether in a particular case the relevant act was committed in the course of carrying out the joint enterprise.

We have carefully considered the summation and have come to the view that the trial judge fell into error when he failed to leave the issues referred to earlier for the jury's consideration. In the special circumstances of this case we think it was a fatal error and accordingly this ground of appeal succeeds.

Decision and Orders

104. The appeal of Pitman has failed on all the grounds advanced. Therefore we affirm his conviction[21] and sentence.

105 Agard's appeal succeeds on ground 1. We have found no merit in any of the other grounds. Accordingly, we quash his conviction and the sentence of death imposed upon him.

106. The remaining question to be determined is whether or not we should order a retrial for Agard. The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. Among the factors to be considered in determining whether or not to order a new trial are:

(a) the seriousness and prevalence of the offence;

(b) the expense and length of time involved in a fresh hearing;

(c) the ordeal suffered by an accused person on trial;

[20] (1995) 1 Cr. App. R. 441
[21] Bowe 58 WIR 1

(d) the length of time that will have elapsed between the offence and the new trial;

(e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial;

(f) the strength of the case presented by the prosecution, but this list is not exhaustive[22].

107. We have given careful consideration to the above factors and we are of the view that in the interest of justice there should be a retrial. . We direct that the matter be placed on the cause list and the retrial take place as a matter of priority.

S. John
Justice of Appeal

I. Archie
Justice of Appeal

P. Weekes
Justice of Appeal

[22] Reid v R (1978) 27 WIR