TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App: 7 of 2011

BETWEEN

WALTER BORNEO

Appellant

AND

THE STATE

Respondent

*** ** **** * *******

PANEL:

P. WEEKES, J A

A. SOO HON, J A

R. NARINE, J A

Appearances: Mr. J. Singh instructed by Ms. H. Shaikh for the Appellant
Ms. D. Seetahal S.C. and Ms. C. Seetahal for the Respondent

DATE DELIVERED: 9th October, 2012.

JUDGMENT

DELIVERED BY: RAJENDRA NARINE, J A

The appellant was convicted on 5th April, 2011 of the murder of Yusuff Joseph (the deceased). He was a juvenile at the time of the offence and was sentenced to fifteen years hard labour.

The incident occurred on 9th October, 2006. The deceased lived with his wife, Rajdaye Ramadhin, at No. 27 Roxborough Street, Diego Martin, in one of a block of eight apartments. Christine Dhanpat and her boyfriend Christopher Thomas had moved into one of the apartments the day before. Rajdaye was helping Christine hang curtains, when she heard a noise of the roof. She looked out and saw the appellant on the roof. He was wearing a red round neck jersey with no print and a black three quarters pants. He had a black stocking over his hair which was in cane rows at the back. She had known him as her neighbour for over a year.

Rajdaye and Christine left Christine's apartment and went downstairs to Rajdaye's apartment. On reaching downstairs, Rajdaye again saw the appellant on the roof. This time she asked him what he was doing there. He responded that he was looking for a hammer. Christine also testified that she saw a guy on the roof under Rajdaye's apartment about 14 feet away. Her description of the person was similar to Rajdaye's, except that she described him as wearing a red jersey with a print at the front.

Rajdaye and Christine subsequently went back upstairs. While upstairs, Rajdaye heard the deceased call out from downstairs. She went downstairs and opened the gate to go inside her apartment. She glimpsed some gunmen coming from the direction of the walkway. One of them locked her neck and took her to the living room. Another one walked inside and stood by the kitchen door. The deceased was in the kitchen. The other man asked the deceased for "weed". The deceased said he did not know anything about that. The deceased was then taken upstairs to Christine's apartment, while Rajdaye was kept downstairs. Rajdaye then heard a gunshot. The man released her and ran. She then ran in the direction of the upstairs apartment. Before she reached upstairs, she saw two persons running away. She recognized one of the persons as the appellant. He had a red and white bandana over his eyes. He was wearing the same round neck red jersey, three quarters pants and a black stocking over

his head. She also recognized him by his physical features. The two men ran, in the direction of the appellant's apartment.

Christine testified that she was upstairs with Christopher Thomas, when she saw the deceased walking towards her front door. There was someone behind him wearing a red jersey, a black three quarters pants and a bandana over his face from his nose. He had a gun in his hand pointing behind the deceased. This was the same man she had seen on the roof about 10-15 minutes before. There was another man with him who was wearing a ski mask.

Christine sneaked out of the house and went down the steps. She looked into Rajdaye's apartment and saw that Rajdaye was being held at gun point by a man in a ski mask. She pulled back, and ran out of the front gate. She was some distance away when she heard a gunshot.

After Rajdaye saw the two men run in the direction of the appellant's apartment, she went upstairs, where she saw the deceased lying on the floor bleeding. She called the deceased's sister Natasha Santana, who lived nearby. Natasha and her husband Dr. David Santana arrived. Natasha testified that she heard a police officer asked the deceased if he knew who shot him. The deceased replied, *"Yeah the little fella from in the yard there, Walter, Walter."* Dr. Santana testified that he heard the deceased say *"The little boy next door, Walter, Walter".* The police officers who came to the scene that night did not support the evidence of the Santanas with respect to the words spoken by the deceased. P.C. Samuel testified that when he asked the deceased who shot him, he responded by shaking his head from side to side. P.C. Samuel remained there for about two minutes with the deceased. Sergeant Elliot came to the scene afterwards. He interviewed the deceased. He did not remember the deceased saying the name *"Walter"* in his presence. It was not in his notes.

The ambulance arrived shortly afterwards. The deceased was taken to the hospital where he died at 1.59 pm the following day. The post mortem examination revealed that he died of vascular injuries and haemorrhage due to a gunshot wound to his right thigh.

The appellant was arrested the following day. Upon being told of the report and being informed him of his rights, the appellant responded that he was at home.

On 12th October 2006 the appellant was interviewed by Cpl. Seales in the presence of P.C. Mings and the appellant's mother. The notes were signed by the appellant and his mother.

At the trial the appellant gave no evidence and called no witnesses. Through his attorney he suggested that the Santanas concocted their evidence with respect to the words of the deceased spoken in response to the question as to who had shot him.

GROUNDS OF APPEAL

1. The trial judge erred in law in admitting the statement of the deceased into evidence, and failed to properly direct the jury on the statement.
2. The trial judge erred in law in ruling that the interview notes of the appellant did not amount to a mixed statement. As a result, the judge erred in law in failing to direct the jury on the issue of alibi.
3. The trial judge erred in law in failing to give the jury a *Lucas* direction with regard to the utterances of the appellant.
4. The trial judge erred in law in failing to direct the jury that the evidence of Christopher Thomas was not to be considered for its truth.
5. The trial judge erred in law in giving a good character direction with respect to the appellant.
6. The trial judge erred in law in omitting to direct the jury on the issue of joint enterprise, which resulted in the appellant being deprived of the possibility of a manslaughter verdict.

GROUND 1

The appellant's complaint under this ground is twofold:

(i) the trial judge erred in admitting the statement of the deceased made shortly after he was shot, and

(ii) the trial judge failed to properly direct the jury on the issue.

In his oral submissions, Mr. Singh conceded that the judge's directions to the jury on this issue were adequate. However, he maintained that the trial judge erred in admitting the statement, in that she failed to place sufficient weight on the fact that the

deceased was left alone with two state witnesses (the Santanas) for about half an hour, and the fact that the police officers' evidence did not support that of the Santanas with respect to the words spoken by the deceased.

Before admitting the statement the trial judgment heard arguments on its admissibility. The prosecution sought to have the statement admitted as an exception to the hearsay rule by virtue of the principle of res gestae. In her written ruling the trial judge referred extensively to the principles set out by the House of Lords in **R v. Andrews** (1987) 84 Cr. App. R. 382.

In **Andrews** Lord Ackner outlined the principles by which a trial judge should be guided in deciding whether to admit a statement as evidence of its truth by virtue of the res gestae exception to the hearsay rule. These principles are stated by Lord Ackner at pages 300-301.

> "*1. The primary question which the judge must ask himself is - can the possibility of concoction or distortion be disregarded?*
>
> *2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.*
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> *3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the*

statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. In the instant appeal the defence relied upon evidence to support the contention that the deceased had a motive of his own to fabricate or concoct, namely, a malice which resided in him against O'Neill and the appellant because, so he believed, O'Neill had attacked and damaged his house and was accompanied by the appellant, who ran away on a previous occasion. The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error. In the instant case there was evidence that the deceased had drunk to excess, well over double the permitted limit for driving a motor car. Another example would be where the identification was made in circumstances of particular difficulty or where the declarant suffered from defective eyesight. In such circumstances the trial judge must consider whether he can exclude the possibility of error."

It is clear from her written ruling that the trial judge addressed her mind to the relevant principles in deciding the issue of admissibility in the statement. She carefully considered the circumstances in which the statement arose and found that the events were "so unnatural or startling or dramatic as to dominate the thoughts of the deceased"

(See transcript 10th February, 2011 at p.6). She considered whether the statement was sufficiently proximate to the events which triggered it, and she concluded that it was. She expressly considered whether there were any special features in the case, and the possibility of error on the part of the deceased in identifying the appellant.

The judge further considered the fact that the police officers did not support the evidence of the Santanas with respect to the deceased identifying the appellant by name. The judge concluded that it was a matter for the jury to consider the evidence and to attach what weight they saw fit to the statement.

The judge also considered the evidence that the statement was made in answer to a specific question. She noted, however, that there was no evidence that anyone told the deceased what to say.

At the hearing of this appeal, Mr. Singh indicated that he had not had sight of the judge's ruling on the admissibility of the statement. Having been provided with an opportunity to peruse the ruling, Mr. Singh submitted that the trial judge erred in law in that she exercised her discretion based on evidence which eventually proved to be hearsay. In her ruling, the trial judge expressly addressed her mind to the possibility of error on the part of the deceased in identifying the appellant. The judge noted in this context that Christopher Thomas (who was then expected to testify as an identifying witness) would have seen the appellant in almost identical circumstance, as the deceased would have seen him.

As it turned out, Christopher Thomas subsequently failed to appear to give evidence at the trial. Accordingly, Mr. Singh argues that the trial judge based the exercise of her discretion on evidence which did not materialize.

For the State Ms. Seetahal submitted that the trial judge considered the relevant principles as outlined in **Andrews**, and her ruling cannot be faulted due to the subsequent non-appearance of the witness Thomas. Ms. Seetahal referred to the fifth principle as outlined by Lord Ackner, (supra) that if only the ordinary fallibility of human

recollection is relied upon, this goes to weight and not to the question of admissibility. It is therefore a matter for the jury to decide what weight to attach to the statement.

Ms. Seetahal further submitted that there were two other identifying witnesses who did give evidence, which supported the identification by the deceased, namely, Rajdaye Ramadhin and Christine Dhanpat. So that even if Christopher Thomas failed to give evidence, as in fact happened, the trial judge could have considered the evidence of these witnesses, and would have inevitably ruled as she did.

Having considered counsel's submission on this point, we find that there is much force in Ms. Seetahal's submissions. Ultimately where there are no special features arising in the case such as malice, intoxication, defective eyesight or difficult circumstances of identification, the question of the possibility of error is a question of fact that ultimately falls to be decided by the jury.

From her ruling it is clear that the trial judge applied her mind to the correct principles, and there was evidence before her to reach the decision that she did. Accordingly, there is no valid basis on which this court can interfere with the exercise of her discretion to admit the statement. The Privy Council in **Andrews** (at p. 302) observed.

> *"Where the trial judge has properly directed himself as to the correct approach to the evidence and there is material to entitle him to reach the conclusions which he did reach, then his decision is final, in the sense that it will not be interfered with on appeal. Of course, having ruled the statement admissible the judge must, as the Common Sergeant most certainly did, make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not*

activated by any malice or ill-will. Further, where there are special features that bear on the possibility of mistake then the jurys' attention must be invited to those matters."

In her summing up the judge directed the jury as follows:

"It is for you to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said by the deceased. You must be sure that the deceased did not concoct or distort the statement to his advantage or the disadvantage of the accused. Ask yourselves: Did the deceased concoct this statement? Consider the condition of the deceased as I have outlined to you above. It is only if you are sure that the deceased did make a statement in response to a question from a police officer, whether he knew who had shot him, and it is for the State to make you sure that the deceased made a statement, and it is for the State to make you sure what the content of that statement was, it is only then that you can act on this evidence."

It is clear from the above extract of the summing up that the trial judge's directions to the jury on how they should treat with the res gestae statement followed the guidelines set out in **Andrews** and were therefore quite adequate.

It follows that there is no merit in this ground.

GROUND 2

The essence of the complaint under this ground is that the trial judge erred in law in ruling that the notes of the interview conducted on 10th October 2006, constituted a purely exculpatory statement as opposed to a mixed statement. As a consequence of this ruling she decided that she would not direct the jury on the issue of alibi. Mr. Singh submits that the judge ought to have found that the interview notes amounted to a mixed statement, and the since issue of alibi was raised in the interview notes, the judge ought to have directed the jury on the issue. Mr. Singh further contends that in so

far as the appellant's account of his whereabouts given in the interview contradicted what he had told the police upon his arrest, the trial judge ought to have given a *Lucas* direction.

The following propositions may be extracted from **R v. Sharp** (1988) 1 All E.R. 65, a decision of the House of Lords, which reviewed the law in relation to out of court statements made by an accused person:

1. A purely exculpatory statement made out of court is not admissible as evidence of the truth of its contents.
2. A full confession or incriminating admissions made in an out of court statement, are admissible as evidence of the truth of the facts stated therein, as an exception to the hearsay rule.
3. A mixed statement is a statement which is in part admission and in part exculpatory.
4. A partial confession is a statement in which the accused admits some matter that is required to be established if the crime is to be proved against him.
5. In deciding where the truth lies, the jury must consider the whole of the statement as evidence of the truth it asserts, that is both the incriminatory and exculpatory parts, the trial judge commenting where appropriate, that the incriminating parts are likely to be true whereas the exculpatory parts do not carry the same weight.

For the appellant Mr. Singh submitted that the admission by the appellant in the interview notes, that he was on the roof that night, and had spoken to the state witness Rajdaye Ramadhin, was a declaration against interest, so as to make the interview notes a mixed statement. In addition , the appellant admitted in the interview that he had plaited his hair on the morning of the incident, and that he had a red bandana, which he used to tie his hair at night when he went to bed.

The trial judge ruled that the interview notes were purely exculpatory. The statements made by the appellant placed him in the vicinity at the time of the incident. On the State's case his presence on the roof was sometime before the shooting. In the interview the appellant placed himself in the vicinity at the time of the shooting, speaking with his mother, presumably at his home. After that, he went "down the road". On the face of it, the interview notes amount to a denial of any participation in the

offence, and do not include any matter that the State is required to prove in establishing a case against the appellant. There mere presence of the appellant in the vicinity of the place where the offence was committed provides no evidence of participation in the commission of the offence. While the admission that the appellant plaited his hair that morning and owned a red bandana may provide some support for the evidence of identification of Rajdaye Ramdhin, it does not go to establishing any element of the offence which the State is required to prove. In our view, therefore, the trial judge was correct in holding that the interview notes did not contain any incriminatory matter and were not to be considered as evidence of the truth of assertions contained therein.

However, even if the trial judge was wrong in holding that the statement was not a mixed one, the assertion that the appellant was speaking to his mother at the time he heard the loud explosions, does not raise an alibi. An alibi in an assertion by a person that he was elsewhere at the time that an offence was committed. In this case, the evidence is that the appellant lived in the same compound in which the shooting took place. Upon his arrest, he told the police he was at home at the material time. In his interview, he told the police he was speaking to his mother at the time he heard the loud explosions. On both accounts, it is clear that the appellant placed himself at the material time in proximity to the place where the offence was committed. In our view this does not in law amount to an alibi.

In addition, the appellant gave no evidence of alibi, either by himself, or through any witness. He did not raise the issue in cross-examination of witnesses, and he did not serve any notice of alibi as required by Section 16 A of the **Indictable Offences (Preliminary Enquiry) Act** Chap. 12:01.

For these reasons, the trial judge was correct in declining to direct the jury on the issue of alibi.

The appellant also raised the issue of the failure of the trial judge to give a *Lucas* direction in relation to ground 2. The issue is also raised in ground 3. We consider that the issue may more conveniently be discussed in relation to ground 3.

The appellant also raised the issue of the failure of the trial judge to give a *Lucas* direction. However, since the issue was also raised in relation to ground 3, we consider that the issue may be more conveniently discussed in relation to that ground of appeal.

GROUND 3

As indicated above, we hold the view that the trial judge was correct in ruling that the interview notes were purely exculpatory. It follows that, assuming that the appellant made statements in the interview which contradicted his assertion to the police upon arrest that he was at home at the material time, these statements are not evidence of the truth of the facts stated in them. The trial judge was careful to point out to the jury that the utterances of the appellant were relevant only to show the reaction of the appellant when confronted with the report, and when interviewed by the police. It follows that there was no proven lie of the appellant that would require a *Lucas* direction.

In addition, the prosecution did not rely on any utterance of the appellant as corroboration of any aspect of its case, or as evidence of guilt. Nor was there any real danger that the jury might have relied on any lie as evidence of guilt: See **Burge and Pegg** (1996) 1 Cr. App. R 173.

In fact a careful perusal of the interview notes does not reveal any contradiction, or lie which would attract a *Lucas* direction. In the interview the appellant stated that he went “down the hill” around 8.00 o’clock (from the context it would be 8.00 pm) and he also stated that he was talking with his mother when he heard a loud explosion. However, he did not know when the police and ambulance arrived, because he was “down the road” by Leslie. He returned about 11.15 pm just in time to see a movie on television.

A reasonable interpretation of the interview notes, is that the appellant was at home talking to his mother when the shooting occurred. He left shortly afterwards to go down the road by Leslie, and returned home at about 11.15 pm. It follows that he did not contradict his first statement to the police that he was at home at the time of the shooting.

Accordingly the trial judge was correct in not giving a *Lucas* direction.

GROUND 4

This ground arises from the evidence of Sgt. Elliott who testified that shortly after the appellant was arrested he was taken to the police vehicle, where Christopher Thomas pointed to him and said, *"This is the man who shoot Yusuff in my (Thomas') apartment on Monday night".*

Christopher Thomas subsequently failed to appear at the trial to give evidence, and the trial judge refused to admit his evidence under s. 15(c) of the **Evidence Amendment Act**.

The appellant complains that this evidence was highly prejudicial and lacking in probative value, since the evidence of Christopher Thomas was not placed before the jury. In these circumstances, the appellant contends that the trial judge ought to have directed the jury that no probative value could be attached to this evidence.

In **R v. Christie** (1914) A.C. 545 H.L., Lord Alkinson pointed out (at page 554) that, *"A statement made in the presence of an accused person, even upon an occasion which should be expected reasonably to call for some explanation or denial from him, is not evidence against him of the facts stated save in so far as he accepts the statement, so as to make it, in effect, his own".*

In this case the appellant was asked by the police officer if he had heard what Thomas had said, and the appellant replied: "I was at home."

In her summing up the trial judge directed the jury as follows:

> *"Now you heard from Sergeant Elliott that they took the accused across to the police vehicle where Christopher Thomas was seated, and Christopher Thomas pointed to the accused and said something. The police officer asked the accused if he had heard what Christopher Thomas had said,Corporal Prescott again cautioned the accused and informed him of his rights to an attorney or a person of his choice and the accused replied that he was at home. They then arrested the accused and took him to the West End Police Station.*
>
> *Now, Members of the Jury, you have just heard that when the accused was first approached by police officers in relation to this*

report, and when he was confronted with the report and cautioned, he said he was at home. This evidence is of very limited relevance, the only relevance of this evidence in this case is that it shows the reaction of the accused when he is first confronted with the allegation about the shooting of Yusuff Joseph. It is not evidence that the accused was at home at the relevant time".

It is to be noted that the trial judge was careful not to remind the jury of the words that were spoken by Thomas that prompted the appellant's response. She goes on to make it clear to the jury that the only relevance of the evidence was to show the reaction of the appellant when first confronted with the allegation of shooting the deceased.

It is also to be noted that very early in the summing up, the trial judge outlined to the jury the evidence on which the State was relying in order to establish its case. She made express reference to the identification evidence of Christine Dhanpat and Rajdaye Ramadhin and to the statement of the deceased. No mention was made of Christopher Thomas as an identifying witness. She later went on to examine in detail the evidence of the identifying witnesses, and gave the jury careful directions on how to approach their evidence. It is significant in this case that there is no ground of appeal in relation to the judge's directions on the identification evidence of these witnesses.

It is not unusual that unforeseen events may take place during the course of a trial which may result in prejudicial matter being placed before a jury. In such a case it is for the trial judge to consider the particular circumstances of the case and to fashion her directions to the jury so as to minimize any likely prejudicial effect that such evidence may have on their minds.

In most cases when the jury is exposed to prejudicial matter, the trial judge should immediately give a robust warning to the jury that they must disabuse their minds of such matter, and it should play no part whatsoever in their deliberations. The warning may be repeated during the summation, where the trial judge considers that there may still exist some danger that the jury may direct their minds to the prejudicial material. In extreme cases where the trial judge considers that the prejudice is such that the accused can no longer be afforded a fair trial, he may decide to abort the trial.

In other cases, the circumstances may be such that the trial judge may consider that a robust warning or direction may serve only to draw attention to the prejudicial material, and to intensify its effect on the minds of the jury. It is always a matter for the trial judge to consider the particular circumstances of the case and to take such action as he considers appropriate in the context of his overriding duty to ensure fairness to both sides.

In this case the trial judge discussed the matter with both counsel before the start of her summing up, and sought to devise an approach which eliminated the actual words used by Christopher Thomas, and included the words of the appellant that he was at home. The judge then directed the jury that the only relevance of the evidence was to show the reaction of the appellant when he was first confronted with the allegation.

In our view, in the peculiar circumstances of this case, the trial judge cannot be faulted for the course she adopted. This was a fairly long trial. Sergeant Elliot gave evidence more than a month before the State closed its case after Christopher Thomas failed to appear at the trial and the trial judge refused an application to admit his deposition into evidence. A warning or direction to the jury at the time of his non-appearance, or in the summation may have served only to remind the jury of the prejudicial evidence and to intensify its effect on their minds. In our view the approach adopted by the trial judge and her direction as to how the jury should treat with the evidence was both sensible and reasonable.

Accordingly, we find no merit in ground 4.

GROUND 5

The appellant complains that the trial judge erred in law in giving a good character direction in favour of the appellant.

The trial judge in this case gave a standard direction on the relevance of the appellant's good character with respect to both his credibility and propensity to commit the offence. The credibility limb of the direction is given in cases where the defendant testifies at his trial or made pre-trial statements. The propensity direction is required whether the defendant testifies or not: See **Vye** (1993) 1WLR 471.

It follows that the trial judge was quite correct in giving the good character direction on both limbs. Even so, the direction could only have redounded to the benefit of the appellant when the jury came to consider the weight to be attached to his pre-trial statement. It is difficult to see what prejudice could accrue to the appellant even if the direction was superfluous.

Accordingly, there is no merit in this ground.

GROUND 6

The essence of the complaint under this ground is that the trial judge deprived the appellant of a possible verdict of manslaughter, when she failed to direct the jury on the liability of secondary parties engaged in a joint enterprise.

The liability of a secondary party is based on his participation in the joint enterprise with foresight of the relevant act of the principal as a possible incident of the common unlawful purpose: See **Hui Chi-Ming v. R** (1992) 1 A.C. 34. However, where the secondary party foresees that some harm may result from the act of the principal, but falling short of grievous bodily harm, then the secondary party will be guilty of manslaughter: See: **Poulette v. The State** Cr. Apps. No. 6 and 7 of 2007. **Kelvin Bailey v. The State** Cr. App. No. 19 of 2000, **R v. Anthony John Parsons** (2009) EWCA Crim. 64. Knowledge that the principal was carrying a weapon, and the type of weapon used, are usually relevant to the issue of foresight: See: **R v. Powell; R v. English** (1999) AC 1, **Rahaman v. R (**2008) UKHL 45.

In **Pittman and Agard v. The State** Cr. Apps. Nos. 44 and 45 of 2004, this court explored the conceptual differences between criminal liability under the felony-murder rule and the liability of secondary parties under the principle of joint enterprise. The court went on to express the view that, in summing up the case the trial judge is not confined to arguments advanced by the prosecution or the defence. The judge has a duty to apply the whole of the law, not just that advanced by counsel.

In this case, before the trial judge embarked on her summation, she took the precaution of conferring with counsel on various aspects of the case, including the basis for liability of the appellant for the offence. Both counsel agreed that she should direct the jury on felony murder. She also raised the issue of joint enterprise with counsel.

State counsel expressed the view that such a direction might confuse the jury, if it were given together with the felony murder direction. The trial judge then agreed to direct on joint enterprise only in relation to the offence of robbery with aggravation as an arrestable offence within the context of the application of the felony murder rule. Defence counsel did not advocate for a joint enterprise direction in respect of the offence of murder itself.

One may well understand the concerns of State counsel that a direction on both bases of liability may well confuse a jury, particularly in cases where the application of both concepts may lead to different verdicts. In such a situation, a jury may well have difficulty in deciding on the basis of liability that they should choose.

On the particular facts of this case, apart from the evidence of the two identifying witnesses with respect to the presence of the assailants, and their actions, there is little evidence on which the jury could have decided who was the principal and who were the secondary parties. As the judge noted at the **Ensor** hearing, apart from the oral utterance of the deceased, there was no evidence of which assailant fired the fatal shot. In those circumstances, the judge concluded that a direction on joint enterprise would mean that each participant in the enterprise would be responsible for the actions of the others. This direction would have placed the appellant in no better position than he was in relation to the application of the felony murder principle.

Moreover, on the evidence it is difficult for the appellant to assert that he ought to have been considered by the jury as a secondary party. The appellant was identified by Christine Dhanpat as the man who was behind the deceased with a gun in his hand pointing it at the deceased, as he walked towards the front door of Christine's apartment. In addition, the oral utterance of the deceased made shortly after the shooting, identified the appellant as the shooter.

In **R v. Anthony John Parsons** (supra), the court expressed the view that a situation in which a secondary party foresees some harm less than grievous bodily harm, may occur more readily in practice where the weapon that the secondary party knows about is a knife or a piece of wood or the like. It is far less easy to envisage in reality, such a possibility where the secondary party knows that the principal has a gun which may be used.

A fortiori, in a case such as this, in which on the evidence the appellant himself is armed with a gun.

It follows that even if the trial judge had directed on joint enterprise, on the evidence in this case, she could not realistically direct the jury that they should consider the position of the appellant as a secondary party to the joint enterprise.

Accordingly, this ground is devoid of merit.

DISPOSITION

It follows that this appeal is dismissed and the conviction is affirmed. However, an issue was raised somewhat belatedly by Mr. Singh with respect to the time spent by the appellant in custody awaiting trial.

In imposing a sentence of 15 years with hard labour on the appellant, the trial judge expressly stated that she took into account the fact that the appellant had spent more than four years in custody awaiting trial. However, she did not precisely set out how this time was factored into the sentence that she imposed.

We invited further submissions from both counsel on the issue of sentencing from which we have derived much assistance.

In **Callachand & anor. v. The State of Mauritius** [2008] UKPC 49, the Privy Council took the view that any time spent in custody prior to sentencing should be taken fully into account by means of an arithmetical deduction when assessing the length of the sentence to be served from the date of sentencing.

In **R v. da Costa Hall** (2011) 77 WIR 66 the Caribbean Court of Justice followed the decision in **Callachand** (supra) that pre-sentence time spent in custody should be fully taken into account in imposing sentence. The trial judge should clearly set out what he considered to be the appropriate sentence taking into account the seriousness of the offence, and all the mitigating and aggravating factors. From this sentence, he should deduct any pre-sentence time spent in custody. If the judge decides not to follow the prima facie rule of granting substantially full credit for time served prior to sentence, he should set out his reasons for doing so. In the interest of transparency, whether he grants full credit or not, a sentencing judge has to explain how he has dealt with pre-sentence time spent in custody.

In **Ajay Dookee v. The State of Mauritius** (2012) UKPC 21, the Privy Council considered a previous decision of the Court of Appeal of Mauritius in **Mbokotwana v. The Commissioner of Prisons** 2010 SCJ 310, in relation to the issue as to whether the court ought to take into consideration the conditions on remand in deciding whether to grant full credit for pre-sentence time spent in custody. In **Mbokotwana** (supra) the Court of Appeal of Mauritius took into account the difference in privileges afforded to prisoners on remand compared to convicted prisoners and came to the decision that a discount of between one-half to two-thirds of time spent on remand should be allowed.

The Privy Council in **Ajay Dookee** (supra) held the view that such a discount was not sufficient. In the Board's view, the benefits afforded to prisoners on remand were minor compared to the fundamental fact of confinement in prison: see para.15 of the judgment. The Board concluded that credit should be given for time spent in custody on remand to the extent of 80 to 100 percent.

The issue for us to consider is whether the conditions on remand in this jurisdiction are so materially better than conditions for convicted prisoners that a full discount ought not to be given for pre-sentence time spent in custody.

In **Colin Edghill v. The Commissioner of Prisons and the Attorney General of Trinidad and Tobago** CV 3178 of 2004, Gobin J gave a detailed description based on the evidence before her, of conditions on remand at one of the country's main prisons. The conditions as found by the judge were so horrific that she was moved to comment at para. 38 of the judgment:

> *"The remand yard Port of Spain is a hell hole in which a man presumed innocent is deprived of the elements necessary for human life, air, light, sanitation, hygiene, exercise and even food. The level of pain and suffering inflicted during detention goes beyond the harsh or what to my mind can conveniently be described as merely unacceptable and unsatisfactory".*

Accordingly, in spite of the difference in privileges afforded to remand prisoners as opposed to convicted prisoners in this jurisdiction, we are of the view that the prevailing conditions on remand in our prisons are such 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.

In this case the appellant was arrested on 10th October, 2006. He was convicted of murder on 5th April, 2011, and sentenced on the same day to a minimum term of 15 years hard labour.

The mitigating factors that were put forward on behalf of the appellant at the time of sentence were his age and his previously clean record. He was 16 years old at the time of the offence. We consider that the appropriate range of sentence in a matter of this kind is a term of 15 to 20 years. Having regard to the circumstances of this case and the aggravating and mitigating factors put forward, we consider that the appropriate sentence is 17 ½ years. From the term of 17 ½ years, we deduct 4 years and 6 months, being the time spent in custody prior to sentencing.

In the result we dismiss the appeal against conviction and affirm the conviction; allow the appeal against sentence and vary the sentence imposed to 13 years hard labour. The sentence will run from the date of conviction.

Dated the 9th day of October, 2012.

P. Weekes
Justice of Appeal.

A. Soo Hon
Justice of Appeal.

R. Narine
Justice of Appeal.