REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 10 & 11 of 2009

BETWEEN

KERON LOPEZ A/C BELLIES AND

GARVIN SOOKRAM A/C BEAM

APPELLANTS

AND

THE STATE

RESPONDENT

PANEL:

Archie, C.J.
P. Weekes, J.A.
Yorke – Soo Hon, J.A.

APPEARANCES:

Mr. J. Singh for the First Appellant
Mrs. P. Elder, S.C. and Mr. R. Mason for the Second Appellant
Ms. D. Seetahal, S.C. and Ms. L. Seetahal for the Respondent

DATE OF DELIVERY: 20th April 2011

REASONS

Delivered by P. M. Weekes, J.A.

1. The appellants Keron "Bellies" Lopez (first appellant) and Garvin "Beam" Sookram (second appellant), were convicted on 2nd March, 2009 at the Port of Spain Assizes of the murders of Kerwyn "Ox" Cyrus and Kerwyn "Richie" Hinds, which were committed on 28th July 2004. Each was sentenced to death by hanging.

THE PROSECUTION CASE

2. The case for the prosecution was based primarily on the eyewitness testimony of Sean Quamina. On 28th July 2004 Quamina was driving a white B-14 car, registration no. PBK 5219. Around lunchtime he picked up his lifelong friend Kerwyn "Ox" Cyrus at Carolina Village and then they picked up Kerwyn "Richie" Hinds at Couva. Quamina had met Hinds two to three weeks prior to that day.

3. Hinds hired Quamina to take him to the home of the second appellant at Sawmill Avenue, Barataria. They arrived there around 3:00 pm and as he drove into the yard Quamina saw the first appellant, whom he knew as "Bellies", the second appellant and several other men in the yard, all armed with a gun.

4. Quamina had met both appellants one week earlier when he visited the second appellant's home. On that visit, he spent two to three hours in their company. He was not more than five to six feet away from them during the visit.

5. When Quamina arrived at the second appellant's house on 28th July 2004, he interacted with Hinds, Cyrus and both appellants. At one point, he left the premises in the company of the first appellant on an errand. Some time after they returned, Hinds asked the second appellant for 'shots' for his gun and the second appellant gave him three bullets. At that time, the second appellant had a shotgun, the first appellant a small machine gun, and Hinds a "Chrome 9".

6. Later that evening the second appellant told Quamina of a plan to rob a man who was supposed to have a lot of money and jewellery and asked Quamina to use his car PBK 1529 as a getaway vehicle. Quamina was reluctant, however, the second appellant gave him some black electrical tape to tape off one of the numbers on his license plate. He instructed Quamina to go nearby to Granado Street at the end of an alley and there apply the tape and call out when he was finished. Quamina did as instructed and in response to his call both appellants and Hinds came to a window of the house and told Quamina to wait where he was.

7. By this time it was after 6:00pm. Quamina went to his car and sat in the driver's seat. From this position he was able to see into the alley. He then saw Hinds, Cyrus and both appellants, walking from the opposite end of the alley coming towards him. There was illumination in the alley provided by the electric lights from a shop at the top of the alley where the men entered. There was also light reflecting from a house opposite the entrance to the alley. Quamina saw Hinds walking in front, both appellants behind him and Cyrus bringing up the rear.

8. About ten to twelve seconds after Quamina first saw the men in the alley, he saw the first appellant turn suddenly and fire shots in Cyrus's direction. Cyrus ran but did not get far before he slumped to the ground. He was later found lying in the alley. Immediately after hearing the shots, Quamina got out of his car and stood by the driver's door. He had an unobstructed view of the alley from this vantage point. He then saw the second appellant fire his shotgun in the direction of Hinds who was ahead of him, (which was also in Quamina's direction). Hinds then turned around and fired back.

9. Quamina then fled on foot onto the main street, Sawmill Avenue, and while running he heard more shots. He went into a nearby house and stayed there for about half an hour and then went to the Morvant Police Station and gave a report to the effect that he was liming with "Bellies" (first appellant), when he heard several loud explosions and was shot. Yet later he gave a second report to Inspector Coa (the complainant) in which he told of the plan to rob

the man and that he was coerced by "Bellies" to take part in the robbery. Quamina's third statement, made 30th July 2004, was consistent with his evidence at trial, as recounted above.

10. On the night of the shooting, around 7:15pm, PC Hosein arrived on the scene and observed a B-14 car PBK 521 parked on Granado Street next to the alley. The last digit appeared to be blocked off. He saw Hinds lying across the left front seat with both legs partially across the driver's seat. His upper body was hanging out of the left front door. There was a firearm on the ground in the area of his right hand. He took possession of it.

11. Other officers arrived, including the complainant who observed that the glass of the left rear window was broken and that there were indentations on the door post. There were pieces of glass and what appeared to be blood on the backseat. Cyrus's body was lying in the middle of the alley. The bodies were fifty feet apart. The complainant took note of small brass objects on the ground and observed there was lighting from the eaves of a nearby house at the end of the alley. There was also light from a streetlight on Granado Street.

12. A police photographer and crime scene officer also attended the scene and the latter took samples of the objects on the ground. He found twenty-two rounds of ammunition from seven different firearms. The sole firearm found on the scene had no identifiable fingerprints.

13. At 11:00pm, Corporal Ramjit was conducting inquiries into the incident, and having received information from the complainant, went to the Port of Spain General Hospital. There he met the second appellant whose left arm and back were bandaged. Corporal Ramjit interviewed him and he said that he and Nigel Hinds were in the company of two other persons whom he did not know and while at an alley off Granado Street he heard several loud explosions and received an injury. He said that he did not know who shot him as the alley was dark. Corporal Ramjit then took him to the Morvant Police Station.

14. The complainant interviewed the second appellant in connection with the incident and he repeated essentially what he had told Corporal Ramjit. He also consented to his hands being swabbed for gunshot residue. None was found.

15. Since Quamina's statement of 30th July 2004 had implicated the second appellant the complainant approached him again on the 31st July 2004. After cautioning him, he replied, *"Boss, that man was meh friend."* He was charged on that day for the murders.

16. The first appellant was arrested on 28th December 2004. After being told of the report and cautioned, he said *"let me see who will point me out for murder."* He was taken to Morvant Police Station where the complainant spoke with him. After being told of the report and cautioned, he replied, *"Boss, me ent know nothing about these murders."*

17. A verification procedure was conducted by Sergeant Koon Koon on 30th December 2004. Before the procedure, Sergeant Koon Koon told the first appellant that he was bringing a witness to see him to which the first appellant replied, *"Let he come."* Quamina was brought into the cell where the first appellant was and said, *"This is Bellies and on that night I saw him shoot Kerwyn Cyrus."* The first appellant said, *"You see me shoot Kerwyn?"* Quamina replied, *"Yes."* When asked if he and the witness had met before, the first appellant admitted that he had met him once before at the home of the second appellant. The complainant later charged the first appellant for the offences.

18. The post mortem findings of Dr. Des Vignes identified the cause of Cyrus's death to be multiple gunshot injuries to the front and back and, in particular, one to the head. The body would have been turned or turning when the injuries to the back were inflicted. Hinds died as a result of shotgun and gunshot injuries. There was massive destruction of the flesh of his thigh and his lower face was torn away. Such an injury would have occurred if a shotgun was discharged within a yard of his face.

THE DEFENCE CASE

The First Appellant

19. The first appellant did not give evidence nor call witnesses. From the cross examination, the thrust of his defence was mistaken identity or fabrication on the part of Quamina.

The Second Appellant

20. The second appellant also did not testify nor call witnesses. He relied on his utterances to the police, and in effect his defence amounted to innocent presence on the scene and fabrication on the part of Quamina. In cross-examination it was emphatically suggested to Quamina that from the position of his car, he would not have been able to see into the alley, and furthermore it would have been too dark for him to have seen clearly.

Visit to *Locus in Quo*

21. On 11th February 2009, the Court visited the scene, at Granado Street off Sawmill Avenue, San Juan. The purpose of the site visit was to establish whether Quamina would have had a line of vision into the alley. The judge instructed the jury:

> "*You bear in mind what I indicated to you on the last occasion that you are looking when you hear and see that evidence, it is with respect to establishing whether or not he had a line of vision into the track when he was in the car, and when he stood up at the right post.*" *[sic]* **Transcript dated 11th February 2009, pg 4, line 40**.

22. At the *locus*, the judge directed that the vehicle being used (not PBK 5219), be positioned in accordance with photographs LG1, LG3, and LG4. She then directed that Quamina should indicate whether the car as positioned was the way that his car had been parked on the night of the incident. State Counsel asked Quamina whether the position of the car used in the demonstration was the same as on the night of the incident. He replied "It looks the same, ma'am". At that point counsel for both accused indicated that they disagreed with the positioning of the car.

23. On the invitation of the court, Quamina then sat in the driver's seat and adjusted it to accommodate his frame. Jurors, State Counsel and the judge took turns sitting in the driver's seat. Both defence counsel declined. Quamina then stood by the right door post indicating how he was able to look down the alley. All jurors, State Counsel, and the judge stood by the door post and looked down the alley. Defence counsel again declined to participate.

24. Quamina then proceeded down the alley and indicated where the second appellant was standing when he fired in his direction and he indicated where he saw the first appellant turn and fire at Cyrus. He also pointed out where Cyrus fell.

25. Counsel for the second appellant then asked Quamina to position himself between two columns as seen in photograph LG8 and look along the alley. When asked if he could see the passenger's and driver's seat of the vehicle he said he could barely see them. Counsel requested that the jury look along the alley using photograph LG8 and Quamina's position in order to determine whether they could see the passenger's and driver's seat. The trial judge then interjected:

> "*It can't as they are seeing it here. But certainly, in light of what the witness has said, they can look at the photograph, look at the positioning of the car from where he is there […].*" **Transcript dated 11th February 2009, pg 17 line 31**

26. Counsel again requested that the vehicle be positioned according to LG8 and the judge responded:

> *"[…] One thing I want to point out and I think it must be obvious to everyone. We are here today to observe the line of vision. What you can ask the jury to do is to look from where he stood, where you are asking, look along there and see what they see of the car and how it lines up with here, and how much it lines up with there. If he says he can see where the seats are, we bear in mind that this photograph was taken at night, and I do not want us to go along a path whereby we are asking the jurors to see things when it is clear from the photographs what is the position. Each and every one of you have LG8, you see the positioning of the seat, you bear in mind, as I told you before we left the court, that this scenario took place at night. The photograph was taken at night, and you look and see how much of the vehicle you can see.*" **Transcript dated 11th February 2009, pg 18 lines 1 – 16**

27. The court moved to another spot and counsel for the second appellant again requested that the vehicle be positioned in accordance with LG8 to which the trial judge responded:

> "*Well that presupposes that LG8 is somehow different from how the car is positioned. I am not entertaining any argument at this stage. The car, the closest and clearest photographs we have in order to position the car is LG1, which shows the door jammed against the wall, and LG3 which shows something similar, and that was done. And, therefore, in the circumstances, we leave it at that. The jurors have the photographs and, no doubt, you could invite them at the appropriate time to draw whatever conclusions you want***." Transcript dated 11th February 2009 pg 22 line 44**

The vehicle was not repositioned according to LG8 at any point.

THE FIRST APPELLANT

Ground 1

Identification Issue

28. Mr. Singh submitted that an identification parade should have been conducted in respect of the first appellant and that the holding of a verification procedure was, in all of the circumstances, unfair.

29. He referred to the decision of ***R v Fergus [1992] Crim. L.R. 363***, in which the Court of Appeal stated:

> *"…the case where the Complainant had seen the assailant once or on a few occasions before might well be treated as that of an identification rather than recognition."*

30. Counsel also referred the court to pg. 7 of the judgment where it was stated:

> "*Their Lordships consider that the principle stated by Hobhouse L.J. in **Reg. v Popat [1998] 2 Cr. App. R. 208, 215**, that in cases of disputed identification "there ought to be an identification parade where it would serve a useful purpose", is one which ought to be followed. It follows that, in a capital case such as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness."*

31. He also referred the court to the case of ***Ronald John v The State*** ***Privy Council Appeal No. 66 of 2007***, in which the Privy Council reiterated the principle in ***R v Popat [1998] 2 Cr App R208, 215*** that an identification parade should be carried out where it would serve a useful purpose. Their Lordships stated at paragraph 14:

> *"As a basic rule, an identification parade should be held whenever it would serve a useful purpose. This principle was initially stated by Hobhouse LJ in* ***R v Popat [1998] 2 Cr App R208, 215*** *and endorsed by Lord Hoffmann giving the judgment of the Board in* ***Goldson & McGlashan v R*** ***(2000) 56 WIR 444****. Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so, for example en route to a robbery). Often, indeed usually, that is the position and, when it is, an identification parade is not merely useful but, assuming it is practicable to hold one, well-nigh imperative before the witness could properly give identifying evidence. In such a case, Lord Hoffmann said in Goldson, "a dock identification is unsatisfactory and ought not to be allowed," although he added: 'Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade.'"*

32. In ***Ronald John v The State***, it was contended that the failure to hold an identification parade vitiated the fairness of the trial to such an extent that the appellant's conviction ought to be quashed. It was held that an identification parade should have been conducted since the case was one of capital murder. Nevertheless, it was also held that this failure did not occasion a miscarriage of justice. At paragraph 27, the Court reasoned as follows

> *"It by no means follows, however, that the failure to hold a parade here can be regarded as having caused a miscarriage of justice. Rather, for all the reasons already rehearsed, their Lordships find themselves quite unable to reach that conclusion and on the contrary regard the position here as a fortiori to that arrived at in* ***Goldson****. Similarly their Lordships do not see this case as comparable to Pop or Pipersburg. Realistically, there was not the same possibility of mistaken recognition in this case as in each of those and the summing up in this case was altogether fuller, fairer and more favourable to the accused than in either of those."*

33. Counsel highlighted the fact that in ***Ronald John v The State***, the witness gave very detailed information to the police which led to the arrest of the suspect, including a detailed description, the suspect's street name which was not overly common, and information about

the suspect's whereabouts. He therefore submitted that the minimal information given to the police in the instant case by Quamina justified the need for an identification parade. The description that Quamina had given gave to the police was, a slim, brown skinned man around six feet tall with a chip in his front tooth and corn rows. Quamina also told the police that he knew the first appellant as "Bellies".

34. In response, Ms. Seetahal for the State opined that on the facts of the instant case, where Quamina knew the appellant and the appellant did not deny that he knew him, an identification parade would have served no useful purpose.

35. She drew the Court's attention to Quamina's evidence of previous interaction with the first appellant including Quamina's visit to his home a week before the incident when he spent two to three hours in the company of both appellants. Also on 28th July 2004, at the second appellant's home, he again spent time in the company of both appellants. Later he also saw the first appellant briefly at the window.

36. At the verification procedure Sergeant Koon Koon asked the first appellant if he had seen the witness before and he said *"I met him once before by Garvin Sookram's house"*, admitting that he had met him on one occasion.

37. Ms. Seetahal relied on the following dictum in ***Brown and Isaac v The State [2003] 62 WIR 440*** in support of her submission that an identification parade was unnecessary:

> *"[**16**] An identification parade is not necessary, and may indeed be positively undesirable, when it is accepted that the accused is a person well known to the identifying witness. In such a case, a parade will establish the uncontroversial fact that the witness is able to identify the person he knows, but will not advance the question of whether that person committed the offence; see **Goldson and McGlashan v R** **(2000) 56 WIR 444** (23 March 2000). On the other hand, if the witness claims only slight acquaintance with the accused or the accused denies that he is the person whom the witness claims to know, an identification parade may serve a useful purpose and should be held."*

She submitted that the dispute in the instant case was not whether the witness was mistaken in his identification of the appellant but whether he was mistaken in his recognition. There

was no evidence from the first appellant to contradict Quamina knowing him or that they had spent approximately four hours together on the day of the incident as well as some considerable time two weeks previously. On the prosecution case the first appellant admitted meeting Quamina at least once without giving any details of the circumstances.

38. We are in full agreement with and endorse the dicta in the cases cited to us by both sides on this ground. In applying them to the instant facts we find that this is a case of recognition. Even though on his evidence, Quamina had met the first appellant on only two occasions, both occasions were proximate to the pertinent events, in fact one of them was earlier on the day in question. On each occasion he had spent a lengthy period in the company of the first appellant, having much interaction with him which from Quamina's evidence must have been face-to-face. We also must take into consideration the fact that on the prosecution case, the appellant admitted that he knew Quamina having met him once before at the home of the second appellant. It cannot escape our attention that on Quamina's evidence he had met the first appellant at the home of the second, therefore, the first appellant's admission confirms at least one of the meetings of which Quamina spoke. Nothing in what the first appellant said denied or contradicted the duration and nature of the meeting as outlined by Quamina.

39. It is our view that in all of the given circumstances, the failure to hold an identification parade, and to instead adopt a verification process in lieu of it occasioned no injustice or prejudice to the first appellant and a *fortiori* no miscarriage of justice occurred.

40. Two further matters must be addressed before concluding this ground. Firstly, the pronouncements of Lord Hoffman in ***Goldson & McGlashan v R*** cannot be excised from its context and made to stand independently as counsel for the appellant sought to do in his arguments before us. They would only be relevant where there is a degree of equivocation on the issue of the familiarity of the witness with the suspect. There was no such uncertainty on Quamina's evidence. Secondly, counsel directed us to the evidence of Sergeant Koon Koon, the officer conducting the verification exercise. During cross-examination, he was asked whether the information he received on the first appellant's description coincided with

the man he saw in the cell. He responded by saying "not necessarily" and that the description was "somewhat different". Despite several attempts in cross-examination to discover what the inconsistency was, Sergeant Koon Koon eventually said that he could not recall what detail did not coincide. The end result was that there was no explanation of the discrepancy. In the absence of such detail, we are unable to evaluate whether these inconsistencies were de minimis or of consequence and we are not prepared to speculate on their importance.

41. We have observed from a careful reading of the evidence, that while Quamina in his report to the police immediately after the events described the first appellant as, among other things, having a cornrow hairstyle, the evidence is that at the verification procedure some five months later, he wore his hair in a low hair cut.

42. In any event, the learned judge directed the jury on this issue in the following manner:

> *"Now Koon Koon in his evidence stated among other things, and you will have to form your own view of Koon Koon, because I must tell you, upon a full assessment of his evidence Koon Koon, for a senior officer, you may wish to draw the conclusion that really his evidence fell short of what is expected of an officer of that rank. He was charged with the responsibility of conducting this procedure whereby the witness would be confronted with the accused and he would say whether this is the person whom he had seen on the night or not.*
>
> *Koon Koon tells you as should happen, the witness repeated the report that he would have made to the police that this man was there on the 28th and what he saw and did and so on. He can't recall the report, he has no note of it.*
>
> *Koon Koon also testifies in relation to the identification procedure that the witness gave him a description of the accused, the suspect as he would have been then , and it didn't coincide on all points, but he has no note, he can't tell you where it didn't coincide or was it that it didn't coincide because of the difference in the haircut, was it a difference in complexion--he can't tell you and that is why I say his evidence falls short of what is to be expected of a senior officer and of an officer who has conduct of a procedure such as this. So in the context of the evidence, of what the police had at that time, that is, the report as given by this man, Koon Koon, saying that there is a difference, nobody else says that, Quamina maintains there is the description, slim brown skinned, about 6 feet, chip tooth, Coa said it as well. That is why I say you have to make what you can of Koon Koon.*

> *In the circumstances, as I said before, the Defence is saying and ID parade should have been held. Now the purpose of an identification parade is to test the accuracy of a witness's recollection of the person whom he says he saw commit the offence, or in this case the offences. And, ladies and gentlemen of the jury, at the end of the day you will determine whether based on the evidence as given by Sean Quamina whether you think it would have been fairer to the accused to hold a parade as opposed to having the witness come there and say this is the man."* Transcript dated 26th February 2009, pg 38 at line 14]

43. Had this been a case in which an identification parade should have been and was in fact conducted, this matter would have been of some concern. However, in the particular circumstances we cannot find that it occasioned any prejudice to the appellant. In the above premises this ground of appeal cannot succeed.

Ground 2

Statement given by the second appellant.

44. Mr. Singh submitted that the judge's directions on the evidential value of the out of court statements made by both appellants were erroneous and/or misleading. All the statements made by each appellant are set out immediately below.

45. The first appellant when initially informed that there was a warrant for his arrest for murder and firearm offences was cautioned and he replied *"Let me see who will point me out for murder."* Later when the complainant told him that he was investigating the murders of Kerwyn Hinds and Kerwyn Cyrus and he had information that implicated him, the first appellant replied, *"Boss, me ent know nothing about these murders."* At the verification procedure conducted by Sergeant Koon Koon, when Quamina identified him as the man who shot Kerwyn Cyrus, he replied *"You see me shoot Kerwyn?"*

46. With respect to the second appellant, the complainant told him he was investigating the murders of Kerwyn Hinds and Kerwyn Cyrus and he had information implicating him. After being cautioned, the second appellant replied, *"Boss, that man was my friend."* He also told the complainant that at around 7:30pm on the night in question he was liming in an alley off

Granado Street with his friend Nigel Hinds, alias Dog Man, a Rastaman, and another man whose names he did not know. He said that while there he heard several loud explosions and he got shot on his left shoulder. He said he was treated at Port of Spain General Hospital but left because he feared for his life. While at hospital, he was interviewed by Corporal Ramjit and gave a similar account.

47. On 31st July 2004, the complainant informed the second appellant that he had evidence to charge him with the murders he was investigating. The appellant replied "*Boss, I want to talk to somebody big."* This led to nothing further.

These are the relevant statements.

48. Counsel referred to pg 13 of the judge's summation dated 26th February 2009 at lines 23 – 43, where she dealt with the statement of the appellants. She directed:

> "*[…] the accused answers provide evidence of their reaction and attitude when questioned about the allegations that they now face. However, they do not amount to evidence of the facts stated by the accused. That is because their answers were not made on oath and have not been repeated on oath. Now, the answers they gave are part of the evidence in the case as I said before. The accused rely upon these answers and you will come to that portion of the summing up where you will look at them carefully, analyse them, assess them and determine what they meant in the context of the evidence in the case. But, you bear in mind, when you are assessing those out-of-court statements that they were not tested by cross-examination, they were not given by oath and you will determine at the end of the day what weight you give to them, and generally, their place in the context of the trial*."

The trial judge gave a direction to similar effect on 2nd March at pg 63.

49. Mr. Singh referred to the decision of ***R v Sharp (1988) 1 All ER 65*** to impugn the foregoing direction. In ***R v Sharp***, Havers LJ, approved the direction to the jury formulated in ***R v Duncan 73 Crim. App. R. 359***. There the court held that where a mixed statement is under consideration by the jury in a case where the defendant has not given evidence, the jury should be told that the whole statement, both the incriminating parts and excuses, must be considered in deciding where the truth lies. It was further held that where appropriate, the

judge may, and should point out that incriminating parts are likely to be true, whereas excuses do not have the same weight.

50. Counsel submitted that the second appellant gave a mixed statement while the first appellant gave wholly exculpatory statements, therefore, there was no need for the impugned direction with respect to the first appellant's statements. He contended that the ***Duncan*** direction should have been given with respect to the second appellant only and had this been done, those statements had the potential of affecting Quamina's credibility. He argued that if Quamina's credibility had been adversely affected on the issue of the participation of the second appellant, then it could have similarly been affected with regard to his identification of the first.

51. In response Ms. Seetahal referred to the very passage criticised by Mr. Singh. She emphasised line 31 – 32 where the judge stated the following:

> "*Now, the answers they gave are part of the evidence in the case as I said before*."

52. She also referred the court to the judge's summation dated 26th February 2009 pg. 7 line 25 – 30:

> "*Now, there are two accused persons before you, and I will direct you as to how you are to treat with the cases. You must consider the case against each accused separately. The evidence is different and therefore, your verdicts need not be the same with respect to each accused*."

53. She submitted that there was no reason to expect that the jury would not have heeded the directions of the judge and dealt with the first appellant's case separately purely on the issue of identification. The likelihood of the treatment of the second appellant's statement adversely affecting the case against the first appellant, was too remote especially as the first appellant had not given evidence nor otherwise adopted the second appellant's statement.

54. While the second appellant admitted being at the scene, the test of whether a statement is "mixed" turns on whether it contained an admission significant to an issue in the case. In ***R v Papworth and Doyle*** ***[2007] EWCA Crim 3031***, the court stated at para. 15:

> *"The admission in interview of an ingredient of the offence will often constitute a significant admission for the purposes of the Garrod test, but not necessarily. The fact that a defendant on trial for murder accepted in interview that the victim was dead is not likely to be a significant admission.* ***Likewise, in the absence of an admission of an ingredient of the offence, it will be more difficult to conclude that the admissions which were made convert the statement into a mixed statement.****"* [Emphasis ours]

55. The second appellant's presence at the scene was not in issue, and cannot be regarded as being *significant* to any issue in the case. It is not admission of any ingredient of the offence. In ***Junior Reid v R*** ***[1990] 1 AC 363***, the appellant gave a statement admitting to being present when a murder took place, however he denied taking any part in it. The Privy Council stated at pg 396:

> *"But this caution statement was essentially an exculpatory statement.* ***True enough it contained admissions of the defendant's presence at the scene*** *where the shooting took place and his knowledge of the area,* ***but it set out in considerable detail the innocent part which the defendant said he had played.****"*[Emphasis ours]

56. It is clear that the statements of the second appellant were exculpatory to any ingredient of the offence of murder. There was no necessity for the judge to direct the jury in the terms of ***R v Duncan***. On a perusal of her directions on the issue of the statements of the appellants, we find no justification for the complaint that her directions were erroneous or misleading and are satisfied that the jury would have understood the proper and permissible effect of each statement as it pertained to its maker and his co-accused. The judge's directions on the statements did not deprive the first appellant of any favourable consideration.

Accordingly, this ground of appeal fails.

Further grounds

57. At the end of Mr. Singh's submissions, he indicated that he would adopt the grounds of the second appellant in so far as they were relevant to the first.

THE SECOND APPELLANT

Ground 1 *(Relevant to the first appellant)*

Visit to the *locus in quo*

58. The ground as argued before us evolved into a contention which was substantially different from that in the written submissions. In any event we are of the decided opinion that the exercise conducted by the trial court was not a reconstruction and therefore not governed by the learning on that matter. It was nothing more than a visit to the *locus in quo*.

59. Mrs. Elder submitted that during the visit to the *locus* the judge refused the defence request to reposition the vehicle as depicted in photograph LG8, and that from that view there would have been no line of vision into the alley. She also complained that the judge trivialized this point by telling the jury that the photograph was taken at night.

60. In response Ms. Seetahal asserted that there is nothing to suggest that the position of the vehicle in photographs LG1, 3 and 4 was any different from LG8 and in any event LG1 and 3 gave a close up view of the vehicle as it was discovered by the police on the night of the incident. She submitted that the judge's position was supported by the evidence of WPC Ganesh who testified that photograph LG8 depicted the vehicle from a distance and from the opposite direction and that in the absence of any evidence on an alternative position for the vehicle, no useful purpose could be served by attempting to position the vehicle in accordance with LG8 as the vehicle was shown at a distance and only partially visible. She argued that it was only Quamina who could properly give the position of the vehicle on the night in question and he did so when he agreed with the eventual position in which the car had been placed under the direction of the court.

61. We note that defence counsel were allowed to voice their objection on record about the positioning of the vehicle and the judge did not in any way inhibit their opportunity to do so. There was also extensive cross-examination about the position that Quamina held at the time that he had claimed to made his various observations. Further the jury had the benefit of defence counsel's vigorous closing addresses on the issue. The judge also in her review of the evidence drew the jury's attention to the point that was being made by Counsel, that is, if the car had been positioned as it appeared in LG8, Quamina could not possibly have seen into the ally and observed what transpired there and that whatever view he had it would have been adversely affected by the poor lighting conditions.

62. The appellant had the full and complete benefit of having Quamina cross-examined on the issue and of the jury considering the contentions on his behalf. He suffered no prejudice by the car not being repositioned or by the jury not standing at the point asked by defence counsel. The utility of the visit to the *locus* was to allow the witness to point out *where he says he was* at the material time. Whether he was in fact there, or at another position, was a matter of fact for the jury to determine and any repositioning of the vehicle would not have been dispositive of that issue.

63. On this ground Mrs. Elder also submitted that the positioning of the vehicle had to be based on objective physical evidence. She complained that the car had been eventually placed on the judge's directions and this was wrong because no measurements of the vehicle's position had been taken by the crime scene experts and that the photographs could not accurately depict the placement of the vehicle. She conceded that from the record it was clear that even though the court had initially, with reference to the photographs, directed the placement of the vehicle, Quamina confirmed that it had been placed correctly.

64. In response, Ms. Seetahal opined that it was for the witness, Quamina, to say if the scene was staged in accordance with his recollection and that the judge had simply facilitated the process by putting the vehicle in the general area and leaving it to the witness to make any necessary adjustments.

65. We were referred to ***M v Director of Public Prosecutions*** ***(2009) 2 Cr. App. R 12,*** a case which provides guidelines for the proper conduct of a view of a crime scene. As in the instant case, there was a misconception that the court had engaged in a reconstruction when all that had taken place was a viewing. However we find the guidelines useful. At paragraph 13, the court held:

> *"What is critical before any court embarks upon any view is that there is absolute clarity about precisely what is to happen on such a view, about who is to stand in what position, about what (if any) objects should be placed in a specific position and about who will do what. None of this should happen at the scene of a view, which should be conducted without discussions for the very reasons identified in this case, namely that otherwise not all involved can participate."*

We endorse the procedure advised in ***M v DPP*** and urge trial judges who propose to engage in visits to the *locus in quo* to follow this guidance. This would avoid differences being canvassed for the first time at the *locus* and would give the trial judge and counsel on both sides to hammer out the procedure to be adopted on the scene. Any objections can be made and ruled on in the courtroom, and if they need be made at the scene, they would simply be formal objections read into the record and not involve further argument and rulings as these would already have been dealt with.

Accordingly, this ground of appeal fails.

Ground 2

Misdirections on the second appellant's out of court statements

66. Mrs. Elder, S.C. submitted that the trial judge erred when she directed the jury that the utterances of the second appellant, while evidence of his reaction and attitude when questioned, did not amount to evidence of the facts stated because the answers were not made on oath and were not repeated on oath. Counsel referred the Court to ***R v Sharp*** and ***R v Duncan***, authorities which have already been considered earlier in this judgment.

67. Ms. Seetahal in response asserted that while the judge did err, her directions in the round taken together with the caveat in ***R v Sharp***, obviated any prejudice to the appellant. The judge, having told the jury that the utterances were evidence in the case though not evidence of the facts, still left them to be considered and gave otherwise helpful directions in respect of their treatment.

68. She referred the Court to ***R v Hampson*** ***(2004) EWCA Crim. 3100***. In that case the judge did not expressly direct the jury that what the accused said in interview was part of the evidence of the case. The court held that even though the trial judge did not expressly tell the jury that they should treat all of the interview as evidence in the case, such a failure could not make the conviction unsafe. The Court held that once the judge made it clear to the jury throughout that they should take into account the contents of the interview, the conviction was safe. Counsel argued that in the instant case the judge did even better than in ***R v Hampson*** in that the she told the jury that the statements made by the appellant was evidence in the case. She submitted further that the judge made it clear to the jury that they were to take the contents of the interviews into account in deciding where the truth lay.

69. As already stated, we are of the view that the second appellant's statements were exculpatory, and the judge's directions on them did not effect prejudice to the appellant.

Accordingly, this ground of appeal fails.

Ground 3

Misdirections on Principles of Joint Enterprise

70. Mrs. Elder, S.C. submitted that the learned judge misdirected the jury on the principles of joint enterprise. The learned judge directed the jury as follows:

> *"Another direction that I move on to is with relation to joint responsibility. Now, the Prosecution's case is that these two accused persons committed these offences together in each other's company. No doubt you recall the evidence of Sean Quamina to the effect that he was told to wait on these men. He parked his car at the entrance to the track and he saw the four men coming out. "Richie" in front,*

that's Kerwyn Hinds, the two accused behind him and Kerwyn Cyrus, his friend "Ox" at the back, when suddenly, Accused No. 2 turns and fires at Cyrus and he said he didn't go too far, he just fell to the ground and then he saw "Beam" shooting in his direction as he puts it. So that it is on the basis of that evidence, if you accept it, I give you this direction with respect to joint responsibility. The Prosecution's case is that the accused committed these offences together. Where a criminal offence, or criminal offences are 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 word "plan" and "agreement" do not mean that there has to be any formality about it, that is, you need not have any evidence before you that they met together on so and so day, and on so and so hour, and agreed that this is what they would do. 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 not or a wink, or a knowing look. An agreement can be inferred from the behaviour of the parties. When we come to analyse the evidence of Sean Quamina, you would recall that when Mrs. Latchoo asked him to give a chronology of events, what he saw, who shot first, he said he saw "Bellies" turn and shoot Cyrus who was behind him. And he said what happened next, he said when "Beam" started shooting in his direction and you would recall that "Richie" was also in the direction of the witness. So that in assessing the evidence, you may wish to ask yourself well if Keron Lopez was acting on his own, he just suddenly spun around and shot at Cyrus, then you would have expected some sort surprise or some sort of reaction from Accused No. 1 other than his lifting his shotgun and then firing in the direction of Richie. But it is a matter for you and that of course, is dependent upon whether you accept the evidence of Sean Quamina. As I said before, 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, however great or small, to achieve that aim." **Transcript dated 26th February 2009, pg. 8 – 9.**

71. Counsel asserted that the prosecution case was that the appellants were participants in a joint enterprise to rob and the second appellant was a secondary party in Kerwyn Cyrus's killing, the first appellant being the principal. She submitted that the jury should have been directed on the liability of secondary parties in relation to the second appellant.

72. We have considered Counsel's submissions and are constrained to point out that they are misconceived. Any reasonable interpretation of the prosecution case would reveal that it was not that a joint enterprise to rob that went awry, but that there was a joint enterprise to kill the victims, the plan to rob being a ruse to lure Hinds and Cyrus to the scene of their death. It

can be reasonably inferred that they were quite prepared to be part of a criminal enterprise together with the appellants involving the use of firearms and that this was ostensibly the reason for their going into the alley. There the appellants turned suddenly on the victims and carried out the real plan.

73. The nub was forecast in the closing address for the prosecution when State Counsel said as follows:

> *"[…] one of the issues in this case that you have to consider is the issue of joint enterprise. The State's case is based on that principle known as joint enterprise. The learned trial judge, at the appropriate stage, will give you directions. When we say joint enterprise we mean the two accused were acting in concert, they were acting together. As I told you,* ***we don't have to establish when the plan was forged to kill Cyrus and Hinds.****"* [Emphasis ours] **Transcript dated February 16th 2009**.

74. The judge at an Ensor hearing also clarified that the State's case was that of a joint enterprise to kill, not to rob. The following exchange between Court and defence counsel is instructive:

> *"Counsel: Well, My Lady, given the fact that according to the evidence of the witness, they were all going* ***on an enterprise to rob someone****, or going out with firearms please, My Lady…*
>
> *Court:* ***Now, you see, the thing is this, we cannot confuse the issues****. If you would recall during the course of your submissions on the no-case submissions,* ***you pointed out, on the issue of what was the enterprise, that regard could not have been had to that plan to rob this man****.*
>
> *Counsel:* ***Yes, because the enterprise has to be to kill the individuals, yes****.*
>
> *Court: Very well […] Seemingly, this incident arose on the spur of the moment, there was no trigger of it, at least no obvious trigger* ***[…]"*** [Emphasis ours] **Transcript dated February 16th 2011 at pg. 56**

75. The judge directed the jury that an agreement could arise on the spur of a moment and nothing need be said and that an agreement could be inferred from behavior. She then juxtaposed the cases for the prosecution and defence saying:

> *"He was asked […] 'Who did you see fire first?' He said "Bellies". 'What did you see after that?' And his answer was "I see "Beam shooting in my direction […]' So what he is saying here, and this is critical as well, to your determination of the issues in this case, because the Prosecution's case is that these two men*

were acting in concert. So you have to examine the evidence. They are walking in the track, "Bellies turns around, on Quamina's account, and shoots at Cyrus. Then he says […] he saw Accused No. 1 shooting in his direction, and then "Richie turns around and shoots. So on the basis of that evidence, the Prosecution is saying they were acting together. They were acting together because when Accused No. 2 shoots at Cyrus, Accused No. 1 who might have been expected, if he was totally shocked and surprised at what was happening here, may have done something to evince that surprise or shock. But in this account which the Prosecution have proffered to you, and asked you to believe, Accused No. 1 then starts to shoot in the direction of the witness […] Accused No. 1 of course disputes that he had any shotgun and was firing at anybody, he says he was there with Hinds, two other friends, shooting erupted, he got shot […] it was dark and he does not know who was shooting […] you will determine what you make of it ultimately." **Transcript dated 2nd March 2009 pg. 32 – 33**.

76. We have perused the judge's summation and we are of the view that her directions on the principles of joint enterprise were adequate. She directed the jury that where criminal offences are committed by two or more persons each of them may play a different part, but if they act pursuant to a joint plan or agreement to commit the offences, they are each guilty. **Archbold Criminal Pleading, Evidence and Practice 2009 para. 18 – 15** provides:

> *"Where two or more persons embark on a joint enterprise each is liable for the acts done in pursuance of that joint enterprise. That includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise."*

77. The judge directed the jury on joint enterprise in clear terms. She presented the prosecution case and the defence case and clearly left the determination of the issue to the jury. This was not a case of principal and secondary party but one of what we may term "pure" joint enterprise – both appellants having the intention to kill or cause grievous bodily harm to Hinds and Cyrus and acting in furtherance thereof. We therefore find no merit in Counsel's submissions on this ground.

Accordingly, this ground of appeal fails

Ground 4

Failure to give Turnbull directions

78. Mrs. Elder submitted that although the second appellant admitted his presence on the scene, this did not disentitle him to a ***Turnbull*** direction, since at the trial challenges were made to Quamina's credibility and reliability. She contended that the jury should have been directed to first consider whether Quamina was an honest witness, and if they found that he was, then to consider the further possibility of him being mistaken.

79. Counsel referred to the judge's summation dated 26th February 2009 pg. 49 – 50:

> "*[…] I told you as well that although Accused No. 1 says he was there, he puts himself on the scene, he disputes the account as given by Quamina but relies upon the issue of visibility in the track to invite you to consider that in fact Sean Quamina, either was lying, he made up the story against him or he would have been mistaken because the visibility was so poor that he could not in the track to have seen him with a gun and so on*."

80. Counsel referred to ***R v Thornton (1995) 1 Cr. App. R 578***. In that case the appellant agreed that he had been present during part of an attack, but denied taking part in it. The court held that in the circumstances of the case a mistaken identification was possible, therefore the judge ought to have given a full ***Turnbull*** direction. Counsel highlighted the following reasons that a ***Turnbull*** direction was warranted in the instant case: the attack took place at night; there were poor lighting conditions; Quamina had a fleeting glance or sighting in difficult conditions; his distance from the events; the speed of the incident; the trauma he would have suffered; the disputed line of vision; the absence of gunpowder residue on the second appellant's hands and clothing; the absence of motive; that Quamina was a witness with an interest to serve; Quamina's failure to mention the second appellant's name to police on two earlier occasions; his admitted lies; the second appellant's mixed statement; the use of seven different firearms at the scene and Quamina's admission that he had been smoking marijuana.

81. In response, Ms. Seetahal opined that a ***Turnbull*** direction is intended primarily to deal with the ghastly risk run in cases of fleeting encounters per Widgery C.J. in ***R v Oakwell [1978] 1***

WLR 32. She also referred the court to ***R v Slater [1995] 1 Cr. App. R 584***. In this case the circumstances were distinguished from those in ***R v Thornton*** and it was held that a full ***Turnbull*** direction was not required where an appellant admitted presence at the scene but denied involvement in the crime. It further held, that a full ***Turnbull*** direction is required where there is a chance of mistaken identity, i.e. where the appellant disputes his presence at the scene of the crime. Rose L.J. stated at pg 589:

> *"Where however there is no issue as to the defendant's presence at or near the scene of the offence, but the issue is as to what he was doing, it does not automatically follow, in the judgment of this Court, that a Turnbull direction must be given. Whether such a direction is necessary will depend on the circumstance of the particular case. It will be necessary where, on the evidence, the possibility exists that a witness may have mistaken one person for another., for example, because of similarities in face, build, or clothing between two or more people present."*

82. Counsel submitted that a full ***Turnbull*** direction was not necessary in the instant case because the appellant did not dispute his presence at the scene and Quamina had met him prior to the killings and on the day in question spent several hours observing him in good light. Additionally, their meeting on the day of the shootings was prearranged and consequently this was not a "fleeting encounter" as described in ***R v Oakwell (supra)***. She submitted that in any event, the judge gave proper directions on how to approach the identification of the second appellant. She referred the Court to the portions of the summation where the judge gave directions on distance, lighting, Quamina's reliability as a witness and the fact that Quamina may be a convincing but mistaken witness and submitted that these directions were sufficient to guide the jury and the appellant could not be said to have suffered any prejudice.

83. The judge also highlighted the weaknesses in Quamina's identification evidence. At pg. 26 of Transcript dated 26th February 2009 the judge directed:

> "*Now, I want to say in relation to Accused No. 1, that although he puts himself in the track, he is challenging the account as given by the witness. He is saying first of all, its's a fabrication against him, he is making it up, he won't be in a position to see, in any event, it was too dark in the track, although he, Accused No. 1 was there, he never participated in any killings, he doesn't know anything about it. And when you come to assess the evidence of the lighting in the track […] you*

bear in mind that that is the challenge by Accused No. 1 to the evidence. Now I must remind you of the following specific weaknesses which appeared in the evidence of identification. First of all with respect to lighting. Now, Sean Quamina said that there was a light on at the shop at the end of the track […] he said there was a light to the middle of the track which was reflecting on the track itself, and Coa said that there were also lights reflecting from a house to the left […] So in assessing the evidence you have to determine whether the lighting was sufficient so as to have allowed Sean Quamina to see, to give you the details that he did. As well you would recall one of the photographs showed […] some overhanging branched toward the middle of the track and the photographer said in particular that those branches would have contributed to the darkness in the track. So that is a matter for you at the end of the day to determine whether in those conditions Sean Quamina was able to see […] Another weakness in the identification evidence is that of the period of observation. Now Quamina says that he spoke to the men and they told him to wait. And the period of time that he would have observed them walking from the top of the track to where the incident started was 10 – 12 seconds. And, of course, he said when he heard the first "bow", that's the sound he heard, he got out of the car, he stood up by the post and he looked. His words were he "froze for five seconds." So in all, that would be a period of 15 – 17 seconds […] You must also take into account the fact that the witness Quamina would have been frightened. He was shocked. He said it in evidence, he was shocked, he was frightened […] So you have to put that in the mix. Could he be mistaken as to anything […]."

84. We are satisfied that the judge gave ample assistance to jury on the issue of the second appellant's identification. In particular, the judge made note of the fact that the appellant admitted presence in the alley but nonetheless went on to identify those weaknesses in Quamina's evidence capable of supporting the defence. We are therefore of the view that the judge's directions on Quamina's identification evidence were more than adequate to focus the jury on the pertinent issues.

Accordingly this ground of appeal fails.

Ground 5

Failure to direct on Absence of Motive

85. Mrs. Elder submitted that because there was evidence of friendship between the second appellant and Hinds, the jury should have been directed that although motive is not an

element of a crime and the prosecution need not prove it, they should nevertheless consider the second appellant's lack of motive to kill Hinds. She argued that in the circumstances of this case, the absence of motive is a relevant factor in determining guilt or innocence and the weight to be given to it was a matter for the jury. She cited ***R v Lewis (1979) 2 SCR 821*** in which the court held that where motive was not proven by the Crown and absence of motive was not proven by the defence, there was no clear obligation in law to charge the jury on motive. Their lordships stated at pg 843:

> *"Applying the propositions which I have outlined earlier, it will be seen that motive was not proven as part of the Crown's case, nor was absence of motive proven by the defence. There was therefore no clear obligation in law to charge on motive. Whether or not to charge became, therefore a matter of judgment for the trial judge and his decision should not be lightly reversed."*

86. Ms. Seetahal responded that as in ***R v Lewis*** neither motive nor lack thereof was proven in the instant case and therefore it was a matter for the judge's discretion whether such a direction needed to be given. She further submitted that the exercise of a judge's discretion should only be disturbed if there had been a failure to exercise any discretion, or to take into account a material consideration or had an immaterial consideration been taken into account and that none of these circumstances arose, nor were they asserted by the second appellant.

87. She added that even though the judge was not duty bound to direct on motive, she did draw the jury's attention to the fact the second appellant and the deceased were friends, thus highlighting the second appellant's lack of obvious motive.

88. The judge said as follows:

> "*Accused No. 1 then replies […] 'Boss, that man was meh friend'. Now you know that the Defence is saying that Hinds was the friend of Accused No. 1, why then would Accused No. 1 take a shotgun and shoot and kill him? Why would he, with the other man, Accused No. 2, as Quamina says, participate in the killing? Well Ladies and Gentlemen of the jury, the fact of the matter is, that if you accept the evidence of Sean Quamina you may act on it, the State does not have to prove motive […] it is for you, having heard what the accused said to the officer here, when you come to assess his case, his challenge to the prosecution's case, to determine whether you accept that that is what he meant […] that he (Hinds) was his friend and therefore, he did not participate in this, he doesn't know what*

happened, it was dark, all he knows is that he got shot." **Transcript dated 27the February 2009 pg 42, line 14 – 19.**

89. We accept that there will be circumstances in which a judge, in order to properly assist a jury, should direct them to consider an accused's lack of motive. This might well arise where on the evidence there is a long or intense relationship with features that would necessarily cause one to infer that one party was unlikely to desire to harm the other without clear reason so to do. We do not consider that the sum total of the evidence of the relationship between Hinds and the second appellant warrants such an inference. The only information that is to be gleaned from the evidence is that they were willing to be partners in criminal activity, to be part of a world in which lethal weapons played an integral part. The saying that *"there is no honour among thieves"* may well be apposite.

This ground is without merit.

Ground 6

The Judge erred when she failed to uphold the submission of no case to answer.

90. At trial, defence counsel made a submission of no case to answer. The submission addressed two issues. It was argued that the prosecution had failed to disprove that the second appellant was acting in self-defence when he shot Hinds and that there was no evidence to suggest an agreement between the first and second appellants to kill Cyrus.

91. In overruling the submission, the judge ruled that there was no requirement in law that there be anything said or done by either accused at the scene to evidence a plan or agreement to act as they did. She referred to ***R v Clarkson;*** **[1971] 3 All ER 344, 347** where it was held:

> *"Mere continued voluntary presence at the scene of a crime, even though it was not accidental, does not of itself necessarily amount to encouragement, but the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might in some circumstances afford cogent evidence upon which a jury would be justified in finding that he willfully encouraged and so*

aided and abetted; but it would be purely a question for the jury whether he do so or not."

92. She went through the chronology of events from the second appellant initially shooting Cyrus to him firing at Hinds. She then ruled that it was the function of the jury to determine from those facts and circumstances whether the accused were operating according to a plan. Having concluded that the issue of joint enterprise was to be left to the jury, the judge did not go further to make any ruling in respect of the self defence limb of the submission. From her assessment of the case in her ruling, it appears that she rejected that limb of the submission. **See transcript dated 6th February 2009**.

93. Mrs. Elder submitted that the facts of ***R v Clarkson*** were distinguishable from the instant case. She submitted that ***R v Clarkson*** involved the rape of an eighteen year old girl and in that factual scenario one would expect an individual who was present to offer some sort of dissenting view or assist the victim. However in the instant case, what occurred was a spontaneous act with the first appellant turning and firing at Cyrus. After this, the second appellant and Hinds were seen shooting. Counsel submitted that this scenario made it difficult for there to be any cogent evidence of an immediate expression of dissent as raised in ***R v Clarkson***.

94. On the self defence issue Counsel argued that Quamina's evidence was that after the first appellant fired in Cyrus' direction, the second appellant fired a gun in his (Quamina's) direction and the second appellant and Hinds were firing their guns at the same time and based on this evidence, the issue of lawful self-defence arose and no evidence was led by the state to negate it.

95. Ms. Seetahal referred us to the judge's direction on joint responsibility, where she said:

"*Now the Prosecution's case is that these two accused persons committed these offences together and in each other's company. No doubt you recall the evidence of Sean Quamina that he was told to wait on these men. He parked his car at the entrance of the track and he saw four men coming out. "Richie" in front, that's Kerwyn Hinds, the two accused behind him and Kerwyn Cyrus, his friend "Ox" at the back, when suddenly Accused No. 2 turns and fires at Cyrus and he said he*

> *did not go too far, he just fell to the ground and then he saw "Beam" shooting in his direction, as he puts it. So that it is on the basis of that evidence, if you accept it, I will give you this direction with respect to joint responsibility*." **Transcript dated 26th February pg 8, at line 33.**

96. She referred to ***R v Coney and others (1882) 8 QBD 534*** in which it was held that aiding and abetting the commission of a crime requires that the accused intentionally encourages the perpetrator. Such encouragement can be evidenced by a person being voluntarily and purposefully present witnessing a crime, and not offering his dissent in circumstances in which he may reasonably be expected to. In ***R v Clarkson*** which applied ***R v Coney and others***, it was held that a person's voluntary and purposeful presence may in some circumstances be evidence of his willful encouragement. She argued that the question of willful encouragement is a question of fact for the jury to determine whether the accused's behaviour amounted to encouragement and to aiding and abetting and that in this case there was evidence from which the jury could make this determination and the trial judge could only be able to remove the issue from them if it was so manifestly unreliable that no reasonable jury could safely convict on it.

97. Counsel referred to the case of ***Taibo v R 48 WIR 74 PC*** in which it was held that a trial judge should send a case to the jury even if the evidence is "thin". She argued that the instant case rested on the credibility of Quamina and since his evidence was not so discredited as to be deemed manifestly reliable, the issue of whether there was an agreement between he appellants to kill Cyrus was a matter for the jury.

98. We have looked afresh at the state of the evidence at the close of the prosecution case which, given that neither appellant testified nor called witnesses, is no different from at close of the evidence. The exercise of a judge's discretion is not lightly to be disturbed. Having perused the judge's ruling on the no-case submission, we are unable to find that she fell into error such as to warrant our finding the discretion improperly exercised. The judge had a grasp of the prosecution evidence as led before her and it was for her, at the stage of a no-case submission to assess it for its legal effect. It is for the judge to decide whether a jury, if properly directed could convict and it was not for her to purport to assess the credibility of

any evidence. The submission should only be allowed where there is no evidence upon which, if the evidence led was accepted, a reasonable jury, properly directed could convict.

99. We are not convinced that we should disturb the judge's exercise of her discretion. Accordingly this ground of appeal fails.

Accordingly, this ground of appeal fails.

Ground 7
Inadequacy of Caution Direction on Quamina's Credibility

Ground 8
Wrong directions on what constituted evidence supportive of Sean Quamina's evidence

These Grounds will be dealt with together.

100. Mrs. Elder submitted that the judge's direction to the jury was inadequate to alert the jury of the extreme care necessary in assessing Quamina's evidence. She referred to the judge's summation of 26th February 2009, pg. 50 from line 26:

> "*Now as a result of the admitted lies and of the inconsistencies, I must warn you to approach the evidence of Sean Quamina with caution. It is advisable that you look among the body of evidence for evidence of that is capable of supporting his testimony and I will now point out to you the bits of evidence which lends some support to his evidence [...]*"

101. Counsel submitted that in light of the nature and number of lies told by Quamina, the inconsistencies and contradictions, in addition to the fact that the witness had an interest to serve, a clear and robust direction was necessary. She contended that the jury should have been told that these matters affected his credibility and reliability and that before they convicted on his evidence they should exercise great care since there was no evidence capable of supporting his version of events against the appellant.

102. She contented that merely telling the jury to approach the evidence of Quamina with caution would not have impressed upon them that his evidence was tainted and that there was

the danger in convicting on his unsupported evidence. Counsel referred to the decision of ***R v Makanjoula; R v Easton* (1995) 2 Cr. App. R. 469**.

103. Ms. Seetahal responded that the old rules in relation to a caution to be given if a witness is an accomplice or otherwise suspect witness no longer applied. She relied on the ***Evidence Act, Section 15A***. The Act provides:

> *"(1) Any requirement at common law whereby a trial on indictment it is obligatory for the Court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person because that person is –*
>
> *(a) An alleged accomplice of the accused; or*
>
> *(b) …….*
>
> *is abrogated.*

104. She argued that a judge has complete discretion whether any warning should be given and, if there is an evidential basis for suggesting that a witness is unreliable, the judge may give an appropriate warning. She submitted that where a judge gives a warning it should be given during the judge's review of the evidence and assistance to the jury on how it should be assessed. This would be in keeping with the direction in ***R v Makanjoula; R v Easton (supra)***.

105. Counsel submitted that Quamina was not an accomplice therefore the warnings given by the trial judge throughout her summation were enough given the circumstances of the case. She also referred to further warnings by the judge in her summation:

> "*[…] as I told you before when assessing the evidence of Sean Quamina you exercise caution. You exercise caution because of the inconsistencies in the evidence and because he has admitted to lying on two previous occasions. I told you further that you must look for support in the evidence as a whole for his testimony*." **Transcript dated 2nd March 2009 at pg. 29 line 43.**

And later at pg. 36 line 29:

> "*So that was the evidence-in-chief of Sean Quamina, and as I have already told you, you are to carefully assess his evidence because you can only convict these men on his evidence. If you have reasonable doubt on it, then you must acquit*

both Accused No. 1 and No. 2. It is only if you are satisfied to the extent that you feel sure that you may convict them on his evidence."

She contended that on the evidence, these directions were more than fair to the second appellant given that Quamina, was not an accomplice.

106. At the beginning of the judge's summation, she directed the jury generally on Quamina's credibility and the manner in which they should assess it:

> "*Now, Ladies and Gentlemen of the jury, it must be clear to you at this stage that the case for the Prosecution stands or falls on the evidence of Sean Quamina. He is the sole eye-witness in this case. So that what you make of this witness at the end of the day, what you make of his evidence is crucial to your ultimate determination […] You all had the opportunity to see and hear this witness over a period of three to four days. You saw him in court and you saw him t the scene at Sawmill Avenue. What do you make of him. You assess credibility of a witness by having regard to several factors. One such factor is whether there are inconsistencies in his evidence. That is, having said something in here in court with respect to a particular issue, he said something else on a previous occasion […] So you look for those inconsistencies […] If you find that there are inconsistencies you go on to consider, well what is the explanation he has given […] Did he say it was a mistake. Did he say it was a lie. Is it that he could not remember, and it is you the jury […] who will determine whether you accept the explanation […] In assessing credibility, and ultimately the weight you will give to his evidence as a whole, you would also look at his demeanor whilst under cross-exammination, whilst he gave his examination-in chief, he was there before you nd you will determine what you make of him […] It is upon his evidence alone, that you can find Accused No.1 guilty, if you are satisfied to the extent that you feel sure […]."* **Transcript dated 26th February 2009 pg. 6.**

107. When directing them on Quamina's identification evidence, she told the jury to consider his two previous accounts of the incident, which he admitted were lies. She also addressed the issue of Quamina having an interest to serve:

> "*Now, from the evidence, it is clear that Seam Quamina had on two occasions, prior to the 30th, given the police an account of the incident which was not consistent with what he eventually gave in the statement and what he eventually gave here. They were lies. And he admitted to you that he lied on those previous occasions. And specifically in relation to the incident, wit hrespect to those lies, on one account he says that he was in the track, he heard gunshots and he fled the scene. In other words he saw nothing. On another occasion, he said he was there, and soon after the incident began, he ran. So in other words on those occasions, basically, what he was saying is that he did not see anything, he does not know*

> *anything, he called nobody's name […] So you put that in the mix Ladies and Gentlemen of the jury, you must grapple with that and you must ask yourselves, is it as the Defence is saying, he is just making up a case as he is going along? Is it that to protect himself he is trying to put other people in the fire so he called Bellies's name, he called Sookram's nam? Or is it, as the Prosecution is asking you to find, that he realized that he was the sole eye-witness to a double murder, and that he was afraid*." Transcript dated 26th February 2009, pg 30

108. On the final day of summation, she went through Quamina's evidence in great detail, and highlighted the inconsistencies for the jury: **Transcript dated 2nd March 2009 pg 37 – 61**.

109. We are of the view that when considered in the round, the judge's summation sufficiently alerted the jury to the dangers inherent in evaluating the evidence of the sole eye witness. The matters which should have been at the forefront oft their minds as they sought to find the truth were repeatedly drawn to their attention throughout the judge's directions. The judge, in the exercise of her discretion, crafted her own expression of the relevant principles drawing to the jury's attention that the case stood or fell on the sole identifying witness, that the witness quite possibly had an interest to serve and that this gave rise to a need for extreme caution in assessing his evidence. This in our view was sufficient to ensure that the jury gave the necessary level of scrutiny to the evidence in question.

110. Mrs. Elder went on to submit that the judge erred when she identified certain evidence to the jury as being supportive of Quamina's testimony, in particular, the second appellant admitting he was in the alley, the gunshot injuries to Cyrus's back, and the fact that Hinds died from gunshot and shotgun injuries.

111. She argued that supportive evidence had to be relevant to a fact in issue and that there was no issue that the second appellant was in the alley nor as to the nature and position of the injuries on the deceased. The sole matter in dispute was whether he had taken part in the shooting and that this was the issue on which the jury had to look for supporting evidence.

112. In response Ms. Seetahal submitted that having pointed out that Quamina had lied and his testimony bore inconsistencies, the judge had a duty to in assist the jury in evaluating his

testimony which she did. The judge methodically went through the inconsistencies and lies of the witness that could weaken his testimony, ensuring the jury had a balanced picture. Further, since the decision to give a caution direction was within the judge's discretion, it followed that she was not required to confine her directions on supporting evidence in keeping with the old law on corroboration which dictated that corroboration had to be independent evidence that directly implicated the accused. Ms Seetahal said that the evidence Mrs. Elder complained of was capable of supporting of Quamina's testimony, once the jurors accepted him as a reliable witness of truth.

113. While the second appellant's presence was not "in issue" in the strict sense, it was incumbent on the prosecution, nevertheless, to prove opportunity, therefore the fact that he admitted to being in the alley did support Quamina's evidence. Cyrus's gunshot injuries were capable of supporting Quamina's evidence that the first appellant suddenly fired on Cyrus who slumped to the ground. Hinds' shotgun injuries were also capable of supporting his evidence that the second appellant fired his shotgun in Hinds' direction. This is so since the position of the injuries and other details of the post mortem report are consistent with the account of the shooting given by the witness up to the time that he fled. The decision whether or not the evidence identified by the judge in fact, supported Quamina's evidence is one based on common sense and best left to the jury.

We are of the view that these grounds of appeal are without merit.

Ground 9

Summation Unbalanced, Unfair and Inadequate Analysis of Evidence

114. Mrs. Elder submitted that the significance the following aspects of the evidence was not pointed out to the jury and analysed for their benefit:

- The evidence of WPC Ganesh about the lighting in the alley. Counsel submitted that the darkness of the alley was not linked to Quamina being mistaken or lying about the second appellant's involvement. The jury was not directed that this

supported the second appellant's oral statements that the alley was dark and so he could not see who shot him;

- The impact of Quamina's lies on his credibility and reliability

- That the second appellant consenting to the police swabbing his hands and the absence of gunshot residue supported his oral statements. The judge failed to point out that there was no supporting evidence of Quamina's testimony about the second appellant's involvement in the shooting but that there was support for the second appellant's oral statements.

- The judge did not sufficiently draw to the jury's attention the absence of cannabinoids in Cyrus's blood. Quamina had testified that he and Cyrus smoked marijuana shortly before the incident, however the forensic report revealed no cannabinoids, that is marijuana residue, in Cyrus's blood and this suggested that Quamina was lying.

She also complained that the judge attempted to rehabilitate Quamina by advancing reasons for his lies and giving directions supportive of his explanations; that the judge invited the jury to consider whether the second appellant's statements were reasonable but invited them to consider whether there were reasonable explanations for Quamina's inconsistencies; and that the judge undermined the importance of the forensic evidence that the cartridge cases from seven firearms had been found at the scene. We pause to note that there was no evidence that all of these cartridge casings were discharged during this incident and it would have been entirely improper for the judge to draw this inference or to suggest to the jury that this was an inference that they could properly draw. It is not unknown in our society for spent ammunition to be discovered lying in the streets, particularly in areas known as "hot spots".

115. Ms. Seetahal submitted that WPC Ganesh had arrived on the scene at 9:00pm and this would be of little assistance to the jury in determining what the lighting was like at the time of the incident earlier that evening. She further submitted that the evidence did not conclusively support the assertion that the alley was dark. The illumination in the alley was a contested issue and the judge sufficiently directed the jury on illumination and visibility. Counsel referred to the judge's summation:

> "*[…] when you are assessing the evidence of identification, because you would recall, I would have told you, you have to deal with the issue of lighting. Quamina said he was able to see. Deal with the issue of lighting in the context of all the evidence […]"* **Transcript dated 26th February 2009 pg. 60**

116. She also made reference to the judge's directions on pg. 29:

> "*Now, Quamina does not give you the time, the last time that he gives when he says the car was returned to him sometime around 6:00, he said it was dusk to now getting dark…So the guidance that you have, the closest in relation to the time comes from the first responders. Coa said he left…to come to the scene at 7:55pm, so bear that in mind when assessing the lighting, this is the month of July. We live in Trinidad and Tobago, and all of you know that towards the end of the year, November into January, by 6 o'clock, its quite dark, its completely dark. The incident happened in July, you live here, you will determine at that time, when it is completely dark.*"

117. Ms Seetahal submitted that the judge never attempted to rehabilitate Quamina and in fact told the jury:

> "*You, at the end of the day, will determine whether his involvement as he has described it in this matter taints him to such an extent that you cannot accept anything he says, or whether, notwithstanding the fact that he was there driving these men about, at least he knew when he arrived in Sawmill Avenue on the 28th that one of the men in his car had a gun, and he was in the company of all these men with guns and so on, whether that makes him unfit, incredible, not worthy of credit, that's a matter for you.*" **Transcript dated 2nd March 2009, pg. 38**

118. She also contended that it could not be said that the judge undermined the importance of the forensic evidence. She referred to the judge's summation:

> "*Well one of the things when you are dealing with this bit of evidence is that you may have to consider…what the witness said…and it is only reasonable, one may expect, is that he picked up what was on the scene, he cannot say what was the age of those bits of ammunition, as to whether all of them related to this matter. What cannot be said, really, at the end of the day, is whether any of the persons in the track, if you accept Quamina's evidence, had more than one weapon. That is why ladies and gentlemen of the jury, you deal with the evidence that is before you.*" **Transcript dated 27th February 2009 pg 15**

119. With respect to the absence of gunshot residue, counsel submitted that the judge specifically advised the jury that the evidence might be supportive of the second appellant's defence:

> "*They go on to tell you that as a result of the report which was ultimately obtained in respect of the swabbing of Accused No. 1's hands which showed that there was no gunpowder residue, that you should see that report in the context of what he has been saying in the beginning, which is that he was not involved at all… As I told you before, it is for you at the end of the day, what you make of the evidence*." **Transcript dated 27th February 2009 pg 16 – 17**.

120. Ms Seetahal also responded that the trial judge did bring the issue of the absence of marijuana in Cyrus's blood to the attention of the jury. She then went on to comment on the evidence as she was entitled to once she left the finding of fact to the jury. This she did. The judge said:

> "*An was issue raised about his evidence, that the men in the yard smoked marijuana, including "Ox", that's Kerwyn Cyrus, and that the report, the scientific report from an examination of the blood of Cyrus did not reveal that there were any cannabinoids, that is, the residue from smoking marijuana. And that was another instance that […] Defence counsel pointed to, to suggest that he was lying and he was lying on his friend. Well Ladies and Gentlemen of the jury, again, you will assess that. He said that they were smoking there. You have no scientific evidence before you as to how much of a cigarette you need to inhale before you would see evidence after a test. You would recall, with respect to the issue of the gunpowder residue, the fingerprint, you had the assistance of expert evidence, you have none in this area. This is what he says, that is what the report shows, it is a matter for you to determine what you accept and how relevant, how important you think it to the central issue that you must determine of the credibility of Quamina. It is a matter for you*." **Transcript dated 2nd March 2009 pg. 45 line 31**

121. Counsel relied on ***Marlon John v The State*** ***(2001) 62 WIR 314*** in submitting that a judge is not precluded from making remarks that are critical of an appellant's case in a summation and that what is required is impartiality without appearing to weigh heavily for or against one party. She suggested that the judge presented both sides fairly and said that isolating snippets of the judge's summation rather than considering holistically was not helpful as it did not give a true picture.

122. Ms Seetahal submitted that some of the matters complained of by the second appellant were *de minimis* and indicated a failure to appreciate that a trial judge was not bound to make every point for the defence.

123. We need say little more in respect of this "umbrella" ground other than that as seen from the extracts of the summation, some of the complaints are without foundation, others have been dealt with in previous grounds and that as contended by Ms Seetahal, a judge is not duty bound to raise each and every point, however, small, that can be made in favour of the defence.

124. We are satisfied that in dealing with the several matters of concern to the second appellant, the judge dealt sufficiently with them and presented to the jury a balanced, fair and adequate analysis of the evidence thereby affording the appellant a fair trial.
Accordingly, this ground of appeal fails.

ORDER

125. Having regard to our conclusions in relation to the grounds of appeal of both appellants, we dismissed their appeals and affirmed their convictions and sentences.

I. Archie
Chief Justice

P. Weekes
Justice of Appeal

A. Yorke-Soo Hon
Justice of Appeal