REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. 5 of 2008

IN THE MATTER OF

NIMROD MIGUEL **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:
R. Hamel-Smith, J.A.
S. John, J.A.
Weekes, J.A.

APPEARANCES:
Mr. I. Khan, SC and Mr. D. Khan on behalf of the appellant
Ms. D. Seetahal , SC on behalf of the respondent

DATE OF DELIVERY: 27th February 2009

JUDGMENT

Delivered by S. John, J.A.

Factual Background

1. On January 30, 2008 after a trial at the San Fernando Assizes before Brook, J. and a jury the appellant was convicted of the murder of Ramesh Lalchan (the deceased) and the mandatory sentence of death by hanging was imposed upon him.

The Case for the Prosecution

2. Ramesh Lalchan was a fisherman and lived in Rio Claro. On December 30, 2003 he was at Tableland having drinks with friends. At about 10:00 pm he dropped them home and proceeded in his vehicle towards San Fernando. The following day around 8:00 a.m. his lifeless body was found at Fairfield by one Errol Rooplalsingh.

3. When the police arrived on the scene they observed the deceased's hands and feet bound with shoelaces and his mouth tied with a red cloth. They also discovered three spent cartridges which appeared to have been discharged from a .32 calibre firearm. The post mortem

examination showed that death was due to head injuries. He also sustained injuries to the neck. During the autopsy the pathologist removed two bullets from the head of the deceased.

4. Later that day about 2:00 pm, Shaffina Lalchan, the wife of the deceased, called her husband's cell phone and a male voice, which she did not recognize, answered.

5. On January 2, 2004, the deceased's vehicle was discovered by the police in Princess Town. The last digit on the license plate had been obliterated. The following day the vehicle was inspected by Acting Sergeant Ramdeo who could not open the trunk from the outside but gained access to it from inside the vehicle. The trunk contained a pair of registration plates bearing the number PBM 5551 on each of them. Ramdeo was able to lift certain fingerprint impressions from them, some of which were the fingerprint impressions of the appellant.

6. On January 24, 2004, around 5:00 a.m. a party of police officers went to Indian Walk Princes Town where they arrested the appellant in an abandoned house. The appellant identified himself as Brian Miguel. He was cautioned, informed of his rights and he made no requests. He was then taken to the Princes Town Police Station and placed in a cell at the back of the station.

7. During the period 10:40a.m. - 10: 50a.m. that morning, the appellant was taken to the Homicide Office San Fernando by Officer Renwick and placed in an enclosed air-conditioned room equipped with cushioned chairs. About 11:23 a.m. Acting Sergeant Hamid identified himself to the appellant, told him about the report he was investigating, cautioned him and informed him of his legal rights. Hamid began to interview him and about five minutes into the interview Hamid arranged for the appellant to have something to eat and he was given a meal comprising rice, chowmein and corned beef. The appellant requested a glass of water which was given to him.

8. The appellant was interviewed again at about 12:40 p.m. the same day by Ramdeo and Renwick. Renwick drew the appellant's attention to a large print document intituled 'Notice to Persons in Custody' posted on the wall of that office and read it aloud to him. He asked him whether he understood what it meant and the appellant responded in the affirmative. That interview ended at 2:10 p.m. The appellant denied any knowledge or involvement in the murder.

9. On January 25, 2004 about 12:25 p.m. while the appellant was being transported to the Homicide Office San Fernando he told Hamid and Renwick *"I just ready to talk to all ah yuh."* Around 4:04 p.m. that afternoon, the appellant dictated a cautionary statement which was recorded by Hamid in the presence of Renwick and the Justice of the Peace, Ezra Dube, who also authenticated it.

10. In that statement, the appellant admitted that he together with three other persons participated in the robbery of the deceased's car. The appellant said that he tied the deceased's mouth but claimed that one of the other men shot the deceased after he (the appellant) refused to do so. The appellant also admitted that the following day he was present when one of the men involved in the robbery and murder attempted to put different licence plates on the deceased's vehicle. The appellant also said that the deceased's car had two cell phones in it and he had

answered one of them when it rang the day after the incident and heard a woman's voice at the other end.

11. The appellant was subsequently charged for the offence of murder.

The case for the Defence

12. The appellant testified on his own behalf but called no witnesses. He denied that he was ever at Fairfield on December 30 or 31, 2003. He said that he was arrested at his girlfriend's house around 6:30 a.m. on January 24, 2003, not at an abandoned house as the police claimed. He was never cautioned or informed of his legal rights. While in custody at the Princes Town Police Station he was beaten on his ribs. The appellant also testified that he was not fed substantial meals as claimed by the police and he slept on a concrete bunk. He said that he did not dictate any statement to Hamid. In his evidence in chief, the appellant also testified that Justice of the Peace Dube did not speak to him in the absence of the police officers. He was told by Renwick to sign notes and he wanted to contact his mother but was denied the opportunity. In cross-examination the appellant stated that he only signed various parts of the statement because he was told by Renwick that if he did so he would be allowed to go home.

13. The trial judge conducted a voire dire and ruled that the statement made under caution was voluntary and admitted it.

14. The Appellant filed six grounds of appeal and we now consider each of them in turn.

Ground 1

Rule 3 or Rule 2 Caution

The learned trial judge erred in law when he admitted the written confession of the appellant into evidence.

15. Mr. Khan for the appellant has asserted that the appellant was not read a Rule 3 caution before his written statement was taken. Counsel indicated that the appellant was extremely vulnerable after having been "cajoled" into giving a statement and had he been given a Rule 3 caution, it is unlikely that he would have further incriminated himself. Mr. Khan relied upon the principle that as soon as there is enough evidence to prefer a charge, an arrested person must without delay be charged or informed that he may be prosecuted for the offence. This principle was clarified in the case of ***Re Sherman and Apps***[1] where the court stated that:

> *"The principle is subject to no qualification and no qualification should be introduced by, for example, setting an unduly high standard of "sufficient evidence." The criticism that an officer refrained from charging and retained a man in custody is incomparably more serious than that he charged a man on insufficient evidence."*

[1] [1980] 72 Cr. App. R. 266

16. In the present case that appellant gave a statement while under Rule 2 caution, that is he was not charged nor warned of impending charge. In the English Court of Appeal decision of ***Malcherek and Steel*** the court considered the case of an accused who having produced a written statement was subsequently questioned by police about the contents of the statement without first having been charged or warned about impending charge with the relevant offences. In a judgment delivered by the Lord Chief Justice the court stated that:

> *"The Detective Chief Inspector in charge of this case had before him the alleged written confession, parts of which I have already read. He had also the knowledge of the sort of person it was who was alleged to have made the statement. If, without further ado, he had charged the man then no doubt that could have been the subject of criticism. If he took steps to ensure that he was not charging someone who had made a false confession, then again he was going to be subject to the very criticism to which he has been subject in this Court.* ***Whether there is enough evidence is, in any event, a qualitative matter, and it will vary in case to case according to what has been said, what evidence there is and according to the sort of person it is who made the remarks which are alleged to be confessions.*** *This Court is very far from saying that the Detective Chief Inspector was wrong in not immediately charging this applicant after the written confession, but assuming that he was wrong and assuming that he should have charged the defendant immediately, and even assuming that having charged him then it was improper to go and see him to ask him any further questions, it seems to us that nevertheless the evidence contained in the statement itself, coupled with everything else which we have endeavoured to set out and upon which the prosecution were relying, was ample evidence for the jury to come to the conclusion that they did. If there was anything wrong, this would have been plainly a case to which the proviso would have applied."*

17. The Australian case of ***Van Der Meer v R***[2] is also pertinent as in it the court considered inter alia an instance of the delayed caution and charge of the suspects. Mason C. J. (as he then was) stated:

> *"I do not doubt that in some situations the police, though believing a suspect to be guilty of the crime, wish to ascertain whether he has an answer to the suggested case against him, before making a definitive decision to charge him. But, recognition of the right to silence and considerations of fairness to the suspect demand that, in these situations, the police should issue a caution and that they should not whittle down the effect of the caution by pressuring or cajoling the suspect into speaking once he has clearly indicated his wish to remain silent. Whether the suspect wishes to take advantage of the opportunity given to him is a matter for him to decide. And it is vital that the law should ensure that his freedom of choice is respected.* ***It follows that the police will be acting improperly if they attempt to use the occasion as an excuse for attempting to break down a prior voluntary account given by the suspect of his relationship with the critical events in relation to the crime.*** *The injunction, expressed in the*

[2] 1988] HCA 56; (1988) 82 ALR 10 (the High Court)

Judges' Rules and elsewhere, that a person arrested or in custody must not be cross-examined, means no more than that. As Williams J. observed in ***McDermott v The King (1948) 76 CLR 501*** *(at p 517):*

> *"But the mere asking by the police of a question which would only be asked in cross-examination at the trial does not, in my opinion, amount to cross-examination ... A cross-examination for this purpose would be an examination intended to break down the answers of the accused to questions put by the police to which they had received unfavourable replies."* [Emphasis added]

18. In the circumstances of the case the police need not have issued a Rule 3 caution after the appellant indicated that he wished to give a written statement. At that point the police must make a judgement call in respect of whether "there is enough evidence …. according to what has been said, what evidence there is and according to the sort of person it is who made the remarks which are alleged to be confessions. What they ought to do at this stage is to be circumspect in their questioning of the accused.

Questioning the appellant after his written statement

19. In addition to the concerns raised by counsel, we were also concerned with the nature of the appellant's statement produced before the jury consisting as it did of an amalgam of a written statement and twenty questions and answers asked by the police and answered by the appellant. We raised our concerns with counsel when the matter came before us and gave both sides the opportunity to submit written submissions on the issue.

20. Mr. Khan for the appellant submitted that named questions were not "necessary for the purpose of preventing or minimizing harm or loss to other persons or to the public or for clearing up ambiguities in previous answers in the written statement." Counsel for the State submitted that the questions served to make the statement coherent, intelligible and relevant to material matters and that the cumulative effect of the questions and answers was such that no unfairness was wrought on the appellant and therefore the learned trial judge was right to admit the 'amalgamated' statement.

21. It is important to remember that the Judges' Rules were issued to give police officers guidance on the procedures that they should follow in detaining and questioning suspects. They were intended to change the way interviews were conducted to avoid the resulting evidence being ruled inadmissible in court. The Rules set out the kinds of conduct that could cause a judge to exercise discretion to exclude evidence, in the interests of a fair trial. High Court judge Lawrence J explained in ***R. v. Voisin***[3], that:

> *" In 1912 the judges, at the request of the Home Secretary, drew up some rules as guidance for police officers. These rules have not the force of law; they are administrative directions the observance of which the police authorities should enforce upon their subordinates as tending to the fair administration of justice. It*

[3] [1918] 1 KB 531

*is important that they should do so, for statements obtained from prisoners**, contrary to the spirit of these rules**, may be rejected as evidence by the judge presiding at the trial."* [Emphasis added]

22. In the case of ***Shabadine Peart v The Queen Privy Council***[4] the Privy Council considered the status of the Judges Rules in Jamaica. The Board reiterated the centrality of the notion of fairness at the trial in the Judges' Rules and opined that it was the key criterion in the admission of a statement:

"In their Lordships' opinion the overarching criterion is that of the fairness of the trial, the most important facet of which is the principle that a statement made by the accused must be voluntary in order to be admitted in evidence."

23. The Board distilled four propositions in respect of the Judges Rules of which proposition 4 is directly relevant:

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary.

24. Ms Seetahal correctly framed the test laid down in **Peart** (supra) – Were the ***questions*** unfair to the appellant? Do they make the circumstances of the taking of the statement unfair? It is in the application of the test that counsel is misguided. Counsel suggests this court should consider that if the cumulative effect of the questions and answers are not prejudicial to the accused then the circumstances of the taking of the statement would not have been unfair. We cannot endorse such a test. The Rules are for the guidance of police officers and must be used in a manner that produces consistent results. Unfair questions leave the door open for the receipt of answers which may prejudice an accused's case and thereby render the evidence liable to be rejected by the judge.

25. We have considered the standard of fairness which the questions must attain and were guided by the decision of the English Court of Appeal in the case of ***R v Hudson.***[5] The fairness of questions put and answers forthcoming from an accused was considered in the case. The court considered whether or not the questions and answers as well as a voluntary statement were obtained by unfairness. Their Lordships quoted Lawton L.J. in ***Houghton's case (1979) 68 Cr.App.R. 197, 206***

*"Evidence would operate unfairly against an accused if it had been obtained in an oppressive manner by force or against the wishes of an accused person or by a trick **or by conduct of which the Crown ought not to take advantage**. It follows, so it seems to us, that when considering whether to exercise his discretion to*

[4] Appeal No. 5 of 2005
[5] 1981) 72 Cr. App. R. 163.

disallow alleged confessions on the grounds of unfairness a judge has to ask himself ***what led the accused to say what he did****."* [Emphasis added]

26. The court considered the unfairness to the appellant in circumstances in which they had already concluded amounted to an unlawful detention. The court however opined obiter that:

"If the detention had been lawful then it ***may*** *well be no question of unfairness would arise."* [Emphasis added]

27. So that in circumstances where a detained accused is questioned the issue of fairness turns on whether:

(i) *It was obtained in an oppressive manner by force or*
(ii) *against the wishes of an accused person or*
(iii) *by a trick* ***or***
(iv) ***by conduct of which the Crown ought not to take advantage****.*

28. In the instant case the police asked the appellant some 20 questions after he concluded dictating his written statement. While we acknowledge that the police may, in accordance with Rule 3 of the Judges' Rules, ask questions in order to make the statement *"coherent, intelligent and relevant"* we do not agree that such questions can be used as an avenue to cross-examine an accused or as an opportunity for the police to go on a fishing expedition to gather information/evidence that they have not uncovered by their own investigative efforts. We confirm that the test in **Peart** (supra) in respect of unfairness relates to the questions asked by the officers and not to the answers which they elicit.

29. We shall now consider the most troubling questions in turn.

Question 4
When Shane say we going to get a car what did he mean?

Response by Nimrod
That was we going an put ah gun by ah man head an taking he car.

30. The Canadian Court of Appeal considered a question of similar effect in the case of ***R. v. Frank Cappellano***[6]**.** The court decided that a question which could not properly be asked in cross-examination would not become admissible simply because it was asked in a police interview. In a sexual assault case the police, during an interview, asked the accused

Q: Frank, the allegation that you have sexually abused D. [the complainant] is a serious one. If what you say is true, give us an explanation as to why D. is saying this about you?

A: I don't have a clue.

[6] 1996 CanLII 623 (ON C.A.), (1996), 104 C.C.C. (3d) 461 (Ont. C.A.).

31. The court concluded that the question should not have been put before the jury since it could not properly be asked of the accused in the cross- examination. By its nature, the question called for the accused to give a reasoned or persuasive argument with a possible adverse inference if he failed to do so. If a question could not properly be asked in cross-examination, it does not become admissible simply because it is in a police interview.

32. This question called for the appellant to make a judgement on the state of mind of another person "Shane". This question is plainly objectionable at trial and is also therefore inappropriate in a police interview. The question should have been edited out of the statement presented to the jury.

Question 13 and 17

Question 13
Was anyone else armed?

Response by Nimrod:
Nah nobody else me eh see no more gun

Question 17
You spoke about a number plate they got for the car do you know where they got it?

Response by Nimrod:
Nah I eh know where they get it from, and I eh know the number.

33. These questions sought additional details in respect of information already given by the appellant in his written statement, details which the police would not have known. It is critical that as an investigation progresses there comes a stage where the police are no longer seeking to gather information to decide upon the question whether charges should be proffered. The general inquiry has moved beyond the stage whereby the suspect has been identified as the perpetrator of the crime and as the guilty party and thereafter further investigations are generally directed to the obtaining of further evidence to support a prosecution.

34. It is imperative that at this stage police officers ought not to question the suspect with a view to having him provide details to further incriminate himself. The answers eventually produced by the suspect are of no moment. The Judges Rules are a code of conduct for police officers and must be interpreted and applied in a manner that prevents the State's agents from engaging in 'conduct of which the State ought not to take advantage'. The questions were deliberate attempts to have the appellant further incriminate himself by providing details of his knowledge of the offence, details which were not given by the appellant in his written statement.

35. We find therefore that the asking of the questions rendered the relevant portions of the statement unfair in that they were capable of jeopardizing the appellant's right to a fair trial because his statement was obtained in circumstances which affect the reliability of the statement. These questions and answers should have been edited out of the statement presented to the jury. Assuming that he should have charged immediately and even assuming it was improper to ask

him further questions it seems to us nevertheless that the evidence contained in the statement itself coupled with all the other evidence upon which the State relied was ample evidence for the jury to come to the conclusion that the appellant was guilty.

Accordingly, this ground of appeal fails.

Ground 2

The learned trial judge omitted to give the jury proper and adequate directions as to how they should evaluate the oral confession of the appellant; and if necessary the written confession of the appellant.

36. The three main contentions put forward by Mr. Khan., counsel for the appellant, were: 1) the jury should have been directed that the statement under caution was made in breach of Rule III of the Judge's Rules and his constitutional right against self-incrimination; 2) the members of the jury were not adequately instructed on how the oral and written statements were to be evaluated; and 3) the trial judge ought to have given a ***Mushtaq*** direction. Counsel relied upon ***R v Mushtaq***[7] in support of these submissions. The common thread that permeates all three arguments is that a ***Mushtaq*** direction should have been given by the trial judge.

37. Counsel for the respondent submitted that the trial judge was under no obligation to give a ***Mushtaq*** direction because the appellant's case was that he never made the statement as opposed to the situation where he gave the statement but that it was obtained under oppression.

38. The Court in ***Deenish Benjamin and Deochan Ganga v The State***[8] relying upon the guidelines laid down in ***Wizzard v The Queen***[9] affirmed that in cases where the appellant contends that the he did not make the statement although he affixed his signature to it, a ***Mushtaq*** direction was not required.

39. The appellant maintained in his evidence that he did not dictate a statement to the officers and he signed what Officer Renwick told him to be notes. In cross-examination he stated that he only signed various parts of the statement because he was told by Renwick that if he did so he would be allowed to go home.

40. There is a dichotomy between an assertion by the appellant that he made the confessional statement and the affixing of his signature to the statement albeit the signature was obtained by violence. Where the latter obtains as in this appeal, a ***Mushtaq*** direction by the trial judge is not necessary. This is supported in **Archbold 2006 [15-385]**:"*Where the only dispute is whether the defendant's account of the interview is true, it may well be enough for the judge to indicate that, if the jury consider that the confession was, or may have been, obtained in the way described by the defendant, they must disregard it*." Therefore, in cases such as the instant appeal where the appellant asserts that he never made the statement in the first place, the basis upon which the jurors should be directed to reject the statement is that they must be satisfied to the extent that

[7] [2005] UKHL 25
[8] CA CRIM Nos. 51 and 51 of 2006.
[9] [2007]UKPC 21.

they feel sure that the appellant's account as to how his signature appeared on the statement is true. The next issue for us to determine is whether the trial judge in the present case directed the jury in that manner.

41. Mr. Khan's general submission on this ground was that the members of the jury were not given adequate guidance on how the oral or written statements should have been evaluated. Mr. Khan invited the court to examine p. 34 lines 15-18 of the trial judge's summation where he said:

> *"It is not open to doubt that the mere confession of an accused alone is sufficient to warrant his conviction. Scepticism about the reliability of confessions has increased in recent years but it is still the law that a truly voluntary confession may be cogent evidence of guilt."*

42. Ms. Seetahal on the other hand argued that the trial judge gave the jury specific directions on how the written statement was to be treated and referred us to p.34 lines 24-26 and p.60 lines 12-16.

43. At p. 60 lines 12-18 of the summation the trial judge stated:

> *" The central burning issue in this case is whether you are sure that the accused gave the interview and the statement under caution on the 25th of January 2004, that followed it, and if you are, how you construe it, what you make of it, what does it say, how do you interpret it? Or, whether he did not give that interview at all, but merely signed the prepared statement, ignorant as to its contents, after being given meals that weren't up to scratch and being forced to sleep on a concrete bunker, or may have done, when he was told that if he did so, he would go home."*

44. And later at p.61 lines 1-6 the trial judge further instructed the jury:

> "*On the other side of the coin, is it true or may it be, did he sign a prepared document, ignorant as to its contents when told if he did, he would go home, or did he, or may he not have given that interview. If you are sure that he did give the interview and the statement in the manner and in the terms of how those witnesses told you, then it's simply a question, is it not, of your construing what you may find to be admissions contained therein and considering all that in light of the legal directions given you earlier on, today."*

At p. 14 lines 17-21 to p.15 line 1 the trial judge had directed the jury earlier:

> *"As I have already directed you, the facts of this case are your responsibility. If in my review of the evidence, if I appear to express any views concerning the facts or emphasize a particular aspect of the evidence, do not adopt those views unless you agree with them. And if I do mention something, which you think, is important you should have regard to it and give it such weight as you think fit. When it*

comes to the facts of the case, it your judgment and your judgment alone that counts."

45. The trial judge in his summing-up at pages 14-15 directed the jury that they were the sole arbiters of fact and could attach whatever weight they deemed appropriate based upon the evidence. He did not repeat that function of the jury at pages 60-61 of the summation when he addressed them on the issues of the interview and the statement. While a trial judge will have his own style when giving the jury directions on the issues, we feel that it is important for him to reiterate and emphasize to the jury during the summing-up that they are to attach whatever weight they deem necessary to the evidence.

46. The statement was a pivotal item of evidence in the case for the prosecution. The trial judge conveyed in clear and unambiguous terms to the members of the jury that it was for them to determine whether they accepted the account of the witnesses for the prosecution or the appellant's version. But at this critical point of his direction on the statement the trial judge did not explain that if they leaned in favour of the appellant's version on what transpired in the interview that they could reject the statements in it. Rather the gist of what he said was that after they deliberated on whether the admission was true or not they should bear in mind his earlier direction. This aspect of the direction was extremely vague and we do not feel that the jury would have necessarily linked it to his instruction much earlier at p. 14 of the summation that they should attach whatever weight they deemed fit.

Accordingly, this ground has merit.

Ground 3

The learned trial judge erred in law when he directed the jury that the appellant's attempt to assist his confederates to change the number plates of the deceased's car the day after he was executed was powerful evidence that the act which caused his death was within the scope of the joint enterprise of aggravated robbery.

Ground 4

On the State's case against the appellant, the issue of withdrawal became a live issue but the learned trial judge eroded this "plea"/ "defence" by constantly telling the jury throughout his summation that because the appellant went home with his confederates in the stolen car of the deceased and changed or attempted to change the number plates of the said car the next day, this was evidence that he did not withdraw from the joint enterprise which caused the death of the deceased.

48. Grounds 3 and 4 will be considered together as they relate to the broader issue of joint enterprise in the context of the felony murder rule.

49. As we understand it, Mr. Khan's submission is that the appellant's involvement in the attempted alteration of the license plates on the deceased's car (on the day after the deceased was

shot) was a separate incident and should not have been linked to the joint enterprise of armed robbery.

50. Counsel for the appellant invited us to consider at p. 84 lines 20-30 of the trial judge's directions to the jury after they requested further guidance on joint enterprise:

> "*To convict the accused of Murder on this basis, you would have to be sure that the accused with others embarked on an arrestable offence involving violence, either by participating with the others or by assisting the others, or by encouragement, by lending support and giving confidence to the others, and that Ramesh Lalchan died in the course or furtherance of that or any other arrestable offence involving violence.*
>
> *The State relies on the evidence of the admissions as to how the plan to rob was hatched. How the car was picked. What the accused did in the canefield, tied the man's mouth after another had tied his hands and feet. That one of them shot him. They left him in the canefield and drove off in his car, and that he, the accused that is, was present the next day when steps were taken to disguise the car by changing the number plates although this was aborted for want of tools, or the plates were actually changed...*"

51. The Felony Murder rule is encapsulated in section ***2A (1) of the Criminal Law Act Chapter 10:04*** as amended and stipulates as follows:

> "*Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course and furtherance of that violence, or any other arrestable offence involving violence, he and all other persons engaged in the course or furtherance of the commission of that arrestable offence or any other arrestable offence involving violence are liable to be convicted of murder, even if the killing was done without intent to kill or to cause grievous bodily harm.*"

52. The evidence revealed that the deceased was robbed of his vehicle, his mouth and hands were bound, he was shot in the head and neck with a gun and that he died as a result of those injuries. The following day there was an attempt by the perpetrators to cover their tracks by changing the license plates on the deceased's vehicle.

53. We are of the opinion that the acts and events which transpired over the course of two days represented a continuous criminal activity involving armed robbery and murder. After all, the stolen vehicle and the attempt to disguise it afterwards was part and parcel of the same plot to rob the deceased of it; the appellant who was one of the participants continued to be part of the same unlawful enterprise. The appellant and his confederates carried out their plot to rob the deceased of his vehicle and in furtherance of that offence the deceased was shot and at some point later he died.

54. The approach taken by counsel for the appellant to compartmentalise grounds 3 and 4 would not have given an accurate and holistic perspective of the trial judge's summation; in particular whether the appellant by his refusal to shoot the deceased could have been said to have withdrawn from the acts and events of 30 and 31 December 2003 which culminated in the deceased's death.

55. For these reasons stated above we do not agree that the trial judge fell into error when he mentioned the attempted license plate change as part of the joint enterprise of aggravated robbery of the deceased.

Accordingly, we find no merit in grounds 3 and 4.

Ground 5

The learned trial judge played down the good character of the appellant by directing the jury that "the accused is a man of good character which you should accept in the sense that he has no previous convictions recorded against him" [Emphasis].

Counsel for the appellant directed us to page 52 lines 14- 29 of the summation where the learned judge said:

> "*You have heard unchallenged evidence that the accused is a man of good character which you* ***should accept in the sense that*** *he has no previous convictions* ***recorded*** *against him. Of course, good character cannot by itself provide a defence to a criminal charge but it is evidence which you should take into account in the accused's favour in the following ways*:
>
> *Firstly, the defendant has given evidence, and as with any man of good character it supports his credibility, this means it's a factor which you should take into account when deciding whether you believe his evidence. In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime now. I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this you are entitled to take into account everything that you have heard about the defendant including his age now, which one can calculate as twenty-four and a half. That he worked as a plumber and labourer with his father, and that he had been helping to support the family since he was fifteen, having regard to what you know about the accused, you may think that he is entitled to ask you to give considerable weight to his good character when deciding whether the Prosecution has satisfied you of his guilt. However, it is not the passport of an acquittal*." [***Emphasis added***]

56. The issue for us to consider is whether the expression '*in the sense that*' used by the trial judge in his direction to the jury amounted to words of qualification of the appellant's good character. We feel that by commencing the good character direction in this manner the effect of the words used by the trial judge may have conveyed to the members of the jury at first blush

that the appellant's good character may be regarded in a narrow perspective. While the expression should have been avoided, we do not think that the appellant suffered any disadvantage.

57. The next issue is whether the expression used by the trial judge and the remainder of his direction to the jury on the appellant's good character could have caused prejudice to the appellant.

58. Generally a trial judge has a duty to place the good character of an accused in an even-handed and unambiguous manner to the jury, and particularly in capital offences this duty of fairness must be always be borne in mind by the trial judge in his direction . The Court of Appeal re-affirmed in ***Guerero v The State***[10]the hallmark principle of fairness to the defence that should be guarded by the court which was earlier pronounced in ***R v. Aziz***[11] :

> " *…[W]hy should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance...*"

59. The trial judge instructed the jury to consider that the appellant, then twenty-four and a half years, had contributed financially to the household from the age of the fifteen (15) through his trade as a plumber. He instructed the jury appropriately on both limbs of the good character direction and stated unequivocally to the jury that the appellant was a person of good character and that it was to be used in his favour during their deliberations.

60. We are of the view that notwithstanding the use of the earlier expression, the good character which the appellant had in his favour was not whittled away to render the conduct of his trial unfair and his conviction unsafe.

This ground of appeal also fails.

Ground 6

The cumulative effect of grounds one to five above caused the jury to return a verdict of guilty on unreliable evidence which resulted in a miscarriage of justice.

61. We find that ground 6 is cumulative of all the other grounds already discussed and we make no further comment.

[10] C.A.Crim 33 of 2007, p.8
[11] [1996] A.C. 41,51.

62. Although we find that there is merit in ground 2, nevertheless, we are satisfied that notwithstanding the criticisms made of the summing-up, on the evidence as a whole, the appellant suffered no miscarriage of justice. Accordingly, in this case we would apply the proviso and dismiss the appeal.

R. Hamel-Smith
Justice of Appeal

S. John
Justice of Appeal

P. Weekes
Justice of Appeal