REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 12 of 2010

BETWEEN

GERARD PAMPONETTE

Appellant

And

THE STATE

Respondent

PANEL:

P. Weekes, J.A.

A. Yorke-Soo Hon, J.A.

R. Narine, J.A.

APPEARANCES:

Mrs. S. Chote, S.C. and Mr. Trevor Clarke for the appellant.

Ms. J. Honoré-Paul for the respondent.

DATE DELIVERED: 20th February 2013

Delivered by: A. Yorke – Soo Hon J.A.

JUDGMENT

BACKGROUND

1. On 28th May 2009, Gerard Pamponette (the appellant) was found guilty of the following offences: kidnapping, two counts of robbery with aggravation, two counts of shooting with intent, possession of firearm and the possession of ammunition. He was sentenced as follows:

(i) Twenty (20) years hard labour for kidnapping;
(ii) Fifteen (15) years hard labour for each count of robbery;
(iii) Fifteen (15) years hard labour for each count of shooting with intent;
(iv) Five (5) years hard labour for possession of firearm;
(v) Five (5) years hard labour for possession of ammunition.

The sentences for kidnapping, robbery with aggravation and shooting with intent were ordered to run concurrently, while the sentences for the possession counts were ordered to run consecutive to the other sentences.

2. The appellant has appealed his convictions and sentences and has filed four grounds of appeal.

FACTS

3. David Baker was a taxi driver who plied the Arima to Port-of Spain route. On 29th June 2004, four persons entered his taxi. In the front seat sat Joel Bailey while in the back, sat Gabriel Alexis, the appellant and an unnamed passenger.

4. The unnamed passenger exited the taxi at Maloney. While the taxi was heading along O'Meara Road, Alexis told Baker to stop the car. Alexis, armed with a gun, proceeded to rob Bailey and put him out of the taxi. He then robbed Baker of his

wedding band and cash and instructed him to go into the front passenger seat and the appellant began to drive the car.

5. Bailey entered another taxi and caused it follow Baker's vehicle. He also called the Arima Police Station. Two officers, WPC Sookdeo and PC Thomas, received a wireless transmission and they proceeded along Tumpuna Road and saw the taxi, which had come to a stop at the intersection of Tumpuna Road and the Churchill Roosevelt Highway.

6. The officers drove alongside the taxi and stopped at an angle in order to prevent it from proceeding. They observed Alexis in the backseat, pointing a gun to the head of Baker and threatening to kill him.

7. The appellant maneuvered the car out of its blocked position and drove off, striking the police vehicle. He then shot at the police, who returned fire. Both the appellant and Alexis were shot.

8. The taxi then crossed the highway and crashed into a wall. The appellant and Alexis run away from the taxi. PC Thomas pursued and caught the appellant. He saw him throw an object resembling a gun into the bushes. The appellant was searched and an ice pick found on his person. He was bleeding and was taken to the hospital by police officers.

9. WPC Sookdeo, who had remained there to assist Baker, had searched the vehicle and discovered a homemade shotgun on the floor of the back seat. PC Thomas returned to the scene of the crash. Upon receipt of another transmission, the officers proceeded to Penta Paints where they found Gabriel Alexis, bleeding.

10. One WPC Robinson went to the Arima Hospital where she met Baker and Bailey. While they were speaking, the appellant was brought in by officers. Both Bailey and Baker pointed out the appellant. Baker indicated that the appellant was one of the men who robbed him and also pointed out that the appellant was wearing his wedding band. WPC Robinson retrieved the gold ring and Baker formally indentified it.

11. Upon being interviewed at the hospital, the appellant remained silent.

12. Baker was not available to attend the trial and his deposition was read into evidence.

CASE FOR THE DEFENCE

13. The appellant testified on his own behalf and called several witnesses. His defence was that he was a victim of the robbery and that when he drove the car he was acting under duress.

14. He testified that on 29th June 2004, he got into a taxi on Henry Street to get to his home at Arima and that there were four other persons in the taxi: Baker the driver, Bailey the front seat passenger, Gabriel Alexis and one other gentleman. He said that he did not know Alexis at that time.

15. He denied that he was involved in a joint enterprise together with Alexis. He testified that he saw when Alexis robbed both Bailey and Baker and put Bailey out of the car. Alexis then pointed the gun at him and told him to pass all that he had. The appellant handed over his money. Alexis then told him "You moving with me. You driving the car." The appellant indicated that he was afraid and so he complied.

16. The appellant also said that when the police later pulled alongside the vehicle at an angle. He put up his hand in surrender. Alexis then threatened to shoot Baker and told the police to "back off". He heard an explosion and was ordered by Alexis to drive off, which he did. His side became numb and he crashed the taxi into a wall.

17. The appellant stated that civilians who were nearby assisted him out of the taxi and he was taken to the hospital. He denied running off, and further denied shooting at the police. He also denied being in the possession of a ring belonging to Baker.

18. He claimed that at the hospital he was unable to tell the police what had occurred because he was in no condition to speak at that time. After he was charged,

he met Alexis who threatened him and eventually stabbed him at the prison. He stated that because of this incident he did not say anything to the police.

19. PC Lalla who testified for the defence indicated that he had recorded a statement from Baker, whose deposition was read into evidence. He pointed out the inconsistencies between Baker's statement and his deposition.

20. Glenda Allicock, the records manager at the Arima Health Facility, also testified and the appellant's medical record was admitted into evidence. It disclosed that the appellant had visited the Health Facility on 28th October 2004 and had complained of pains to his head and of being attacked by a prisoner. He had a small wound over the left side of his scalp and tenderness to his scalp and neck.

21. Acting Prison Officer Mr. Deonarine Sewah testified that a Reception Statement on behalf of the appellant indicated that the appellant reported that on 28th October, 2004 at 4:30 pm he had been attacked by another prisoner and received injuries to his head.

GROUND ONE – The judge erred in law by misdirecting the jury on the burden of proof and failed to appropriately correct the legal error. These were fundamental misdirections and would have led to a possible miscarriage of justice.

SUBMISSIONS

22. Ms. Chote, Counsel for the appellant submitted that there were various misdirections on the burden and standard of proof particularly in relation to the defence of duress and in relation to the accused's right to silence. She pointed out the various instances where this occurred and submitted that it may have left the jury thinking that it was incumbent on the accused to speak out before trial about the duress. She contended that such directions were irreconcilable with the directions on the accused's right to silence. In effect, the jury may have held it against the appellant that he exercised his right to silence. Counsel submitted that these errors went to the root of the case and may have resulted in a possible miscarriage of justice.

23. She contended that the error was further compounded by the comments made by the judge on the failure of the appellant to raise his defence earlier. The judge was under a duty to make it clear to the jury that the appellant was under no obligation to raise duress prior to trial and any suggestion by her that the appellant should have said something about any alleged duress at an earlier stage had the practical effect of shifting the burden of proof over to the appellant to prove his defence.

24. She complained that such a direction plainly conflicted with the direction that the appellant had a right to silence. The judge's approach to the appellant's failure to raise his defence before the trial when juxtaposed with a direction that the appellant was entitled to remain silent had the effect of confusing the jury. Counsel submitted that the effect of the directions as a whole was to neutralise the appellant's defence. Ms. Chote further argued that the judge, having been alerted to these misdirections by prosecuting counsel, ought to have corrected them in accordance with the learning in **R v Moon [1969] 1 WLR 1705**.

25. Ms. Honoré-Paul for the State responded that the judge's directions on the burden and standard of proof were clear and adequate and did not lend themselves to uncertainty. Throughout the summing up the judge was careful to indicate that the onus of disproving duress was on the prosecution. The use of the phrase "reasonable doubt or to your satisfaction" when considered in the context of the entire summing-up could not have confused the jury into thinking anything other than they must be satisfied beyond a reasonable doubt or to the extent that they are sure.

26. The judge correctly pointed out that the appellant was under no obligation to say anything upon being cautioned and that no negative inference should be drawn from his failure to respond. When the judge indicated that the facts of any alleged duress would have been known solely to the appellant, and further explored the reasons given by him not proffering the details of the duress earlier, she was simply dealing with the case as presented by the defence. She was duty bound to deal with these issues since they were central to the appellant's case.

Directions on Standard of Proof

27. It is trite law that in a criminal trial the jury must be directed on the standard of proof required by the prosecution, that is, the prosecution must make them sure of the guilt of the accused or that they must be satisfied of it "beyond reasonable doubt": **Lawrence v R [1933] All E.R. 196**.

28. The Privy Council in **Henry Walters v The Queen (1968) 12 WIR 354** discussed the case of **Ramroop v R (1963) 6 WIR 425** where the trial judge used the words: "It is better ... merely to look at it as being satisfied, as you have to be in some important matter concerning yourselves". On appeal, the Court in **Ramroop** considered that an explanation in these terms would "suggest no particular standard of proof" because "whereas one juryman might feel satisfied from certain facts to act in a particular way in some matter of importance to him, another on the same facts might feel differently". The Board in **Walters** declined to adopt this line of reasoning, and explained that the correctness or otherwise of a direction to a jury on the onus of proof cannot depend upon fine semantic distinctions. It was held that by the time a judge sums up, he has had an opportunity of observing the jurors, and it was best left to his discretion to choose the most appropriate set of words in which to make that particular jury understand that they must not return a verdict against a defendant unless they are sure of his guilt. No attempt should be made to lay down any precise formula or to draw fine distinctions between one set of words and another. It was the effect of the summing-up as a whole that mattered.

29. In the instant case, the judge directed the jury on the burden of proof as it relates to duress as follows at page 10:

> "He has raised the defence of duress, quite apart from denying other aspects of the Prosecution's case, he does not have to prove he was acting under the duress. The Prosecution must negative it or disprove that there was any duress there, and they do so by proving to you beyond reasonable doubt, or to your satisfaction that, in fact, on the day in question the 29th June 2004, he was acting in concert with Mr. Alexis."

30. At page 36, the judge indicated as follows:

> "You bear in mind the prosecution must prove its case to you, the burden is on them. The accused has nothing to prove, they must prove their case to a standard, that of proof beyond reasonable doubt or to the extent that you feel sure. They must negative the duress that the accused has raised. He does not have to negative it."

31. And at page 49, the judge says:

> "…if upon a consideration of all the evidence you form the view that the accused is not telling the truth, you must be satisfied to the extent that you feel sure, on the case for the State, before you convict him. Once you are --- the State has satisfied you beyond reasonable doubt, they have proved to you beyond reasonable doubt, his guilt, by negativing the duress, you may convict. If you have reasonable doubt then of course, you give the accused the benefit of the doubt and you would then acquit."

32. The use of the phrase "to your satisfaction" is unobjectionable when considered against the totality of the summing-up. Having regard to the fact that on several occasions throughout the summing-up, the judge clearly and correctly explained the meaning of "beyond reasonable doubt" to the jury, it is unlikely that the jury would have been left in any state of confusion in relation to the standard of proof when it was applied to the defence of duress.

Comments on Burden of Proof and Failure to Raise Duress Earlier

33. There is no general proposition of law that a judge may not, in his summing up, comment on the failure to disclose the defence prior to trial: **R v Littleboy [1934] 2 KB 408**. However, it is possible for comments made by judges during a summing-up, about an accused not giving an explanation for a particular action or not raising a particular defence before trial to amount to a misdirection when inappropriately juxtaposed with the accused's right to silence. This point is well illustrated in the following cases.

34. In **R v Naylor [1933] 1 KB 685** where the English Court of Appeal indicated that the purpose of the caution was to convey to an accused person that he is not obliged to say anything unless he desires to do so. The words of the caution are not meant to be construed in the sense that the accused can remain silent after being cautioned but may find his silence made a strong point against him at his trial. In that case, upon being cautioned the accused said, “I do not wish to say anything except that I am innocent.” The Recorder commented on the failure of the accused to make a more complete statement, saying to the jury, “Surely if he is innocent one would think he would... make his defence then and there.” This was held to be a misdirection.

35. **Naylor** was considered in the case of **R v Littleboy [1934] 2 KB 408**. In that case, the appellant did not disclose his defence prior to the trial, but at trial gave evidence that at the material time he was at Wroxham (the offence having been alleged to have taken place elsewhere). He called witnesses in support of this evidence. The judge commented that it was “unfortunate” that the prisoner had not disclosed this alibi at the time he was charged or at the preliminary inquiry and added:

> “If he says it then and there, it gives the police, or those conducting the prosecution, an opportunity of making their own inquiries to test the truth of the statement that he was at Wroxham on that afternoon, at the material time. By adopting the course of saying I reserve my defence, of course, he deprived the prosecution of any opportunity of testing that statement.”

The Court indicated that comments on the failure to disclose the defence prior to trial however should be made with care and in fairness to the accused. The Court drew a distinction between the situation where a judge makes an observation with regard to the force of an alibi and saying that it is unfortunate that the defence was not raised earlier and the situation where the non-disclosure is used as evidence against an accused person.

36. Similarly, in the case of **R v Leckey [1944] KB 80** the judge in his summing up said:

> "If a man is charged with murder and is not responsible, if he has not committed murder or anything like murder, what do you expect him to say? Would you expect him to deny murder or anything like murder, what do you expect him to say? Would you expect him to deny it?... Of course members of the jury he is not bound to say anything, but what would you expect?"

And later:

> "Again, as I have said before, it is not necessary for a man to say anything on such an occasion, but it is not a little difficult to see why, if a man is asked to account for his movements and told what the inquiries are being made for, he should not say: "I did not murder the girl. When I left her she was all right" if that be the fact?

The court said that this (among other instances) amounted to a misdirection because it suggested to the jury that they might infer the appellant's guilt by considering the fact of his silence after being cautioned. The Court was of the view that if this sort of direction was allowed to stand, a caution would become a trap instead of a means of finding out the truth in the interests of justice.

37. In **R v Hoare [1966] 1 WLR 762** the judge failed to remind the jury that a person cautioned was not obliged to say anything, and the summing up had the effect of clearly conveying to the jury the inconceivability of an innocent man not giving the details of his defence at once to the police if it were a true one. This was held to be a misdirection.

38. In contrast, in **R v Michael Ryan (1966) 50 Cr App R 144** although the Deputy Chairman made comments on the failure of the accused to give an explanation for what he was doing at the time of his apprehension, those comments were made in

conjunction with a clear indication to the jury that the appellant was under no obligation to give such an explanation. The Court of Appeal held this to be acceptable.

39. In **R v Richard Williams Sullivan (1967) 51 Cr. App. R. 102**, the defendant was charged with smuggling watches and after being cautioned by customs officers he refused to answer their questions. In the course of his summing-up, the judge observed that "if a man was innocent, he would be anxious to answer questions". Although this was held to be a misdirection, the Court found that there was no possible miscarriage of justice. The Court of Appeal opined that the line dividing what may be said and what may not be said is a very fine one, and there will be cases where any unfairness may be imperceptible to the members of any ordinary jury.

40. In the instant case, the critical consideration is the effect of the judge's comments on the summing-up as a whole. Counsel for the appellant suggested that the comments amounted to misdirections because they had the overall effect of suggesting to the jury that the burden of proof had shifted to the appellant.

41. The judge directed the jury on the accused's right to silence and its importance. At page 21, she said:

> "He was cautioned, he was informed of his rights, he remained silent. It is his right to remain silent. Whilst on this point, let me take the opportunity to tell you, you do not draw any adverse inference against the accused on the occasions that he was cautioned by the officers, told of the offence and he remained silent. That is his right. In fact, the very caution says, "You have the right to remain silent." That is a right given to every citizen, the right against self-incrimination, the right to remain silent when confronted by the police with an allegation."

42. And at page 30:

> "<u>You bear in mind that I told you he does not have to say anything. The very caution to him says he has the right to remain silent. He has nothing to prove.</u> But he also proffered in evidence that when Corporal Parks

spoke to him at the Port of Spain General Hospital he was in a lot of pain... so in any event, he couldn't speak. He couldn't give an explanation or tell the police that he was, in fact, acting under duress. He was not acting of his own free will. Now you would imagine, of course, and you would bear in mind my warning to you, he has nothing to prove."

43. At page 31, the judge indicated that while the facts of the duress would have been known only to the appellant he nonetheless has nothing to prove:

"You, as the finders of the facts, may want to consider that based on what the police encountered, they were entitled to the view that the driver, the person who is driving this car with the taxi driver in it, is part of the enterprise as, indeed, is the man with the gun. If there are facts and circumstances which say otherwise, then reasonably, one would expect those facts and circumstances to be outlined by the accused...

He said he talks to his attorney, he tells him what happened, but nothing was proffered. So that is all there in the mix, it is part of the evidence, and you make of it what you will in the context of all of the evidence in the case. But you bear in mind, and I repeat it because it is very important, he does not have to prove he was acting under duress, he has nothing to prove, and he had the right to remain silent on every occasion that that he was challenged by the police."

44. The judge reiterated the point at page 54:

"...the accused says that he didn't say anything at the time to Corporal Parks because he was in pain... And he also stated that apart from this interview he has not been interviewed by the police and, therefore, he is asking you to find – should you come to the position that you would have expected him to say something to the police about what was happening in the car, seeing that he says he was acting under duress – he is asking you to find that in all the circumstances he really wasn't given the opportunity.

Because he denies that WPC Robinson spoke to him at Arima, and he says the condition he was in, he couldn't say anything. But you bear in mind he has the right to remain silent, he doesn't have to prove anything. He had raised the defence of duress, he does not have to prove it. It is prosecution who must negative duress. In other words, it it the prosecution who must satisfy you to the extent that you feel sure that when he got behind the wheel of that car, drove from O'Meara to Tumpuna, when he pulled away from the police, after the police intercepted and drove through the intersection and hit the car, and so on, he was not acting under duress, but in fact, he was part and parcel of that enterprise."

45. At page 62:

"... if you accept that he was wearing that gold wedding band on his right middle finger, and then he is asked about it and he says nothing, well, you may come to such conclusions as you see fit, because, surely he had the right to silence, he does not have to say anything. But in the circumstances where the prosecution allege, on the prosecution's case Mr. Baker was four feet away and said in a loud tone of voice, "look one of the men who robbed me and look he wearing my ring." "That is one of the men who robbed and look he have on my wedding ring", one would expect that is Robinson then, as making an enquiry, and that ring is his, at least he would say so."

46. On 28th May 2009, at page 20:

"So that on the case as he raises it, Bailey is unaware that he is also an innocent victim and that he was compelled by Alexis to drive the car. So that information is in the bosom of the accused. For the police to know that he has to say so."

47. From the above, it is clear that the judge was careful to repeatedly remind the jury of the appellant's right to silence. However, it is possible that such reminders may

have lost their potency when juxtaposed with the following comments on the appellant's failure to raise the defence of duress prior to trial:

(i) The State's case against the appellant was that he, the driver of the taxi, was part of the enterprise and if there were facts and circumstances which say otherwise, then one would reasonably expect the appellant to outline those facts and circumstances.

(ii) The appellant said he spoke with his attorney and told him what happened but "nothing was offered".

(iii) In respect of the gold wedding band while directing the jury that they may conclude as they see fit, the judge went on to say that one would expect that if the ring belonged to the appellant at least he would say so.

(iv) The judge told the jury that the information that the appellant was acting under duress was in his bosom and for the police to know that he has to say so.

48. We find that not only did the judge shift the burden on the appellant to prove that he was acting under duress but the directions were also likely to place an overall burden on the appellant to testify more convincingly than the other witnesses when the judge directed the jury that "unlike the other witnesses it is his trial and therefore, he has a lot more at stake as it were."

49. We are therefore of the view that these directions were inappropriate and that their cumulative effect may have had the impact of leading the jury to believe that although the appellant had a right to silence, he ought to have given the relevant explanations after being cautioned. He, not having done so, the jury was left with an open invitation to draw inferences of guilt against him. Therefore the reminders of his right to silence may have served only as an artificial exercise as it was a clear case of giving with one hand and taking with the other. The judge's comment may have been so weighted against the appellant so as to leave the jury with little choice other than to believe that the appellant was bound to say something about the duress at the earliest opportunity and that his failure to do so was indicative of his guilt.

50. We therefore agree with counsel that these directions may have led to a possible miscarriage of justice and we uphold this ground of appeal.

GROUND TWO – The Learned Trial Judge erred in law by failing to provide the jury with adequate assistance as to its use of the deposition of the witness Baker within the case as a whole.

SUBMISSIONS

51. Counsel for the appellant contended that the judge failed to deal fairly with the inconsistencies which arose between what the witness Baker had originally said in his statement, the evidence which he gave at the preliminary inquiry, and the evidence of other witnesses. It was conceded that the judge directed the jury as to the general limitations concerning the use of the deposition, however counsel submitted that those directions were undermined by further directions which invited the jury to speculate about the reason for the inconsistencies.

52. The judge suggested the following reasons for the inconsistencies:

(i) The witness was traumatized when he gave his statement;

(ii) The evidence came back to him when he was testifying;

(iii) It did not happen.

Counsel argued that the judge was not entitled to suggest any reason at all to explain away the inconsistencies, particularly because there was no evidence from Mr. Baker giving a reason for the inconsistencies. The better course, counsel suggested, was simply to explain the limitations to the use of the deposition, highlight the inconsistencies to the jury and direct the jury to take such inconsistencies into account when assessing Mr. Baker's evidence.

53. She also submitted that the judge's treatment of the inconsistencies was unbalanced particularly because some of the inconsistencies spoke to facts which the appellant had specifically denied in his defence, namely:

(i) whether Baker had been escorted to the front passenger seat by the appellant;

(ii) whether there was any conversation between the appellant and Alexis before they left the taxi;

(iii) whether the appellant fled the scene;

(iv) whether the appellant was armed and shot at the police.

The judge ought to have made the point to the jury that on these key aspects of the case, parts of Mr. Baker's statement supported the account of events given by the appellant. In sum, the judge failed to analyse the inconsistencies in a way which highlighted to the jury the benefits of such inconsistencies to the appellant's case.

54. Counsel for the State submitted that the judge dealt carefully and copiously with the evidence of Mr. Baker, by pointing out the inconsistencies between Baker's statement, his deposition and the evidence of other witnesses. She submitted that the trial judge was entitled to suggest to the jury that trauma was one possibility for the inconsistencies, because generally witnesses are sometimes traumatized after events. She argued that the judge did not go outside the boundaries of judicial comment by providing possible reasons for the inconsistencies and indeed, by suggesting three distinct reasons for the inconsistencies the judge was approaching the inconsistencies in the fairest possible way.

55. It is clear that in dealing with the case for the prosecution that the judge directed the jury on the limitations of relying on the deposition in their assessment of the evidence and pointed out that they had not had the opportunity to see, hear or assess Mr. Baker in the witness box as they did the other witnesses. The judge indicated the discrepancies between Mr. Baker's deposition and the evidence of other witnesses. For example, the judge left it to the jury to consider that while Mr. Baker's statement reported that he had been escorted to the front seat, Mr. Bailey merely indicated that he saw the driver come around to the other side.

56. The judge went further to point out the differences between Mr. Baker's statement and his deposition. The jury was directed that during the course of the evidence of Constable Lalla it emerged that there was no record in the statement that

the appellant escorted Mr. Baker to the front seat. There was also no mention of the appellant fleeing the scene nor was there any mention of a conversation between the appellant and Alexis in which they both said they got shot and had to get out of the car. She also reminded the jury that Mr. Baker did not say in his deposition that the appellant had a gun or that he saw him shoot at the police.

57. The judge was careful to point out the salient aspects of the inconsistencies that were of value to the appellant. Although she did not expressly say that these were supportive of his case in material respects, she did invite the jury to consider the deposition evidence in the context of all the other evidence particularly the evidence of the eye-witness and instructed them that they must reach their verdicts by considering all the evidence in the case.

58. With respect to counsel's contention that the judge was wrong to offer reasons for the inconsistencies, the case of **R. v Manifold [2011] EWCA Crim 1271** is instructive. It was the prosecution case that M had deliberately countersigned a number of passport applications knowing them to be false, and that in relation to seventeen applications he knew that the person in the photograph was not the person in respect of whom the application was made. M's case was that he knew the people in the photographs and that although he might have known them only by their street name, there was nothing to indicate to him that the applications were not genuine. The Court of Appeal considered how a judge ought to treat with inconsistencies and suggested that if a judge is going to venture to suggest reasons for inconsistencies, he must present a balanced view. Indeed, the court suggested that the best route was to leave it for counsel to raise any arguments about why certain inconsistencies may have arisen:

> "… if the judge was going to bother to advance prosecution arguments, there was no reason why she should not counterbalance it by referring to the defence argument or alternatively, leaving, as she might have been better advised to do, the arguments to counsel and not bothering to remind the jury of them at all."

59. We agree that the preferred course is for a judge to say nothing about the reasons for inconsistencies at all and leave any such suggestion to the closing arguments of counsel. If it became necessary to suggest reasons for inconsistencies, a balanced view must be presented. However, looking at this summing-up and the evidence as a whole we take the view that there was no lack of balance in the suggested reasons for inconsistencies. The suggestion that there were inconsistencies because some of the events simply did not happen encapsulated the appellant's denial of the events. The suggestion that Mr. Baker was perhaps traumatized came from Constable Lalla who recorded his statement so that the judge's reference to that was not speculative nor was the suggestion that human frailty may lead to the omission of evidence.

60. In the circumstances we are of the view that the judge dealt adequately with the inconsistencies and therefore find no merit in this ground of appeal.

GROUND THREE – The Learned Trial Judge failed to place the Appellant's case fully and fairly before the jury.

SUBMISSIONS

61. Counsel submitted that the judge did not properly leave the case for the defence to the jury. She complained that:

(i) The comments complained of in the grounds above, had a negative impact on the presentation of the defence case;

(ii) The fact that the appellant was found to have an ice-pick on his person was irrelevant to the offences with which he was charged and it was erroneous for the judge to suggest that from its presence the jury could infer an intention to use violence;

(iii) The judge improperly elevated the evidence given by Mr. Bailey by suggesting that there was no reason for the witness to lie about whether the appellant fled the scene;

(iv) The judge ignored that there were several possibilities as to why the witness Bailey may not have seen the appellant at the scene and it was improper for the judge to appear to hold Bailey's evidence in such high regard.

62. In her oral submissions, counsel added that the judge failed to give proper directions on the issues of joint enterprise and joint possession, particularly with respect to the shooting and possessions counts. Counsel contended that, for instance, there ought to have been shown that the appellant had some prior knowledge of the existence of Alexis' gun. Counsel further complained that the prosecution case was that the appellant shot at the police, yet the judge failed to point the jury to the facts and circumstances which would have assisted them in fairly assessing the evidence against the appellant for that offence.

63. In response, Counsel for the State submitted that every aspect of the appellant's case was examined for the jury's benefit. The judge did not exhibit unfairness or pro-prosecution bias in her approach to the summing-up, and was entitled to make comments on how the evidence may be treated. It was further submitted that the fact that the appellant was found with an ice-pick was essential to the prosecution case that the appellant was part of a joint enterprise and not merely an innocent bystander. The judge therefore allowed the evidence in the interest of fairness. Counsel accepted that the judge said Bailey acted "like a good citizen" but noted that despite that comment, the judge outlined to the jury that it was their job to make an assessment of Bailey as a witness and decide whether and how far they would rely on his evidence.

64. On the issue of joint enterprise, counsel submitted that the judge adequately directed the jury on the issue of joint responsibility. The judge made it clear that the Prosecution was relying on the evidence of the firearm in the actual possession of Alexis and that the appellant's liability arose, on the State's case, through joint enterprise. In that respect, the judge explored the evidence on which the prosecution relied for the possession counts. Counsel noted that from the appellant's own version of

the facts, he saw that Alexis had a gun from the inception of the hold up. Thus, even on the appellant's version he would have been aware of the gun and was properly part of a joint enterprise.

65. The case of **R v Curtin [1996] Crim LR 831** sets out generally the duty of a judge during a trial. The Court said:

> "In our judgment it is a judge's duty, in summing up to a jury, to give directions about the relevant law, to refer to the salient pieces of evidence, to identify and focus attention upon the issues, and in each of those respects to do so as succinctly as the case permits. It follows that as part of this duty a judge must identify the defence. The way in which he does so will necessarily depend on all the circumstances of the particular case. When the defendant has given evidence it will usually be desirable, though it may not always be necessary, to summarise his evidence. When the defendant has answered questions in police interviews, as well as giving evidence, it may be appropriate for the judge to draw attention to consistencies or inconsistencies between the interviews and the evidence. When the defendant has neither answered questions in interview nor given evidence, it will often be very difficult for the judge to say much in relation to the defence, though it will usually be appropriate in such a case for him to remind the jury of significant points made in defence counsel's speech. When, as in the present case, the defendant was interviewed at length but did not give evidence, the judge, as in every other case, has to decide how fairly and conveniently he should place the defence case before the jury."

66. The Judicial Committee of the Privy Council in **Mears v R [1993] 1 WLR 818** had to consider the appropriateness of a summing-up. Lord Lane CJ in delivering the judgment of the Board said:

> "A judge .... is not entitled to comment in such a way as to make the summing-up as a whole unbalanced. .... It cannot be said too often or too

> strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury."

Lord Lane referred to the judgment in **R v Gilbey (unreported, 26 January 1990)**, and further stated:

> "Comments which fall short of such an usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little choice other than to comply with what are obviously the judge's views or wishes."

Misdirections

67. In addressing ground one, we have already found that the judge misdirected the jury when commenting on the appellant's failure to raise the defence of duress prior to the trial.

68. We therefore agree with counsel for the appellant that such comments had a negative impact on the appellant's defence in that they were so weighted against the appellant as to leave the jury with little choice other than to conclude that the appellant had an obligation to say that he was acting under duress each step of the way.

Inconsistencies

69. Having found above that the judge adequately dealt with the inconsistencies in the evidence, we are of the view that in this regard the judge properly presented the case for the appellant.

Prejudicial Evidence

70. At page 17, the judge directed the jury as follows:

> "It was also adduced later in evidence that the accused was searched and an ice-pick was found on him, and the prosecution invite you to consider from that circumstance, the finding of the ice-pick on his person that, in

> fact, he came prepared to commit these acts of violence. At the end of the day, it is a matter for you."

71. It was the prosecution case that the ice-pick was relevant to the issue of whether the appellant was an innocent by-stander or part of a joint enterprise to commit acts of violence. The judge merely canvassed the prosecution case before the jury, and called on them to assess whether they felt that that was a valid conclusion to be drawn. No prejudice accrued to the appellant having regard to the evidence that he was seen with a firearm shooting at the police. In light of that evidence, the presence of the ice-pick simply paled into insignificance.

The witness Bailey

72. In **R v Newman (1990) 154 JP 113**, the court held that where a judge commends a particular witness, the question to be asked was: could the jury have thought that the Judge was putting forward that witness as a credible witness whose evidence was to be preferred to that of the appellant by reason of the Judge's commendation?

73. In that case, in the presence of the jury the judge called the two witnesses forward and commended them "for acting in such a brave and public way", emphasizing that he was doing so "without prejudicing the result of the case at all." In the absence of the jury, the judge also awarded the witnesses £100 each for their actions. The judge later said to the jury with regard to this particular incident:

> "Clearly Mr Gunton and Mr Farnworth are important witnesses. You heard my comment to both of them at the conclusion of their evidence, do not let that influence you in the slightest. Some of you might have agreed with what I said, some not, the point is it is irrelevant. It is your view of the witnesses that counts and not mine."

74. Lord Lane CJ advised as follows :

"Obviously each case in this area has very much to be decided on its own facts… All that was done in the presence of the jury was to make the remarks which I have already indicated the Judge made. Secondly, and more importantly, what the Judge was commending Mr Gunton and Mr Farnworth for was their bravery and not for their accuracy. What Mr Gunton and Mr Farnworth were doing was acting in a public-spirited manner, and they were acting in a public-spirited manner whether looked at from the point of view of the prosecution evidence or from the point of view of the appellant's own evidence. He admitted he was a burglar. He admitted he was running away from the scene. He admitted that he was armed with a knife, and that was the basis upon which the Judge was commending the witnesses."

75. It is noted that the Court recommended that in future, where a judge wished to commend witnesses for their action in connection with the offence which was being tried, he should do so in the absence of the jury.

76. In this case, during the summing-up the judge said this about the witness Bailey:

"You may want to think that he is not the police, he is someone who was sitting in a car, he was robbed, and so on. Like a good citizen he made a report, he followed, he didn't have to do that. He followed, he got in another car, followed the car and then he saw the events as they unfolded. Why would he say that the accused wasn't there if he was there, and you assess him as well. You, from his evidence, would make an assessment of him as a person, as a witness. Do you think that if he got on the scene and the accused was there, he would not have noticed him, or he wouldn't have said it? So you think, having heard him, seen him under cross-examination, he had any reason to come and say, "the accused was not on the scene when I arrived there together with Mr. Baker?" It is a matter for you."

77. As in the case of **Newman** above, the judge here held the actions of the witness Bailey in high regard. She commented that the witness was acting "like a good citizen" for making a report and pursuing the car, and we agree that such action can be seen to be brave and public-spirited behaviour. However, the judge did not go so far as to paint the witness' credibility or accuracy with the same brush. She called on the jury to make their own assessment of him, bearing in mind the evidence he had given. The judge did not project the witness as a reliable and credible witness. Instead, by asking whether the witness would not have noticed the appellant, the judge was suggesting questions which the jury ought to ask themselves in assessing the evidence.

Joint Enterprise

78. At page 7, the judge directed the jury as follows:

> "… I take just one of the counts in order to make a point to you, on the evidence the person in possession of the firearm was [Gabriel] Alexis. The person who makes the demand of the passengers and the taxi driver to hand over the money is [Gabriel] Alexis. But the Prosecution's case is that this accused was present and he was part of the whole enterprise, and he was participating. So that the actions of [Gabriel] Alexis is [sic] the action of the accused."

79. She later directed them that:

> "The presence of the firearm in the hand of Mr. Alexis, and the Prosecution's case is that they were acting in concert and, therefore, the possession of the firearm by Mr. Alexis is also in the possession by this accused."

80. At page 12, the judge said:

> "… once you come to the conclusion that Mr. Pamponette was acting in concert with Mr. Alexis from the time that hold up started on O'Meara Road, he was acting in concert with him with respect to the robbery, that he shot at the police and so on… the fact that he is acting in concert, if you

so find, with Alexis, means that notwithstanding the fact that the weapon was in the, [sic] actually in the hand of Alexis, he is guilty of possession of that firearm.

Similarly with the issues of possession of ammunition, there was one cartridge recovered. The State is relying upon the principle of joint enterprise, joint responsibility for these offences. The fact that the weapon and any ammunition to be used in that weapon was actually in the physical possession of Alexis, notwithstanding that fact, he is also responsible, if you accept the evidence that Alexis was in possession of that firearm, if you accept the evidence that he was part and parcel, that is this accused was part and parcel of the robbery, of the kidnapping, that he shot at the police, and so on, he was part of the whole enterprise, then he, as well, is guilty of possession of that ammunition…"

81. It is clear from the above that the judge directed the jury on how to approach the issue of joint responsibility. Counsel complained that it was important for the prosecution to show that the appellant had prior knowledge of the presence of the gun. The prosecution case is that Alexis had the gun, which he held to the head of Mr. Baker, and that the appellant himself had a gun which he fired at the police officers. The appellant's gun was never recovered. However the appellant is charged for possession of a firearm and ammunition on the basis that he was part of the enterprise and is also liable for the gun which Alexis had under his control. In any event, if the appellant only became aware of the presence of the gun when Alexis took it out in the car and he nonetheless continued to participate in the event which involved the use of the gun, he too bears responsibility for that gun. In the circumstances, we find that it was not incumbent on the prosecution to show that the appellant had prior knowledge of the presence of the firearm.

82. In light of the above we are of the view that this ground of appeal succeeds in part.

GROUND FOUR – The sentences imposed by the Trial Judge were excessive.

83. Having regard to the outcome of the grounds above, we do not propose to make any orders as to sentence. However, with respect to this ground we find it necessary to make the following comments.

84. Ms. Chote argued that the imposition of a twenty-five year sentence for kidnapping was grossly excessive. Case law does not record a similar sentence being imposed. She further noted that the authorities show that the imposition of a consecutive sentence is to be reserved for exceptional cases and where imposed, a reason for doing so must be given. Counsel also pointed out that the appellant was in pre-trial custody for approximately three years. She argued that the judge failed to make the requisite discounts in accordance with the learning from **Romeo Da Costa Hall v The Queen [2011] CCJ 6** and **Ajay Dookee v State of Mauritius [2012] UKPC 21**.

85. The State submitted that the judge considered the aggravating factors in this case and correctly applied the sentencing principles. Counsel also accepted that there is no record of a twenty-five year sentence having been imposed for offences of this nature and agreed that it was excessive. Counsel conceded that the judge ought to have given reasons for imposing a consecutive sentence and further ought to have taken into consideration the time which the appellant spent in pre-trial custody.

Excessive Sentence

86. A long sentence is not necessarily reprehensible but as the Court of Appeal in **Benjamin Mano v The State Cr. App. No. 81 of 1964** opined, a prison term as long as 30 years must be supported by the principles of sentencing, particularly the preventive principle. In that case, the accused appealed his sentence of 30 years' imprisonment and 20 strokes for the offence of causing grievous bodily harm. It was held that having

due regard to the prisoner's age, such a term extended beyond one appropriate for the purpose intended to be served.

87. The sentence for common law kidnapping is at large. In **R v Spence and Thomas (1983) 5 Cr App R (S) 413**, the English Court of Appeal gave guidelines on the length of sentence in kidnapping cases. At page 416, Lord Lane CJ stated:

> "…there was a wide possible variation in seriousness between one possible instance and another. At the top of the scale came carefully planned abductions where the victim was used as a hostage or where ransom money was demanded. Such offences would seldom be met with less than eight years' imprisonment or thereabouts. Where violence or firearms were used, or there were other exacerbating features such as detention of the victim over a long period of time, then the proper sentence would be very much longer than that. At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all. They very often arose as a sequel to family tiffs or lovers' disputes and they seldom required anything more than 18 months' imprisonment and sometimes a great deal less."

The court then went on to reduce an eight years' imprisonment to six, and six years to four, in the case of two men who kidnapped a girl with a view to living on her earnings as a prostitute.

88. It is clear from **Mano** and **Spence and Taylor** that the rationale is that cumulative sentences are necessary to mark the gravity of offending and for deterrent purposes.

89. In **Michael Fernandez v The State Cr. App. No. 29 of 1997**, the appellant was convicted on a seven (7) count indictment for robbery with aggravation, rape, buggery, serious indecency, indecent assault and two counts of kidnapping. He was sentenced to twenty-two years imprisonment and ten (10) strokes with the birch.

90. In **Victor Flores v The State Cr. App. No. 54 of 2001**, the appellant held the victim and her boyfriend at gunpoint in a car park. He got into the victim's boyfriends car

and instructed him to drive. He fired the gun and directed the victim's boyfriend to proceed to a clearing in the bushes where he ordered the couple to strip. He had the couple choose whether they would die by knife or by gun and even instructed the victim to stab her own boyfriend. When she refused to do so, he abandoned the boyfriend at a wooden house and proceeded to rape the victim in the vehicle. This sequence of events lasted for four hours. The appellant was sentenced to twelve (12) years hard labour for each count of kidnapping and the rape, ten (10) years for robbery with aggravation, three (3) years for possession of a firearm, two (2) years for possession of ammunition, one (1) year hard labour for malicious damage.

91. A fifteen year sentence for kidnapping was imposed in **Francis Young v The State r App No 2 of 2001**. In that case, persons vacationing in Tobago were approached by three masked men armed with a gun, a cutlass and a crowbar. They demanded money and instructed the victims to accompany them to the bank to withdraw cash.

92. In **Fernandez**, there were several aggravating factors, particularly the various types of sexual assault to which the victim was subjected. In **Flores**, sexual assault was also a key factor, as well as the fact that the appellant put both victims through an ordeal of humiliation, terror and mental torture for a period of four (4) hours. The facts of this case are more aligned with those in **Young**, and can be said to fall midway between the factors stated in **Spence and Thomas**.

Consecutive Sentences

93. There is no statutory guidance for determining whether sentences are to be cumulative or concurrent. Such considerations have emerged from case law. In **James Torrel v The State Cr. App. No. 71 of 1992** the Court of Appeal noted that a judge ought to impose a sentence which reflects the seriousness with which he views the offence. Notwithstanding, it is an accepted practice that unless special circumstances are shown to justify the imposition of consecutive sentences, they should run concurrently.

94. In **Leslie Tiwari v The State Cr. App. No. 51 of 1989**, the appellant was convicted on counts of rape, two charges of robbery with aggravation and arson. The judge sentenced him on the count of rape to 30 years' imprisonment with hard labour and 20 strokes of the whip, 10 years' imprisonment with hard labour on the first robbery count, to run consecutively to the sentence of 30 years, 10 years' imprisonment with hard labour on the second robbery count, concurrent with the sentence on the first count of robbery, and imprisonment for life on the count of arson, to run consecutively to the other sentences. This resulted in a sentence of forty (40) years followed by a sentence of life imprisonment. The Court of Appeal agreed that the offences were quite serious, but was of the view that the combined sentences were "inordinately long" and ordered that they run concurrently.

95. We note that in **John Kellon Cr. App. No. 18 of 2004** the Court of Appeal varied the sentences to run consecutively. This was because the Court viewed the use of weapons, particularly firearms, in the carrying out of a kidnapping as a critical factor. However, in **Kellon's** case the charge was kidnapping for ransom, whereas, in the present case, it is not.

96. Notwithstanding the gravity of the actions of the appellant against Mr. Baker, we are of the view that a 20 year sentence for simple kidnapping was inordinately long. We are also of the view that the judge was also wrong to impose a consecutive 5 year sentence for the possession counts.

Discount

97. The Board of the Judicial Committee of the Privy Council in **Callachand & Another v The State [2008] UKPC 49**, an appeal from Mauritius expressly approved the practice of taking into account time spent in custody prior to sentencing and also indicated how this should be done:

> "It seems to be clear too that any time spent in custody prior to sentencing should be fully taken into account, not simply by means of a form of words

but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."

98. We are also guided by the impact of the case of **Da Costa Hall v R**, where the Caribbean Court of Justice indicated that a judge must take into account time spent in custody prior to sentencing upon determining the appropriate sentence. At paragraph 26, the majority of the panel of the CCJ laid down "the primary rule" in these terms:

> "The primary rule is that the judge should grant **substantially full credit** for time spent on remand in terms of years or months and must state his or her reason for not granting a full reduction or no reduction at all."

99. On the same issue, the Privy Council in the later judgment of **Dookee v State of Mauritius [2012] UKPC 21** concluded as follows:

> "The Board's conclusion, therefore, is that… credit should ordinarily be given for time spent in custody on remand to the extent of 80-100% (80% being the default position unless, for example, the detainee is a foreign national whose family lives abroad and cannot visit)."

100. The Court of Appeal in **Walter Borneo v The State Cr. App. No. 7 of 2011** examined the above authorities and came to the following conclusion:

> "We are of the view… that the entire period spent in pre-sentence custody ought to be discounted from the sentence that the trial judge arrives at having taken into account the gravity of the offence, and mitigating and aggravating factors. The judge should state the appropriate sentence so arrived at, then deduct the time spent on remand awaiting trial for the offence, showing in a clear and transparent fashion how the sentence to be served is arrived at."

101. We are therefore of the view that all time spent in pre-trial custody by the appellant ought to have been discounted from his sentence.

102. We remark shortly on the comments of the judge during the sentencing of the appellant. At page 53, the judge stated:

> "What is alarming is the fact that from the facts of the case and , clearly, the facts as accepted by the jury, is that it wasn't good enough too have robbed Mr. Bailey and Mr. Baker. You and your confederate then drove off with Mr. Baker in the car, both of you armed with firearms, **and had the police not had a timely intervention, we do not know what may have transpired to Mr. Baker**."

103. We are of the view that judges ought to exercise caution with regard to the nature of their comments. Speculation about what may have occurred has no place in a judge's considerations when deciding an appropriate sentence. Judges must measure their remarks to suit the particular circumstances of the case and not overspill into the realm of what could have been.

Retrial

104. We now turn to the guiding principles on the issue of retrial. These are set out in the Privy Council decision of **Reid v R** (1978) 27 WIR 254. The Privy Council noted factors which should be considered in deciding whether to retry a case. They are: (i) the seriousness and prevalence of the offence, (ii) the expense and length of time involved in a fresh hearing, (iii) the ordeal suffered by an accused person on trial, (iv) the length of time that would have elapsed between the offence and the new trial, and (v) the strength of the case presented by the prosecution. It was noted that this list is not exhaustive. It was otherwise held that it is in the interest of justice and the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.

105. We consider this to be a borderline case. Ms. Chote conceded that the offences are both serious and prevalent but submitted that considering that nine (9) years have passed since the incident, it is in the interest of expediting justice that such an old

matter should not be placed on the list for hearing. We are of the view that the expedition of justice must be balanced with the need to have matters ventilated. We agree with Ms. Honoré-Paul that the case against the accused is a strong one. Further, counsel for the State indicated that the trial against Gabriel Alexis, with whom this accused was jointly charged, is scheduled to commence within the next two (2) months. She indicated that the Prosecution was ready to proceed and that all the witnesses are available. It would therefore be in the best interests of justice to have both alleged offenders tried together. When weighing all factors together, this matter is therefore suitable for retrial. The time spent in custody is not inordinate nor is there anything before us to suggest that the appellant has suffered any ordeal.

ORDER

106. The appeal is allowed and the convictions and sentences are quashed. We order a retrial and the appellant is remanded into custody. He is to appear at a bail hearing on 22nd February 2013 and this matter is to be placed on the Cause List on 9th May 2013.

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P. Weekes
Justice of Appeal

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A. Yorke-Soo Hon
Justice of Appeal

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R. Narine
Justice of Appeal