THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. Nos. 17, 18, 19, 20, 21 and 22 of 2015
Cr. No. 3 of 2013

BETWEEN

SOMAN RAMPERSAD also called "Toppy"

Appellant No. 1

KENNY JASON MOHAMMED

Appellant No. 2

JUNIOR JOHN

Appellant No. 3

SHIVA BAJNATH

Appellant No. 4

VISHAM BAJNATH also called "Sonny"

Appellant No. 5

RYAN BAJNATH

Appellant No. 6

AND

THE STATE

Respondent

PANEL:

A. Yorke-Soo Hon, J.A.
R. Narine, J.A.
M. Mohammed, J.A.

APPEARANCES:

Mr. J. Heath, Mr. R. Persad and Mr. K. D. Saney appeared on behalf of Appellant No. 1
Mr. R. Rajcoomar and Ms. N. Bansee appeared on behalf of Appellant No. 2
Mr. J. Heath and Mr. C. Pegus appeared on behalf of Appellant No. 3
Ms. S. Chote, SC and Mr. P. Carter appeared on behalf of Appellants Nos. 4, 5 and 6
Mr. G. Busby, Assistant D.P.P. appeared on behalf of the Respondent

DATE OF REASONS: November 16, 2018

JUDGMENT

Joint Judgment Delivered by A. Yorke-Soo Hon, J.A., R. Narine, J.A. and M. Mohammed, J.A.

INTRODUCTION

[1] The appellants, Soman Rampersad (also called "Toppy"), Kenny Jason Mohammed, Junior John, Shiva Bajnath, Visham Bajnath (also called "Sonny") and Ryan Bajnath were jointly charged for the murders of Sangeeta Ramdial and Sarah Ramdial. On June 26, 2015, the appellants were all found guilty of both charges and were all sentenced to death. On July 30, 2018 we dismissed their appeals and affirmed their convictions. Our written reasons follow.

THE CASE FOR THE RESPONDENT

[2] The prosecution case was based predominantly on the eye witness evidence of the deceased's parents, Ashook Ramdial (Ashook) and Geeta Singh (Geeta), as well as Ashook's nephew, Richard Nigel Ramdial (Nigel). The prosecution also placed reliance on background evidence which depicted an ongoing land dispute and feud between the appellants and some of the prosecution witnesses.

[3] In April, 2009, Ashook and Geeta lived at Playground Avenue, Uquire Road in Freeport, together with their children Sarah and Sangeeta Ramdial, and Nigel.

[4] Ashook testified that on April 13, 2009, at around 6:00 p.m., he had an argument with his neighbour, Visham Bajnath (Visham), during which he took a bottle and threw it in Visham's direction. Ashook then left for his job and returned home forty-five minutes later, before again leaving for a nearby savannah to walk his dogs. He returned home at around 11:00 p.m. Geeta testified that the police visited their home on two occasions on April 13, 2009. The first occasion was around 8:00 p.m. The appellant Soman Rampersad (Soman) was also seen arriving at the house in a white car. The police officers asked about the whereabouts of Ashook and Nigel. Geeta

informed them that Ashook had gone to work. Soman and the police officers then got into their respective vehicles and left.

[5] At around 12:00 a.m., Geeta testified that the same police officers arrived at the house. The police officers entered and enquired into Ashook's whereabouts. She informed them that Ashook had taken the dogs to the back. The police officers then entered Nigel's room and threw cold water on him, before beating him.

[6] Nigel testified that he was awakened by the police officers slapping him in his face. They enquired as to what he had done to the next-door neighbour and Nigel responded that he did not do anything to them. One of the police officers was tall, "red" in complexion and had a tattoo on his neck.

[7] Ashook testified that later on in the night, he was awoken by Geeta. He proceeded to jump through a window of the house and hid in a grass patch, near a karela or "caraili" tree, approximately eight feet from the house. While hiding, Ashook heard loud explosions which he believed to be gunshots and he observed Soman and Junior John (Junior) in his front yard. Ashook had known Soman for several years as they grew up together. He had also known Junior for approximately five years before that day and he would usually pass his house on his way to work. Ashook saw the men walking towards the house and entering the front shed. Soman was holding a keg in his left hand and a gun in his right hand. When Ashook first saw the men, they were approximately twenty-five feet away from him. He was able to see both men clearly. At that time there was a street light to the front of the house and "stadium-like" lights at a nearby burger factory which aided in his vision. When Soman and Junior got to the platform of the step leading to Nigel's room, Ashook no longer had sight of them. He proceeded to walk along the western side of the house, to the back, where he saw Visham, Ryan and Shiva standing in a line. Prior to the incident, Ashook had known Visham, Ryan and Shiva as they lived next door to him and he had grown up with them. Shiva, who was approximately fifteen feet away from Ashook, was armed with a cutlass in his right hand. Ryan was seen pacing in an east-west direction. Visham

was approximately twenty-five feet away from Ashook and was seen standing near Nigel's bedroom window with a keg in his hand. Visham climbed through the window with the keg in his hand and exited the window without it. Visham then re-entered the house through the same window.

[8] At that time, Ashook walked along the back of the house, through the grass, until he reached an area near the fence separating his premises from that of Visham's. While hiding in that area, Ashook saw Visham jump out of the window of Nigel's room, located on the eastern side of the house. Immediately afterwards, Junior was seen jumping out of the same window, armed with a gun. Ashook then returned to the front of the house, to an area close to the caraili tree. At that time, the house was engulfed in flames and Ashook heard his children screaming. Ashook then saw Junior and Soman at the front of the house. Soman was standing near Nigel's car with a keg in his hand and Junior was standing near a pipe. He heard the sound of glass breaking and saw Soman emptying the contents of the keg into the car.

[9] Ashook proceeded to cross a gravel road and he hid in a spot near a track which led to the front of his house. Whilst there, he saw Soman, Junior, Visham, Ryan and Shiva walking out of his yard. The men were approximately four feet away from him at that time.

[10] Ashook subsequently met up with Geeta at the caraili tree and he enquired about their children. Geeta told him that Junior had shot her in both of her hands. Ashook and Geeta proceeded through a nearby savannah and saw a police vehicle with a white vehicle closely behind it. On seeing this, Ashook and Geeta attempted to hide. The police vehicle stopped in front of them and offered to take them to get medical assistance. Ashook refused the offer as he had recognised one of the police officers to be "Toppy's partner". He described this police officer as being "red" in complexion, with curly hair and a tattoo on his neck. Ashook and Geeta were eventually assisted by a taxi driver whom they knew as "Sadhu", who took them to the Chaguanas Health Centre.

[11] Geeta testified that around midnight, she was at the front door of her house when she saw Soman and Kenny Jason Mohammed (Kenny) jumping over the gate of Visham's house. She had known Soman for approximately seven years before that day as he would usually "hang out" at her mother-in-law's house. Kenny was also known to her as he also "hung out" at her mother-in-law's house. The men walked towards Nigel's car, which was parked near a wire fence to the front of Visham's adjoining property. Geeta observed that Kenny had a bottle in his hand and was spraying the contents inside of the car. Both Kenny and Soman then walked in the direction of the house. Kenny, using a t-shirt, covered his face, revealing only his eyes. Both men walked up to the house, near the front steps. Kenny then started spraying the contents of the bottle on the step where Geeta was standing. Geeta realised that the bottle contained gasoline upon recognising the smell. Kenny and Soman then circled the house, while Kenny sprayed gasoline on the structure. Geeta followed the men from inside the house. When they got to Nigel's bedroom window at the back of the house, Kenny struck a match and threw it inside the house, through the window. Geeta walked to Nigel's room and saw Nigel in bed. She fell at the front of Nigel's bedroom door and when she got up, she observed a police vehicle at the corner of the road. She also saw Junior on her left side, armed with a black and silver gun. She had known Junior for approximately three years and would usually see him at Visham's house or at her mother-in-law's house. Junior pointed the gun to her head. Geeta ran inside the house. Shortly afterwards, she heard explosions which sounded like gunshots and then saw Nigel leaning. She also saw Soman, who was three feet away from Junior. Geeta was then shot twice by Junior, first on her right hand and then on her left hand. Junior was five feet away from her at the time.

[12] After being shot, Geeta went to her bedroom and woke up her children. She instructed them to follow her. Geeta exited the house by jumping through one of the windows. At that time, the galvanize roofing sheets from the house began falling, which prevented the girls from getting through the window. Geeta heard them screaming. She ran to the caraili tree on the western side of the house where she saw Junior standing by a pipe in the front of the house. He was holding a gun up in the air. Geeta called out to Ashook and he appeared a few seconds later. The house

was on fire at that time. Geeta, upon hearing her children scream, was about to run into the house but was restrained from doing so by Ashook.

[13] Nigel gave evidence that on the night in question, he was awakened by a fire in his bedroom. He got up and ran towards his front door and upon reaching the platform of his stairs, he saw Soman in front of him, armed with a gun. Nigel knew Soman prior to that day as they were related. Soman shot at him and he felt the side of his body become numb. Nigel walked down the stairs and said to Soman, *"But me ain't do nobody nothing"* and he responded, *"Alyuh like to play alyuh bad."* Nigel also observed another man at the bottom of the stairs. Nigel laid in the grass at the front of the step and he heard Soman say the name "Junior". Nigel then saw Soman walking towards his (Nigel's) car with a container in his hand. Soman pulled open the left front door of the car and emptied the contents of the bottle inside. Nigel then saw fire inside of the car.

THE CASE FOR THE APPELLANTS

[14] The case for the appellants was one of denial. Soman, Shiva, Ryan, Visham and Junior also relied on the defence of alibi. Soman, Shiva, Ryan and Visham also asserted that Geeta, Ashook and Nigel fabricated the evidence against them. Junior and Kenny claimed that Ashook and Geeta were mistaken when they identified them as being present at the scene on the night in question.

[15] The only appellant who elected to give evidence was Junior. He testified that on April 13, 2009, at approximately 7:30 p.m., he arrived at Samkist Bar, after dropping his son off at a bazaar. He left the bar after 3:00 a.m. on April 14, 2009 and returned home. He returned to Samkist Bar at around 7:00 p.m. that night and was informed by the bartender that two children had perished in a fire at "Firebun". Junior denied being in the company of the remaining appellants on the night of April 13, 2009.

[16] Mohanie Ramdial was called as a witness on behalf of Soman, Shiva, Ryan and Visham. She was the mother of Nigel and the sister of Ashook. She gave evidence that on April 15, 2009, at around 11:00 a.m., she visited Nigel at the San Fernando General Hospital. Whilst there, she asked Nigel who had shot him and he replied that he was unaware. At that time, Ashook entered the room and said to Nigel, *"You don't know who shoot you, tell the police I see Toppy shoot you."* Ashook then left the room. Mohanie told Nigel that *"If he did not see who shot him, he should not call anyone's name and lie on them."*

[17] Soman Rampersad also relied on the evidence of Dr. Raymond Seedoo, which was adduced by formal admission. Dr. Seedoo attended to Nigel when he was admitted at the San Fernando General Hospital for gunshot wounds to his back and left upper limb. Dr. Seedoo recorded the information given by Nigel. The record of the information was contained in an entry made on April 14, 2009 at 4:45 a.m. in the San Fernando General Hospital official history and physical record. The record reflected that Nigel told Dr. Seedoo that he *"had alcoholic drinks last night, was asleep, and when he was awake the house was on fire and he ran out realising he was shot in his back and his left arm".* Nigel also told Dr. Seedoo that he was *"unaware of the type of gun, how many times he was shot and who shoot him"*.

THE APPEAL

[18] Due to the number of appellants and the multiple grounds of appeal advanced on their behalf, we have found it necessary to divide the judgment into broad headings and sub-headings under which they will be considered.

[A] BAD CHARACTER

Appellant No. 1 - Ground 3: Improper admission of evidence of the appellant's bad character and inadequate directions

Submissions

[19] Mr. Heath submitted that certain evidence adduced by the prosecution ('the fresh evidence') contained several references to Soman's bad character and ought not to have been admitted since it had the effect of adversely affecting the fairness of the proceedings. In support of this submission, he relied on the decision in **Richardson Flemming a/c Popo v The State**[1].

[20] Mr. Heath also submitted that the principles in relation to the admissibility of fresh evidence which guide the Court in the exercise of its discretion are well known. He placed reliance on the principles enunciated by Lord Parker CJ in **R v Parks**[2], namely that the Court must be satisfied that the evidence (i) was not available at the trial, (ii) is relevant to the issues, (iii) is credible, that is, capable of belief and (iv) if it had been given at the trial, it might have created a reasonable doubt in the minds of the jury as to the guilt of the appellant.

[21] The prosecution successfully applied to adduce bad character evidence in the form of unproved allegations, premised on they being important explanatory evidence under **section 15N(1)C of the Evidence (Amendment) Act Chapter 7:02**. Mr. Heath contended that the prejudicial effect of this evidence exceeded the probative value and that the evidence went beyond the permissible limits of collateral issues, which had the potential to adversely affect the jury's focus. Mr. Heath argued that the judge improperly exercised her discretion by allowing the evidence since it was unnecessary for the jury to understand the case, especially since the incidents were alleged to have occurred eight years prior and the witnesses were unable to consistently recall details about the incident. He relied on the decision in **R v Pendleton**[3] in support of these submissions.

[1] Cr. App. No. 11 of 2014 at [17]
[2] (1961) 46 Cr. App. R. 29.
[3] [2002] 1 WLR 72.

[22] Mr. Heath submitted that the trial judge failed to warn the jury that the matters of bad character were based on unproven charges and that they should not consider the bad character evidence unless they found the evidence of the prosecution witnesses credible and reliable.

[23] Mr. Busby, for the respondent, submitted that the principles governing the admissibility of fresh evidence in criminal trials in this jurisdiction were distilled in the case of **The State v Warren Tidd et al**[4] and **Yaseen and Thomas v The State**[5], as opposed to **R v Parks**[6], which deals with the calling of fresh evidence on appeal.

[24] Mr. Busby submitted that in the present case, it was important to remember that most of the impugned evidence was foreshadowed on the depositions and belatedly became the subject of objection by Soman's trial counsel. The judge, after receiving written submissions on the point, exercised her discretion and allowed the evidence and no real complaint could be made that she did not adequately direct the jury on how they were to deal with it. It was submitted that in these circumstances it was not open to counsel to challenge the exercise of the judge's discretion unless he could show that such discretion was unreasonably exercised. Further, there was sufficient time between the disclosure of the documents and the calling of the evidence to allow defence counsel to respond to the notice. Further, it was always open to defence counsel to request an adjournment in order to deal with the evidence.

The Law, Analysis and Reasoning

[25] At common law, the principle governing the admission of fresh evidence at a criminal trial proceeds from the basis that, except in limited circumstances, where evidence is relevant, it is *prima facie* admissible. In order to avoid any surprises to an accused person, a judge may exercise his discretion to exclude evidence of this nature. However, where the prosecution gives appropriate notice of the intention to call fresh evidence, once the judge is satisfied that the defence has sufficient time to respond, he ought to be slow to exclude the evidence: see the

[4] HCA No. 516 of 1997.
[5] (1990) 44 WIR 219.
[6] **Parks** (n. 2).

decisions in **The State v Warren Tidd et al**[7] and **Yaseen and Thomas v The State**[8]. Mr. Heath's argument, based on the decision in **R v Parks**[9], is therefore misconceived and we agree with Mr. Busby that the principles set out in that case deals with the admission of fresh evidence on appeal as opposed to evidence in a criminal trial.

[26] In our view, it was reasonably open to the judge, in exercising her discretion, to admit the evidence of bad character as fresh evidence. Mr. Heath has not shown that the exercise of that discretion was unreasonable in the Wednesbury sense. There was a period of twenty-three days between the time of the disclosure of the relevant documents and when the evidence was called by the prosecution. This was ample time for defence counsel to obtain instructions on the issue and to make relevant submissions on them. We are not persuaded that the introduction of this evidence caused prejudice to Soman.

[27] Counsel for the appellant has also complained that the judge failed to adequately direct the jury on how to deal with the background evidence. The judge's directions to the jury on this issue were as follows:

> *"I move on to another topic, motive.* ***The State opened with two words, "land and bad blood", and told you that the opening is not evidence. But they went on to lead evidence in relation to these issues from Ashook Ramdial, Geeta Singh and Nigel Ramdial. I will now remind you of the evidence that was led in this regard.***
> *…*
> *…*
> *…*
> *…*
> ***Now, how did Accused No. 1, 2, 3 and 4 respond to these allegations? Well, they did not testify, but from the thrust of the cross-examination by Mr. De Lima they denied that these incidents occurred…***
> *…*

[7] **Warren Tidd** (n. 4).
[8] **Yaseen and Thomas** (n. 5).
[9] **Parks** (n. 2).

Now, I told you earlier that this case is about two murder charges, the murder of Sangeeta Ramdial and the murder of Sarah Ramdial. You are, therefore, probably wondering why you heard such evidence in the first place, about land dispute and bad blood between Ashook and Accused Nos. 1 to 4. You are probably saying that this does not have anything to do with the incident in question. I will now give you a direction in law on how you should approach this evidence which is essentially evidence of the history of the relationship between Accused Nos. 1, 2, 3 and 4 and Ashook Ramdial.

Members of the Jury, it is relevant, because if you accept it, it explains that the events which occurred on or about 14th April, 2009, did not take place in isolation. There are two aspects of the background on which the Prosecution places reliance. The first is a fact that Accused Nos. 1 to 4 forced Ashook and his family off the first piece of land that they occupied and, secondly, that as a result of the land dispute, there was a breakdown of the relationship between Ashook and Accused Nos. 1, 2, 3 and 4. These issues, if believed, are relevant because they suggest a motive for the incident that occurred on or about 14th April, 2009. It's really for you to decide if it does*. I direct you that in any criminal case the State does not have to prove motive. If, however, there is evidence to suggest motive, the State is permitted to lead such evidence to assist you in deciding whether or not you believe the State witnesses when they testify in relation to the incident in question, the burning down of the house.* ***Put simply, it is background evidence that puts the evidence in this case in context, if you view it as such.***[10]" [emphasis added]

[28] The judge's directions to the jury on this issue were unassailable. She highlighted the relevant parts of the evidence, placed it in its proper context and adequately directed the jury as to how they were to deal with it. The judge properly directed the jury that if the evidence is believed, it could be used as background evidence to provide a context for the other evidence in the case.

This ground of appeal is without merit.

[10] Summing Up: Day 1 dated June 22, 2015 at pages 16-18.

Appellant No. 1 - Ground 4: Improper admission of evidence related to immunity

Submissions

[29] The appellant, Soman, had been a state witness in another case in which he, along with three others, stood accused of perverting the course of justice, committing forgery, conspiracy to utter a forged document and conspiracy to make a false statement under oath. He was granted immunity from prosecution in that matter and the indictment against him was quashed. At the trial, the prosecution led evidence of these other charges and admissions against the other accused which he made while he was a state witness. Mr. Heath submitted firstly that this evidence, which took the form of unproven charges, was inadmissible. Secondly, the directions given in respect of that evidence were deficient and ought to have explained the effect and meaning of the term "the quashing of the indictment". Additionally, he submitted that the judge's directions needed to address that Soman had received immunity in that case in exchange for his admissions against the other accused and directed the jury to consider those admissions in the context that he had his own interest to serve.

[30] Mr. Busby submitted that the trial judge properly exercised her discretion in admitting the evidence since there was no undertaking by the prosecution that any or certain parts of the evidence or information arising from the conspiracy matters, subject to the immunity, would not be used in other subsequent proceedings against the appellant. He submitted that counsel for Soman had not shown that the judge was wrong in the exercise of her discretion and therefore her decision ought not to be interfered with. Mr. Busby also submitted that the judge's directions to the jury on this issue were simple to understand and did justice to both sides.

The Law, Analysis and Reasoning

[31] It is well-settled that allegations which have not been proved in a court of law may constitute bad character evidence: see **R v Edwards and Other Appeals**[11].

[11] [2005] EWCA Crim 3244.

[32] The judge was required to determine the issue whether the immunity granted to Soman in relation to a matter in which he was involved in 1998 protected him from having his bad character brought out in respect of that event. The judge ruled that there was no undertaking by the prosecution that any or certain parts of the evidence or information from those matters would not be used in other subsequent proceedings against Soman. We find that this was a proper exercise of the judge's discretion based on the settled law that dismissed charges are capable of satisfying the requirement of bad character evidence.

[33] The judge, in directing the jury on the bad character of Soman in relation to the quashed indictment, related to them the circumstances under which he had been charged and how the indictment came to be quashed. The judge then directed the jury in the following terms:

> *"Now, you are probably wondering, I have already told you this case is about two murder charges. So why have you heard about these offences which Accused No. 4 committed and that he received an immunity, et cetera? Well, Members of the Jury, the accused, through his attorney, Mr. de Lima, made an attack on the character of State witnesses, Ashook Ramdial and Nigel Ramdial, suggesting that they were lying. In judging whether the accusations against Ashook and Nigel in relation to this incident, whether there is any truth in it, you should know the character of Soman Rampersad, one of the persons on whose behalf those allegations were made.* ***You are entitled to have regard to the accused's own character as revealed by his previous convictions and in the dismissed matter when considering and deciding what is the truth. Whether and to what extent it assists you is for you to judge. A person with bad character may be less likely to tell the truth, but it does not follow that he is incapable of so doing. You must decide to what extent, if at all, his character helps you. And, normally, it helps you, as I was going to say, when judging his evidence; he did not give evidence in this matter; however, you know the thrust of his defence. Bear in mind that his bad character cannot, by itself, prove that he is guilty. It will, therefore, be wrong to jump to the conclusion that he is guilty just because of his bad character. This evidence was also brought to your attention apart from the attack on the credibility of the witnesses to show propensity to be untruthful.***[12]*"* [emphasis added]

[12] Summing Up: Day 4 dated June 26, 2015 at page 46, line 31 to page 47, line 10.

[34] In our view, these directions were sufficient to raise in the minds of the jury how they were to treat with the bad character evidence, more specifically, the evidence in relation to the dismissed charge against Soman. We pause to note that in this jurisdiction, where an accomplice witness gives evidence for the prosecution, the practice is that, in order to mitigate the risk of the giving of false evidence, the witness is given an immunity. However, this does not absolve the judge of the responsibility of directing the jury that in assessing the evidence of the immunized accomplice witness, they must be mindful of the possibility and the risk that notwithstanding the immunity, the witness might still have a motive to lie because he might feel beholden to the state by dint of the existence of the immunization.

[35] It is important to underscore that the prosecution relied on the relevant charges to show the appellant's disposition "towards untruthfulness"[13]. The direction contended for by Mr. Heath would only be required if probative reliance was being placed on the evidential material in the context of proof of a prosecution case based in whole or in part on the evidence of an accomplice witness. As highlighted in paragraph [33] above, the judge correctly drew this to the jury's attention. Where bad character evidence is adduced for the reason of credibility assessment, any details and specifics of the underlying charge and any associated factors such as dismissal and quashing of the indictment would be largely irrelevant.

[36] We do not agree with the submission of Mr. Heath that the judge ought to have directed the jury on the effect and meaning of the quashing of the indictment. All that was required of the judge was to highlight to the jury the circumstances under which the charge was laid and how they were to treat with the bad character evidence, which she did.

For these reasons, we find this ground of appeal to be unmeritorious.

[13] Transcript of the Proceedings dated May 19, 2015 at page 6, lines 40-44.

Appellant No. 4 - Ground 2/Appellant No. 5 - Ground 2/Appellant No. 6 - Ground 3: Bad character of Ashook Ramdial, interest to serve and motive to lie

Submissions

[37] Ms. Chote S.C. submitted that the trial judge erred in law in her directions to the jury concerning the bad character evidence of the witness, Ashook. She argued that as a witness of admittedly bad character, his evidence ought to have attracted an immediate direction. She also submitted that the judge failed to direct the jury that he had an interest to serve due to the history of bad blood between himself and the appellants, and therefore his evidence should be treated with special caution. Counsel argued that the failure to provide this caution was likely to have greatly prejudiced the appellant, and this was compounded when the judge gave reasons to shore up Ashook's credibility. The cumulative effect of these errors was that the jury were misdirected in their approach to the credibility of a key prosecution witness.

[38] Mr. Busby submitted that Ashook was not a witnesses with an interest to serve but merely one with an interest in the outcome of the case and that there was nothing to suggest that his evidence was tainted with improper motive. Further, the trial judge nevertheless issued a care warning directing the jury to consider whether he was an independent witness and instructed them that it was crucial to ask themselves whether Ashook had a motive to lie. Additionally, counsel submitted that the decision in **R v Makanjuola; R v Easton**[14] imparted a wide discretion to a trial judge when formulating directions and care warnings and since the judge had directed the jury in terms which she considered fit, there were no grounds for complaint.

The Law, Analysis and Reasoning

Bad Character

[39] Evidence of a witness' bad character, including evidence of previous convictions, is admissible where it is of substantial probative value in relation to a matter in issue and is of substantial

[14] [1995] 1 WLR 1348.

importance in the context of the case of a whole.[15] Where evidence of this nature is admitted, the trial judge is obliged to provide directions to the jury on its relevance and its use in their assessment of the witness' credibility. It is left to the jury to assess whether and to what extent the previous convictions affect the witness's evidence.

[40] In **Brewster and Cromwell v R**[16] the Court of Appeal of England and Wales set out the respective roles of judge and jury in relation to this specie of evidence. The trial judge's task is to evaluate the bad character evidence and decide whether it is reasonably capable or sufficiently persuasive to be worthy of consideration on the issue of the witness's creditworthiness. If it meets this threshold, the judge ought to provide appropriate directions and leave it to the jury to make a proper evaluation of that evidence and whether it in fact bears on the question of the witness's truthfulness.

[41] In the present case, jurors were informed that Ashook had three convictions and one pending charge related to crimes of dishonesty. The judge directed them that they were entitled to take this into account and that that did not mean that Ashook's evidence was untrue. They were told that it was up to them to assess whether and to what extent his previous behavior (in particular a conviction for robbery with aggravation and violence) might assist in assessing his evidence and in resolving whether or not he was credible, reliable and truthful.

[42] The directions given alerted the jurors to the evidence's capacity to demonstrate dishonesty and instructed them to take it into account in assessing his credibility. This was balanced by the further instruction that previous convictions for crimes of dishonesty did not automatically mean that his testimony was untrue. Nothing further could be asked of the judge's directions.

[15] Section 15M of the Evidence Act Chapter 7:02.
[16] [2010] EWCA Crim 1194.

Interest to serve

[43] The major complaint under this ground was that the judge failed to direct the jury that Ashook, had an interest to serve and therefore his evidence should be treated with caution. The learned authors in **Blackstone's Criminal Practice 2018** at **Part F5.14**[17] considered a judge's obligation to give care warnings to a jury. The authors stated:

> *"At common law, a judge is obliged to advise a jury to proceed with caution where there is material to suggest that a witness's evidence may be tainted by an improper motive, the strength of advice varying according to the facts of the case (Beck [1982] 1 All ER 807)."*

[44] At **Part F5.5**, the learned authors of Blackstone's said:

> *"In appropriate circumstances the jury should be warned to exercise caution before acting on the evidence of certain types of witness, if unsupported. Whether a warning is given is a matter of judicial discretion dependent on the particular circumstances of the case, and failure to give a warning therefore will not necessarily furnish grounds for a successful appeal. Equally, if a warning is given, the strength of warning and the extent to which the judge should elaborate upon it, also turn on the particular circumstances of the case."*

[45] Counsel for the respondent, Mr. Busby, contended that a trial judge is under no obligation to adopt a specific formulation of words in giving a care warning. In support of this contention, he relied on the decision in **R v Makanjuola; R v Easton**[18]. In that case**,** Lord Taylor summarised the principles relevant to the formulation of a care warning in respect of the unsupported evidence of accomplices and victims of sexual offences, who might have an interest to serve. As to the circumstances in which it may be appropriate for the judge to give such a warning, Lord Taylor said at pages 732 to 733:

> *"The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to*

[17] Blackstone's Criminal Practice 2018, Part F Evidence, Section F5 Corroboration and Care Warnings.
[18] **Makanjuola** (n. 14).

carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the 1994 Act. ***Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however, the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.***

We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. ***We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content****."* [emphasis added]

[46] The principles enunciated in **Makanjuola**[19] developed from the need to alert jurors to the risk of convicting on evidence produced by witnesses with interests to serve. These principles can be traced through a line of authorities commencing with **Davies v DPP**[20] and refined in the subsequent decisions of **R v Prater**[21]*,* **R v Beck**[22] and **R v Spencer**[23]*.* They have found application in this jurisdiction in **Soogrim and Maharaj v The State**[24] and **Wanzar (Michael) v The State**[25]**.**

[47] A distinction must be drawn between the evidence of an accomplice and a witness with an interest to serve. Accomplices fall into a specific category requiring a strong caution. Witnesses with an interest to serve are persons who may have reason to give perjured evidence against the

[19] Ibid.
[20] [1954] AC 378.
[21] [1960] 1 All ER 298.
[22] [1982] 1 All ER 807.
[23] [1987] AC 128.
[24] Crim. App. Nos. 23 and 24 of 1984.
[25] (1994) 46 WIR 439 (CA).

accused. This distinction was aptly described by Persaud JA in **Soogrim and Maharaj v The State**[26]:

> *"**All the cases to which reference has been made, indicate a difference between an accomplice and a witness who has an interest to serve,** and the balance of opinion seems to be that where a witness is not an accomplice, but one with an interest to serve the trial judge should warn the jury in terms more or less similar to the warning he must give them if the witness falls into the latter category depending on the circumstances of the case. **It should be clear that an accomplice is a person who took part in the offence itself or was an accessory, whereas one who has an interest to serve seems to fall into a lesser class in that while he is not an accomplice to the offence, there could be a reason or several reasons why the possibility arises that he may wish to give perjured evidence against an accused person.** He may do so out of self-interest as was the case in R. v Prater, ([1960] 1 All ER.298 and R. v Stannard ([1964] 1 All ER.34) or **he may display some marked degree of prejudice or spite which motivates him to give the evidence, or, as it has been put by one judge, he may have an axe to grind, but not the desire to see that justice is done**. But notwithstanding all this, he may yet not be particeps criminis. But a court must be careful that the question of whether or not a witness has an interest to serve which is of comparatively recent origin, and which in itself is a salutary "rule" does not assume the gay abandon of an unruly and unbridled horse on the run. **An examination of the decided cases shows that the need to give the warning must depend on the particular circumstances of the particular case**."* [emphasis added]

[48] Examples of witnesses with an interest to serve include those acting out of self-interest or motivated by prejudice or spite. However, a person motivated by a desire to see justice done does not fall within any of these categories.

[49] The line of cases was also considered by the Court of Appeal of Trinidad and Tobago in **Wanzar (Michael) v The State**[27]. In that case, the appellant argued that the principal prosecution witness ought to have been treated as an accomplice, requiring the special caution in respect of

[26] **Soogrim and Maharaj** (n. 24).
[27] **Wanzar** (n. 25).

corroboration. The witness was present at the scene of a murder but was not charged as an accomplice. He denied involvement in the crime. In the course of cross-examination it was put to him that he had had a dispute with the accused "over a bird". He admitted that he had. It was also put to him that he was lying "because of his involvement in the matter". Save for this suggestion, the case did not paint the witness as an accomplice. Rather, in his closing address, trial counsel labelled him a witness with an interest to serve. The trial judge warned the jury that they should proceed with caution before acting on his evidence because it was contended that he had an interest of his own to serve by involving the accused and exculpating himself. The judge further directed that it was open to the jury to act on his evidence if they believed it but only after examining it with extreme caution.

[50] Hamel Smith JA, in delivering the judgment of the court identified the following principles in deciding whether a caution was required:

(a) The categories of accomplice are closed; participation in a fray that leads to a murder and a guilty plea to the lesser offence of assault did not automatically make one an accomplice: **Davies**[28];

(b) Courts are reluctant to label a witness as an accomplice merely at the suggestion of counsel, a greater evidential basis is required: **Prater**[29];

(c) When faced with a witness who was not an accomplice but whose evidence could be considered tainted by improper motive, the trial judge had the discretion, depending on the facts of the individual case, whether to give the jury some adequate caution or warning: **Beck**[30]; and

(d) Where the witness is not an accomplice, but there exists potential corroborative material, the extent to which the judge makes reference to that material depends

[28] **Davies** (n. 20).
[29] **Prater** (n. 21).
[30] **Beck** (n. 22).

on the facts of each case. The overriding rule is that he must put the defence fairly and adequately: **Spencer**[31].

[51] In **Wanzar**[32], the trial judge treated the witness as having an interest to serve and directed the jury to use care when considering his evidence. The court of appeal held that the trial judge was under no obligation to give the full corroboration warning in such circumstances. Accordingly, the instruction to exercise care was sufficient as his defence had been put fairly and adequately and the jury could not have been confused as to what it was.

[52] In **R v Pringle**[33], the Judicial Committee of the Privy Council provided further guidance on the treatment of witnesses with interests to serve. One of the appellant's grounds challenging his conviction for murder related, to the prosecution evidence of a statement from a former cellmate whom he claimed was a prison informer with an obvious interest to serve. His counsel argued that this was tainted evidence and should have been the subject of directions which were not given by the trial judge. Lord Hope, at paragraph 32, observed that before a warning could be given, there must be some evidence or indication that the evidence had been tainted:

> *"The indications that the evidence may be tainted by an improper motive must be found in the evidence. But this is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence."*

[53] The guidance to trial judges set out clearly in **Pringle** are as follows. First, there must be an evidential basis for establishing that the witness has an improper motive. Second, where there is evidence of such motive, the trial judge must bring this to the attention of the jury. Third, the jury should be directed to be cautious before accepting that evidence.

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[31] **Spencer** (n. 23).
[32] **Wanzar** (n. 25).
[33] [2003] UKPC 9.

[54] It is important to note that a trial judge retains the discretion to warn the jury to exercise caution whenever he considers it appropriate to do so, whether in respect of an accomplice or a complainant or any other witness. As stated by Lord Taylor in **Makanjuola**[34], where the trial judge has exercised this discretion, a superior court would be disinclined to interfere unless the trial judge's decision was unreasonable in the Wednesbury sense. Further, as noted by the authors in **Blackstone's Criminal Practice 2018**[35]:

> *"…the discretion imparted to trial judges by Makanjuola is a wide discretion and, where it is appropriate for the judge to warn the jury to exercise caution, no set form of words is required (Blasiak [2010] EWCA Crim 2620, where, in the case of a witness who was an in-patient at a psychiatric unit, it sufficed to draw attention to the central question of her alleged unreliability)."*

[55] In the Jamaican decision in **Mervin Jarrett v R**[36], one of the issues that arose on appeal was that the judge had given no warning as to the dangers of acting on the evidence of the complainant without corroboration. In deciding on this issue, Morrison P., in giving the judgment of the court, said at paragraphs 18 and 19:

> *[18] We will first say a word on the matter of corroboration. By section 26(1) of the Sexual Offences Act 2009, there is now no mandatory requirement for a corroboration warning in relation to the evidence of the complainant in a sexual case. Instead, as section 26(2) provides, the trial judge may, where he considers it appropriate to do so, give a warning to the jury to exercise caution in determining (a) whether to accept the complainant's uncorroborated evidence; and (b) the weight to be given to such evidence. These provisions reflect the position to which the common law had already come, as demonstrated by the decision of the Privy Council in R v Gilbert [2002] UKPC 17 (applying R v Makanjuola; R v Easton [1995] 1 WLR 1348), which confirmed that the question whether to give a corroboration warning in sexual cases was a matter for the discretion of the trial judge (see also the decision of this court in R v Prince Duncan & Herman Ellis, SCCA Nos 147 & 148/2003, judgment delivered 1 February 2008). [19]* ***The question of whether or not to give a corroboration warning in respect of the evidence of the complainant in this case was therefore entirely a***

[34] Makanjuola (n. 25).
[35] Blackstone's Criminal Practice 2018 > Part F Evidence > Section F5 Corroboration and Care Warnings.
[36] [2017] JMCA Crim 18.

matter for the discretion of the judge. Accordingly, on the basis of standard appellate court doctrine governing review of the exercise of a judicial discretion, this court will be loath to interfere unless it can be shown that the judge exercised it on an erroneous basis or principle *(as to which see The Attorney General of Jamaica v John MacKay [2012] JMCA App 1).* ***As will be seen from the passage of the summing up set out above, the judge chose not to use the term corroboration at all. Instead, she told the jury that they should approach the complainant's evidence carefully, bearing in mind that there was no independent evidence, and that they could only convict if, after considering her evidence carefully, they were satisfied so that they felt sure that she spoke the truth. In our view, it was entirely a matter for the judge to determine whether she would give any warning at all and, if so, in what terms. It seems to us that in the light of what the judge did say to the jury, they could hardly have failed to appreciate the anxious level of scrutiny which she was inviting them to give to the complainant's evidence."*** [emphasis added]

[56] The judge in her summing up pointed the jury to the animosity between Ashook and the Bajnaths and their family members and the background of tension stemming from a land dispute. The judge correctly left it open to the jury to find whether Ashook had an interest in the outcome of the case. The judge also carefully and meticulously marshaled the evidence that went to this issue:

"Now, I told you earlier that this case is about two murder charges, the murder of Sangeeta Ramdial and the murder of Sarah Ramdial. You are, therefore, probably wondering why you heard such evidence in the first place, about land dispute and bad blood between Ashook and Accused Nos. 1 to 4. You are probably saying that this does not have anything to do with the incident in question. I will now give you a direction in law on how you should approach this evidence which is essentially evidence of the history of the relationship between Accused Nos. 1, 2, 3 and 4 and Ashook Ramdial.

Members of the Jury, it is relevant, because if you accept it, it explains that the events which occurred on or about 14th April, 2009, did not take place in isolation. There are two aspects of the background on which the Prosecution places reliance. The first is a fact that Accused Nos. 1 to 4 forced Ashook and his family off the first piece of land that they occupied and, secondly, that as a result of the land dispute, there was a breakdown of the relationship between Ashook and Accused Nos. 1, 2, 3 and 4. These issues, if believed, are relevant because they suggest a motive for the incident that occurred on or about 14th April, 2009. It's really for you to decide

if it does**. I direct you that in any criminal case the State does not have to prove motive. If, however, there is evidence to suggest motive, the State is permitted to lead such evidence to assist you in deciding whether or not you believe the State witnesses when they testify in relation to the incident in question, the burning down of the house. **Put simply, it is background evidence that puts the evidence in this case in context, if you view it as such.

You must decide whether you accept the evidence of Ashook, Nigel and Geeta in relation to these earlier incidents. In making that decision, you will need also to consider the evidence that was adduced in cross-examination by Mr. De Lima from Ashook Ramdial in relation to these incidents. Please remember that the critical evidence in this case concerns the events that occurred on or about the 14th April, 2009. It is important to keep a sense of proportion about the evidence of past incidents. It may be helpful in resolving where the truth lies, that is a matter for you to judge. But past incidents cannot prove the guilt of Accused Nos. 1, 2, 3 and 4.

If you do not believe that those earlier incidents occurred, you must still go on to consider the evidence of Ashook, Geeta, and Nigel in relation to the incident that occurred on or about the 14th April, 2009.

***Even if you do accept that Accused Nos. 1, 2,3 and 4 have behaved as stated towards Ashook Ramdial in the past, it does not necessarily follow that they acted as alleged on or about the 14th April, 2009, in relation to the incident before this court. You still need to examine critically and carefully the evidence of Ashook, Geeta, and Nigel and come to a decision in relation to the accused in this matter on the basis of their evidence in relation to the incident that occurred on or about the 14th April, 2009**."*[37] (sic) [emphasis added]

[57] The judge also directed the jury in the following terms:

*"… **I am first dealing with Ashook Ramdial. And the evidence that is, that might be capable of impacting on his credibility or reliability and truthfulness, depending on what assessment you make of it**…*

[37] Summing Up: Day 1 dated June 22, 2015 at page 17, line 43 to page 18, line 48.

He is one of three eyewitnesses presented by the State. As I said, he is alleged to have identified Accused Nos. 1 to 5 as being at his house and being responsible for the death of his children.

Now, you would recall I dealt with the assessment of witnesses and I suggested to you that it might be useful, when assessing witnesses, to ask yourself certain questions. And that's for all witnesses, so some of the questions which I referred to, if you will recall, is whether, for example, the witness is an independent witness. So, in the case of Ashook, is he an independent witness, does he have any motive to lie? Is there any other evidence that diminishes his evidence? Is his evidence reliable and credible? Are there any inconsistencies in his evidence, or any contradictions with other witnesses? Those are just some of the things, I just suggest. It is up to you, of course, how you approach it.

So let's look at the first question, is Ashook an independent witness?… ***Now, it is open to you to find that he has an interest in the outcome of this case because he is the father of the two children who died, he is the husband of Geeta who was shot, he was the uncle of Nigel who was shot, if you accept the evidence of them being shot from the medical and from the circumstances in which they were shot****…*

Now, it is crucial to ask yourself another question, does he have a motive to lie? Now, why this is a crucial question, it is in light of the fact that one of the main points or planks of the Defence for Accused Nos. 1 to 4 is fabrication, that he lied.

…

In considering this question you might wonder whether the fact that Ashook has previous convictions means that he is lying in relation to Accused Nos. 1, 2, 3 and 4. Let me give you a direction on how to address his previous convictions.

Now, you heard in the course of this trial, the examination in chief, it was brought out by the State attorney that Shook has three convictions and one pending charge. *In relation to the convictions, one, the oldest is for malicious wounding which occurred 21 years ago, that is, in 1994. And he was convicted and fined $750 or nine months hard labour and ordered to pay the victim $7,500 in compensation. Another conviction was for malicious damage, that occurred 20 years ago on the 1st July, 1995 for which he pleaded guilty and was ordered to pay compensation in the sum of $3, 690.*

The third was seven years ago in January of 2008, for robbery with violence, for which he pleaded guilty, and was fined $8,500, and agreed to pay compensation of $5,000.

Now, additionally, he has a pending matter for which he was charged, and that is robbery with aggravation, which allegedly occurred in January of 2008. Why have you heard about the previous convictions of Ashook Ramdial and about the pending charge? What does it have to do with this matter, you are probably wondering. He is a witness in this case, he is not on trial. You have heard about Ashook Ramdial's convictions and pending matter because the State's case is that he identified five of the perpetrators of this crime. Accused Nos. 1 to 5, and because amongst other things, Accused Nos. 1, 2, 3 and 4, they state, part of their case is that Ashook Ramdial fabricated his evidence against them when he implicated them in the murders of Sangeeta and Sarah Ramdial.

Additionally, Ashook made allegations against them in relation to acts of violence perpetrated by them against him, which arose out of land disputes. You, therefore, heard about his convictions and a pending matter in this trial, the credibility of Ashook Ramdial is of substantial importance. *"*[38] (sic) [emphasis added]

[58] The judge in her summing up, in highlighting to the jury the background evidence, said:

"Ashook, Nigel and Geeta explained the fact that prior to living in the house that burnt down, they lived two house plots away… Ashook explained that he grew up on that piece of land where they had lived previously with his family…. He said that he was forced to leave this piece of land…

Ashook said that Shiva started to occupy the land as he was forced to leave and he said he broke down Ashook's plywood house and dug up the foundation with a backhoe and dug a trench. Ashook said that there had been many altercations between Shiva, Ryan, "Sonny" and "Toppy", and he said one evening in 2002, he was standing in his yard and "Toppy" came in the yard and started to shoot at him and shoot him in his hand. Ashook said he ran into the gallery and then "Toppy" and another man came into the gallery, took the gun butt and start to beat him in his face. It broke his teeth and he said they buss up his head… He said that "Toppy" then dragged him out into the yard and then "Sonny", Ryan, Shiva and other men beat him up on the ground.

[38] Summing Up: Day 2 dated the 24th June, 2014 at page 14, line 33 to page 16, line 22.

… As a result of the incident, Ashook said that his finger was mash up, and his two front teeth broke out …

…

…

***Now, how did Accused No. 1, 2, 3 and 4 respond to these allegations? Well, they did not testify, but from the thrust of the cross-examination by Mr. De Lima they denied that these incidents occurred**.[39]"* [emphasis added]

[59] In **R v Blasiak**[40], the appellant was convicted of rape. The prosecution case was that the appellant had raped the complainant. The defence case was that he had encountered the complainant. He had admittedly engaged in sexual activity, but such activity was initiated by the complainant. He had not penetrated her and he had reasonably believed that she was aged 16 years or over. One of the issues that arose on appeal was whether the judge was wrong in not giving a direction to the jury that caution had to be exercised before convicting on the uncorroborated evidence of the complainant in the particular circumstances of this case. The essence of the submission by counsel for the appellant was that the judge had promised a direction as to the caution necessary when considering the complainant's evidence in the absence of corroboration, but that he had not given such a direction. On this issue, Gross LJ, went through the judge's summing up in great detail and said at paragraphs 32-33:

"[32] *We have earlier outlined the summing-up at some length. In our judgment it was both fair and lucid.* ***The question of the Complainant's alleged unreliability was fairly and squarely brought to the jury's attention. In the circumstances, even if it was unfortunate that the judge did not deliver a direction in the specific terms he had himself foreshadowed, there was no need so to do. He had already said more than enough to direct the jury's attention to the central question of the Complainant's reliability or unreliability and hence the need for caution in considering her evidence. In this regard there is no magic in a particular form of words. It was for this reason that there was no gap in the summing-up*** *and no doubt why Mr Arnold at the time did not think it appropriate to complain. Had it then struck him that the judge had overlooked a matter of this nature, we have no doubt that he*

[39] Summing Up: Day 1 dated June 22, 2015 at page 16, line 9 to page 17, line 14. See also the Transcript of the Proceedings dated March 4, 2015 at page 49, lines 7-14.
[40] [2010] EWCA Crim 2620.

would have raised it. There is no criticism of him that he did not. The reason for not doing so was that any additional wording was unnecessary.

[33] The discretion imparted to trial judges by Makanjuola is a wide discretion. No set form of words is required. We are not remotely persuaded that the failure by the judge in this case to give a direction in the specific wording foreshadowed gives rise to any Wednesbury error. In any event, even had we been wrong about that, we would have no doubt that the judge's failure to give such a direction did not begin to render the verdict unsafe*…"* [emphasis added]

[60] It is clear that given the nature of the background evidence and the question of Ashook's independence as a witness, his credibility and reliability were of substantial importance and warranted an appropriate warning to the jury. However, the strength and terms of that warning were matters within the domain of the trial judge. This court will not interfere with the trial judge's exercise of discretion save in a case where the exercise is unreasonable in the Wednesbury sense.

[61] From the foregoing extracts of the summing up at paragraphs [56], [57] and [58] above, it must have been obvious to the jury that the judge was drawing their attention to the special position of the witness Ashook, namely, his close relationship with the victims which raised the possibility that his evidence might be tainted. The trial judge brought the jury's attention to the central question of Ashook's reliability or unreliability and the need for caution in considering his evidence. The jury were specifically directed to consider whether his desire to obtain justice for his deceased daughters might provide him with a motive to lie and whether he was an independent witness, and to factor this into their assessment of his credibility.

[62] Ms. Chote S.C. drew our attention to Ashook's admission that he shared a tumultuous relationship with the appellants and their relatives (the Bajnath family) and that generally there was "bad blood" between Ashook and the Bajnaths at the time of the attack. The judge's direction to the jury in relation to this evidence was to examine Ashook's evidence *"critically and*

carefully", which were in even stronger terms than the decision in **Jarrett**[41] where the trial judge directed the jury to examine the complainant's evidence "carefully" [see paragraph 55 above]. These directions communicated in substance that Ashook's evidence ought to be approached with care. To adopt the words of Morrison P. in **Jarrett**, the jury could hardly have failed to appreciate the level of scrutiny which the trial judge was inviting them to give to Ashook's evidence. We are fortified in this view from a reading of the summing up as a whole. The content of the warning provided in the case at bar was woven into a direction that fell clearly within the trial judge's discretion. This was despite the directions being separated. A preferable approach would have been to merge the various parts of the directions. In doing so, the directions would have been more coherent and its impact would have been bolstered in the minds of the jurors. However, this Court does not hold trial judges to a standard of perfection. It is notable that this trial was a relatively lengthy one, taking up a period of approximately five months with various complex areas of law. In addition, the summing up was given over a period of four days. Further, we wish to reiterate that it is within a trial judge's discretion how he or she approaches their summing up to the jury. There are no precise words that need to be employed and it is not always necessary or helpful to delve into granular detail in formulating instructions for them. The prescribing of any formulaic expressions in relation to certain principles would only seek to restrict trial judges in their task of directing the jury.

[63] We also wish to point out that the facts raised under this ground were all matters within the province of a jury possessed, no doubt, of common sense and experience. We are mindful of the decision in **Hans Noel v The State**[42] where Hamel-Smith J.A. said at page 31:

> *"One cannot allowed, in hindsight, to dissect every word in a summing up and conclude that, looked at in isolation, it did not convey the correct or proper meaning to a jury.* ***A jury must be allowed a measure of common sense and a degree of intelligence in dealing with the directions given and the summing up must be looked at as a whole to see whether a wrong or improper impression was conveyed to them."*** [emphasis added]

[41] **Jarrett** (n. 36).
[42] Cr. App. No 29 of 1990.

[64] The trial judge was accordingly justified in exercising her discretion and concluding that there were no special features in the case at bar which required such a special warning. To suggest otherwise would be a leap of logic and would in effect revert the position to the one pre-**Makanjuola**, where warnings were given as matter of course and did not need to be linked to issues of specific unreliability in relation to the evidence of a witness.

[65] We are satisfied that the issue as to the care and caution in which the jury were to approach the evidence of Ashook was clearly and unequivocally conveyed to them in this case. The trial judge's cautions met with the minimum requirements and accordingly we can find no basis for interfering with her discretion.

This ground of appeal is without merit.

Appellant No. 1 - Ground 13: - Judge descending into the arena

Submissions

[66] The appellant, Soman, complained that the trial judge was partial to the prosecution when she descended into the arena to advise prosecuting counsel on the details their application to adduce evidence of his bad character would require to succeed.

[67] Mr. Busby, in response, submitted that even a cursory reading of the transcript of the proceedings would reveal the fact that the accusation that the judge was partial to the prosecution was fallacious and ill-founded. He submitted that the transcript made it manifest that the trial judge was fair and even-handed with both sides.

The Law, Analysis and Reasoning

[68] The proceedings at the heart of the appellant's complaint occurred on February 19, 2015. The prosecution sought leave of the court to adduce bad character evidence related to a historical land dispute between Soman and the Ramdials. The court indicated in its ruling that there were certain issues raised by the prosecution's application which it wished to question, namely, *"the length of the land dispute, when it began, when they were moving from one piece of land to another, when in the course of any period of time this event occurred so that we can have some sort of time frame."*

[69] The following is an extract of the exchange between the judge and the prosecutor[43]:

> **The Court:** *Attorneys, I am going to give just a summary of my ruling…. Now there are certain issues I need to ask questions about, so when those issues arise, I will ask the appropriate parties."*
> *…*
> *…*
> *Now, in relation to this issue, I would like Ms. Rambhajan, I need some clarity in terms of the approximate time when this matter – because, as you know, under section 15(N)(3)…it refers to fairness if the Defence applies for the evidence to be excluded, the Court needs to consider whether it's fair to do so.*
>
> **Ms. Rambhajan:** *Yes, please, My Lady.*
>
> **The Court:** *…Further, in section 15(N)(4), it says the things that the Court should take into consideration or some of it, when considering the issue of fairness, and one of it is the length of time between the alleged incident and the incident before this court….I also want to know if, from your instructions … if Geeta and Nigel…actually witnessed this or is it hearsay evidence… So all the Court wants from you is some clarity with respect to the approximate time.*
> …
> …

[43] Transcript of the Proceedings dated February 19, 2015 at page 4, lines 29-35, page 8, lines 20-41 and page 19, lines 18-21.

The Court: *So it was during the time, it was with respect to the first piece of land?*

Ms. Rambhajan: *From my reading of it, yes, please, My Lady…..*

[70] It is important to note that the clarification sought by the judge, in relation to the further details required for the bad character application, was eventually addressed by the prosecutor, Ms. Rambhajan. The court, upon receiving this further information, allowed the prosecutor to lead certain pieces of evidence but also excluded certain evidence from being led[44].

[71] In our view, the exchange between the judge and the prosecutor was insufficient to mount a complaint that the judge descended into the arena to advise the prosecution on its application. There was nothing inherently wrong with the judge enquiring about specific details related to the prosecutor's instructions on her application to adduce bad character evidence. In fact, we commend this approach taken by the judge in her attempt to ascertain the full details about the application before coming to her conclusion and giving her ruling on the issue. This is part of active case management and the judge is to be commended, not criticized for it.

[72] We also find Mr. Heath's submission, that the judge was partial to the prosecution in her decision on Soman's bad character evidence, to be ill-founded. No complaint can be made of a trial judge's decision to identify the deficiencies in an application by counsel and providing an opportunity to clarify those issues. In fact, a perusal of the transcripts shows that Soman also benefitted from such an approach by the judge[45]. In our view, the judge did not exhibit partiality to either the prosecution or defence but was even-handed and fair in her approach throughout the trial.

This ground of appeal is without merit.

[44] Transcript of the Proceedings dated February 26, 2015 at page 9, line 1 to page 12, line 37.
[45] Transcript of the Proceedings dated February 10, 2015 at page 10, line 44 to page 11, line 29; Transcript of the Proceedings dated February 12, 2015 at page 6, lines 36-47 and at page 10, line 28 to page 11, line 2.

Appellant No. 3 - Ground 2: Reference to inadmissible bad character evidence in the summing up

Submissions

[73] During the course of the trial, Ashook, under cross-examination, blurted out certain utterances which amounted to inadmissible bad character evidence against Junior. Mr. Heath submitted that at the Ensor hearing on June 1, 2015,[46] the prosecution and the appellant's trial counsel agreed that this bad character evidence should be expunged from the record or not be referred to at all in the addresses to the jury. Notwithstanding this agreement, the trial judge made reference to the evidence in her summing up.[47] It was submitted that the judge compounded the error by referring to it as "fresh evidence" which amounted to an "inconsistency by omission" since Ashook had not referred to that evidence before. It was submitted that the judge failed to direct the jury to disregard that evidence as inadmissible, highly prejudicial and non-probative as it was not evidence which the prosecution had based its case on. It was further submitted that it was open to the jury to consider this evidence for its truth when in fact it ought to have been expunged from the record. In support of these submissions, Mr. Heath relied on the case of **Akim Carter and Clinton Otis John v The State**[48].

[74] Mr. Busby submitted that the theme of Ashook's cross-examination sought to establish that Junior had never gone to Ashook's house at any time prior to the night of the fire. Therefore, the reliability of his evidence purporting to identify Junior would have been diminished and resulted in an attack on his credibility. Ashook gave four statements to the police. In one of those statements dated February 5, 2015, he referred to Junior coming to his home at a time prior to the night of the fire. In his evidence-in-chief, he did not make any mention of the prior incident involving Junior. It was during his cross-examination that the evidence of the prior incident involving Junior came out. In those circumstances a good prosecutor would have made an application to advance Ashook's previous inconsistent statement in order to rebut the allegation

[46] Transcript of Proceedings dated June 1, 2015 at page 8, lines 40-50 and at page 9, lines 1-44.
[47] Summing Up: Day 3 dated June 25, 2015 at page 9, lines 35-42.
[48] Cr. App. No. 32 of 2005.

of recent fabrication but this was not done. In dealing with this issue, the trial judge left it with the jury as a previous inconsistent statement of Ashook. The Respondent thus submitted that this option taken by the judge redounded to the benefit of Junior rather than to his detriment and therefore he suffered no prejudice.

The Law Analysis and Reasoning

[75] The bad character evidence referred to in this ground concerned an alleged failed attempt by Junior to attack Ashook and kill him in his gallery sometime prior to the night of the fire. While it was agreed between the parties that no reliance would be placed on any prior actions of Junior towards motive, a perusal of the transcript of the Ensor hearing dated June 1, 2015 revealed that it was the judge's intention to treat with the issue as an inconsistency by omission in light of the fact that the evidence came out in Ashook's cross-examination on March 5, 2015, when it was put to him that Junior was never at Uquire Road, at his place, and he indicated, *"Yes, he come before. He come that day, he come and attack me already to kill me in my own gallery, shoot at the door and all kind ah thing."* The judge's directions relative to this evidence were as follows:

> *"Additionally, it was stated by Ashook that Junior tried to attack him already and kill him in his gallery. And this, he has never stated this before, so that was an omission on his part. In relation to the fact that he said that he saw the five accused and in addition to that, he saw men that he couldn't make out. This was fresh evidence, this was the first time he was saying it, so that is considered an omission in his evidence."*[49]

[76] The evidence of prior actions of this appellant, though previously agreed by trial counsel to be excluded, arose from defence counsel's cross-examination of Ashook. As a result, the judge was constrained to deal with it and could not ignore it. The judge chose to deal with it as an inconsistency by omission rather than as evidence of the appellant's bad character. In so doing the trial judge sought to minimize the prejudice that might have been caused to Junior by the unintended consequences of defence counsel's questioning. This direction, taken with the trial

[49] Summing Up: Day 3 dated June 25, 2015 at page 9, lines 35-42.

judge's detailed instructions on the approach to be taken when assessing inconsistencies[50] was sufficient to negative any risk of prejudice. As a result we find no fault with the judge's direction or the manner in which she exercised her discretion in dealing with the particular evidence.

Appellant No. 3 - Ground 8: Re-examination of Ashook Ramdial on inadmissible bad character evidence

[77] This ground of appeal is related to the complaint which has already been addressed under the reasoning for Ground 2 above, and therefore will not be repeated. The agreed inadmissible bad character evidence was introduced by Junior's trial counsel and we are of the view that the trial judge's treatment of the issue was satisfactory and did not result in any prejudice.

[B] EVIDENCE OF CORPORAL GOPAUL

[78] Corporal Gopaul gave a statement dated May 20, 2009, which was tendered into evidence at the preliminary enquiry and which gave an account of his involvement in the matter. In that report, he stated that he was on mobile patrol in the Freeport district from 1:20 a.m. on April 14, 2009 when he responded to a report of a fire at Playground Avenue. When he arrived at the scene, he observed a house and car both engulfed in flames. He conducted inquiries and saw Geeta Singh, who appeared to be suffering from wounds, in the company of Ashook Ramdial. He made attempts to interview both of them but they refused. He continued his inquiries and saw Nigel Ramdial lying on the ground in a bushy area. After taking certain information from Nigel, Corporal Gopaul contacted the ambulance services. Shortly afterwards, the Fire Services arrived with the District Medical Officer, who ordered the removal of the charred remains of human bodies to the Forensic Sciences Centre. The scene was processed by crime scene experts and photographed. Corporal Gopaul then returned to the Freeport Police Station and made an entry in the Station Diary.

[50] Summing Up: Day 1 dated June 22, 2015 at page 13.

[79] During cross-examination at the preliminary enquiry, Corporal Gopaul said that he had gone to Ashook's house between 8:00 p.m. and 10:00 p.m., prior to the fire, in order to investigate a report of malicious damage. The police vehicle in which he travelled to Ashook's home was followed by another vehicle occupied by Soman. When Corporal Gopaul got to the house that first time, Ashook was not there. Geeta was at home and she was asked about Ashook's whereabouts. Nigel was also at home, in bed, and he was questioned by Corporal Gopaul. After looking around the house, Corporal Gopaul returned to the Freeport Police Station where he saw Soman, who was in the company of other males of East Indian descent. He could not recall the time that he returned to the Police Station but indicated that he recorded it in the Station Diary. Corporal Gopaul had a brief conversation with Soman before returning to Ashook's house. When he returned the second time, he contacted the ambulance services. In cross-examination, Corporal Gopaul said that he recalled passing through the police station and seeing Soman with other males there but he was not sure of the time. He said that, *"when I left and saw them at the station, I went on patrol."* He also said that the time that he went out on patrol was approximately 1:20 a.m.

[80] In the Station Diary, there were several entries made by Corporal Gopaul. There was an *"omitted entry"* made at 1:45 a.m. on April 14, 2009, just after Corporal Gopaul had returned to the police station for more manpower. According to the entry, this was after his visit to Ashook's house in response to the report of fire. This entry placed the appellant (Soman), Visham Bajnath and two other male persons of East Indian descent at the police station at 12:40 a.m. on April 14, 2009. The entry also detailed that Visham Bajnath was being threatened by Ashook and Nigel.

Appellant No. 1 - Ground 5: Identification of Corporal Gopaul by Ashook Ramdial and Nigel Ramdial

Submissions

[81] Mr. Heath complained that a material irregularity occurred when the trial judge permitted counsel to bring Corporal Gopaul to court to be identified by the prosecution witnesses, Ashook

and Nigel. In summing up the case to the jury, the judge explained the basis for having the police officer brought to court:

> *"Ashook's evidence suggests that the reason he ran away and refused to accept the police's offer for assistance, medical assistance for Geeta, is because he could not trust a particular officer. He referred to that officer as "Toppy's" friend. He did not know the officer's name and gave a description of him."*[51]

[82] Mr. Heath submitted that this statement had the potential to cause prejudice in the minds of the jury which was incurable by any subsequent direction. Mr. Heath argued that no police officer in the trial was ever identified as "Toppy's friend" and when Corporal Gopaul was brought into court for Ashook to identify him, he did not identify him as "Toppy's friend". Mr. Heath submitted that in those circumstances, there was hardly room for any inference that Corporal Gopaul was "Toppy's friend".

[83] Mr. Busby submitted that there was evidence upon which the jury could have drawn an inference that Corporal Gopaul was "Toppy's friend" and that it was crucial for the jury's consideration to have Ashook attempt to identify him.

The Law, Analysis and Reasoning

[84] The evidential foundation for the judge's comments and the identification exercises are found in Ashook and Nigel's testimonies. Ashook's evidence was that in the aftermath of the attack on the night of April 14, 2009, after Geeta met him by the caraili tree and he observed her injuries, he took her and headed through the savannah. He stopped by the house of a man named "Sadhu" whom he asked for two t-shirts and to be carried to the Health Centre in Chaguanas. Whilst there, a police jeep came and stopped and he was asked by the police officers if they wanted to be carried to get some help. Ashook refused, stating that one of the police officers was *"Toppy*

[51] Summing up: Day 2 dated June 24, 2015 at page 17, lines 2-7.

partner". This officer, Ashook described as being "red" in complexion with curly hair and a tattoo on his neck.

[85] Nigel's evidence was that on April 13, 2009 he wasn't sleeping for too long when he was awoken by two police officers slapping him in his face and asking him what he did to his neighbour. He described one of the police officers as being tall, "red" in complexion with a tattoo on his neck.

[86] With the foregoing pieces of evidence in mind, we are of the view that the issue of whether Corporal Gopaul was the person whom Ashook described as "Toppy's friend" was an important issue for the jury to consider since it had the potential to provide an explanation for his (Corporal Gopaul's) actions both at the time of the offence and at the trial, which suggested that he might have "changed sides". This was a factor that would in turn be relevant to a proper assessment by the jury of his level of partiality, credibility and reliability. Further, identification was in issue throughout the trial. It was important for the jury to not only appreciate that Soman and Corporal Gopaul were friends, but also that Ashook had identified him, thereby showing that he knew which officer was "Toppy's friend". If the judge had not allowed Ashook to attempt to identify Corporal Gopaul, this might have been open to valid criticism.

[87] With respect to Corporal Gopaul's identification of Nigel, this too was important on account of Nigel's testimony that Corporal Gopaul was one of the police officers who, together with Soman, visited Ashook's house prior to the fire. In fact, Corporal Gopaul testified that he had questioned Nigel at the house prior to the fire. Therefore, we do not see how his identification of Nigel occasioned an irregularity. This ground of appeal is without merit.

Appellant No. 1 - Ground 6: Impermissible questioning of Corporal Gopaul

Submissions

[88] Mr. Heath submitted that the prosecutor not only extensively examined Corporal Gopaul, but also employed a certain tone and tenor in addition to making general comments in the presence of the jury about his conduct. He submitted that this would have had the effect of the jury

discrediting Gopaul's evidence. He further submitted that the prosecutor was in effect cross-examining her own witness by using leading statements, which the judge allowed. He argued that Gopaul's evidence was unfavourable to the prosecution case and the judge did not maintain her impartiality. This was evinced by the judge's use of the words, *"According to him"* when referring to his evidence which suggested that the judge did not believe his evidence. He submitted that this impropriety by the court, combined with the extensive cross-examination, was sufficient to cause the jury to negate or reduce Corporal Gopaul's evidence.

[89] Mr. Busby submitted that to establish Corporal Gopaul was a hostile witness, the prosecution need only show that he was decidedly adverse. If that condition was met, it was within the trial judge's discretion to allow the cross-examination of that witness: **Clarke v Saffrey**[52] and **R v Darby**[53]. As to the complained breach of the prosecutor's duty, he submitted that regard must be had to the following principles: (i) the concept of fairness applies to both sides, (ii) one of the aims of the criminal justice system is to try to achieve the truth by the best evidential means, and (iii) in trying to achieve the truth, an overly technical and rigid approach is to be eschewed, as far as this is practicable, and fairness to the accused persons must be kept uppermost in mind. In conclusion, he submitted that the line of questioning permitted by the judge did not result in a miscarriage of justice.

The Law, Analysis and Reasoning

[90] Corporal Gopaul's evidence has already been set out at paragraphs [78] to [80] above. The material aspects of that evidence, insofar as they relate to this ground of appeal, concern Corporal Gopaul's testimony and his omitted station diary entry which placed Soman, Shiva, Visham and Ryan at the police station around the time of the fire. What took place at the trial was essentially a prosecution witness, Corporal Gopaul, giving evidence that Soman, as well as Shiva, Visham and Ryan were at the Freeport Police Station prior to and/or during the course of

[52] (1824) Ry & M. 126.
[53] [1989] Crim. LR 817.

the fire giving rise to a possible alibi. That testimony gave rise to the following exchange during the trial[54]:

The Court: *…Do you accept that the issue of 'alibi' is a live issue in this matter?*

Mr. Rajcoomar: *Oh, definitely, My lady.*

The Court: *And, therefore, the time, timing with respect to the first incident and second incident, vital.*

Mr. Rajcoomar: *Vital, My Lady.*

The Court: *And where the accused were at the time.*

Mr. Rajcoomar: *Vital, My Lady.*

The Court: *So, the person who conducted the enquiry or investigation into the first issue, the report with the bottle throwing that's quite relevant, too, and all that …*

Mr. Rajcoomar: *We would have cross-examined on that anyway, no difficulty, relevant.*

The Court: *No, no, no. What I am saying is that – I am saying that I see no difficulty with the State leading evidence in relation to the enquiry and the conduct of this officer in the enquiry, because it happened before, I don't know how long before because of differences of timing. But I think it is crucial, his evidence is crucial in relation to what he did, how long it took for him to do whatever he did, which of the accused were present, I think that's all very relevant because of the closeness in time to the incident that follows.*

…

Yes… So I am just telling you bear that in mind so that, as we all know, the State attorney can't just go and ask him to give evidence from the station diary. But he has given evidence that he was the investigator although he only remembered later on he was the investigator from the 14th and his conduct with respect to that enquiry, as it relates to the accused persons, I think that is relevant because the same accused persons are accused of this act, the act of Arson and killing of two children. So make your comments in that context and if you disagree with me, please say.

[54] Transcript of the Proceedings dated April 2, 2015 at page 29, line 39 to page 31, line 6.

Mr. Rajcoomar: *In that context, My Lady, I have no problem in understanding My lady's formulation there.*

The Court: *Yes.*

Mr. Rajcoomar: *And I would say, that is the formulation that any lawyer sitting down here would have concluded when one reads the station diary and extracts what is from this. What my friend purports….*

The Court: *Sorry, one more issue I want you to think about.*
… Mr. De Lima forecasted earlier on that 'alibi' and a couple of State witnesses will assist his case and this is one of them, isn't it?

Mr. De Lima: *Oh, yes, absolutely.*

Ms. Rambhajan: *It is the one.*

…. There was one, please, My Lady, and it was Gopaul.

The Court: *It is the one.*
…
And therefore so the State knows in advance what issue, the issue that Mr. De Lima is going to raise and the State has an obligation to meet what is going to be put forward by Mr. De Lima.

[91] Both Nigel and Ashook gave testimonies which pointed to a friendship between Soman and a police officer whose description tended to match Corporal Gopaul's physical description. In those circumstances, we are of the view that it was important and entirely permissible for the prosecutor to explore whether or not Corporal Gopaul, who appeared before her bearing a tattoo on his neck, was "Toppy's friend", as referred to by Ashook. This was because if confirmed, it would have been relevant to the assessment of whether Corporal Gopaul had carried out his functions properly on the night in question or whether, because of his relationship with "Toppy", the investigations were compromised. This ground of appeal is without merit.

[C] JUDICIAL COMMENT

Appellant No. 1 - Ground 7 - Comments undermining the credibility of Mohanie Ramdial

Submissions

[92] Mr. Heath submitted that the judge created prejudice in the minds of the jurors and questioned Mohanie Ramdial's credibility by stating in front of the jury that, *"In fairness to all concerned this witness is going to leave the courtroom and I don't want her to speak to anyone and that's why if you need a moment now I will rise and give you a moment to think about it."* He contended that this went beyond the bounds of permissible judicial comment, had the effect of discrediting her evidence and unfairly prejudicing the jury's assessment of it. In support of these submissions, he relied on the decision in **Dale Richards v The State**[55]. He also relied on the decision in **R v Peter Tuegel and Others**[56] where it was said that every defendant has the right to have his defence faithfully, fairly and accurately put to the jury.

[93] Mr. Busby submitted that the judge's comment, taken in its proper context, was not prejudicial. Mohanie was examined, cross-examined and briefly re-examined. The judge was of the view that the re-examination had been completed and asked defence counsel whether he wished for the witness to be relieved but defence counsel indicated that he wanted to reserve further re-examination until the following day. This was clearly not in line with the judge's plan for management of the case and it was in this context that the comment was made.

[94] Mr. Busby also submitted that it was unlikely that any prejudice accrued as a result of the comment as it was based on the twin chances of the jury (i) interpreting this utterance as being a negative comment by the judge on her evidence and (ii) remembering it a month later when they retired to consider their verdict on June 26, 2015. He argued that even if that highly improbable confluence occurred, Soman was protected by the fact that the judge directed the

[55] Cr. App. No. 15 of 2007.
[56] [2000] 2 Cr. App. R. 361.

jury as a matter of law that, *"My views about the facts insofar as I express them are there for you to accept or discard as you will."*

The Law, Analysis and Reasoning:

[95] Mohanie was called as a witness on behalf of Soman, Shiva, Visham and Ryan and testified that on April 15, 2009, she visited Nigel at the San Fernando General Hospital. She asked him who had shot him and he replied that he did not know. Ashook then entered the room and said to Nigel, *"You don't know who shoot you, tell the police I see Toppy shoot you."* When Ashook left the room, Mohanie told Nigel that if he did not see who shot him, then he should not place the blame on anyone. According to Mohanie, based on what Nigel told her, he was lying when he said that it was Toppy who shot him.

[96] A perusal of the transcript of the proceedings shows that in the re-examination of Mohanie, defence counsel's first question was met with an objection by the prosecutor. After arguments were made on the permissibility of the question, defence counsel indicated that he wished to reserve his re-examination of the witness until the next day. The judge however was of the view that that was not the preferred course and she asked defence counsel to respond to the objection, which, after further arguments, she sustained. The judge then enquired whether defence counsel wished for the witness to be relived but he requested that she return the next day in order to ask *"a question or two."* At that point, the judge made the comment of which complaint is made, that is:

> *"It is just that, Mr. De Lima, I would like to end the proceedings, as well. However, in fairness to all concerned, this witness is going to leave the courtroom and I don't want her to speak to anyone and that's why, if you need a moment now, I will rise and give you a moment to think about it.*[57]*"*

[57] Transcript of the Proceedings dated May 27, 2015 at page 66, lines 30-35.

[97] In several decisions coming out of the United Kingdom, the Court of Appeal makes it clear that judges must be robust in case management decisions: see **R v Alan Phillips**[58]. In the decision in **R v Jisl and Others**[59], the Court said at paragraph 116, *"Active, hands on, case management, both pre-trial and throughout the trial itself, is now regarded as an essential part of the judge's duty. The profession must understand that this has become and will remain part of the normal trial process, and that cases must be prepared and conducted accordingly."* In **R v Chaaban**[60], the Court said at paragraph 38, *"In principle, the trial judge should exercise firm control over the timetable, where necessary, making clear in advance and throughout the trial that the timetable will be subject to appropriate constraints."*

[98] In our view, the actions of the judge, and the comments complained of, were an instance of the judge exercising her case management powers in the trial by way of taking firm control of the timetable. We are not in agreement with Mr. Heath's submission that the trial judge's comments had the effect, indirectly or by innuendo, of casting aspersions on the witness. The comment was not prejudicial. It was necessary to protect the witness's credibility and integrity. This ground of appeal is without merit.

[D] IMBALANCED SUMMING UP

Appellant No. 1 - Ground 9 - Improper cross-referencing of the evidence

Submissions

[99] Mr. Heath submitted that the judge erred and canvassed the prosecution's witnesses on unequal footing by cross-referencing the evidence of Corporal Gopaul and Corporal Cassie with the evidence of Ms. Sheridan Murphy. Ms. Murphy's testimony related to the computer generated time stamp of the call to the emergency services on the night of the fire. That call occurred before

[58] [2007] EWCA Crim. 1042 at paragraph 36.
[59] [2004] EWCA Crim. 696.
[60] [2003] EWCA Crim 1012.

the police officers testified to having seen Soman at the Freeport Police Station. Mr. Heath argued that the effect of these directions left the jury with the distinct impression that Ms. Murphy's evidence was more credible than that of Corporals Cassie and Gopaul, thereby undermining Soman's alibi.

[100] Mr. Busby submitted that the judge did not refer to Ms. Murphy's evidence as being more credible than the police officers'. Rather, what the judge suggested was that Ms. Murphy's evidence was more reliable as it was based on an automated computer system. According to Mr. Busby, the evidential fabric of the trial was such that the evidence of Ms. Murphy, Corporal Cassie and Corporal Gopaul were interwoven to provide the jury with the means to resolve one of the main issues which they had to grapple with, to wit, Soman's alibi. Mr. Busby also underscored that none of these witnesses gave evidence of Soman's location at the time of the fire.

[101] Mr. Busby also submitted that the judge could not be faulted for suggesting to the jury that it was open to them to find that the police officers' testimony did not support Soman's alibi if they accepted Ms. Murphy's evidence. In fact, Soman derived a benefit when the judge directed the jury that they could consider the evidence of Corporals Cassie and Gopaul in their determination of whether there was evidence of an alibi for Soman.

The Law, Analysis and Reasoning:

[102] The judge, in her summing up, directed the jury in the following terms:

> *"The evidence of … Ms. Sheridan Murphy…her evidence might assist you, depending on what you make of it, assess the credibility of both Gopaul and Cassie…*
> *…*
> *…*
> ***Ms. Murphy's evidence will assist you or might assist you in determining the time of the fire or approximate time of the fire, if you accept her evidence."***[61]

[61] Summing up: Day 2 dated June 24, 2015 at page 33, lines 42-45 and at page 45, lines 30-34.

[103] The judge went on to direct the jury as follows:

> *"Now, it is open to you to find, it is entirely a matter for you, that Ms. Murphy is an independent witness. She does not, it does not appear from any evidence that she knows any parties involved.*
>
> *…*
>
> *…**Okay, if you accept Ms. Murphy's evidence in relation to the time, it is open to you to draw the inference that the fire began before 1:21:29, so you first have to make that finding. Now, if you accept that evidence that came from Global Medical, and you accept Mr. Cassie's evidence that Soman Accused No. 4 was at the Freeport Police Station after 1:45 a.m., then it is open to you to find that he was there after the fire and this evidence, Cassie's evidence cannot support the alibi of 1 to 4. It is entirely a matter for you.***
>
> *If you accept Officer Gopaul's evidence that he returned to the Freeport Police Station at 1:40 a.m. and you accept Ms. Murphy's evidence as well, then…you could infer that 1:40 is after the fire, that's only if you accept Ms. Murphy's evidence.*
>
> ***So both Cassie and Gopaul's evidence, if you accept Murphy's evidence, it is open to you to find that it doesn't support the alibi for Accused Nos. 1, 2, 3 and 4. It is entirely a matter for you, it depends on what view you make of Ms. Murphy's evidence, what view you have of Officer Cassie's and Officer Gopaul's evidence…***[62]*"* [emphasis added]

[104] It can be gleaned from the relevant parts of the summing up extracted in paragraphs [102] and [103] above that the judge did not suggest to the jury that the evidence of Ms. Murphy was more credible than that of Corporal Cassie and Corporal Gopaul. The respective evidence of the witnesses Ms. Murphy, Corporal Cassie and Corporal Gopaul went to a critical issue in the case. The judge crystallized the issue and comprehensively assisted the jury on the potential evidential implications for the alibi if Sheridan Murphy's evidence was accepted. The judge's duty is to marshal the evidence in the case to assist the jury to determine the facts. In so doing, the judge is entitled to juxtapose the evidence of one witness against the other. Had the judge not done this, she would have been failing in her fundamental duty to explain to the jury the potential

[62] Summing up: Day 2 dated June 24, 2015 at page 35, line 17 to page 36, line 4.

relevance, both directly and/or inferentially of various pieces of evidence. This ground of appeal is without merit.

Appellant No. 1 - Ground 10 – Unsupported inferences

Submissions

[105] Mr. Heath submitted that the judge's summing up invited the jury to draw an inference that Soman and a police officer who was involved in the investigations in the present matter, that is, Corporal Gopaul, were friends. Since there was no evidence to support this conclusion, the jury was invited to speculate whether the investigating officer was in fact Soman's friend when the Court permitted an attempted identification of Corporal Gopaul by Ashook, who, at the trial, did not identify Gopaul as such.

[106] Mr. Busby submitted that the determination of whether Corporal Gopaul was Soman's friend was an issue of fact for the jury to decide and the judge would have been wrong not to leave it for their consideration. The critical identifying feature was the tattoo on the neck of police officer who was said to be Soman's friend. There was sufficient evidence for the jurors to draw the inference that that police officer was Corporal Gopaul. Further, despite Corporal Gopaul's testimony that he did not have a tattoo in 2009, it was open to the jury to believe that if he was in fact Soman's friend, he would have been inclined to lie about the time when he got the tattoo.

The Law, Analysis and Reasoning

[107] This ground touches and concerns issues which we have addressed in grounds 5 and 6 of Soman's submissions. As we have already noted, not only was the in-court identification of Corporal Gopaul by Ashook justified but there were several other pieces of evidence which potentially supported the inference that Corporal Gopaul was Soman's friend:

(i) Corporal Gopaul was a policeman who was attached to the Freeport Police Station;

(ii) He could be described as tall, of "red" or fair complexion and had a tattoo on his neck;

(iii) He testified that he went to Ashook's house to investigate a report of malicious damage and spoke to Geeta and Nigel. Nigel identified him as one of the police officers who visited the house the night before the fire occurred and said that he had a neck tattoo;

(iv) He omitted to put in his statement that Soman accompanied him to Ashook's house the night before the fire occurred and failed to make such a record in the Station Diary at the Freeport Police Station;

(v) In the fifteen minute period when the house was ablaze, Corporal Gopaul chose to enter in the Station Diary ("an omitted entry") that Soman was at the Freeport Police Station prior to the fire;

[108] In our view, the issue of whether Corporal Gopaul was Soman's friend was an important issue to be left for the jury's determination. This had the potential to explain Corporal Gopaul's actions both at the time of the incident and during the trial. This was in turn relevant to the jury's assessment of his credibility and reliability. We therefore agree with Mr. Busby's submission that the judge was correct in leaving the issue to the jury for their determination as there were several pieces of evidence capable of supporting the inference that Soman and Corporal Gopaul were friends. This ground of appeal is without merit.

Appellant No. 4 - Ground 5/Appellant No. 5 – Ground 5/Appellant No. 6 – Ground 6: Failure to marshal evidence to ensure separate treatment

Submissions

[109] Ms. Chote S.C. submitted that the trial judge did little to marshal the evidence in such a way that the jury would appreciate the salient points for and against each of them and assess their cases separately. She complained that this was detrimental to the appellants who faced trial on poor quality identification evidence and might have been convicted by the jury lumping together the evidence against them. She suggested that this detriment was not helped by the appellants' joint

representation by the same attorney at trial, whose cross-examination was somewhat "broad brush".

[110] Mr. Busby submitted that the trial judge made it clear to the jury that each accused's case should be considered separately and specifically stated that the prosecution evidence against each accused was different and thus the verdicts against each accused need not have been the same. He further submitted that the trial judge dealt separately with Ashook's identification evidence as it related to each of the appellants and gave specific directions detailing the opportunities he had to see each of them, drawing their attention to criteria in **R v Turnbull**[63], and also detailing the weaknesses.

The Law, Analysis and Reasoning

[111] A helpful summary of the law as it relates to separate treatment is provided by the authors of **Blackstone's Criminal Practice**. **At Part D, Section D18.28**, the authors, relying on the learning in **R v Smith**[64] stated: "*where there is more than one accused on trial, the jury should be directed to consider the case for and against each separately."*[65]

[112] On Day 1 of her summing up, the trial judge addressed the jury on the separate treatment in the following terms:

> *"I now move on to another topic: Separate treatment. Members of the Jury, the six accused persons are being tried together for two charges of murder. Sometimes I will say charges, sometimes I will say counts, the same thing. You must consider the case against and for each accused separately. This direction in law is given in every case where there are multiple accused."*[66]

[63] [1976] 3 All ER 549.
[64] (1935) 25 Cr App R 119.
[65] Blackstone's Criminal Practice 2017, Part D Procedure, Section D18 Trial on Indictment: Procedure between Close of Defence Evidence and Retirement of Jury/ Summing-up/Standard Directions - D18.28- Separate Consideration of Counts and Defendants.
[66] Summing Up: Day 1 dated June 22, 2015 at page 14, lines 38-44.

[113] In relation to Shiva, Ryan and Visham, the judge was even more specific. She stated:

> ***"It is even more relevant to give it in this case where one attorney, Mr. De Lima, represented four accused persons. Accused No. 1, 2, 3, and 4. So not because he is representing all the four accused, 1, 2, 3, and 4, must you lump your consideration of them together****.*
>
> *Additionally, some of the attorneys in this case might have asked questions that might not have pertained specifically to the accused that they are representing. You must not, because of that, treat the case against the accused that they represent as the same as any other accused.*
> *…*
> *…*
> *The State's evidence against each accused is different. It, therefore, does not automatically follow that your verdict against one accused would be the same against another accused. So the verdicts against each accused need not be the same.*
>
> *In this case, it might be best to consider, firstly, your verdicts in relation to Accused No. 1 in relation to count one and two, then your verdict in relation to accused No. 2 in relation to count one and two, and so on until you deal with all the accused persons"*[67]*.* [emphasis added]

[114] From the onset, the judge gave directions on the separate treatment of the accused as a distinct issue. She emphasized that the case against each accused must be considered separately and despite some of the accused sharing the same attorney, that they should not lump their consideration of the accused together. The judge also stated that the prosecution evidence against each accused was different and that the verdict against each one need not be the same.

[115] On the second day of her summing up, the trial judge addressed Ashook's identification evidence.[68] He testified that he had jumped out of a window and ran into the grass which was about eight feet away from the house. From there he observed some of the other appellants. He then moved from that position to the back of the house where he saw these Visham, Shiva and

[67] Summing Up: Day 1 dated June 22, 2015 at page 14, line 45 to page 16, line 2.
[68] Summing Up: Day 2 dated June 24, 2015 at page 46, lines 31-35.

Ryan. He noted that Shiva was standing by his (Ashook's) room, Visham was standing by Nigel's window, and Ryan was standing between the two windows. He observed that Shiva and Ryan had cutlasses and Visham had a white keg. He saw Visham entering Nigel's room and eventually leaving the house through the eastern window. He also noticed that the entire house was on fire after Visham exited the window. Ashook indicated that he changed position at various points whilst hiding in the grass.[69] After relating the incident as per Ashook's evidence, the judge said:

> *"Now I mentioned to you earlier about the Turnbull [guidelines] and the questions you have to ask yourselves. So I will look at that in relation to each of the accused. So, in relation to Accused No. 1, Shiva, Ashook is the only witness who said he saw Accused No. 1, so let me highlight more closely the circumstances under which he saw accused No. 1.*
> *…*
> *Now, in terms of time and opportunity for viewing Shiva, while there was no specific evidence of the length of time that he saw Shiva, from his evidence, Ashook would … have had two opportunities to see Shiva…*
> *…*
> *So it is open to you to infer that when he was in position No. 2 and Shiva was walking west, in a westerly position, he would be able to see the front of Shiva.*
>
> *Equally, it is open to you to find that when Shiva was walking towards the east that he was able to see the back of him. It is a matter for you, but that is an inference, a possible inference that can be made from what he said about east and west.*
> *…*
> *In relation to lighting Ashook said that there was a big streetlight in front or 30 feet away from Ashook while he hid in the bush. He said the neighbor had a bulb facing them… there was a bulb coming from Sonny's House. He said there was also lighting coming from Vasha's burger factory… Was there anything obstructing his view of Accused No. 1? Ashook said that there was nothing obstructing his view of Shiva.*
>
> *Did he know him before? Ashook gave evidence that he grew up with Shiva…*
>
> *Length of time from the initial observation to the later identification. The later identification was made on the 28th April, 2009, when Ashook said he went to*

[69] Summing Up; Day 2 dated June 24, 2015 at pages 47-49.

Gasparillo Police Station, and there he went into a room and he identified Shiva to the police."[70]

[116] The judge then went on to address the jury on the need to consider possible weaknesses of the identification evidence concerning Shiva. She said:

> *"Weaknesses. I told you weaknesses and possible weaknesses have to be considered. This would apply for all of the persons that were seen, or the accused. It is open to you to find that it was a traumatic event with men around the house armed and with kegs, and for Ashook with his family in the house, it is open to you to find that he would have been scared, he would have been concerned for his family.*
>
> *On the other hand, people react differently to stressful situations. Some become more alert and focused, others become frazzled and less able to observe details. It would be for you to decide, from the extent of the details given, whether he was affected by this stressful situation in a negative or a positive way.*
>
> *Now another possible weakness is that Ashook said that Shiva was walking up and down, east and westerly direction. From where Ashook was located, well, like I said this to you already, the possible views of his body that he could, in fact, have. So that he would not have always had the front view of the body of Shiva."*[71]

[117] The judge went on to highlight the weaknesses concerning Ashook's narration as to the length of time the incident took place, that is, *"very fast"*; that at times Ashook *"duck down in grass"* which meant that each appellant was not always in his view; that his attention was divided because he stated that he was looking at two other accused persons during that time; and that Ashook sat down in grass that was at times waist height and chest height.

[118] This meticulous process was repeated for Visham and Ryan. The judge was careful to point out the varying distances and positions from which each appellant would have been observed, the

[70] Summing Up: Day 2 dated June 24, 2015 at page 50, lines 18 to page 52, line 7.
[71] Summing Up: Day 2 dated June 24, 2015 at page 52, lines 11-32.

lighting conditions, the number of opportunities for him to see each of them, possible obstructions, and Ashook's familiarity with each appellant.[72]

[119] In our assessment of the summing up we note that the trial judge did in fact separate the identification evidence relating to these appellants. She specifically related Ashook's evidence concerning his identification of each appellant during the incident. The judge also specifically drew the jury's attention to the length of time which had elapsed when Ashook identified the appellants at the Gasparillo Police Station. We acknowledge that the judge informed the jury that the same evidence which applied to one of the Bajnath brothers applied to another one. This, however did not amount to a lumping of all them together.

[120] Concerning the treatment of weaknesses in the evidence, Ms. Chote S.C. submitted, that the evidence was not properly marshaled in such a way, that the weaknesses were put in a fair and balanced way for the jury's consideration, and that there was no direction as to what evidence could or could not be used to support Ashook's testimony. She also stated that the judge referred to actual weaknesses as "possible weaknesses", leaving the jury with the impression that they could choose to decide whether they should treat them as weaknesses at all.

[121] It is our view however, that the judge carefully highlighted the weaknesses in the evidence. We disagree with Ms. Chote's contention that the judge ought not to have used the phrase *"possible weaknesses"* at all. A judge is entitled to leave to the jury's determination whether certain pieces of evidence amount to weaknesses or not. It is up to the jury to weigh the effect of the evidence. In our view the evidence was put before the jury in a fair and balanced manner and the weaknesses concerning each of the Bajnath brothers were highlighted to the jury.

[122] On the issue of the quality of the identification evidence before the jury, we note that it was of considerable strength. There was sufficient lighting to enable Ashook to see the appellants, there was little obstruction to his view of them, the appellants were known to him for several years

[72] Summing Up: Day 2 dated June 24, 2015 at page 53, line 27 to page 56, line 32.

before the night of the incident, and the distance from which he observed them was adequate. With these conditions in mind, we reject the submission that the quality of the identification evidence was poor.

[123] We have carefully considered the Judge's summing up to the jury and her marshalling of the identification evidence as it relates to these appellants and disagree with the assertion that the judge failed to meticulously separate the identification evidence as it related to these appellants, or that the identification evidence was of a poor quality. We also disagree that the weaknesses in the evidence were not put before the judge in a fair manner. Accordingly, this ground is without merit.

[E] INADEQUATE AND INCORRECT DIRECTIONS TO THE JURY

Appellant No. 1 - Ground 8: Inadequacy of directions on Dr. Seedoo's medical report

Submissions

[124] Mr. Heath submitted that the judge failed to properly direct the jury on what weight they should place on Dr. Seedoo's medical report. The closing addresses of counsel relative to the medical record were in conflict. According to Mr. Heath, although the judge identified this issue to the jury, she failed to clarify and explain to them what was meant by "the truth" which would have left the jury in a state of confusion with respect to the medical report. In support of his submission he cited **Kendrick London and Chandroutie London v The State**[73] as authority for the proposition that the jury should have be warned against improperly using evidence of this kind if, or to the extent, that it was unsupported by the evidence of the patient.

[125] Mr. Busby submitted that the parts of Dr. Seedoo's report note that are relevant to this ground of appeal are that Nigel consumed alcoholic drinks on the night in question and that he was asleep at the time when the fire started. According to the medical notes, Nigel also informed the

[73] Cr. App. Nos. 24 and 25 of 2001.

doctor that he was unaware of the type of gun that was used, how many times he was shot and who shot him. Mr. Busby also relied on the decision in **Kendrick London and Chandroutie London v The State**[74], emphasizing that it is usual for a doctor to be permitted a certain latitude in repeating what he has been told by the patient. However, the doctor's evidence cannot be used to prove the historical setting in which the injury occurred.

[126] He submitted further that the medical report from which Dr. Seedoo's note was taken also stated that Nigel was *'referred for Gunshot wounds to back and left upper limbs'*, and that the doctor's opinion was not reliant on what was told to him by Nigel. Additionally, no references in the doctor's note were supported by direct evidence from Nigel. With the exception of Nigel's knowledge of who shot him, none of the matters referred to in the doctor's note qualified as a previous inconsistent statement and as such, they were all inadmissible. Accordingly, he submitted that the hearsay evidence contained in the doctor's report should not have been admitted and that Soman had in fact derived a benefit from its admission and the judge's directions in respect of it.

The Law, Analysis and Reasoning

[127] On the night of the fire, Nigel was referred to the Accident and Emergency ward at the San Fernando General Hospital for gunshot wounds to his back and left arm. He was attended to by Dr. Seedoo who, at 4:45 a.m. recorded the information given to him by Nigel in the hospital's record. That record shows that Nigel informed Dr. Seedoo, inter alia, that he was unaware of the type of gun which was used to shoot him, how many times he was shot and who shot him. In his evidence given at the trial however, Nigel said that it was Soman who shot him. At the trial, counsel for Junior put the contents of Dr. Seedoo's note to Nigel, leading to the following exchange:

The Court: *So for you to understand, Defence Attorney is saying that you had a conversation with a doctor and he is putting to you the contents of that conversation. Can you do one at time, please?*

[74] Ibid.

Mr. Heath: *Much obliged, My Lady.*

By Mr. Heath:

Q: *One that you told the doctor that you were asleep the night before.*
A: *No, sir. I can't recall talking to any doctor.*

Q: *And you also told him, I am suggesting to you that you also told this doctor that you were awoke (sic), and the house was on fire.*
A: *No, sir.*

Q: *You also told the doctor, sir, I am putting it to you, that you ran out of the house realizing you were shot on your back and left arm.*

A: *I can't recall that, sir.*

Q: *I am putting to you, sir, that you also told the doctor that you were unaware of the type of gun and how many times you were shot.*

A: *Cannot recall that, sir.*

Q: *And, sir, finally, you also told this doctor you did not know who shot you. I put that to you.*

A: *I cannot recall speaking at all to any doctor…*[75]

[128] In her summing up, the judge identified the contradiction between Dr. Seedoo's and Nigel's evidence when she set out the cases for each appellant and marshaled the evidence that went to the issue of fabrication. The judge then directed the jury on the relevance of the contradiction in the following terms:

> *"…In Mr. de Lima's closing address….he said, "…If you agree with me and you accept that Nigel told the doctor he did not know who shot him, we have a serious situation here, because it means Mohanie telling us the truth, which I never doubted… It means*

[75] Transcript of the Proceedings dated April 24, 2015 at page 30, lines 14-37.

also Ashook is a liar, it means Nigel is a liar." He said that Nigel in his evidence said, "Look, I have my hospital card, they admit me at 7 o'clock," with great surety…

…

…

And Ms. Rambhajan said, "So at 4:45 in the morning when you just get shoot, you can't tell the doctor who shoot you and what type of gun and how many times he was shot. Because you know what it is, 4:45 in the morning, it just happened, you are still addled, you are still catching yourself, because here what comes after in Dr. Seedoo's notes: "Richard Ramdial denied loss of consciousness and was unaware of the volume of blood lost." … Members of the Jury, it is for you to decide on this issue if you accept the record, was Nigel in a proper state of mind to give the information relative to any issue, and, in particular, the details of what happened to him earlier that day. This is entirely a matter for you."[76]

[129] The judge in her summing up also directed the jury on how the contradiction had the potential to impact on the case. The judge gave the following directions:

"Now, contradictions, previous inconsistent statements and omissions are all relevant to your assessment of the credibility and reliability of witnesses. It is one of the things that you factor in when determining whether, in your view, the witness is reliable, honest, straightforward and credible.

Now, when these contradictions, previous inconsistent statements, and omissions appear in a case, you cannot simply brush it aside. They are part of the evidence in the case and your must, therefore, scrutinize them and deal with them…

In dealing with them, you must ask yourself three questions, the first question is this: is the contradiction, previous inconsistency, or omission on a major issue or a minor issue? In other words, is it an issue that goes to the root or the heart of the case, or is it a side issue, something peripheral to the real issues in this case?

…

The second question you have to ask yourselves is, what is the reason for the contradiction, inconsistent statement or omission? Is it an innocent reason, such as an honest mistake on the part of a witness, or is it that the witness is deliberately lying and being untruthful to you?

[76] Summing Up: Day 4 dated June 26, 2015 at page 41, line 38 to page 42, line 50.

If you find that a witness is deliberately dishonest on an issue, you might then ask yourselves whether you can trust the rest of the witness' evidence…

The third question you must ask yourself is, has the witness given a reasonable explanation for the contradiction, previous inconsistency or omission? Basically, does the explanation given by the witness make sense or not? In looking at the contradictions, previous inconsistencies and omissions, you are entitled to look at the overall effect. One or two inconsistencies or omissions or contradictions by themselves may not be that significant in the general scheme of things. But when you put them all together they may well be…

If, having applied the three questions you consider the inconsistency, the contradiction, or omission is significant, you then have to consider if there is a reasonable explanation for it. If there is a reasonable explanation for the change, you might conclude that the underlying reliability of the account is unaffected. But what if the inconsistency has not been satisfactorily explained and it is on an important issue? You will be less likely to overlook it, and it might lead you to conclude that you cannot rely on the person's oral evidence."[77]

[130] In light of the foregoing detailed directions, we are unable to agree with Mr. Heath's submission that the judge failed to properly direct the jury on what weight they should place on Dr. Seedoo's medical report. We are of the view that the judge correctly directed the jury on the relevant issues in relation to the report. Further, the weight of that evidence was entirely a matter for the jury to consider. The jury was therefore well assisted on the issue of the medical report.

Appellant No. 1 - Ground 18 - Failure to separate the appellant's defence

Appellant No. 1 - Ground 19 - Failure to adequately put the appellant's defence

[131] The matters considered in these grounds are closely connected and we proceed to deal with them together.

[77] See the Summing Up: Day 1 dated June 22, 2015 at page 12, line 15 to page 13, line 17.

Submissions

[132] Mr. Heath contended that the judge failed to separate Soman's defence from that of Shiva, Ryan and Visham, which differed on the evidence adduced during the trial. Corporal Gopaul testified that he specifically remembered meeting and interacting with Soman in relation to the events which occurred on the material night. Mr. Heath submitted that the judge's failure to carefully consider the evidence as it related to Soman severely prejudiced his case as the jury would not have had the benefit of that evidence being treated separate and apart from the evidence related to the other appellants. Additionally, as a consequence of the inadequate directions in relation to Soman's alibi, the jury would have been unable to appreciate the impact of Corporal Gopaul's evidence relative to him.

[133] Mr. Busby submitted that during the proceedings below, trial counsel for Soman, Shiva, Ryan and Visham put in cross-examination that each of the four was at the Freeport Police Station between the hours of 11:00 p.m. and 4:00 a.m. at the time of the incident. However, none of them gave testimony in support of this. He submitted that the judge rightfully brought this to the jury's attention and went further, having regard to the evidence of Corporals Gopaul and Cassie. Additionally, the judge gave directions on the defence of each of these appellants when she told the jury that they were entitled to look at all of the evidence in the case, including that of Corporals Gopaul and Cassie, as well as any other evidence that they found relevant in deciding whether the prosecution had disproved the alibi beyond reasonable doubt. The judge also gave an extensive summary of the evidence of Corporal Gopaul, and with painstaking detail went through all of the opportunities that Corporal Gopaul had to interact with Soman.

The Law, Analysis and Reasoning

[134] Soman's defence consisted of denial, fabrication and alibi. These defences were also raised by Shiva, Ryan and Visham. Starting with Shiva, the judge went into great detail in setting out the evidence that was relevant to alibi and fabrication.[78] She was careful to point out that although

[78] Summing Up: Day 4 dated June 26, 2015 at page 35, line 33 to page 36, line 45; page 36, line 48 to page 42, line 37, page 43, line 43 to page 44, line 10; page 44, line 47 to page 45, line 17.

the appellants had not given evidence, trial counsel's instructions put to Corporal Cassie during cross-examination raised the defences of alibi and fabrication. She explained that this meant that the appellant, through his counsel, was saying that he was not at the house at the time of the fire and linked this to Corporal Cassie's evidence that he was at the police station from 11:00 p.m. on April 13, 2009 to 4:00 a.m. on April 14, 2009, where he claimed to have seen Shiva, as well as the other appellants, and then directed the jurors on the burden of the prosecution to prove the guilt of the accused.[79] Similarly, the judge provided thorough directions on the defence of fabrication, with respect to Shiva's case, which she explained had been raised by trial counsel's cross-examination of Ashook, as well as Mohanie's testimony that Ashook had instructed Nigel to say that it was Soman who had shot him.[80]

[135] In relation to Soman's defences, the judge gave the following directions:

> *"So I move on to another issue in relation to the accused, Accused No. 4, right to silence. You remember that Officer Marrain indicated in his evidence that the accused told him he chose to remain silent, and you know he did not testify. Same direction: Do not draw any adverse inferences from that. I move on to denial. Again, from the thrust of the cross-examination, denial is one of the issues raised by Accused No. 4. It's not for him to prove anything, it's for the State to satisfy so that you feel sure of their evidence, and in this case, against Accused No. 4, the State is relying on the evidence of Ashook, Geeta and Nigel. This accused also raised the issue of alibi from the thrust of his cross-examination, and I direct you that the same direction I applied with respect to Accused No. 1, 2 and 3 applies in relation to his defence of alibi. Four, fabrication. The same direction I gave with respect to fabrication for 1, 2, and 3 applies to this accused as well.[81]"*

[136] A perusal of the extracts of the summing up as set out above shows that the judge went into great detail with respect to the defences of alibi and fabrication, using Shiva's case to map out the relevant evidence and the applicable directions.[82] When she got to Soman, who was Accused No. 4 at the trial, she referred to her directions given in respect of Shiva when dealing with alibi

[79] Summing Up: Day 4 dated June 26, 2015 at page 35, line 33 to page 36, line 9.
[80] Summing Up: Day 4 dated June 26, 2015 at page 36, lines 10-45.
[81] Summing Up: Day 4 dated June 26, 2015 at page 47, lines 11 to 29.
[82] Summing Up: Day 4 dated June 26, 2015 at page 35, line 33 to page 36, line 45; page 41, lines 10-34.

and fabrication. Although this practice is not usually a recommended one, it is important to underscore that at the trial, Shiva and Soman were represented by the same counsel and they both relied on the same defences and the evidence in relation to those defences. There were no material differences in the evidence with respect to alibi and fabrication between Shiva and Soman. Further, the judge dealt with the cases for the accused persons in sequence, all on the same day. This meant that the case for each accused person would have been fresh in the minds of the jury. With this in mind, when the judge in her summing up got to the case for Soman, repeating the same directions and evidence would have been a somewhat artificial exercise. However, when it came to Soman's defence of alibi, we are also mindful that the judge went through in great detail the opportunities that Corporal Gopaul had to interact with Soman specifically.[83] This showed that the judge carefully considered the evidence of Corporal Gopaul as it related to him. The relevant part of the judge's summing up is as follows:

> *"Now, Officer Gopaul said while at the Freeport Police Station he spoke briefly to Soman, he said for about a minute and a half to two minutes, and that was in the reception area in the front…*
>
> *…Officer Gopaul said, when he was speaking to Soman in that 15-minute period, for a minute and a half to two there was "Other East Indian male with him."* [84]

[137] Accordingly, we find that the judge adequately linked all parts of the legal directions on these issues to the evidence in the case. We are satisfied that the structure and sequence of the summing up and the judge's warnings to treat the case for each accused separately, faithfully followed by the jury, would have ensured that all the appellants' defences were considered separately, notwithstanding the unavoidable overlap occasioned by their reliance on identical evidence. The evidence specific to Soman's defence of alibi and his interactions with Corporal Cassie were also brought to their attention so there can be no complaint that his defence was not adequately put. The judge not only properly marshalled the evidence around these issues,

[83] Summing Up: Day 2 dated June 24, 2015 at page 26, line 9 to page 33, line 41.
[84] Summing Up: Day 2 dated June 24, 2015 at page 27, line 42 to page 28, line 2.

but also provided the jury with sufficient of the evidential framework against which to apply the legal directions given. These grounds of appeal are without merit.

Appellant No. 3 - Ground 9: Confusing and erroneous summing up

[138] Counsel for Junior submitted that the trial judge made several errors during her summing up that were never corrected.

(i) The judge confused "Toppy" with Junior John[85]

[139] Mr. Heath submitted that the judge confused Soman with Junior and communicated and directed the jury based on inaccurate evidence. Mr. Busby, in response, submitted that the judge was simply setting out some of the Turnbull guidelines in respect of Ashook's first sighting of Junior. It was submitted that the sentence containing the name "Toppy" was one wherein the judge referred to the lighting conditions at the time that Ashook first saw Junior. It was submitted that the evidence of Ashook was that he first saw Junior walking side by side with "Toppy" so that the lighting conditions in respect of both of them would have been the same, that is, emanating from the street light twenty-five feet away.

[140] The judge's directions to the jury on the issue were as follows:

> *"So moving on to the final accused that Ashook saw. He said that, remember he said when he first saw Junior John, the person he says is Junior John, he was walking, coming towards his house, entering the shed with a gun in his hand and swinging his hand, and at that stage he saw his whole body. And he said Junior was standing watching towards the house. He said he looked at Junior for about 10 to 15 seconds, and he said the house was alit at that stage.*
>
> *The distance is the same. He said the caraili tree where he was at is 25 feet from Junior. The lighting, he said when he first sighted* ***"Toppy"*** *the lighting was good. Again, he had big streetlights, plus the neighbor had bulbs facing them. Vasha's burger place. The streetlight was 30 feet from where he was in the bush. The*

[85] Summing Up: Day 2 dated June 24, 2015 at page 57, lines 9-37.

*streetlight was close to "**Toppy**" and he demonstrated and the attorneys agreed it was 25 feet.*

He said nothing obstructed his view. He said that he knew Junior four to five years before 2009. He said the last time he saw Junior was a week before the incident. Ashook said that he used to pass on the same street that Junior lived to go to work, and he gave a description of Junior John…

And he said Junior John was arrested at 1:00 a.m. on the 26th May, 2009 at Samkist Bar. I am going to take a short break now and finish off the evidence of Junior John…"[86] [emphasis added]

[141] The following pieces of Ashook's evidence are pertinent to resolving this ground[87]:

*"***Q: *And how far was the streetlight from "Toppy" when you first see him?***

A: *It was close…*

Q: *Give us your average?*

A: *Well, I could say about 15 feet and thing.*

Q: *All right.*

A: *15 to 20 feet somewhere round there.*

Q: *Now, if you are "Toppy", right, if you are "Toppy" where you are sitting –*

A: *Yes.*

Q: - *where was the streetlight from "Toppy", using a distance in this court?*

A: *It could be about the same distance, from here to that wall there (indicating).*

Ms. Rambhajan: *My Lady, 25 feet?*

The Court: *Yes, thank you."*

[142] Ashook Ramdial went on to give the following evidence[88]:

"Q: *Now, you told us that you saw "Toppy" and Junior in the front yard?*

A: *Yes, ma'am.*

[86] Summing Up: Day 2 dated June 24, 2015 at page 57, lines 9-37.
[87] Transcript of the Proceedings dated February 26, 2015 at page 71, lines 31-48.
[88] Transcript of the Proceedings dated February 26, 2015 at page 74, lines 6-13 and 36-39.

Q: *Where were you when you first saw Junior?*

A: *I was hiding by a caraili tree.*

Q: *Now, when you saw Junior, was it at the same time that you saw "Toppy" or two separate moments?*

A: *Same time, they were walking together coming.*

Q: *Now, in relation to "Toppy", how far was Junior from "Toppy"?*

A: *Side by side."*

[143] A review of extract of the summing up at paragraph [140] above shows that the judge inadvertently referred to "Toppy" when she directed the jury in relation to Junior. Those directions were in respect of the Turnbull guidelines relative to Ashook's first sighting of Junior, in particular, the lighting conditions at the time that Ashook first saw him. Any "slip of the tongue" on the part of the judge did not have the potential to create an artificial or misleading picture to the jury since the evidence was that both "Toppy" and Junior were walking side by side and therefore the lighting conditions in relation to both of them would have been identical.

(ii)Error in the date of the appellant's arrest[89]

[144] Counsel for Junior also submitted that the judge made an error when referring to the date on which he was arrested. The trial judge stated that Junior was arrested on May 26, 2009 when he was actually arrested on May 16, 2009. The respondent conceded that the error was made but submitted that the appellant suffered no prejudice because of it.

[145] Although the judge mentioned the wrong date of arrest of the appellant, it is our view Mr. Heath's submission is misconceived. It is not to be assumed that jurors are so lacking in common sense that they would not have known the correct date of Junior's arrest, especially since the correct date was presented to the jury on several occasions throughout the trial. When Sergeant Donovan Thompson was cross-examined on February 24, 2014, he gave evidence that the appellant was arrested on May 16, 2009. Officer McIntyre also gave evidence that he conducted

[89] Summing Up: Day 2 dated June 24, 2015 at page 57, lines 34-35.

an interview with Junior on the said date, during which interview notes were recorded and signed by various persons. These interview notes were dated May 16, 2009 and the jury were allowed to retire with them. Junior himself gave evidence of being arrested on May 16, 2009. There can be doubt that the jury knew the correct date of Junior's arrest despite the judge's error.

(iii) When was Junior last seen by Ashook?[90]

[146] The appellant's submissions did not specifically identify an error. Mr. Busby presumed that the appellant's complaint was that the trial judge erred in stating that Ashook's evidence was that he last saw Junior about a week before the incident. He submitted that this was an accurate recital of the evidence but acknowledged that the evidence was inconsistent with the deposition which stated that Ashook last saw Junior approximately three weeks prior to the incident. He also submitted that the raising of this as an error against the backdrop of the fact that the witness testified that he knew Junior for 4-5 years, was to quibble.

[147] If Mr. Busby's presumption is correct, it must be recalled that Ashook gave evidence that he was accustomed to passing by Junior's house on his way to work. Ashook was also able to describe where Junior's house was located, that it was on a dead end road, that it was a white wooden house with an *"old Galant park up in front"*. In the circumstances, the judge's error concerning when Junior was last seen by Ashook before the event was unlikely to have had any real effect on the jury's assessment of whether or not Ashook was correct in his identification of the appellant on the night of the fire.

(i) It was Toppy who climbed over the gate, not Junior[91]

[148] Mr. Busby conceded that this was an error in the judge's recap of the evidence in that it was Toppy who climbed over the gate with Kenny and not Junior as stated by the judge. The respondent stated that the jury would have recognized the judge's error as they had been following the trial and were invested in the evidence.

[90] Summing Up: Day 3 dated June 25, 2015 at pages 5-6.
[91] Summing Up: Day 3 dated June 25, 2015 at page 14 lines 29-41.

[149] The direction of which complaint is made in this sub-ground is as follows:

> *"You would recall that Geeta said that when she first saw both men coming over, that is Junior and Kenny, she was about 50 feet away from the gate. And you would recall that she changed the length of time she saw, she first saw them, from two to five minutes to two seconds. She said she watched Kenny for two seconds. You would recall that she said that Kenny pulled down a jersey over his head. That would mean it would be open to you to find, of course, that at that point in time she could only see his eye… and that would have impeded her view of his whole face. She was viewing two men and, therefore…her vision or focus would have been on both of them and divided between both of them."*[92]

[150] An appreciation of the case for the prosecution makes it clear that the evidence of who jumped the gate on the night of the incident did not form a significant or exclusive basis for Junior's conviction. The issue was a minor part of the case and was of little importance. The main evidence was whether Junior participated in causing the deaths of the deceased.

[151] We pause to note that the judge treated with the issue earlier on in her summing up when she correctly identified that it was "Toppy" who climbed over the gate and directed the jury as follows:

> *"Concerning the main incident now, Geeta said that she was at her front door, the bottom half was already pulled in, and while pulling in the top half, there was about a foot of space open when she saw two men on the ground who proceeded to climb and jump over "Sonny's" gate coming towards her house. She said that the two men were "Toppy", Accused No. 4, and Kenny, Accused No. 6."*[93]

[152] The judge continued:

> *"She said in relation to the incident, she said she watched "Toppy" for about two to three minutes before he climbed the gate. However, later on another day of evidence, she said she watched "Toppy" for two seconds from the time he was on the ground on the other side of the gate to the time he landed on the ground in the roadside. She said that "Toppy" was two and a half feet from Kenny. She said she saw "Toppy's"*

[92] Summing Up: Day 3 dated June 25, 2015 at page 14, lines 29-41.
[93] Summing Up: Day 3 dated June 25, 2015 at page 10, lines 24-30.

face when he landed on the ground and was facing her house. She said nothing obstructed her view. She said the streetlight was on, the light to the back of "Sonny's" house facing her was on, the light to the front of "Sonny's" house was on, and the light from the burger factory was also on. She said she recognized "Toppy's" gold tooth that night. She said that "Toppy" lived in Fireburn and that he used to lime by her mother-in-law, Dolly Ramdial, about once to twice a week. She said he did not have a good relationship with Ashook, her husband, because she saw that "Toppy" beat up Ashook and used a gun butt to knock out his teeth. So that's in relation to her viewing of "Toppy" at that point in time."[94]

[153] It is clear that the judge was here summarising for the jury Geeta's evidence in relation to her viewing of "Toppy" at the particular point in time when he jumped the gate along with Kenny. This would have been obvious to the jury since twice in the above quoted passages, she emphasized it. We find that although the judge made an error in respect of the person jumping the gate, Junior suffered no prejudice. This ground of appeal must fail.

Appellant No. 2 - Ground 6: Failure to properly direct the jury on the issue of motive

Appellant No. 2 - Ground 8: Erroneously equated the 'background evidence' with motive

Submissions

[154] These grounds are closely related and accordingly will be dealt with together. Counsel for Kenny submitted that the trial judge erred when she equated background evidence with motive and failed to direct the jury that the background evidence was irrelevant to his case.

[155] The respondent submitted that the equating of background evidence with motive was irrelevant to Kenny's case and therefore he suffered no prejudice. Further, there was no evidence of a long or intense relationship amongst Kenny and any of the witnesses to support the inference that he was unlikely harm them. As such, it was not necessary for the judge to direct the jury to consider Kenny's lack of motive.

[94] Summing Up: Day 3 dated June 25, 2015 at page 12, lines 2-21.

The Law, Analysis and Reasoning

[156] Background or explanatory evidence includes evidence as to motive.[95] Accordingly, in her summing up, the trial judge drew the jury's attention to the evidence of a land dispute and "bad blood" between Soman, Shiva, Ryan and Visham, and the Ramdial family. The judge then gave directions in law explaining how they could use that evidence, if accepted, to explain that the events leading to the fire did not take place in isolation, and to find support and context for the prosecution witnesses' testimony. They were also told that the evidence was relevant since it suggested a motive for the incident. These directions were followed by a strong caution warning against placing disproportionate reliance on the background evidence against Soman, Shiva, Ryan and Visham and a further instruction to critically and carefully analyse Ashook, Geeta and Nigel's evidence to determine what took place on the night of the fire.[96]

[157] It is evident that the directions given in relation to background evidence and motive were in relation to Soman, Shiva, Ryan and Visham. While the trial judge did not explicitly mention that it did not pertain to Kenny, it was quite clear that it was intended in relation to those four accused solely since the trial judge repeatedly made reference to them.

[158] A further answer to Kenny's complaint is found in **Lopez and Sookram v The State**[97] in which it was stated that in order to properly assist a jury, there will be circumstances in which a judge should direct them to consider an accused's lack of motive. This may arise, where on the evidence, there is a long or intense relationship with characteristics that would lead to the inference that one party was unlikely to desire to harm the other without clear reason so to do.

[159] In the present case however, we do not consider that the evidence of the relationship amongst any of the witnesses and Kenny warrants such an inference. In the circumstances, there was no need for the judge to direct the jury to consider Kenny's lack of motive. This ground is without merit.

[95] Archbold 2011, page 1462 at paragraphs 13-30.
[96] Summing Up: Day 1 dated June 22, 2015 at pages 16-18.
[97] Cr. App. No. 10 & 11 of 2009.

Appellant No. 2 - Ground 9: Conflicting directions on motive and separate treatment of cases for each accused

Submissions

[160] Counsel for Kenny argued that the trial judge's directions on motive conflicted and/or were confusing in relation to directions on the separate consideration of the cases against each accused.

[161] The respondent's position was that it was inconceivable that motive was a source of prejudice since it was not necessary to convict Kenny. Counsel for the respondent also contended that the directions on separate treatment and evidence on each count were general directions given in a particular context and were therefore to be understood and applied accordingly. It was clear when and how the evidence and directions were applicable to more than one or sometimes to all accused persons.

The Law, Analysis and Reasoning

[162] The direction to treat the case against each accused separately was given many times throughout the summing up. The judge went through the evidence for each accused thoroughly, explaining, in relation to the appellants, that their cases were based on the evidence of Ashook, Geeta and Nigel as well as on the interview notes or statements. Although the judge later grouped the cases for the accused persons together, she repeated that the jury must deal with the case against each accused separately. At points in the summing up, the cases against the six appellants were dealt with together, but the need for the jury to separate the issues and the case against each accused was reiterated. An example of this is demonstrated in relation to the issue of joint enterprise where the judge indicated:

> *"The essence of joint responsibility for a criminal offence is that each alleged party shared the intent to commit the offence and took some part in it, however great or small, to achieve that aim.* ***Your approach to this case should, therefore, be as***

follows: In looking at the case of each accused, and you must look at their case individually, *if you are sure that the intention to commit, that the person had the intention to commit the offence, and that person either committed the offence on his own or that he took some part in committing it with others, he is guilty."*[98] [emphasis added]

[163] As discussed earlier in this judgment under Ground 8 at paragraphs [156] - [159] above, the trial judge's directions on motive were in relation to Shiva, Ryan, Visham and Soman. That was specifically pointed out by the trial judge in her summing-up, and, as we have already determined, there was no need in this case for the judge to direct the jury to consider Kenny's lack of motive. There was no conflict between the directions on motive and the clear and repeated directions that each case had to be considered separately. Therefore, Kenny's challenge to the sufficiency of the summing-up in fairly putting the case of each appellant and the issue of joint enterprise cannot be sustained.

Appellant No. 3 - Ground 4: Failure to adequately deal with the issue of motive

Submissions

[164] In a complaint similar to his co-appellant, Junior submitted that the trial judge failed to direct the jury to consider the lack of motive on his part in relation to the specific allegations against him.

[165] The respondent submitted that since motive was not proven as part of the prosecution case against Junior nor was the absence of motive proven by him, there was no clear obligation in law for the judge to direct on motive in respect of him. As such, whether or not she chose to do so was a matter of discretion and it was submitted that in the circumstances of this case she could not be faulted for not doing so.

[98] Summing Up: Day 1 dated June 22, 2015 at page 25, lines 10-19.

The Law, Analysis and Reasoning

[166] In **R v Lewis**[99] the Supreme Court of Canada held that where motive was not proven by the Crown and absence of motive was not proven by the defence, there was no clear obligation in law to charge the jury on motive. At page 843, the Court said:

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

[167] As we have already adverted to, there will be circumstances in which a judge, in order to properly assist a jury, should direct them to consider an accused's lack of motive.[100] However, just as in **R v Lewis**, neither motive nor lack thereof was proven in the instant case and therefore it was a matter for the judge's discretion whether such a direction needed to be given. The exercise of a judge's discretion should only be disturbed if there had been a failure to exercise a discretion, or to consider a material consideration or where an immaterial consideration had been taken into account. In our view, none of these circumstances arose, nor did Kenny assert them. This ground is therefore without merit.

Appellant No. 2 - Ground 7 - Failure to give directions on fresh evidence issues

Submissions

[168] Mr. Rajcoomar submitted that the trial judge erred in law when she failed to direct the jury on how to approach the fresh evidence in relation to material issues, in particular identification, alibi, motive and collusion.

[99] (1979) 2 SCR 821.
[100] Lopez and Sookram v The State Cr. App. No. 10 & 11 of 2009.

[169] Mr. Busby asserted that he was unable to respond to this ground since the appellant did not identify what material issues he was referring to or what fresh evidence these issues were said to relate to.

The Law, Analysis and Reasoning

[170] This court is of the view that this ground does not get off the ground, given that no particulars of the fresh evidence or the material issues were provided.

Appellant No. 2 - Ground 10 - Erroneous directions on previous inconsistent statements

Appellant No. 2 - Ground 11 - Wholly inadequate directions on inconsistent statements

[171] Grounds 10 and 11 touch and concern the same issue and will therefore be dealt with together.

Submissions

[172] Mr. Rajcoomar contended that the trial judge erred in her directions with regard to previous inconsistent statements of the witness Geeta, and in particular where she had accepted that when she made those statements, they were true. Further, Geeta indicated in cross-examination that what she said in her statement and at the Magistrates' Court were true save and except for a statement where she had referred to seeing three men walk into her yard, when in fact it was two.

[173] Mr. Rajcoomar's second contention was that where the inconsistencies related to material issues, the witness is rendered unreliable and the judge must direct the jury accordingly. The judge was required to forcefully point out areas of unexplained inconsistency and direct the jury that the witness was unreliable on these issues. The judge's failure to do so amounted to a miscarriage of justice.

[174] Mr. Busby submitted that the trial judge gave standard directions on the use of previous inconsistent statements based on well-established principles and practice. In response to the second contention, he submitted that the trial judge did direct the jury accordingly.[101] This direction was followed by the judge's instructions to the jury on how to deal with the contradictions, inconsistent statements and omissions. Kenny's submission that the judge should have directed the jury on the inconsistencies relating to material issues, is patently wrong and proceeds from a perplexing misunderstanding of the respective roles of the judge and jury. The respondent submitted that it is outside the judge's function to tell the jury that an issue is material or not or that a witness is reliable or not. These matters are solely within the province of the jury

The Law, Analysis and Reasoning

[175] The impugned direction on previous inconsistent statements is as follows:

> "*A previous inconsistent statement is a statement made by a witness on a previous occasion and that witness would have said something different to what the witness is saying on oath in this trial. Or it may be two statements the witness has made on an issue whilst giving evidence in this trial, which differs. So it is either the witness in this trial says something different to what he said before on a prior occasion, or he says two different things whilst he is testifying in this matter."*[102]

[176] The judge continued her directions on how the jury should deal with previous inconsistent statements as follows:

> *"Now, contradictions, previous inconsistent statements and omissions are all relevant to your assessment of the credibility and reliability of witnesses. It is one of the things that you factor in when determining whether, in your view, the witness is reliable, honest, straightforward and credible.*
>
> *Now, when these contradictions, previous inconsistent statements, and omissions appear in a case, you cannot simply brush it aside. They are part of the evidence in the case and you must, therefore, scrutinize them and deal with them…*

[101] Summing Up: Day 1 dated June 22, 2015 at page 12, lines 21-25.
[102] Summing Up: Day 1 dated June 22, 2015 at page 11, lines 21-29.

In dealing with them, you must ask yourself three questions, the first question is this: is the contradiction, previous inconsistency, or omission on a major issue or a minor issue? In other words, is it an issue that goes to the root or the heart of the case, or is it a side issue, something peripheral to the real issues in this case?

Now, you would appreciate that not all issues in a case would be of equal importance, some might be of moderate importance, some might be of less significance. But, bear in mind, that's the first question you have to ask yourself, is it on a major issue or a minor issue?

The second question you have to ask yourselves is, what is the reason for the contradiction, inconsistent statement or omission? Is it an innocent reason, such as an honest mistake on the part of a witness, or is it that the witness is deliberately lying and being untruthful to you?

If you find that a witness is deliberately dishonest on an issue, you might then ask yourselves whether you can trust the rest of the witness' evidence. So the second question you have to ask yourself is what is the reason for this contradiction, inconsistency, or omission.

The third question you must ask yourself is, has the witness given a reasonable explanation for the contradiction, previous inconsistency or omission? Basically, does the explanation given by the witness make sense or not?"[103]

[177] The judge concluded her directions on the issue by saying:

"The extent to which such inconsistencies, contradictions, or omissions in a witness' account, the extent to which they should affect and influence your judgment of a witness' credibility and reliability is for you and you alone to decide. I direct you that the account given by a person in a previous statement forms part of the evidence. You are not bound to accept either account. But if, having fully and carefully considered the issue, you conclude that the witness' previous statement is accurate and his oral testimony is not, then you may act on the previous statement in preference to the person's oral testimony, oral evidence.

[103] Summing Up: Day 1 dated June 22, 2015 at page 12, line 15 to page 13, line 1.

Later on in my summing-up I will highlight for you some contradictions, inconsistencies, and omissions in the evidence of some of the witnesses…"[104]

[178] At the time, the judge was not referring to any specific evidence. With respect to the particular inconsistency complained of by Mr. Rajcoomar, the judge said:

"And, further, Mr. Rajcoomar asked her whether or not she said she saw two people walking by Nigel's car at this trial. And she said, yes, and he suggested to her, like Mr. Heath did, that she said three persons and she said, no, the person didn't hear her properly. And she explained her position. She said, firstly, that the statement was not reread to her, you would recall that she can't read or write. She said, referring to the police officer, 'I tell she I only see two person coming through the front. One of the person in meh statement I didn't know which side he did come from. Either he come from the back, but I did see three persons.' So she is agreeing she saw three persons, but two came from the front and she didn't know where the other one came from."[105]

[179] In dealing with the inconsistency between Geeta's statement and her evidence under cross-examination, the judge properly assisted the jury in accordance with the mandatory directions. In addition to pointing out the inconsistency to the jury, the judge took the further step of telling them that the witness had in fact offered an explanation for it.

[180] **Section 15H** of the **Evidence Act** provides that:

Where in criminal proceedings a person gives oral evidence and— (a) he admits making a previous inconsistent statement; or (b) a previous inconsistent statement made by him is proved by virtue of section 5, 6 or 7, the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible.

[181] Thus, the judge accurately directed the jury that where a deponent accepts that a prior inconsistent statement was true, the prior inconsistent statement becomes evidence in the case when the judge said: *"But if, having fully and carefully considered the issue, you conclude that the*

[104] Summing Up: Day 1 dated June 22, 2015 at page 13, lines 18-32.

[105] Summing Up: Day 3 dated June 25, 2015 at page 28, lines 12-25.

witness' previous statement is accurate and his oral testimony is not, then you may act on the previous statement in preference to the person's oral testimony, oral evidence."[106]

[182] As stated earlier, the inconsistencies as they related to Geeta were all sufficiently dealt with by the judge who directed the jury's attention to the instances where the witness might have contradicted herself and where her evidence was shown to be unreliable in cross-examination. These were all matters of fact correctly left for the jury's determination. The judge directed the jury in great detail how they might approach the inconsistencies in the evidence.[107] The judge then pointed out to the jury the manner in which the inconsistencies arose and gave adequate examples. She then proceeded to remind the jury of the main inconsistencies, as she had promised. In particular, the trial judge on more than one occasion reminded the jury in very strong terms about the inconsistency between the Geeta's evidence and her statement. For these reasons we find no merit in these grounds.

Appellant No. 2 - Ground 13 - Inadequate and erroneous directions on the Interview Notes

Submissions

[183] The essence of this complaint is that the trial judge erred in law in ruling that the notes of the interview conducted on May 28, 2009, constituted a purely exculpatory statement as opposed to a mixed statement. Mr. Rajcoomar submitted that the judge ought to have found that the interview notes amounted to a mixed statement, since it contained incriminatory statements in which Kenny, accepted that he knew the co-accused and exculpatory statements in that he denied involvement in the incident and provided an alibi. It was submitted that the trial judge was wrong to direct the jury that the interview notes had a limited purpose. It was further argued that in the alternative, the directions on the interview notes had the potential to confuse the jury when they considered the issue of alibi, since being told it was of limited value, they might have concluded that there was no evidential basis to consider the alibi.

[106] Summing Up: Day 1 dated June 22, 2015 at page 13, lines 24-29.
[107] Summing Up: Day 1 dated June 22, 2015 at page 13.

[184] Mr. Busby argued that the statements made in the interview notes were exculpatory and as such the trial judge was correct when she directed the jury that they were only led to show Kenny's response when taxed with the allegations, and were only evidence of his reaction when questioned by the police. They were however a factor which the jury could properly take into account as having some relevance to the genuineness of his defence of alibi.

The Law, Analysis and Reasoning

[185] The trial judge ruled that the interview notes were purely exculpatory. During the interview, Kenny placed himself either at home or at work at the time of the incident. Thus, the interview notes amounted to a denial of any participation in the offence. In our view, the trial judge was correct in holding that the interview notes did not contain any incriminatory material and were not to be considered as evidence of the truth of the assertions contained therein. The judge's directions pertaining to the interview notes were thus appropriate and sufficient in the circumstances.[108]

[F] MOON DIRECTION

[186] Counsel for Soman and Visham complained that, in directing the jury, the trial judge made errors which were not adequately rectified once discovered.

Appellant No. 1 - Ground 11: Failed to rectify errors in accordance with the "Moon" direction.

Appellant No. 5 - Ground 6: Failed to correct error on the treatment of the evidence from the ambulance company in the context of the case as a whole.

Submissions

[187] It was submitted that the judge erroneously directed the jury that the evidence of Ms. Sheridan Murphy could assist them in assessing the credibility of Corporals Gopaul and Cassie. The judge,

[108] Summing Up: Day 1 dated June 22, 2015 at page 38, lines 16-20.

realising her error, sought to correct it, directing them that Ms. Murphy's evidence could assist them in determining the approximate time of the fire. Counsel for Visham, Ms. Chote S.C. and counsel for Soman, Mr. Heath both complained that the judge did not direct her mind to the guidelines in **R v Moon**[109] and **Jackman v The State**[110],which set out what is required when correcting errors made in the summing up. They submitted that the judge failed to direct the jury to disabuse their minds of all they would have heard of the earlier direction which she sought to correct and at the point of correcting the direction, she did not restate the direction which she attempted to correct. It was submitted that the judge simply gave the jury the proper direction which would have led to them becoming confused since the judge would have recited a changed direction without putting it in its proper context.

[188] Mr. Heath submitted that the judge also failed to adequately put the defence of alibi and the issue relating to the timeline to the jury. He also submitted that the judge confused Soman with Junior and directed the jury based on inaccurate evidence.

[189] Mr. Busby argued that the decision in **R v Moon** is distinguishable from each of the three instances raised by the appellants. In that case, the Assistant Recorder repeatedly misdirected the jury on the fundamental issues of the burden and standard of proof in respect of self-defence, which was the only live issue in the case. He contended that the guidance in **R v Moon** represents what is necessary to effectively correct a fault that, if not put right, would be fatal to a summing up. He argued that none of the issues highlighted by Soman could be characterized as such.

[190] With respect to the direction to the jury in relation to Ms. Murphy's evidence, he submitted that the judge realised her mistake, directed that jury that she wanted to correct what she said and gave a revised direction. Accordingly, the judge's directions made it clear to the jury in a plain and effective way, that she wished to correct her earlier error.

[109] [1969] 1 WLR 1705.
[110] Crim. App. Nos. 13 - 14 of 2005

[191] In response to the contention that the judge failed to adequately put the defence of alibi and the timeline to the jury, Mr. Busby submitted that the judge, after quoting the relevant portions of the evidence that related to the timeline, went on to direct the jury as to how the evidence of Corporal Gopaul, Corporal Cassie and Ms. Murphy were related.

[192] Mr. Busby, in response to the submission that the judge confused Soman ("Toppy") with Junior when narrating the evidence, submitted that the judge was simply setting out some of the Turnbull guidelines in respect of Ashook's first sighting of Junior. It was submitted that the sentence containing the name "Toppy" was one wherein the judge referred to the lighting conditions at the time that Ashook first saw Junior. Ashook said that he first saw Junior John walking side by side with "Toppy" so that the lighting conditions in respect of both of them would have been the same, that is, emanating from the street light twenty-five feet away.

The Law, Analysis and Reasoning

[193] In the decision in **R v Moon**[111], the appellant was charged with assault and at his trial, the sole issue was whether he had acted in self-defence. The court, throughout the summing up, misdirected the jury by stating that the onus was on the defendant to satisfy them on a balance of probabilities that he acted in self-defence. At the end of the summing up, the error was pointed out to the Court by counsel and the Court attempted to correct the error. The defendant was convicted. On appeal, it was held that such a misdirection could be corrected only in the plainest terms. It was stated that the Court must repeat the direction given, acknowledge that it was wrong, tell the jury to put out of their minds all that they had heard from the court about the burden of proof relating to self-defence and then direct them on the law in clear terms, incapable of being misunderstood. Since there was no onus on the defendant to prove self-defence, the error had not been effectively corrected and the conviction was deemed unsafe.

[111] **Moon** (n.109).

(i) The error as dealt with by the judge

[194] The judge first directed the jury in the following terms:

> *"Now I want to quickly go through the evidence of … Ms. Sheridan Murphy, and her evidence might assist you, depending on what you make of it, assess the credibility of both Gopaul and Cassie.*[112]*"*

[195] Upon realising her error, the judge sought to correct herself by saying:

> *"**Before the break I was dealing with the evidence of Mr. Cassie, Officer Gopaul and Ms. Murphy. I stated that Ms. Murphy's evidence can assist you in assessing the credibility of Mr. Cassie and Officer Gopaul. I want to correct that.***
>
> ***What I want to say now instead of what I just said before is Ms. Murphy's evidence will assist you or might assist you in determining the time of the fire or approximate time of the fire if you accept her evidence.*** *It is entirely a matter for you. And if you do accept her evidence, which is that the call was received at 1:21:19, then it is open to you to infer that the fire began before that time.*[113]*"* [emphasis added]

[196] The judge, in clear and simple language, informed the jury of the error which she made and went on to give them the correct direction. This approach by the judge showed that she complied, in substance, with the direction in **R v Moon**[114]. The failure of the judge to inform the jury to remove the misdirection from their minds, in our view, was not so substantial so as to cause prejudice to Soman. The judge's correction sought to limit the application of Ms. Murphy's evidence, not to discredit the accounts given by Corporals Gopaul and Cassie, but rather as means by which the jury could determine the approximate time of the fire.

[197] This analysis disposes of Visham's ground of appeal in its entirety. Soman complained of two further errors which we will now address.

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[112] Summing Up: Day 2 dated June 24, 2015 at page 33, lines 42-44.
[113] Summing Up: Day 2 dated June 24, 2015 at page 45, lines 25-38.
[114] **Moon** (n. 109).

(ii) The defence of alibi and the timeline in relation to the fire

[198] The judge's direction from which this complaint stems was:

> *"So that is in essence his evidence. He puts 1, 2, 3 and 4 at the Freeport Police Station during the 15 minute period, and he puts 1, 2, 3 and 4 at the Freeport Police Station after the fire. However, with respect to the 15-minute period, he puts it at 1:40 a.m. – sorry, yes, 1:40 a.m. sorry if I confused you. So he said that the 15-minute period, when he returned to the Freeport station, the 15-minute period that was at 1:40 a.m."*[115]

[199] The only witness who gave evidence in support of the defence of alibi in relation to Soman and Visham, Ryan and Shiva was Corporal Gopaul. Corporal Gopaul, after refreshing his memory from a station diary extract, testified that he returned to the Freeport Police Station at around 1:40 a.m. on Tuesday April 14, 2009 and was there for approximately 15 minutes. Whilst there he saw Soman.[116]

[200] The judge accurately recalled the evidence with respect to the fifteen minute period and the timeline. She, in her summing up, went on to explain to the jury how the evidence of Corporal Gopaul, Corporal Cassie and Sheridan Murphy were related, namely, that the emergency call for the fire occurred before the time at which Corporal Gopaul placed Soman at the Freeport Police Station and that that could be taken into account in their assessment of his alibi.[117] We are therefore not in agreement with Mr. Heath's submission that the judge failed to adequately put the defence of alibi, and the timeline to the jury. The judge's direction on this issue were unassailable. She reminded the jury of the evidence in relation to the defence of alibi as well as the timeline and placed them in their proper evidential context, by relating it to the evidence of Corporal Cassie, Corporal Gopaul and Sheridan Murphy.

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[115] Summing Up: Day 2 dated June 24, 2015 at page 33, lines 25-34.

[116] Transcript of the Proceedings dated April 16, 2015 at page 49, line 25 t0 page 50, line 30.

[117] Summing Up: Day 2 dated June 24, 2015 at page 35, line 21 to page 36, line 4.

(iii) The judge confusing "Toppy" with Junior

[201] Mr. Heath submitted that the judge confused Soman ("Toppy") with Junior and in so doing, communicated and inaccurate evidence. A mirror complaint was submitted on behalf of Junior and has been addressed in detail at paragraphs [138] to [143] above.

[G] INCONSISTENCIES

Appellant No. 1 - Ground 12: Failure to direct on inconsistencies

Submissions

[202] Mr. Heath submitted that the judge to failed identify the inconsistencies in the evidence of the main witnesses for the prosecution and did not properly direct the jury on how they should approach them. He contended that the judge ought to have first dealt with the individual evidence of each of the prosecution witnesses, namely Ashook, Nigel and Geeta, in relation to the prosecution case and then with respect to the cross-examination by defence counsel. Further, the judge was required to highlight the inconsistencies between what was said at the preliminary enquiry and what was said at the trial. He was critical of the judge's directions on this issue and submitted that it amounted to a hollow recitation of the evidence without placing it in its proper context. As a result, the jury would not have known how to deal with these issues.

[203] Mr. Busby submitted that the judge did in fact direct the jury on how to approach inconsistencies in the case. The judge gave standard directions on contradictions, previous inconsistent statements and omissions and identified instances of each of these. He also submitted that the judge informed the jury that the assessment of inconsistencies, contradictions and omissions were important issues as they could affect their determination of the credibility and reliability of the witnesses. Accordingly, the jury were well aware of the issues in the case and the approaches open to them to resolve them.

[204] In rejoinder, Mr. Heath submitted that the respondent's submissions failed to address the judge's omission to direct the jury on the following inconsistencies:

(i) With respect to Ashook - the point in time when he jumped out of the window of the house; where he saw Visham and Junior entering and leaving the house; the lighting conditions; the issue of the dogs; Junior's location (at the pipe); Ashook's location; his statement in relation to the children; his past relationship with Junior; his several versions of when he saw Soman and Junior, and the descriptions of Soman and Junior.

(ii) With respect to Geeta - the point in time when Ashook jumped out of the window, the description of Soman and Junior and the location where she met Ashook.

(iii) With respect to Nigel - the note by Dr. Seedoo and his description of Soman.

[205] Mr. Heath repeated his submission that it was the duty of the judge to identify the inconsistencies on substantial issues and adequately direct the jury on how these should be dealt with.

The Law, Analysis and Reasoning

[206] After giving standard directions on the definitions of previous inconsistent statements, omissions and contradictions[118], the judge went on to direct the jury in the terms set out at paragraph [129] above.

[207] Later on in her summing up, the judge identified specific inconsistencies and contradictions in the evidence of the prosecution witnesses:

> *"Now, I move on to the inconsistencies and contradictions, if any, in the evidence of Ashook…*
> *…*

[118] Summing Up: Day 1 dated June 22, 2015 at page 1, lines 16-39.

…

So, Ashook spoke about having a conversation with Geeta, his wife, about dogs barking and asking her to let go the dogs, and she did, and he jumped through the window. That is what he said in his evidence here. But Ashook did not say this before to the police in his statement which he gave on the 14th April, 2009*…*

…

…

Yes, the second point I want to refer to, in evidence in this court he said as follows: ***"Well, earlier on my wife tell me how the police did come looking for me and thing, and "Toppy" and Ryan and Shiva and them dey dey, and she hear 'Toppy" say he coming back to burn down the house." His response: Accepted that this was not in his statement****…*

The third thing I would like to bring to your attention, ***the third inconsistency is Ashook accepts that in court was the first time that he mentioned anything about the lighting from Vasha's and the other light****…*

The fourth point, in Ashook Ramdial's evidence in this court you would recall he said he saw two men entering his house and then they approached his nephew's door, as he heard the shooting. However, in the Magistrates' Court, he said that he saw the two men "in front of my door"*…*

…

The fifth point I would like to raise with you is that in this trial, Ashook said Shiva and Ryan*, you would recall,* ***were walking up and down at the back of the house. But in his statement, he said, "Shiva", "Sonny". "Ryan was". This is his language, "was running round meh house like to see if I go jump out, but I did done outsmart them already."****…*

In his evidence in this court, Ashook said that he saw Junior stand up by the pipe in front the yard, but he accepts that he did not say this in the Magistrates' Court. So that's an omission.

Seventh point, ***Ashook said in this trial that he went in the track ahead of the perpetrators and waited for them to pass. In the Magistrates' Court, he said he was asked, "When you said that you had followed them after they left the burning house, and trailed them for 100 feet,"*** *that's what Mr. heath is saying he said at the Magistrates' Court. And he is saying but in his statement he accepted that "After the burning, after they left the area, I followed them from a distance while they were leaving." So, essentially, Members of the Jury, it is being suggested to him, that he*

said something different in the Magistrates' Court, that he followed them. But in this court he said he went ahead.

…

…

Ashook said that he saw "Sonny" and Junior jump out the window at the eastern side of the house. It was suggested that he did not say that before in relation to Junior. Ashook also said that he saw Junior one week before the incident on the 14th. It was pointed out to him that that was an inconsistency with what he had said before, said in court.

Ashook said that Geeta told him that the children were in the house and the house was one fire. This was not stated before, this is fresh, this was an omission on his part. *He also said in his evidence that he would have made an attempt to go, that is to rescue the children, but the man would have killed him, the first time he was saying that was in this trial.*

Additionally, it was stated by Ashook that Junior tried to attack him already and kill him in his gallery. And this, he has never stated this before, so that was an omission on his part. *In relation to the fact that he said that he saw the five accused and in addition to that, he saw men that he couldn't make out. This was fresh evidence, this was the first time he was saying it, so that is considered an omission in his evidence*[119]*."* [emphasis added]

[208] In relation to the evidence of Geeta, the judge directed the jury as follows:

*"I also want to remind you of certain elements in relation to Geeta. Geeta was being cross-examined by Mr. Rajcoomar and this question was asked… '****As soon as I reach outside, the roof of the house come down. When I reach outside, I end up running through the bushes to go by the savannah.*** *Same time I meet my husband in the savannah. I tell him the house burning and how Nigel get shoot and thing. You remember saying that anywhere?'… Her response is: 'In meh statement?' Question: 'When you put it in the statement, that was correct?' Answer: 'Yes, sir.' Question: 'So what I just read to you, that is correct from your statement? Is that the truth, is that what happened?'* ***Answer: 'Well, first, I did meet him by the caraili tree and then we went in the savannah.' Question: 'So what is in your statement is true, but you first***

[119] Summing Up: Day 3 dated June 25, 2015 at page 6, line 31 to page 9, line 42.

met him by the caraili tree?' Answer: 'And then we walk in the savannah, running up in the savannah.' Question: 'So when you gave your statement in 2009, you didn't say that you met him by the caraili tree?' Answer: 'Yes, sir.'[120]" [emphasis added]

[209] As seen from the judge's summing up quoted *in extenso*, the judge adequately and correctly directed the jury on how they were to approach the inconsistencies, contradictions and omissions in the evidence. The judge then went through several of the inconsistencies in the evidence of Ashook and pointed out one of the inconsistencies in the evidence of Geeta. The judge however did not refer the jury specifically to every inconsistency in the evidence of the prosecution witnesses, some of which were highlighted by Mr. Heath in paragraph [204] above. We remind ourselves of what was said by this Court in the decision in **Chris Singh v The State:**[121]

"*…It is not part of a trial judge's function to rehearse every conceivable factual matter which might impact, however remotely so, on the proof of the State's case. The foundational principle for any summing up is that it must be sufficient to achieve its core purpose. It should aim, wherever it is realistically and fairly possible on the evidence, at precision over complexity and conciseness over prolixity."*[122]

[210] In the very recent decision of the Caribbean Court of Justice in **Gregory August and Alwin Gabb v The Queen**[123], delivered on March 29, 2018, one of the grounds of appeal advanced by the appellant, August, was that the judge failed to adequately address material inconsistencies in the prosecution evidence. On this issue, the Court said at paragraph 60:

"*Although a trial judge ought to explain to the jury the nature and significance of conflicts in evidence and direct them on how to treat with those conflicts,* ***there is no requirement that the trial judge should identify every inconsistency that arises.*** *The Court of Appeal of Jamaica in the case of R v Fray Diedrick SCCA No 107/1989 (22 March 1991) at [9]. cited with approval in the case of Cargill v R [2016] JMCA Crim 6,*

[120] Summing Up: Day 4 dated June 26, 2015 at page 12, lines 26-49.
[121] Cr. App. No. 18 of 2009.
[122] R v Woolin [1999] 1 A.C. 82; R v Landy [1981] 1 W.L.R. 355; and R v Sargent (1983) 22 Sask. R. 230.
[123] [2018] CCJ 7 (AJ).

*JM 2016 CA 17 , **explained that there was no requirement that the judge should "comb the evidence to identify all the conflicts and discrepancies which occurred in the trial"**: [R v Fray Diedrick SCCA No 107/1989 (22 March 1991) at [9]] **What was expected was that the trial judge would "give some examples of the conflicts of evidence which have occurred at the trial**, whether they be internal conflicts in the witness' evidence or as between different witnesses": [R v Fray Diedrick SCCA No 107/1989 (22 March 1991) at [9]]. **Of course, the trial judge should also point out any major conflicts in the evidence of the prosecution or the defence."** [emphasis added]

[211] The judge in this case was under no legal duty to direct the jury on every single inconsistency, contradiction or omission that arose in the prosecution case. All that was required of the judge was to explain to the jury in clear, concise and intelligible terms the major inconsistencies in the case and the approaches open to them to resolve them. The judge faithfully complied with this duty. In our view, the jury were well assisted on the issues of the inconsistencies, contradictions and omissions that arose in the evidence of the prosecution witnesses. This ground of appeal is devoid of merit.

[H] COLLUSION

[212] As a result of the substantial overlap in the matters raised in the fourteenth and fifteenth grounds of Soman's appeal, the second ground of Kenny's appeal and the first ground of Junior's appeal, we proceed to deal with them together.

Appellant No. 1 - Ground 14: Failure to address the issue of collusion among witnesses
Appellant No. 1 - Ground 15: Failure to put the defence of collusion for the jury to consider
Appellant No. 2 - Ground 20: Failure to direct the jury on collusion between witnesses
Appellant No. 3 - Ground 1: Failure to address the issue of collusion among witnesses

Submissions

[213] Counsel for these appellants submitted that the judge failed or omitted to address the issue of collusion among prosecution witnesses. It was submitted that at the Ensor Hearing, the issue of collusion was raised by defence counsel. It was agreed between defence counsel and the judge

that instances of possible collusion would be reduced into writing and sent to the judge. It was submitted that having regard to this exchange, it was a reasonable expectation that the judge had every intention of directing the jury on the issue of collusion. Notwithstanding this, the issue was not addressed by the trial judge. Counsel argued that this omission by the judge deprived the jury of a direction as to how to approach allegations of collusion in assessing the credibility and reliability of the witnesses concerned. The decision in **Keith Bissessar and Gabriel Deosaran v The State**[124] was cited in support of this submission.

[214] Additionally, counsel for Soman submitted that Mohanie Ramdial gave evidence that she had a conversation with Nigel, who said to her that Ashook told him to call Soman's name as one of the persons who committed the offence. Mr. Heath contended that this was direct evidence of collusion between two prosecution witnesses against Soman. According to him, the issue of collusion was also appreciated by the prosecutor.[125] In light of this evidence, it was submitted that it was incumbent on the judge to give a direction on collusion. Mr. Heath further submitted that this issue was central to Soman's defence and that the judge failed to bring it to the jury's attention.

[215] Mr. Busby submitted that both Nigel and Ashook denied that the conversation with Mohanie had occurred. Further, at no time during the trial did Nigel say that he told the police that Ashook saw Soman ("Toppy") shoot him. He contended that even if there was a possibility that Ashook tried to collude with Nigel in this way, that attempt did not materialise since Nigel never complied.

[216] Mr. Busby also sought to distinguish the decision in **Keith Bissessar and Gabriel Deosaran v The State**[126] from the case at bar. He submitted that the complaint in the former case involved the evidence given by three police officers whereas the evidence in this case came from civilian witnesses, who all came from the same family. He argued that the resulting inevitability was that these witnesses would have had some discussion about what happened on the night of the

[124] Cr. App. No. 21 and 22 of 2005.
[125] Transcript of Proceedings dated June 1, 2015 at page 5, lines 40-50.
[126] **Bissessar and Deosaran** (n. 124).

incident. Mr. Busby relied on the decision in **R v Gary Skinner**[127] as authority in support of the drawing of a distinction between police and civilian witnesses.

[217] In a specific response to Soman's complaints, Mr. Busby submitted that the judge was not required to give a specific direction on collusion because there was no evidence to support its existence. He argued that in any event, the judge gave repeated directions on the issue of fabrication during her summing up and no complaint could be properly made that Soman had not received a fair trial. He cited the decision in **Rick Gomes v The State**[128] in support of this submission.

[218] Mr. Heath's rejoinder was that counsel for the respondent failed to address the gravamen of the grounds. He submitted that the judge should have addressed the issue of collusion since it was raised in Mohanie's direct evidence and Dr. Seedoo's medical report.

The Law, Analysis and Reasoning

[219] In **Rick Gomes v The State**[129], the appellant was convicted of two counts of possession of cocaine for the purpose of trafficking, as well as possession of a firearm and ammunition. At the trial, under cross-examination, three police officers gave evidence that before they wrote their individual statements in the matter, they had conferred and discussed with each other the events leading up to the appellant's arrest. They however denied that they had prepared their statements together. The appellant's defence was one of fabrication attributed to the police officers. On appeal, one of the issues that arose was whether there was evidence of collusion in the case and whether the judge gave appropriate directions on the issue. This Court sought to canvass the meaning of the term "collusion" and reference was made to the decision in **R v H**[130] where Lord Mustill said at paragraph 45:

> *"Finally, it is important to note the ambiguity of the word "collusion". In its more limited sense this may denote a wicked conspiracy in which the complainants put their*

[127] (1994) 99 Cr. App. R. 212.
[128] Cr. App. No. 13 of 2010.
[129] Ibid.
[130] [1995] Cr. App. R. 437.

heads together to tell lies about the defendant, making up things which never happened. It is however clear that the argument for the appellant, and the authorities on which it is based, give the word a much wider meaning; wide enough to embrace any communications between witnesses, even without malign intent, which may lead to the transfer of recollections between them, and hence to an unconscious elision of the differences between the stories which each would have independently have told."

[220] Having given due consideration to the reasoning in **R v H** above, Weekes J.A. (as she then was) in delivering judgment in **Rick Gomes** said:

"In the instant matter the "collusion" referred to is obviously in the more limited sense. We pause to say that in this jurisdiction the terms "collusion" and "fabrication" are used interchangeably when referring to a situation in which two or more witness have deliberately concocted an account of events which implicate an accused. Of course there can be fabrication without collusion but the term collusion implies fabrication."

[221] In **Rick Gomes**, the Court of Appeal took into account the fact that the trial judge explained to the jury that the defence was one of fabrication and that it was alleged that the officers "made up" the case against the appellant. The judge also highlighted to the jury the discrepancies in the evidence of the prosecution witnesses. Accordingly, the Court of Appeal found that the jury could not have been left in doubt of the nature of the appellant's case and were alerted repeatedly to the issue that they had to resolve.

[222] In the present case, Mohanie, who was a witness for Soman, said that, "*Ashook walk in and he told him, whilst we was having a conversation with me and Nigel, he told him that, 'You don't know who shoot yuh, tell the police that I see Toppy wey shoot you."*[131] Both Ashook and Nigel denied that this conversation took place.

[131] Transcript of the Proceedings dated May 25, 2015 at page 5, lines 32 to 36.

[223] The judge did not use the terminology "collusion", but dealt with the issue of fabrication at several points during the course of her summing up. In her summing up of the defence cases and evidence, the judge set out the evidence of Mohanie as follows:

> *"Additionally you will recall that Accused No. 1 as well as the others… relied on the evidence of Mohanie Ramdial...she testified that… she went to see Nigel Richard Ramdial at the Couva Hospital…*
> *…*
> *…*
> *…*
> *Mohanie said she spent a half an hour in the room with her son Nigel. She touched him and he woke up and they spoke. She asked him who shot him. He said, "Mammy, I don't know who is shot him," he did not know who shot him…They both then cried. Some time passed while speaking to Nigel, then she said she saw her brother Ashook walk in. Ashook stood up by the bed and called her "Aga", fire in Hindi, and told Nigel the following, 'You don't know who is shot you? Tell the police I see Toppy wey shoot you…'*
> *…*
> *…*
> *Ashook left and walked outside and Mohanie told Nigel, 'Nigel, if you don't see who shoot you, do not call nobody name and lie on them…;'"*[132]

[224] The Judge also set out the evidence of Dr. Seedoo:

> *"…In that record, it is reflected that Richard Nigel Ramdial informed Dr. Raymond Seedoo, that he, Richard Nigel Ramdial, had alcoholic drinks last night and was asleep, and when he awoke the house was on fire and he ran out realising he was shot in his back and his left arm. Richard Nigel Ramdial informed Dr. Raymond Seedoo that he was unware of the type of gun, how many times he was shot and who shot him*[133]"

[132] Summing Up: Day 4 dated June 26, 2015 at page 36, line 36 to page 39, line 11.
[133] Summing Up: Day 4 dated June 26, 2015 at page 41, lines 26-34.

[225] The judge then framed this evidence in the context of the closing addresses of trial counsel on behalf of Soman, Shiva, Ryan and Visham:

> *"Now, in Mr. De Lima's closing address…he said 'Isn't that divine intervention? The key to the case. If you agree with me and you accept that Nigel told the doctor he did not know who shot him, we have a serious situation here because it means Mohanie telling us the truth, which I never doubted.' This is what he is saying. 'It means also Ashook is a liar, is means Nigel is a liar'"*[134]

[226] The judge also directed the jury that a matter for them to consider was whether Ashook had a motive to lie. She reiterated that this was important as the case for Soman was that Ashook fabricated the evidence against him when he implicated him in the matter.[135] The judge also referenced Ashook's previous convictions, told them how they were to deal with them, and directed them that his credibility was of substantial importance in the trial.[136] In dealing with Soman's case, they were specifically told that his defences were denial, alibi and fabrication of the evidence by the prosecution witnesses.[137] In our view, the failure of the judge to give a direction employing the term "collusion" did not prejudice Soman. As stated in the decision in **Rick Gomes v The State**[138], although there can be fabrication without collusion, the terms collusion implies fabrication. In this jurisdiction, where it is alleged that two or more witnesses have concocted evidence against an accused person, the terms "collusion" and "fabrication" have been used interchangeably.

[227] The jury were not left unassisted in their consideration of this aspect of Soman's (or the other appellants') cases as they were directed repeatedly to the defences on which he relied, which the judge placed against the evidence in the case. More importantly however, although the nomenclature "collusion" was not employed by the judge, she adequately marshaled the

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[134] Summing Up: Day 4 dated June 26, 2015 at page. 41, lines 38-46.
[135] Summing Up: Day 2 dated June, 24, 2015 at page 15, lines 17-21.
[136] Summing Up: Day 2 dated June, 24, 2015 at page 15, line 30 to page 16, line 42.
[137] Summing Up: Day 1 dated June 22, 2015 at page 17, lines 11-14; Summing Up: Day 4 dated June 26, 2015 at page 47, lines 11-29.
[138] **Gomes** (n. 128).

evidence of Mohanie and Dr. Seedoo that would have gone to the issue of collusion. The jury, applying the common sense on which it is presumed that they would operate, could have been in no real doubt that this issue was one of the principal ones for their determination. All of the material pieces of evidence that bore on that issue were comprehensively brought to the jury's attention by the trial judge. Therefore, even though the judge did not use the term "collusion" in her directions to the jury, even if that term implies a higher dimension of fabrication, these appellants were neither prejudiced nor deprived of any benefit. This is because the use of the term "collusion" would not have assisted in the elucidation of the issues before the jury more than it had been in the very thorough and robust factual directions by the judge. These grounds of appeal are without merit.

[I] JOINT ENTERPRISE

[228] The following grounds are all taken together as they essentially raise the same complaint, namely, that the trial judge's directions on the issue of joint enterprise were erroneous in light of the decisions in **R v Jogee and R v Ruddock**.[139]

Appellant No. 1 - Ground 16; Appellant No. 2 - Ground 12; Appellant No. 3 - Ground 3; Appellant No. 4 - Ground 4; Appellant No. 5 - Ground 4; Appellant No. 6 - Ground 5

Submissions

[229] Counsel for Soman, Kenny and Junior submitted that the judge's direction on joint enterprise was wrong in law, having regard to the decision in **R v Jogee and R v Ruddock**[140]. Counsel for Soman and Junior, Mr. Heath, submitted that the test for liability under the joint enterprise principles is not one of foresight as in the terms indicated by the judge but rather one of intention to assist or encourage the commission of the crime. In similar submissions, Counsel for Shiva, Visham and Ryan, Ms. Chote S.C. submitted that the judge fell into error by directing the jury that the first

[139] [2016] UKPC 7.
[140] Ibid.

aspect of joint enterprise was knowledge of the principal's intent and that the essence of joint enterprise and liability of the secondary party was his foresight. Ms. Chote S.C. submitted that following **R v Jogee and R v Ruddock**, the law relating to joint enterprise was restated such that secondary liability depends on proof of intentional assistance or encouragement, conditional or otherwise.

[230] Mr. Busby submitted that the decision in **R v Jogee and R v Ruddock** was not applicable on the facts of the case at bar. It was submitted that that case dealt with the doctrine of "parasitic accessory liability", an expression used in **Chan Wing-Siu v The Queen**[141], which meant that where two persons set out to commit an offence (Crime A), and in the course of it one of them commits another offence (Crime B), the second person is guilty as an accessory to Crime B if he foresaw it as a possibility, but did not necessarily intend it.

Mr. Busby also submitted that the decision in **R v Jogee and R v Ruddock** dealt with a case where the issue was whether the secondary party shared the intent of the principal. He submitted that on the facts of the present case, no such issue arose as all the parties shared the common intention to burn the house down and cause at least grievous bodily harm to its occupants.

The Law, Analysis and Reasoning

[231] In the decision in **R v Jogee and R v Ruddock**[142], Lord Hughes and Lord Toulson found that the law had taken a wrong turn in **Chan Wing-Sui v The Queen**[143] and at paragraph 10, their Lordships laid down the following principle:

> *"If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent. D2's intention to assist D1 to commit the offence, and to act with whatever mental element is required of D1, will often be co-extensive on the facts with an intention by D2 that that offence be committed. Where that is so, it will be seen that many of the cases discuss D2's mental element simply in terms of intention*

[141] [1985] AC 168.
[142] **Jogee and Ruddock** (n. 139).
[143] Chan Wing-Siu (n. 141).

to commit the offence. But there can be cases where D2 gives intentional assistance or encouragement to D1 to commit an offence and to act with the mental element required of him, but without D2 having a positive intent that the particular offence will be committed. That may be so, for example, where at the time that encouragement is given it remains uncertain what D1 might do; an arms supplier might be such a case."

[232] We are also mindful of what their Lordships said at paragraph 100:

"The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in Chan Wing-Siu and in Powell and English. The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction."

[233] We have reviewed in detail the judge's directions on joint enterprise. In our view, the directions were not wrong in law because on the facts of this case, each accused had a shared intention to commit the offence in question and they all participated in it. The issue of another offence being committed by one of the accused persons therefore did not arise in this case. We agree with Mr. Busby that in the circumstances of this case, where the secondary party shares the intention of the principal, the secondary party's "foresight" of what the principal might do is equal to his own intention.

[234] This was not a case of principal and secondary liability but one that can be termed "plain vanilla" joint enterprise – all six appellants having the intention to burn down Ashook's house and to cause at least grievous bodily harm to its occupants and acting in furtherance thereof. The judge's directions clearly conveyed that if the secondary parties did not foresee any kind of physical harm by the principal, they were not guilty of murder or manslaughter. The judge pointed out that the jury first had to determine the scope of the joint enterprise and only then would they be in a position to determine what the appellants would have foreseen. We find that the judge's direction on what the appellants contemplated was comprehensive and she laid out for the jury

in a simple, sensible and analytical manner, the various steps and stages which they had to follow in order to make their relevant findings. We therefore find the complaint contained in this ground to be unjustified.

[235] As Mr. Busby argued, it was always the prosecution case that there was a plan or agreement among six accused to burn down Ashook's house and to at least cause grievous bodily harm to its occupants. The change in the law enunciated in **R v Jogee and R v Ruddock**[144], which shifted the basis of liability of secondary parties from one foresight to intention, would have made no difference in this case for two reasons, first, there was evidence from which it could be inferred that all the appellants shared a common intention to at least cause grievous bodily harm, and second, each was a participant in the plan. From the evidence adduced by the prosecution, it was apparent that the essence of the joint enterprise was the common execution of the plan to harm the occupants of the household. Each participant had an identifiable role in the attack.

[236] In any event, there was no prejudice as a result of the judge's directions on joint enterprise since the judge faithfully applied the law as it then was at the time of the trial. In the decision in **Pittman v The State**[145], Lord Hughes dealt with the effect of the decision in **R v Jogee and R v Ruddock** on a past conviction where the judge had faithfully applied the principles in **Chan Wing-Siu v The Queen**[146]. At paragraph 23, Lord Hughes said:

> *"As the Board made clear in Jogee and Ruddock at para 100, exceptional leave out of time to appeal against a conviction which has been arrived at by faithfully applying the law as it stood at the time of trial will be granted only if substantial injustice would be done to the defendant if it were refused."*

[144] **Jogee and Ruddock** (n. 139).
[145] [2017] UKPC 6.
[146] Chan Wing-Siu (n. 141).

[237] The judge directed the jury on joint enterprise in clear terms. She presented the prosecution case and the defence case and clearly left the determination of the issue to the jury. For these reasons, we find that this ground of appeal is without merit.

[J] IMPROPER CONDUCT OF CASE BY PROSECUTION

Appellant No. 1 - Ground 1: Improper reference to bad character in opening address

Submissions

[238] Counsel for Soman submitted that a procedural irregularity occurred when the prosecutor, in her opening address, referred to Soman's bad character without making the relevant application for it to be adduced. He submitted that as a result, these statements were inadmissible and highly prejudicial. These statements concerned land issues and a history of animosity between Soman and the Ramdials and were not relevant to the circumstances of Soman's trial. According to Mr. Heath, although parts of those statements were admitted into evidence at the preliminary enquiry, that did not make them admissible at the trial.

[239] Mr. Heath submitted that the prosecution subsequently admitted that a bad character application should have been made. It was argued that although the prosecution claimed that they had received consent from defence counsel to raise the issues in its opening address, no such consent was actually given. It was further argued that although defence counsel did not object to the statements made in the opening address, it was not intended to be taken as consent. Once prosecuting counsel's intention to adduce bad character became clear, objections were made as to its admissibility.

[240] Counsel for the respondent, Mr. Busby, submitted that prior to the opening of the case for the prosecution, the prosecutor engaged in discussions with defence counsel on the parts of the depositions that she wished to open with, for which no objections were made. He submitted that the evidence of Soman's bad character was therefore admissible by virtue of the agreement of

parties on both sides [**section 15N (1)(a) of the Evidence (Amendment) Act**]. It was further submitted that even after the prosecution's opening address was made, counsel for Soman informed the judge that he had no objections to anything said in the address.

[241] Mr. Busby submitted that in any event, even if the consent given was as a result of insufficient details being given by the prosecutor, no prejudice accrued to Soman having regard to the fact that the judge ruled *ex post facto* that the proposed bad character evidence referred to in the opening address was admissible prior to that evidence being given.

[242] In reply to these submissions, Mr. Heath contended that the prosecutor did not specifically communicate with defence counsel the subject which she wished to present to the jury. All that was communicated to defence counsel was an indication, in general terms, of some background evidence to the incident which she wanted to include in her opening address. Mr. Heath also submitted that it was misleading to say that Soman's counsel had no objection to the prosecutor's references in her opening address as there were several.

The Law, Analysis and Reasoning:

[243] **Section 15N of the Evidence (Amendment) Act** provides that:

> *(1)* ***In criminal proceedings evidence of the accused's bad character is admissible where—***
>
> ***(a) all parties to the proceedings agree to the evidence being admissible****…*
>
> *…*
>
> *…*
>
> *(3) The Court shall not admit evidence under subsection (1) if, on an application by the accused to exclude it, it appears to the Court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it.*
>
> *(4) On an application to exclude evidence under subsection (3) the Court shall have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.* [emphasis added]

[244] We are of the view that the comments made by the prosecutor in her opening address which related to Soman's bad character were not improper since that evidence was made admissible by the agreement of both defence counsel and the prosecutor[147], pursuant to **section 15N (1) (a) of the Evidence (Amendment) Act**.

[245] On February 9, 2015, Soman's trial counsel informed the prosecutor that he would be objecting to the bad character evidence which the prosecution proposed to adduce. This was brought to the attention of the judge who was furnished with written submissions on the admissibility of this bad character evidence. On February 19 and 26, 2015, the judge ruled that the bad character evidence contained in the deposition, which formed part of the opening address of the prosecutor, was admissible. In this regard, we agree with Mr. Busby's submission that even if the consent of defence counsel as to the bad character evidence was given as a result of insufficient details being given by the prosecutor, this would not have caused any prejudice to Soman as the judge ruled *ex post facto* that the relevant evidence was admissible. This ground of appeal is without merit.

Appellant No. 1 - Ground 2: Disadvantage due to prosecution's non-disclosure

Submissions

[246] Mr. Heath submitted that as a result of the prosecution's prolonged delay in satisfying its obligation of disclosure and since the trial had already commenced, instructions were taken in circumstances which were less than ideal as the preparation of submissions had to be expedited and it was impossible to contact potential witnesses. He relied on the decision in **Ashook Kumar v The State**[148] in support of this submission.

[147] Transcript of the Proceedings dated February 10, 2015 at page 13, line 27 to page 14, line 9.
[148] (2000) 56 WIR 503.

[247] The following were disclosed to the defence subsequent to the prosecution opening its case and at the time of the application for fresh evidence:

a. The station diary extract relative to the complaint of malicious damage;
b. The particulars of the conviction of January 24, 2008 against Ashook;
c. Ashook's statement dated February 5, 2015 disclosed on February 9, 2015;
d. Geeta's statement dated February 5, 2015 disclosed on February 9, 2015;
e. Nigel's statement dated February 5, 2015 disclosed on February 9, 2015;
f. The immunity in respect of and the charges against Soman disclosed on May 7 and 11, 2015; and
g. Further evidence of Inspector Mc Intyre disclosed on the May 11, 2015.

[248] Mr. Heath submitted that the disclosure of these documents was vital to the issues of common law fairness and defence counsel's conduct of the trial. Mr. Heath further submitted that the failure to disclose the statements prior to the trial and to introduce them as fresh evidence would have led to an unfair trial for Soman. He submitted that full instructions could have been obtained which might have led to further inquiry and which might have resulted in evidence being called from witnesses as to the veracity of certain incidents.

[249] Mr. Busby submitted that the prosecution complied with its common law obligation and served notice of all the evidence that it intended to adduce well before calling such evidence. He further submitted that if Soman thought that he was being prejudiced by the timing of the disclosure, it was open to him to apply for an adjournment prior to such evidence being led.

[250] Mr. Busby submitted that all the pieces of evidence of which compliant was made, were the subject of applications to the judge who went through the evidence thoroughly and ruled on what she would admit and what she would exclude. In those circumstances it was not open to Soman to re-litigate those issues before this Court. Accordingly, he submitted that this Court should be disinclined to interfere with the judge's exercise of her discretion unless it could be

shown that it was unreasonable, in support of which he cited **Associated Provincial Picture Houses Ltd. v Wednesbury Corporation.**[149]

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[251] The prosecution is not under an obligation to disclose all the evidence available to them at the stage of committal proceedings: see **Epping and Harlow Justices Ex Parte Massaro.**[150] The prosecution is also not under a duty to serve on the defence their entire case before trial. If the prosecution intended to call evidence at the trial, further to the evidence so served, whether that be evidence which was not then available or evidence which they did not adduce, they are required to give notice to the defence of such an intention.

[252] We agree with Mr. Busby's submission that the prosecution complied with its common law duty by giving defence counsel notice of all the evidence it intended to adduce before calling the relevant witnesses to testify. At that time, defence counsel would have had sufficient time to receive further instructions from Soman and to amend his case and submissions accordingly.

[253] In the face of any possible prejudice accruing to Soman as a result of the timing of the disclosure, of which we find there was none, it was always open to his trial counsel to apply for an adjournment prior to the evidence being led. This was particularly so within the context of a trial which necessarily occupied a very considerable period of time. An application for an adjournment was not advanced. This ground is without merit.

Appellant No. 1 - **Ground 17: Improper conduct of the prosecutor during the trial**
Appellant No. 3 - **Ground 7: Improper conduct of the prosecutor during the trial**

Submissions

[254] In her opening address, the prosecutor referred to a bottle which Ashook had thrown at Visham's house. Mr. Heath submitted that there was no evidence on the deposition that Ashook had

[149] [1947] 1 All ER 498
[150] [1973] QB 433.

thrown a bottle, in fact, the evidence on the deposition suggested the contrary. Thus, the inescapable conclusion was that the prosecutor had come by that knowledge by "briefing" the witness, and accordingly had a duty to disclose the inconsistency arising therefrom. He submitted that this was especially so since the prosecution sought to rely on it during the trial, with the clear intent of providing supporting motive for the actions of the appellants. Mr. Heath also submitted that the prosecution led evidence from Geeta that it was Junior and not Soman who had shot her. This contradicted her evidence at the preliminary enquiry which made it obvious that the prosecutor had knowledge of the evidence which Geeta was likely to give at the trial.

[255] A further complaint was made of adverse comments in the prosecutor's closing address concerning Corporal Gopaul, which gave the impression that the prosecution was not relying on his evidence. Mr. Heath pointed out that the prosecutor's application to have Corporal Gopaul deemed hostile, and attempt to have him identified as Soman's friend had both failed. He submitted that by these comments, the prosecution discredited its own witness, whose testimony materially supported the Soman's alibi, and that this damage was not rescued by the trial judge's subsequent directions.

[256] Mr. Busby submitted that aspects of the prosecutor's conduct which were challenged on behalf of Soman were not improper and did not render the conviction unsafe. In relation to the information concerning the bottle, he submitted that there was no duty to disclose any inconsistency which arose on the evidence of a witness during the "run up" to the calling of that evidence at the trial, and further, that the duty to disclose was only in respect of material inconsistencies. Mr. Busby also submitted that the prosecutor had, prior to her opening address, disclosed that she intended to mention a bottle in that address. In relation to Geeta's contradictory evidence, he submitted that it was clear from her deposition that she would have given the evidence which she did at the trial.

[257] In relation to the prosecutor's closing comments on Corporal Gopaul's evidence, Mr. Busby submitted that it was reasonable for the prosecution to suspect that Corporal Gopaul might turn hostile in light of his omission that he had been to Ashook's house in Soman's company before

the fire started. He further submitted that since Corporal Gopaul was a first responder to the fire, the interests of justice gave the prosecutor the right to call him as a witness. The fact that the judge did not grant the application to deem him hostile did not remove the justification for the prosecutor's stance towards him. The prosecutor was entitled to adopt a *"raised eyebrow"* approach to his evidence and to invite the jury to keenly consider his veracity having regard to his ever-changing account. He relied on the decision in **R v Jobe**[151] in support of his submission.

[258] In a two-pronged counter - submission, Mr. Heath argued firstly that Geeta's statement clearly stated that she was shot by Soman ("Toppy"), and although prosecuting counsel had indicated that her instructions were that it was Junior who shot her, she made no such disclosure. Secondly, he submitted that the respondent's reliance on **R v Jobe** was misguided, as in that case, the witness who gave inconsistent evidence was known to be an associate of the appellant. However, in this case, there was no evidence to suggest that Corporal Gopaul was an associate of any of the accused. Accordingly, in these circumstances the judge rightly refused the prosecution's application to treat Corporal Gopaul as hostile.

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(i) Non-disclosure of evidence relating to the bottle

[259] The prosecutor, during her opening address, stated:

> *"So on the 13th April, 2009 there was an altercation again. Ashook Ramdial was at home and living next to him was the accused, one of the accused. In fact, there was a cuss out and Ashook Ramdial took a bottle and he pelt it at the house next door or his, and he broke a glass in a glass door."* [152]

[260] On February 10, 2015, the prosecutor made the following statement to the Court:

> *"My Lady, before we opened the case, I took the pains of listing out everything. At page 302 of Ashook Ramdial's statement, I actually said tongue in cheek, 'This is of*

[151] [2004] EWCA Crim. 3155.

[152] Prosecution's Opening Address dated February 3, 2015.

assistance to my learned senior and my learned friends that it is a previous inconsistent statement that Ashook is denying pelting the bottle,' But I believe they have a station diary extract, please, My Lady, wherein the information is located. I also indicated, please, My Lady, if I remember correctly, that that was a part of the background in relation to the altercations between the parties. So it was listed as one of the issues before I opened, please, My Lady." [153]

[261] The Station Diary extract which the prosecutor referred to in the above statement, which was disclosed prior to her opening address, stated:

"Visham Bajnath age 32 years, indo Trinidadian Hindu of LP 55 Playground Avenue Extension, Uquire Road, Freeport arrived at station and reported that around 8:30 p.m. on tonight's dare whilst at his address with his wife and child One ASHOOK RAMDIAL also known as "Rat" threw an object at his glass window causing same to damage; and one – NIGEL RAMDIAL broke down his concrete post erected on his property. He then reported that the two suspects are known to him and lives in his neighbourhood second to which they made threats towards his life and to burn his house, He further reports that he received several reports from the two suspects earlier on in the week. His house and property is fenced and gated. He was further advised and spoken to. Enquiries Continuing."

[262] From the above extracts, it is clear that the prosecutor did in fact disclose that she intended to mention the bottle in her opening address. This was done prior to her opening address and twenty-three days before the related evidence was called at the trial.

(ii) Who shot Geeta

[263] In order to address this complaint, it is necessary to set out Geeta's statements and evidence in relation to the matter. In her statement dated April 15, 2009, which was subsequently tendered into evidence at the preliminary enquiry, Geeta said that *"Junior start to shoot and den ah see the gun move and going in Toppy's hand. Is Toppy who shoot me in meh hand."*

[153] Transcript of the Proceedings dated February 10, 2015 at page 24, lines 9 to 20.

[264] In a further statement given on July 2, 2009, which dealt with her participation in a confrontation exercise in the presence of Junior, which was also tendered into evidence at the preliminary enquiry, Geeta said *"I point to Junior and ah tell the police that that man is Junior and he is the man that burn down meh house with meh children and he shoot me."*

[265] At the preliminary enquiry, which was held approximately five years before the trial, when Geeta was cross-examined on the identity of the person who shot her, she said:

> *"Today I have not forgotten the person who shot me. Today I am not making a mistake of the person who shot me. In the first statement I told the police the name of the person who shot me and I am sure in the first statement. In the second statement I also said the name of the person who shot me. In that second statement I was also sure that is the person who shot me. In my first statement I did not tell the police that Toppy shot me. Toppy did not shoot me.*[154]*"*

[266] It is noteworthy that one of the prosecution witnesses, Inspector Gaffar, whose statement was tendered at the preliminary enquiry and who gave evidence at the trial, stated that both Ashook and Geeta, at the confrontation exercises which he held, identified Junior as the man who shot Geeta.

[267] It is clear to us that upon reviewing the relevant depositions and statements of both Geeta and Inspector Gaffar, an inference can be drawn that Geeta would have given evidence that it was Junior who shot her. At the trial on May 4, 2015, she did in fact give such evidence.

[268] We are mindful that the judge in her summing up highlighted to the jury the inconsistencies in Geeta's evidence[155]. The issue of her credibility was therefore left squarely before the jury. In these circumstance, we find that there was no resultant prejudice to either Soman or Junior.

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[154] Depositions at page 122.

[155] Summing Up: Day 4 dated the 26th June, 2015 at pages 12-13.

(iii) The Prosecutor's treatment of Corporal Gopaul in her closing address

[269] In **R v Jobe**[156] the defendant was tried on an indictment alleging two counts of rape, in respect of two complainants. The substance of the allegations was that the defendant had met the complainants at the same nightclub, had taken them to his flat and had given them a drink, and that each of the complainants' next recollection was waking up while he was having sexual intercourse with her. The defendant's case was that he obtained consent. In relation to the second count, the owner of the nightclub had given evidence for the prosecution and his account was consistent with his witness statements, namely that no reference was made as to any sexual comment made by the second complainant concerning the defendant. In cross-examination however, he stated that such a comment had been made and the prosecution was allowed to treat him as a hostile witness. The defendant was eventually convicted on the second count and acquitted on the first count. On appeal, one of the issues raised was whether the judge had properly allowed the Crown to treat the nightclub owner as a hostile witness and whether the prosecutor was wrong to comment in his closing address that he must have colluded with the appellant. Lord Justice Potter, in deciding on this issue said at paragraph 72:

> *"We accept Mr. Vosper's [counsel for the Crown] submissions on this point also. We have been referred to* R v Lovelock *[1997] Crim LR 821, in which this Court, on the facts of that case, upheld the right of prosecuting counsel to adopt a "raised eyebrow" approach to the evidence of a witness, without explicitly challenging it, and then to invite the jury to reject it as incapable of belief. Mr Chambers has referred us also to* R v Pacey *The Times, 3 March 1994. There, however, prosecuting counsel made comments, wrongly as this Court held, which were adverse to the prosecution's sole witness who had* not *been treated as hostile. The circumstances of the present case were quite different. We find* R v Lovelock *a more helpful authority, and conclude that the manner in which Mr Vosper cross-examined Mr Sarver did not prevent him from addressing the jury as he did in his closing speech. In any event, he was entitled to suggest collusion to the Appellant himself. He having done so, it would in our judgement have been artificial for the Judge to have fettered Mr Vosper's closing speech. In the final analysis, it was a matter for the jury to decide what they made of the suggestion of collusion."*

[156] **Jobe** (n. 151).

[270] We are of the view that based on the series of events involving Corporal Gopaul, in particular, the omission from his statement that he had visited Ashook's house along with Soman before the fire, it was reasonable for the prosecutor to have suspicions about his allegiances. However, she still reserved the right to call this witness to support parts of the prosecution case, which she did. We agree with Mr. Busby's argument that, as in the decision in **R v Jobe**[157], the prosecutor was entitled to adopt a *"raised eyebrow"* approach to the evidence of Corporal Gopaul and to then invite the jury to consider his veracity having regard to the changes in his accounts. At the end of the day, it was a matter for the jury to consider. For these reasons, we find that this ground of appeal is unmeritorious.

Appellant No. 2 - Ground 21: The conduct of the prosecutor exceeded permissible limits.

Submissions

[271] Mr. Rajcoomar complained that the prosecutor was permitted to refer to character evidence of a highly prejudicial nature before any application for the admission of such evidence had been made. He also complained that the prosecutor was allowed to cross-examine her own witness in a hostile and inappropriate manner without any application or leave of the court, to his client's prejudice. This witness gave evidence which was favourable to the other appellants. Further, both the prosecutor's opening and closing addresses were highly inflammatory, if not an invitation to the jury to speculate on material, issues including identification, alibi and the ability of some of the accused persons to be able to obtain corrupt evidence from a serving member of the Trinidad and Tobago Police Service.

[272] Mr. Busby submitted that no bad character evidence was led in respect Kenny, therefore, whether the prosecutor led such evidence in respect of another appellant was irrelevant to Kenny's case. In relation to the complaint of the prosecution's "cross-examination its own witness", presumably Corporal Gopaul, it was submitted that since Gopaul gave no evidence that touched and concerned this appellant, he could claim no prejudice from the prosecutor's

[157] **Jobe (**n. 151).

treatment of the witness. Mr. Busby asserted that he was unable to respond to the appellant's criticism of the prosecutor's opening and closing addresses since the particulars of which passages were highly inflammatory or inviting of speculation were not provided.

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[273] It is difficult to see how evidence led by the prosecution in respect of another appellant was relevant to the case against Kenny. No bad character evidence was led in respect of Kenny. We therefore cannot see that by leading evidence of the bad character of another appellant as referred to, resulted in a miscarriage of justice or a material irregularity in respect of Kenny. Accordingly there was no risk of unfairness or injustice to him.

[274] This court also notes that the prosecution called 15 witnesses. Since Kenny did not identify which of the prosecution's 15 witnesses it was allowed to "cross-examine in a hostile and inappropriate manner" without any application or leave of the court, this court will not speculate despite Mr. Busby's submission that the appellant was most likely referring to Corporal Gopaul, the investigating officer.

[275] In analysing whether the conduct of the prosecutor exceeded permissible limits, we note the case of **Benedetto v R**[158], in which Lord Hope cited **Randall v R**[159], at paragraph 35 in which Satrohan Singh JA said:

> *"...the principles which determine the proper role of the prosecutor have to be applied in the context of his own environment. He said that the juries need to be spoken to in a language and style that they will understand, and there was nothing wrong with a prosecutor delivering a robust but respectful speech…But there is an obvious difference between a robust speech and one which is xenophobic, inflammatory and seeks to make use of inadmissible and irrelevant material."*

[158] [2003] UKPC 27.
[159] [2002] UKPC 19.

[276] As we round off this ground, we note that Mr. Rajcoomar provided no specific passages or instances to demonstrate the inflammatory effect that the prosecutor's opening and closing addresses would have had on the conduct or the outcome of the trial. Early in her summing up, the trial judge, when alerting the jury to their responsibility to consider the evidence in respect of each appellant, gave these directions:

> *"To fully appreciate what is evidence, I will like to point out what is not evidence. The opening address of State attorney, that's not evidence. ..The closing addresses of the attorneys, that's not evidence. You may wish to take into account the arguments of the attorneys presented in their closing addresses. They have analysed thoroughly the evidence and presented it to you from their own perspective. But you are not bound to accept … any of their views expressed unless it coincides with your view of the evidence."*[160]

Accordingly we find no merit in this ground.

[K] DIFFERENT CASE AT TRIAL

Appellant No. 4 - Ground 6; Appellant No. 5 - Ground 7; Appellant No. 6 - Ground 7:

[277] These appellants, Shiva, Visham and Ryan made identical complaints under these grounds, namely that the trial judge erred in law by permitting them to be tried on evidence which was markedly different from that which had been the subject of their committal, and that the prosecutor was allowed remarkable liberties which removed the equality of arms and which deprived them of a fair trial.

[278] Ms. Chote S.C. submitted, firstly, that the appellants had a statutory entitlement to know the case they had to answer in order to prepare for it and contended that they were ambushed at trial with evidence of a history of hostility between their family and Ashook. This evidence was

[160] Summing Up: Day 1 dated June 22, 2015 at page 5, lines 18-30.

irrelevant and highly prejudicial to the appellants' cases and would have undermined the benefit of the good character directions.

[279] Secondly, counsel submitted that the case was littered with fresh evidence applications and statements taken from witnesses after the trial began. She argued that this practice was not ideal and ought to have been criticised by the trial judge, or at least ought to have been the subject of guidance indicating when such statements might be appropriate. Further, it could be reasonably inferred from the timing of witness statements that they were obtained to have the witness' evidence "dovetail" as far as possible.

[280] Thirdly, counsel submitted that the trial judge allowed the prosecution to cross-examine her own witness, Corporal Gopaul, without deeming him hostile. These questions, improperly asked, were reviewed extensively by the trial judge in her summing up. Indeed, the trial judge even rehearsed evidence for the jury which she found unmeritorious. This would have confused the jury and distracted them from a clean analysis of the evidence and would have led to a possible miscarriage of justice.

[281] Also embedded in this joint ground were additional complaints related to the trial judge's conduct of the proceedings. In her submissions on behalf of Visham, counsel complained that the trial judge rehabilitated the prosecution case on the fundamental area of Ashook being a witness with an interest to serve, thereby undermining the defence's case. Counsel was also critical of the number of interruptions during the cross-examination and summing up. It was specifically argued on behalf of Ryan that the trial judge unnecessarily interrupted the flow of evidence and cross-examination, making it difficult for the jury to focus on the points being made by defence counsel, which led to a miscarriage of justice.

[282] Mr. Busby submitted firstly, that all that needed to be proved in order to secure a committal for trial was a prima facie case for any indictable offence. Accordingly, it was incorrect to say that

the appellants were entitled to know all of the evidence that would eventually be presented against them at the trial. This was not a requirement of fairness and due process.

[283] Secondly, defence counsel was given adequate time and opportunity to consider and respond to the application to introduce Ashook's additional evidence. Moreover, the evidence in Ashook's statement was foreshadowed on the deposition. Accordingly, there was sufficient time for the preparation of the appellants' defence.

[284] Thirdly, in relation to the appellants' complaints that the interruptions of the trial judge during the course of the trial were "inappropriate", "in the hundreds" or "on trivial matters", Counsel submitted that these arguments were devoid of merit and should be dismissed.

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(i) Difference in evidence presented at the preliminary enquiry

[285] The purpose of the preliminary enquiry is to determine the sufficiency of evidence to bear out the prosecution case against the accused. There is no general rule which bars the reception of additional evidence or evidence not deposed to at the preliminary enquiry from being admitted at the trial. The Chancellor of the Court in **Yaseen and Thomas v The State**[161] reasoned that additional evidence could be admitted so long as adequate notice of an intention to do so and the contents of such evidence are given to the other side.

[286] In the course of the application to admit Ashook's additional statement concerning the evidence of a history of hostilities between the appellants and his family, the prosecutor indicated that she had used the term "fresh evidence" out of an abundance of caution but really intended to lead evidence which was in the deposition. The court indicated that the prosecutor should have a conversation with defence attorneys and to state *"in the clearest of terms"* what aspect of the

[161] **Yaseen and Thomas** (n. 5).

evidence she would be leading in respect of the witness.[162] The court also invited submissions from counsel on either side. On the following day, the court held lengthy discussions with the prosecutor and the appellants' trial counsel concerning the fresh statement, and suggested for the second time that the attorneys meet to review the evidence which was intended to be led.[163] In response, the prosecutor indicated that she had reviewed the evidence in detail with defence counsel on the previous day. The prosecutor then pointed out the details of the evidence which she intended to lead which were not contained in the deposition.

[287] The authorities make it patently clear that the prosecution bears no obligation, statutory or constitutional, to inform an accused of the totality of evidence that will be presented against him at trial. It is only if the failure to disclose evidence at the preliminary enquiry was deliberate or intended to cause prejudice that the question of fairness arises. Even then, the question of exclusion is a discretionary exercise for the trial judge and in those instances, the prosecutor's conduct, the reasons given for the delay, and whether the defence was given adequate notice, all feature for consideration.

[288] The appellants' contention that there exists an entitlement to know the detailed contents of the prosecution case against them prior to trial is an overextension of the due process and fairness principles. What is required is the disclosure of the prima facie case which the prosecution seeks to advance. The suggestion that fresh evidence applications ought only to be made in exceptional circumstances is misconceived. In cases where new admissible evidence is led at trial, which potentially changes the nature of the case against the accused, the correct approach is to adopt a procedure which ensures that the defence is given a fair opportunity to answer it and to present its case.

[289] In the case at bar, the appellants' trial counsel was aware that Ashook was the key prosecution witness. His evidence could not have come as a surprise to them. The defence were given two

[162] Transcript of the Proceedings dated February 9, 2015 at page 17, lines 4-8.
[163] Transcript of the Proceedings dated February 10, 2015 at page 18, lines 43-50.

weeks to consider and respond to his additional evidence and submissions were invited. Indeed, the trial judge intervened and discussed at length the proposed evidence and suggested on two occasions that counsel also discuss the evidence between themselves and settle their objections. Given this procedure, there can be no complaint that there was insufficient opportunity to prepare a defence. The trial judge dealt with the fresh evidence application in a fair and transparent manner.

(ii) Admissibility of background evidence

[290] It is sometimes necessary to give evidence of the background against which an offence has been committed, even though it might reveal facts which are discreditable to the accused.[164] The necessity for the admission of evidence for its explanatory value as distinct from its probative weight is both accepted at common law and recognised in statute[165]. **Section 15O** of **the Evidence Act** allows the introduction of this type of evidence if, without it, the jury would find it impossible or difficult to understand the evidence in the case and if its value in understanding the case as a whole is substantial. There is no requirement that the explanatory evidence be of enhanced probative value, as long as it is relevant to the facts in issue.

[291] In **Phillip v The Director of Public Prosecutions**[166] the Privy Council considered the admissibility of this species of evidence under the common law. The appellant was convicted of killing his wife. At the trial, the judge admitted evidence of a history of aggression and possessiveness towards the deceased. The Board held that the evidence was admissible and that there was nothing unfair in the admission of evidence which established an animosity towards the victim, whom the appellant was charged with murdering[167]. That evidence went beyond establishing that the appellant bore hostile intent towards the deceased, and was evidence of motive to harm the victim. Such evidence was always admissible especially where the identity of the killer was in issue.[168]

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[164] Blackstone's Criminal Practice 2018, Part F13 - Explanatory Evidence.
[165] Evidence Act Chap 7:02 S. 15N1(c), 15O.
[166] [2017] UKPC 14.
[167] Ibid. Hughes LJ at [10].
[168] Ibid. Hughes LJ at [7].

[292] The prosecutor's intention in leading the evidence of hostile relations between the two families was to provide context for the attack. The prosecution case was that there was a joint plan to set fire to the Ramdial home or at least to cause grievous bodily harm to its occupants. The fact that the animosity between the appellants and the victims' family was related to an ongoing land dispute was important explanatory information relevant to understanding why the house was set ablaze. Its admission was further justified by its capacity to establish motive on the part of these appellants, who disputed that they were present on the night in question. The details of historical hostility were highly relevant. It would have been difficult for the jury to appreciate why these two girls were murdered by the appellants without some background appreciation of the facts that led to the attack.

[293] The contention that timing of the introduction of this statement was calculated to "dovetail" the prosecution witnesses' evidence is highly speculative. Indeed, reasons were given for the belatedness of the supplementary evidence and ample time and opportunity were provided for the appellants to formulate responses. Discussions were held, the details of the evidence that departed from the deposition were identified and objections were solicited. According to the transcripts of the proceedings below, this exercise was meticulously conducted under the watchful eye of the trial judge, who exercised her discretion in allowing the statement to be admitted. In these circumstances, no complaint can be made of the fairness of the procedure adopted.

(iii) Improper cross-examination of Corporal Gopaul

[294] We have addressed the prosecutor's alleged improper cross-examination of Corporal Gopaul in our analysis at paragraphs [90] to [91] above. That appellant's complaint was substantively identical to the submissions advanced by Ms. Chote S.C. on behalf of these appellants. In disposing of that ground we found that the prosecutor's line of questioning was entirely permissible and relevant to a critical factual issue, namely, a possible relationship between Soman and Corporal Gopaul, which was capable of influencing his conduct on the night in question. The court relies on its earlier analysis and finds no merit in this line of argument.

(iv) Interruptions by the trial judge

[295] It is important to note at the outset of this analysis that this was a lengthy criminal trial. The trial took five months to complete, far beyond the one month timetable initially contemplated by the judge. This was a complex criminal trial involving multiple accused, their several attorneys and it produced many challenging legal and evidential issues. The paramount principle that informs judicial intervention at any stage in a criminal trial is the pursuit of the goal of fairness. Judicial intervention is discretionary and it is against this yardstick of fairness that the exercise of that discretion must be assessed.

[296] The common thread uniting the appellants' arguments is the overall fairness of the trial and the likelihood that fairness was so undermined as to amount to a miscarriage of justice. The appellants say that the judge's interventions were frequent, often unnecessary and cast defence counsel in a bad light. The appellants also say that the judge's interventions were unremitting throughout the trial and that the jury would have been hard-pressed to keep focused on the points being made during the cross-examination of the main witnesses. We are mindful that the exercise of the discretion here complained of was for the trial judge and the trial judge alone and we do not attempt to substitute our own views of the conduct of the proceedings.

[297] Given that this was a lengthy trial, with moderately complicated evidence, one would expect that active judicial management was necessary to ensure that counsel's cross-examination was kept on track. It would be inimical to justice to pick through each intervention and assess whether they were necessary. What we are here concerned with is the overall fairness of the proceedings and we are satisfied that in the context of this case, the judge's interventions do not reach the threshold required to establish a miscarriage of justice.

(v) Structure and contents of the summing up

[298] The appellants also made complaint of the judge's review of portions of the cross-examination of Corporal Gopaul during her summing up. Counsel for the appellants submitted that this distracted the jury from a clean analysis of the evidence in the case.

[299] The trial judge appears to have felt the need to specifically draw the jury's attention to this cross-examination because in the circumstances, it was an unusual piece of evidence calling for special treatment. Corporal Gopaul's evidence however, was not the focal point of the case against the appellants. The true strength of the prosecution case against them rested on the moderately strong identification evidence. In the circumstances, we do not think that highlighting this piece of cross-examination would have pushed the case against the appellants into prejudicial territory, occasioning a miscarriage of justice. At several points during the trial and the summing up, the judge indulged the interjections of defence counsel. Parts of the summing up were reformulated at the insistence of counsel and the judge was generally accommodating of their input. This, at times, disrupted the flow of the summing up. However, its substance and structure remained intact. The trial judge's only fault was her overindulgence of counsel. Our assessment of the summing up is that it met the minimum requirements of fairness. In light of our reasoning above, we are of the view that this ground of appeal is without merit.

[L] IDENTIFICATION AND ALIBI

[300] The appellant, Kenny, in his skeleton arguments filed on September 12, 2016 stated that his grounds 1,2,3,4 and 5, collectively refer to his alibi defence.

[301] Mr. Rajcoomar submitted that there was no factual evidence led or elicited by this appellant in support of an alibi. Accordingly, the submissions set out hereunder, as far as the alibi of this appellant is concerned, are to be read with the understanding that the respondent's primary position is that there was no factual evidence in the case to suggest the possibility of the issue of alibi as a matter for the jury's consideration.

[302] Each ground of appeal will be dealt with in turn. Grounds 1 and 2 will however be dealt with together as they touch and concern the same issue, that is, the directions to be given to the jury on the issue of alibi.

Appellant No. 2 - Ground 1: Failure to adequately or at all put the defence of alibi

Appellant No. 2 - Ground 2: No direction that the rejection of alibi was not consistent with guilt

Submissions

[303] Mr. Rajcoomar submitted that the trial judge erred in law when she failed to adequately, or at all, put Kenny's defence of alibi which was raised in the course of an interview conducted by the police, who neither proved nor disproved it. He further submitted that the trial judge also failed to direct the jury that even if they rejected his defence of alibi, this was not consistent with guilt.

[304] Mr. Busby submitted that even though the trial judge was under no obligation to remind the jury of the appellant's statements (**R v Barbery**[169]), which were made during an interview conducted some forty-four days after the event, to so remind them was the more prudent course (**R v McCarthy (Gerald Joseph)**[170]). Without derogating from the overarching submission that the appellant did not provide a factual basis for the defence of alibi, he submitted that to the extent that the issue of alibi was raised in the interview, the trial judge quite properly reminded the jury of what the appellant had said during the course of that interview and left it for them to make of it what they may. Additionally, the judge did direct the jury on the issue of alibi as was the sensible course.

[305] It was further submitted that the summing up was replete with examples of the trial judge telling the jury that the appellants had nothing to prove in respect of their alibis. The respondent conceded that the trial judge did not specifically caution the jury against assuming that the accused was guilty merely because they disbelieved his alibi, but submitted that this danger would have been nullified when one considered the summing up as a whole. Further, that omission did not render the conviction unsafe.

[169] (1976) 62 Cr. App. R. 248.
[170] (1980) 71 Cr. App. R. 142.

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[For the avoidance of confusion, it is to be noted that at his trial, Kenny was the sixth named accused whereas in this appeal he is the second named appellant.]

[306] It is necessary to set out the impugned paragraphs of the trial judge's alibi directions. The judge first gave a general direction on the burden of proof in relation to alibi in the following terms:

> *"Members of the Jury, I direct you that as the Prosecution has the onus of proving the guilt of the accused persons to satisfy you so that you feel sure, the accused person does not have to prove that he was elsewhere at the time the offence was committed. On the contrary, it is for the Prosecution to disprove the issue of alibi."*[171]

[307] This was repeated by the judge when she dealt with the alibis of the other appellants. However, she gave a specific direction on the issue with reference to Kenny as follows:

> *"I move on to alibi. You will recall that I said Accused No. 6, when he was asked questions about his whereabouts, he said 'I can't recall where I was that night, either at home or at work,' and he explained where he worked, et cetera. I read the statement, his interview notes to you. The same directions for alibi. It's not for him to show where he was, that he was elsewhere, it's for the State to disprove his alibi beyond reasonable doubt, and the State is relying on the evidence of Geeta Singh to do so."*[172]

[308] An alibi direction must meet two requirements. First, it must convey that there is no burden on the accused to prove that he was elsewhere and that it is for the prosecution to prove their case beyond reasonable doubt, which includes the need to prove that the accused was not elsewhere but at the scene committing the offence. Second, it must caution the jury against assuming that the accused is guilty merely because they disbelieve his alibi: **Shazad Khan and Timothy Hunt v The State**[173]; **R v Turnbull**[174].

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[171] Summing Up: Day 4 dated June 26, 2015 at page 35, line 47 to page 36, line 1.
[172] Summing Up: Day 4 dated June 26, 2015 at page 53, lines 6-15.
[173] CA Crim Nos 18 and 19 of 2008.
[174] Turnbull (n. 63).

[309] It is important to note that a trial judge is only required to give a direction on the defence of alibi where there is evidence that the accused was at some other place or area at the time of the commission of the offence. Evidence which merely asserts that he was not at the place where the offence was committed does not raise the defence of alibi.

[310] In **Mills et al v R**[175], the Privy Council considered that an alibi direction need not be given where there is no evidence of it. An unsworn statement as to the accused's whereabouts at the time the offence was committed was not considered to be such evidence. Lord Steyn, at pages 247-248 said:

> *"In the present case the judge did not give [the standard recommended alibi] direction. However, he did direct the jury in the following terms:*
>
> > *'Mr Arthur Mills and the two sons, Garfield and Julius, they say that we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi, they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not, as Mr Mills said, at some lady's house talking, or as the boys said, in their house with their mother.'*
>
> *Counsel submitted that this direction was insufficient and that there was a material failure to direct the jury properly. The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:*
>
> *'Where an accused makes an unsworn statement, no such directions [i.e. about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves.'*
>
> *The last sentence reflects the guidance given by the Privy Council in Director of Public Prosecutions v Walker (1974) 21 WIR 406 at page 411. Counsel submitted that the Court of Appeal erred."*

[175] (1995) 46 WIR 240.

[311] Their Lordships made it clear, therefore, that there is no obligation on a trial judge to give the standard directions concerning an alibi if the accused does not give sworn testimony and does not call any witnesses to support an alibi.

[312] In the instant case, the trial judge directed the jury that the appellant did not assume any burden of proving his alibi, but failed to adhere to the full requirement of the law concerning the defence of alibi. The direction lacked the second requirement as the judge did not specifically caution the jury against assuming that the accused is guilty merely because they disbelieved his alibi. The judge did not warn the jury that even if they disbelieved the alibi, they should be cautious before using it to support the "recognition evidence" of Geeta who placed Kenny at the scene of the crime.

[313] Lord Widgery, CJ in **R v Turnbull**[176] gave clear guidelines with regard to the directions to be given to the jury in respect of the support for identification which might be derived from the fact that they have rejected an alibi. He stated:

> *"False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."*

[176] **Turnbull** (n. 63).

[314] In the signed interview notes, when he was asked about his whereabouts at the time of the incident, Kenny responded that he could not recall and that he was either at home or at work. He lived and worked at #5 Charlotte Street in St. Joseph which is part of the compound of Innovative Security Limited. He indicated that he lived in the dormitory with other security officers. At best, it could only be implicit in the interview notes that he was saying that he was not where the prosecution had said he was.

[315] The judge directed the jury that Kenny did not assume any burden of proving his alibi, but failed to adhere to the full requirement of the law concerning the defence of alibi. The direction lacked the second requirement as the judge did not specifically caution the jury against assuming that the accused is guilty merely because they disbelieved his alibi. The judge did not warn the jury that even if they disbelieved the alibi, they should be cautious before using it to support the "recognition evidence" of Geeta who placed Kenny at the scene of the crime.

[316] Attempts by the investigating officer to verify Kenny's alibi proved inconclusive. In addition, he gave no evidence in support of his alibi, either by himself, or through any witness. The trial judge gave repeated directions on how to treat with the interview notes of each accused. The judge reminded the jury of the most important part of the appellant's interview notes which was that when asked about his whereabouts, he said, *"I can't recall where I was that night, either at home or at work"*. In our view, the judge was correct in holding that the interview notes were purely exculpatory and were not to be regarded as evidence of the truth of the statements made therein. In the circumstances, there was no requirement for the judge to give directions on how the jury should treat with the rejection of an alibi.

[317] The following grounds of appeal are interrelated and we proceed to deal with them together:

Appellant No. 2 - Ground 3: Failure to direct on the relationship between mistaken identification and alibi.

Appellant No. 2 - Ground 4: Failure to direct on the significance of the evidence of Officer McIntyre

Submissions

[318] Mr. Rajcoomar submitted firstly, that the trial judge linked mistaken identification with his defence of alibi. He further submitted that both mistaken identification and the defence of alibi had been linked to Geeta's evidence. By linking the two issues, the jury would have concluded that if they rejected the alibi, then this supported the identification evidence given by Geeta. Mr. Rajcoomar also submitted that the trial judge failed adequately or at all to direct the jury on the significance of the evidence of Officer McIntyre, which was that he could neither deny, nor confirm the alibi.

[319] Mr. Busby submitted that the trial judge did not link the issue of mistaken identification with the defence of alibi. She adopted the same structure when dealing with all the relevant issues in respect of each of the accused persons. Any linking of the issues of mistaken identification, alibi and the reliability of Geeta's evidence was an exercise of common sense since the prosecution used Geeta's identification evidence to discharge the burden of disproving Kenny's alibi.

[320] Mr. Busby further submitted that the evidence of Officer McIntyre with respect to his investigation into the issue of alibi was not relied upon to discharge the burden of disproving this issue, since that investigation was inconclusive. Accordingly, the judge made no mention of it.

The Law, Analysis and Reasoning

[321] The judge's direction on the issue of mistaken identification followed the directions given in relation to alibi:

> *"I move on to alibi. You will recall that I said Accused No. 6, when he was asked questions about his whereabouts, he said "I can't recall where I was that night, either at home or at work," and he explained where he worked, et cetera. I read the statement, his interview notes to you. The same directions for alibi. It's not for him to show where he was, that he was elsewhere, it's for the State to disprove his alibi beyond reasonable doubt, and the State is relying on the evidence of Geeta Singh to do so.*
>
> *Mistaken identification, that's another defence of this accused, Accused No. 6. Now, again, the same directions I gave with respect to Junior John. The accused does not have to prove that Geeta Singh – it is for the State to satisfy you so that you feel sure that Accused No. 6 was a person that Geeta Singh said she saw on the scene that night."*[177]

[322] The judge was tasked with dealing with the full spectrum of directions and had to address a multitude of possible routes to conviction for each of the six accused. We are of the view that the trial judge, in a most balanced way, put forward the case for each accused. She adopted a particular format when addressing the issues relevant to each accused. She dealt firstly with the right to silence and then good character. This was followed by directions on denial and alibi. Fabrication or mistaken identification, whichever was relevant to the particular accused, was dealt with at the end. Clearly, the judge adopted this format in order to ensure that the case for each accused was adequately put forward to the jury to ensure clarity and the avoidance of confusion. This was not an attempt by the judge to link the issues of alibi and mistaken identification as Mr. Rajcoomar contended. Accordingly, no fault can be attributed to the format employed by the trial judge in dealing with complex fact scenarios involving multiple accused.

[177] Summing Up: Day 4 dated June 26, 2015 at page 53, lines 6-22.

[323] We also find no merit in Mr. Rajcoomar's contention that both mistaken identification and the defence of alibi were linked to Geeta without any reference to the evidence of Officer McIntyre, the police investigation, or the interview notes which were admitted into evidence. In fact the trial judge gave the following directions to the jury:

> *"…And it was really in relation to the response of Accused No. 3 when told of the report and, secondly, and thirdly, it was the interview notes with respect to Accused No. 5 and Accused No. 6. And I explained to you that they are both viewed as exculpatory, and … they could only be used in relation to the particular accused who made that particular interview...*
>
> …
>
> *"In relation to Accused No. 6, the contents of his interview notes could only be used in relation to his case. So please bear in mind, it is very important. And it emphasizes, too, the fact that you have to consider each person's case separately."* [178]

[324] Evidently, the trial judge did make reference to the interview notes. However no reference was made to the evidence of Officer McIntyre in relation to the issue of alibi since his investigations with respect to Kenny's alibi were inconclusive. We are of the view that no harm accrued to Kenny by the approach taken by the judge. Accordingly, this ground fails.

Appellant No. 2 - Ground 5: Failure to direct that the third appellant's case supported the second appellant's case

Submissions

[325] Mr. Rajcoomar submitted that the trial judge erred in law when she failed to direct the jury that Junior's evidence supported Kenny's case in that it was uncontroverted that Kenny was not with Junior on the night of the incident and/or that this evidence supported Kenny's alibi.

[178] Summing Up: Day 2 dated June 24, 2015 at page 10, lines 18-33.

[326] The respondent submitted that this ground is a "non-starter" because Junior gave absolutely no evidence as to Kenny's whereabouts at the time of the fire or even that he knew Kenny.

The Law Analysis and Reasoning

[327] Junior testified that on April 13, 2009 at approximately 7:30 p.m., he arrived at Samkist Bar where he stayed for approximately 6-7 hours. At approximately 7:00 p.m. on April 14, 2009, he returned to Samkist Bar, ordered a beer as he would normally do and sat at the counter. It was at that time that the bartender drew his attention to a story of a house on fire at *'Firebun',* where two children had died. He gave no response to this as it did not concern him. He further stated that he was not in the company of any of the appellants on the night of April 13, 2009. He indicated that on that day, Rudy Jankie also known as "Skully" was the bartender at the time. No further evidence was led in relation to Rudy Jankie.

[328] Based on the foregoing, we do not see how Junior's evidence supported this appellant's case. Junior merely stated that he was not in the company of any of the appellants on the night in question. This in no way supports Kenny's alibi. This ground of appeal accordingly fails.

Appellant No. 2 - Ground 14: Directions on identification were wholly inadequate in the circumstances of this case

Submissions

[329] The nub of Mr. Rajcoomar's arguments in this ground is that the trial judge's directions on identification were inadequate because: (i) she failed to point out the weaknesses in the identification; (ii) she failed to connect her directions with those weaknesses; and (iii) she failed to connect those weaknesses with the confrontation.

[330] Mr. Busby submitted that the judge gave directions on the weaknesses in Geeta's evidence,[179] described the factors that would have affected its quality, and reminded the jury of the more

[179] Summing Up: Day 3 dated June 25, 2015 at page 14, lines 25-41.

salient parts of her cross-examination. The respondent also contended that the judge instructed the jurors on the need for caution because of the possibility that an honest witness might be mistaken, and set out in detail the well-known questions for the evaluation of the identification evidence. Accordingly, the jury's attention were immediately drawn to the factors that affected the quality of Geeta's identification in relation to Kenny. Mr. Busby also submitted that the trial judge brought all the relevant issues together and connected them to the confrontation and the first description given by Geeta[180]. Further, taking the summing up as a whole, the directions of the trial judge on Kenny's identification were adequate and cannot be faulted.

The Law, Analysis and Reasoning

[331] It is well established that a **Turnbull**[181] direction is necessary and must be given where the prosecution's case depends wholly or substantially on identification evidence. The essential elements of a **Turnbull** type direction as set out in **Archbold** are that the judge should:

(a) Warn the jury of the special need for caution before convicting on that evidence;

(b) Instruct the jury as to the reason for such a warning;

(c) Refer the jury to the fact that a mistaken witness can be a convincing witness, and that a number of witnesses can be mistaken;

(d) Direct the jury to examine closely the circumstances in which the identification was made;

(e) Remind the jury of any specific weaknesses in the identification evidence; and

(f) Where appropriate remind the jury that mistaken recognition can occur even of close relatives and friends.[182]

[180] Summing Up: Day 4 dated June 26, 2015 at page 33, lines 22-42.
[181] **Turnbull** (n. 63).
[182] Archbold 2009, paragraphs 14-17.

[332] The trial judge gave directions in accordance with the **Turnbull** guidelines.[183] It is well-settled that the judge should be mindful of pointing out the weaknesses in the evidence in accordance with **Turnbull**. In **R v Fergus**[184], Steyn LJ, in delivering the judgment of the court, said at page 318:

> *"...But in a case dependent on visual identification, and particularly where that is the only evidence, Turnbull makes it clear that it is incumbent on a learned trial judge to place before the jury any specific weaknesses which can arguably be said to have been exposed in the evidence. And it is not sufficient for the judge to invite the jury to take into account what counsel for the defence said about the specific weaknesses. Needless to say, the judge must deal with the specific weaknesses in a coherent manner so that the cumulative impact of those specific weaknesses is fairly placed before the jury…"*

[333] The record in the instant case reveals that the trial judge did outline to the jury the key weaknesses in Geeta's identification evidence. The judge specifically directed their attention to (i) the long distance from which she saw Kenny and Junior; (ii) the fact that she had them under observation for two seconds; (iii) that Kenny pulled down a jersey over his head, impeding her view of his whole face; (iv) that her focus was divided between observing the two men; (v) that the house was filled with smoke, making observation difficult; (vi) there was no electricity in the house; (vii) she was scared, injured and that it was a traumatic experience; and (viii) her admission that everything happened very quickly.[185]

[334] It is our view that the trial judge went through the evidence and drew the jury's attention to the weaknesses that were in fact apparent. At the end of the day, the jury were fully aware of the shortcomings in Geeta's identification evidence and had been instructed on how to treat with them. It is sufficient that a trial judge conveys, by clear language, the need for the utmost care in the examination of identification evidence, given the risks of a mistaken identification[186]: see

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[183] Summing Up: Day 2 dated June 24, 2015 at page 12, line 41 to page 14, line 12; at page 12, line 41 to page 14, line 12; Summing Up: Day 3 dated June 25, 2015 at page 13, line 15 to page 14, line 24.
[184] [1994] 98 Cr. App. R. 313.
[185] Summing Up: Day 3 dated June, 25, 2015 at page 14, lines 25-41; page 14, line 46 to page 15, line 18.
[186] Summing Up: Day 2 dated June 24, 2015 at page 12 line 23 to page 13 line 23.

Leroy Mohammed v The State[187]. Any form of words will suffice provided that they impart to the jury the inherent dangers in identification evidence and the necessity to consider it with care before convicting an accused.[188] In our view, the judge's directions on Geeta's identification evidence, and the specific weaknesses therein, were adequate.

[335] The judge also gave very forceful directions on how the jury ought to treat with the confrontation evidence and placed it in its proper context when she said:

> *"So, Members of the Jury, while the identification process selected by Officer McIntyre is a permissible identification procedure and it's permitted in certain circumstances, it is not the best procedure to test the ability of a witness to identify a suspect who is unknown to her. An identification parade is the preferred method if the identification is disputed and the descriptions given by the identifying witness are not considered complete. You should also take into consideration the fact that the suspect came into the police station voluntarily because he heard his name was being called as a suspect. So on one hand, Geeta said that she knew him and she told you how she knew him, and she spoke about knowing him in relation to Sonny and Toppy. On the other hand, the accused is saying, "I do not know her, I do not know Rat's wife". You will have to take all of these factors into consideration when considering the reliability of Geeta Singh's identification…"*[189]

[336] Accordingly, we find that the judge's directions to the jury on Kenny's identification were adequate and cannot be faulted. This ground of appeal therefore fails.

[187] Cr. App. No. 23 of 2008 at page 6.
[188] Summing Up: Day 2 dated June 24, 2015 at page 12 line 23 to page 13 line 23.
[189] Summing Up: Day 4 dated June 26, 2015 at page 34, lines 2-20.

Appellant No. 2 - Ground 15: Discrepancy in Geeta's first description of Kenny

Appellant No. 2 - Ground 16: Admission of evidence of confrontation

Appellant No. 2 - Ground 17: Failure to hold an identification parade

Appellant No. 2 - Ground 18: Inadequate directions on the failure to hold an identification parade

Appellant No. 2 - Ground 19: No evidential link between the appellant Kenny and the "Kenny" referred to in Geeta's statement

Submissions

[337] These five grounds, submitted by Mr. Rajcoomar, all relate to overlapping issues in the identification evidence and it is convenient to treat with them together. Firstly, counsel submitted that the judge failed to point out that Geeta's initial description of Kenny, as contained in her statement, did not match his appearance at the time of his arrest. Secondly, the confrontation on June 1, 2009 at which Geeta identified him was unfair because (i) he was unknown to the witness; (ii) the police neither believed nor accepted her description of him; and (iii) he had requested an identification parade. Accordingly, the confrontation evidence had no evidential value in the circumstances of this case. Thirdly, the failure to hold an identification parade amounted to a miscarriage of justice. Fourthly, the trial judge failed to give adequate directions on the failure to hold an identification parade. Fifthly, the judge also failed to direct the jury that there was no evidential link between Kenny and the "Kenny" referred to in Geeta's statement.

[338] Mr. Busby submitted firstly, that the judge placed all the relevant pieces of evidence before the jury for their consideration in a conventional and unremarkable way. The proper arbiters of what discrepancy, if any, arose between Geeta's description and Kenny's actual appearance were the members of the jury. Secondly, relying on **Brown and Isaac v The State**[190], it was submitted that the value of holding an identification parade in this case would have been very slight. The verification held at the Chaguanas Police Station was arranged to reassure the police that the

[190] [2003] UKPC 10.

Kenny whom they had arrested was the same Kenny referred to by Geeta in her statement. As such, this was not relied on as having any evidential value and neither that nor the dock identification could have caused any prejudice to Kenny. Thirdly, since an identification parade would have been of little value, the failure to hold one did not amount to a miscarriage of justice. Fourthly, the trial judge described and explained to the jury the facts relevant to their proper assessment of the evidence of Geeta's identification of Kenny, the decision of Inspector McIntyre not to hold an identification parade and how that decision affected the case as a whole. As a result, no miscarriage of justice arose from her directions. Fifthly, the verification exercise conducted on June 1, 2009, though not being evidence of identification of Kenny, was evidence that the police had arrested the person referred to in Geeta's statement when they arrested the second appellant. This was proffered as the link between the "Kenny" referred to in her first statement and the appellant, Kenny.

The Law, Analysis and Reasoning

(i) Discrepancy in Geeta's description

[339] This ground of appeal is otiose from the onset. The first description of Kenny as described in Geeta's statement was that he was *"kinda tallish, straight nose – thin nose, brown skin and thin. He is an Indian about 6 feet tall, small eyes, short hair and he have short beard, brown skin"*. The description that the trial judge gave to the jury was identical to this description. The judge stated as follows:

> *"Now, in the course of Mr. Rajcoomar's cross-examination, he reminded Officer McIntyre about the three different descriptions given by Geeta of three different accused, and I will remind you of that. Geeta said Kenny was kind of tallish; straight, thin nose; brown-skinned and thin; he is Indian; about six feet tall; small eyes; short hair; and have short beard; brown-skinned. And you will recall Mr. Rajcoomar asked Accused No. 6 to stand up."*[191]

[191] Summing Up: Day 4 dated June 26, 2015 at page 20, lines 25-33.

[340] The jurors were specifically brought to focus on Kenny. It was done in an obvious manner and he was told to stand. It was for them to make a conclusion on his appearance, considering Geeta's description.

(ii) The confrontation evidence

[341] In **Brown and Isaac v The State**[192], the Board held at paragraph 18, that arranging a confrontation where the identifying witness had already identified the accused was not objectionable if it had *"not been arranged to provide evidence of identification in substitution for a parade but simply to reassure the police that they had not arrested the wrong people"* and provided it *"was not relied upon at the trial as having any evidential value"*.

[342] When Officer McIntyre gave evidence about the verification procedure, the judge gave a number of directions to the jury. These included the following:

> *"…In this case, the investigating officer or the complainant, Inspector McIntyre, chose not to place the accused on an identification parade. He stated that he did not place the Accused No. 6 on an identification parade because of the period Geeta had known him and the frequency with which she saw him. He also formed the view that after speaking to her at length – well, he expressed an opinion which I would not repeat because it's his opinion. So the identification process that was adopted in this case was, as you heard, the accused was placed in a room at the police station and the witness was then allowed to enter the room and to relate the incident and then she was asked whether the person is the person she referred to as Kenny in her statement.*[193]
>
> …
>
> *So, Members of the Jury, while the identification process selected by Officer McIntyre is a permissible identification procedure and it's permitted in certain circumstances, it is not the best procedure to test the ability of a witness to identify a suspect who is unknown to her. An identification parade is the preferred method if the identification*

[192] **Brown and Isaac** (n. 190).
[193] Summing Up: Day 4 dated June 26, 2015 at page 33, lines 6-21.

is disputed and the descriptions given by the identifying witness are not considered complete. You should also take into consideration the fact that the suspect came into the police station voluntarily because he heard his name was being called as a suspect. So on one hand, Geeta said that she knew him and she told you how she knew him, and she spoke about knowing him in relation to Sonny and Toppy. On the other hand, the accused is saying, "I do not know her, I do not know Rat's wife." You will have to take all of these factors into consideration when considering the reliability of Geeta Singh's identification..."[194]

[343] We are satisfied that the judge did not suggest to the jury that the verification procedure supplemented Geeta's identification evidence. It is also clear, from an examination of the judge's charge as a whole, that these passages were designed principally to deal with the suggestion that Kenny had made, to wit, that an identification parade should have been held and to explain why the verification procedure had been arranged instead.

(iii) Failure to hold identification parade

[344] The description given by Geeta to the police was not a generalised description. Rather, it was a detailed description in regard to race, height and colour, coupled with the fact that although she never spoke to him, she had known him for about three years during which time she would see him regularly, about two or three times per week, because he, Soman and Junior *"does always be liming together".* While an identification parade would have been desirable, it is our view that in all of the given circumstances, the failure to hold one, and to instead adopt a verification process in lieu of it occasioned no injustice or prejudice to Kenny and no miscarriage of justice occurred.

(iv) Directions on the failure to hold an identification parade

[345] The judge instructed the jury in relation to the holding of identification parades, and how Kenny might have been affected by the fact that one was not held, in the following terms:

"Now, rules called the Judges' Rules provide that an identification parade shall be held in a case involving disputed identification evidence if suspects ask for one, and it is

[194] Summing Up: Day 4 dated June 26, 2015 at page 34, lines 2-21.

practicable to hold one. In this case, the accused said let the person who say that come and point him out. Separate and apart from this, Members of the Jury, an identification parade should only be held if it will be useful to have such a parade. If a suspect is known to the identifying witness, it will not be useful to hold a parade. In fact, holding a parade in such circumstances serves no purpose because if such an identifying witness is convinced that they saw, for example, A, whom they know, they would simply go to such a parade and point out A. It will not test whether or not they are able to point out a suspect. An identification parade, when held, puts the reliability of Geeta's identification to the test. The failure to hold an identification parade, when required, means that the suspect loses the benefit of the safeguard provided by identification parades, which was created to protect suspects from mistaken identification."[195]

[346] We are satisfied that the trial judge adequately pointed out to the jury the weaknesses in the identification of Kenny, including the failure of the police to hold an identification parade and the value of having such a parade done and how the failure to hold an identification parade could mean that the appellant lost the benefit of a safeguard. She also properly directed the jury on the danger that Geeta could have conveniently selected Kenny as a person who fitted the description of the person she saw. We therefore find that this ground is unmeritorious.

(v) No evidential link between the appellant Kenny and the "Kenny" referred to in Geeta's statement

[347] There was no obligation on the judge to give any special direction that there was no evidential link between the "Kenny" in Geeta's first statement and the appellant Kenny. Doing so could easily have been misinterpreted as implying that the jury be sceptical, having regard to the source of the evidence, Geeta being the mother of the deceased children. A direction of the type suggested was potentially dangerous and it is understandable why the trial judge left it out.

[348] The judge exercised care in identifying the evidence which was relevant to the issue of identification. She highlighted the material evidence that they must consider in relation to the legal directions given. This is precisely the function of a trial judge, to focus the jury on the

[195] Summing Up: Day 4 dated June 26, 2015 at page 32, lines 18-39.

disputed evidence on material issues and to adequately organise the evidence around these main issues. In our view, the core aspects of the identification issue were quite accurately and lucidly conveyed to the jury by the judge. These grounds are without merit.

Appellant No. 3 - Ground 5: Failure to analyse inconsistencies in the identification evidence against Junior

Submissions

[349] Mr. Heath submitted that the mere reading of the witnesses' evidence by the trial judge without any analysis of its weaknesses and the effect of those weaknesses on the reliability of the identification was a flaw in the judge's summing up. It was important for the judge to assist the jury with the analysis of the Geeta and Ashook's evidence in relation to the identification of the appellant for the following reasons:

i. Both Ashook and Geeta gave different accounts as to when they would have seen Junior;
ii. They both gave different descriptions of his physical appearance and clothes;
iii. Geeta's description of him at the trial was inconsistent with the description given to the police;
iv. Geeta testified that she had known Junior for three years before the incident. However, she admitted in cross-examination that a person fitting the description she gave to the police, was not present at the time of the incident;
v. Ashook and Geeta stated that they saw Junior at various times for various seconds at a time.

[350] Mr. Busby agreed that Ashook and Geeta gave differing accounts of when they saw Junior and submitted that this was perhaps the reason why the judge dealt with the quality of their identification evidence separately.

[351] Mr. Busby also submitted that when the judge gave the standard **Turnbull**[196] direction, the jury's attention was immediately drawn to the factors that affected the quality of the identification evidence given by all of the witnesses on each accused. It encapsulated the strength and weaknesses of the evidence, having regard to all the factors, such as the length of the observation of Junior, the distance between the witnesses and Junior, lighting conditions, any obstructions, whether the accused was known before and the length of time between the initial observation and the later identification by the witness. Further, the judge's summing up in respect of the identification evidence concerning Junior was adequate, clear and fair. The judge clearly identified the issues to be resolved which included the impact that any weaknesses or potential weaknesses had on the reliability of the evidence of the identifying witnesses.

The Law, Analysis and Reasoning

[352] The relevant issues are: whether the judge's directions made it clear to the jury that there was a special need for caution before convicting in reliance on the correctness of the identification evidence in keeping with the **Turnbull** guidelines; and whether the judge gave the jury the necessary assistance as regards the weaknesses identified in that evidence.

[353] It is settled that whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, which are alleged to be mistaken, the jury should be warned of the special need for caution before convicting in reliance on the correctness of the identification. The reason for the warning should be given, and reference made to the possibility that a mistaken witness, could be a convincing one. Provided this is done clearly, no particular form of words is required. The judge should also direct the jury to examine closely the circumstances in which the identification came to be made, including the length of time for observation, the distances, lighting conditions, possible impediments to observation, and whether the witness had seen the accused before: **R v Turnbull and others**[197]

[196] **Turnbull** (n. 63).
[197] Ibid. Widgery LJ at 552

[354] It is indisputable that this was a trial where the case against Junior depended substantially on the correctness of Ashook and Geeta's identification evidence. The judge quite simply, in her own way, pointed out to the jury what the most important issue in the case was, when she said, *"The case against these six accused persons is based largely on the identification by Ashook, Nigel and Geeta."*[198]

[355] We find that the judge's directions were in keeping with the standard **Turnbull** directions and were quite adequate.[199] Her directions on the issue of visual identification were not only in keeping with the **Turnbull** guidelines but she also pointed out to the jury what she saw as the significant weaknesses in Ashook and Geeta's identification evidence in relation to Junior.[200]

[356] The trial judge not only outlined in detail the salient features of the identification evidence but also pointed out the weaknesses inherent in that evidence. We take the view that the trial judge gave the jury adequate assistance as regards the approach they should take to the weaknesses which she highlighted, where it was not only appropriate, but necessary to do so, rather than simply leaving it as a matter for the jury. The judge, having painstakingly listed the weaknesses in the prosecution case which were material to the issue of identification, directed the jury on how to treat with these weaknesses and to analyse the significance of them when she said:

> *"Weaknesses. I told you weaknesses and possible weaknesses have to be considered. This would apply for all of the persons that were seen, or the accused. It is open to you to find that it was a traumatic event with men around the house armed and with kegs, and for Ashook with his family in the house, it is open to you to find that he would have been scared, he would have been concerned for his family.*
>
> *On the other hand, people react differently to stressful situations. Some become more alert and focused, others become frazzled and less able to observe details. It would*

[198] Summing Up: Day 2 dated June 24, 2015 at page 12, lines 6-8.
[199] Summing Up: Day 2 dated June 24, 2015 at page 13, line 35 to page 14, line 12.
[200] Summing Up: Day 2 dated June 24, 2015 at pages 56-58; Summing Up: Day 2 dated June 25, 2015 at pages 11-13.

be for you to decide, from the extent of the details given, whether he was affected by this stressful situation in a negative or a positive way."[201]

[357] The approach taken by this court in the case of **Fuller (Winston) v The State**[202] is applicable. In that case, in referring to the trial judge's failure to properly instruct the jury on the **Turnbull**[203] principles, the court said at page 433:

> *"Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor.* ***It is not sufficient merely to read to them the factors set out in Turnbull's case and at a later time read to them the evidence of the witnesses. That is not a proper summing-up. The jury have heard all the evidence in the case when the witnesses testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial judge is required to give to them and also in relation to the issues that arise for their determination. How that is done is best left to the discretion of each individual judge but, howsoever it is done, what is required is that the jury must be given in clear language the assistance that they need to enable them properly to discharge their function".*** [emphasis added]

[358] There is no special incantation of words that a trial judge is required to use. However, the jury must be clearly alerted to the issues which arise in every case and advised as to the need for caution. The judge sufficiently constructed her summing up to meet the particular circumstances of the case.

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[201] Summing Up: Day 2 dated June 24, 2015 at page 52, lines 11-25.
[202] (1995) 52 WIR 424.
[203] **Turnbull** (n. 63).

Appellant No. 3 - **Ground 6: Unfair confrontation exercise and inadequate directions**

Submissions

[359] Mr. Heath, relying on **R v Forbes**[204], submitted that the decision to hold a confrontation deprived Junior of the safeguards of an identification parade. He also complained that the directions on the identification procedure were inadequate and unbalanced, and failed to remind the jury of pertinent evidence, including the absence of his chosen representative and other irregularities he attributed to Inspector Gaffar, who was the police officer conducting the procedure.

[360] Mr. Busby submitted that Junior was not entitled to an identification parade, and that his reliance on **Forbes** was both misplaced and misleading because the mandatory obligation to hold an identification parade as stated in that case, was inapplicable to this jurisdiction. Further, even in the United Kingdom where there was such an obligation, it was subject to certain exceptions, which included instances when it was impracticable to assemble sufficient persons who resembled the accused to ensure a fair parade. In any event, the value of holding an identification parade would have been very slight and it was unnecessary to hold one.

[361] Mr. Busby also submitted that the decision to hold a confrontation was lawful and highlighted the **Judges' Rules - Identification Parades, Rules 1-4**. He argued that since the 12 hour period provided for the presence of the suspect's chosen representative as per **Rule 4** had elapsed, there could be no complaint that the confrontation took place in the presence of the Justice of the Peace. He also referred to the ruling in **The State v Banfield**[205] where the judge referred to the decision in **Martin Lane v Commissioner of Police**[206] where it was suggested that a citizen could be lawfully detained for up to forty-eight hours without charge. Accordingly, Inspector Gaffar's decision to hold a confrontation on May 20, 2009 instead of an identification parade on a later date, was a reasonable one having regard to the fact that: (i) Junior had been arrested and was in custody since May 16, 2009; (ii) he was brought to Inspector Gaffar on May 18, 2009; (iii) the police were already

[204] [2001] 1 Cr. App. Rep 430.
[205] Crim. No. S 34 of 2001 (Unreported).
[206] (Unreported).

in possession of Ashook and Geeta's statements which named him; (iv) every moment of his detention without charge over the 48 hour licence exposed the state to liability for false imprisonment; and (v) Junior did not object when Inspector Gaffar informed him that he could not acquire persons fitting his description and a confrontation would take place instead.

[362] Mr. Busby further submitted that the directions on this issue were outstanding. The trial judge carefully and meticulously placed Inspector Gaffar's evidence in chief and his cross-examination by Junior's trial counsel for the jury's consideration, accompanied by directions on what was required for an identification parade. Mr. Busby contended that the police were permitted to detain a suspect beyond 48 hours if the investigation warranted it and it could be justified. Further, since the description in Inspector Gaffar's possession did not match Junior, and since he had disputed knowing the witnesses, the safeguard of an identification parade should not have been dispensed with.

The Law, Analysis and Reasoning

[363] In **Brown and Isaac v The State**[207] Lord Hoffman in delivering the judgment of the Board issued the following guidance in respect of identification parades:

> *"[15] The main issue at the trial was of course identification and the appellants complain of what they say were four irregularities on this question. First, the absence of an identity parade; secondly, the confrontation at the police station; thirdly the dock identifications by the principal witnesses and fourthly, the judge's directions.*
>
> *[16] An identification parade is not necessary, and may indeed be positively undesirable, when it is accepted that the accused is a person well known to the identifying witness. In such a case, a parade will establish the uncontroversial fact that the accused is able to identify the person he knows, but will not advance the question of whether that person committed the offence: see Goldson v R [2000] UKPC 9 (23 March 2000, unreported). On the other hand, if the witness claims only slight acquaintance with the accused or the accused denies that he is the person whom the*

[207] Brown and Isaac (n. 190).

witness claims to know, an identification parade may serve a useful purpose and should be held."

[364] Ashook testified that he knew Junior *"four to five years before 2009"*. The last time he had seen Junior was a week before the incident. Ashook said that he passed on the same street that Junior lived on to go to work, and he also gave a description of Junior. Geeta gave evidence that she had known Junior for about three years before the incident. She said that she saw him two to three times per week by her neighbour, Visham or out on the road. She also testified that she saw him by Soman's mother's house and that Junior would "lime" with Soman and Kenny (Appellant No. 2). Geeta said that she would see Junior spending nights by Soman, and that she last saw him (Junior) two to three weeks before the incident passing in a car. According to her, he lived in Orangefield in 2009 and he was about 33 years old and described him as *"thin, not too thin, thickish, brown skinned, African descent, kind of big nose…"*

[365] Junior however denied knowing Ashook and Geeta. He said that he had never been to their house. He admitted that he was always tall and lean, but denied that he was darkish in complexion in 2009 or that he had a "kind of a big nose". He accepted that he was *"Dougla"* and looked *"more Negro than Indian"*. On the other hand, he admitted that he knew Soman and said that he was more than a friend and that he would buy a drink for him. They were friends for about 36 years. He also admitted that he had visited Soman's house, which aligned with how Geeta claimed to know him. However, he said that he had only been to Soman's house on about two occasions. He also denied trying to minimise how often he "limed" with Soman. He said that he did not know Kenny well and that he only "limed" with him in Samkist Bar in late 2007 or when he came in with Soman. He did not lime with Kenny more than once.

[366] From the above extracted testimony it is possible to draw the inference that Junior was well known to both witnesses. Additionally, he did not complain of the absence of an identification parade when asked whether he had any issues with a confrontation. In those circumstances, the value of an identification parade as a safeguard would have been very slight. We do not think that the decision not to hold one can be faulted.

[367] The judge's directions on the confrontation identification procedure were in the following terms:

> *"In relation to Accused No. 5, you heard the evidence of the officer who said he wanted to arrange an identification parade and, in fact, he was not able to do so because he couldn't find people of a similar appearance, and I explained to you whilst dealing with No. 6 what is required for an identification parade. The officer gave an explanation why he didn't hold the parade and he went on to hold what he called a confrontation. It is for you to consider - - and the law permits that if an identification parade is not practicable, then other forms of identification could be held. There are different forms of identification: There are group identifications, there's identification in the street, and there is confrontation. You will appreciate that the more people with a suspect, the better it is to test the ability of the witness to identify a particular person. You need to take all this into consideration. The fact that as far as Ashook is concerned, he knew the person; as far as the accused is concerned he didn't know him. Take all that into consideration and decide whether or not the whole identifying process was fair…"*[208]

[368] The judge gave very forceful directions on how the jury ought to treat with the confrontation evidence and placed it in its proper context. It was made quite clear to the jury that the confrontation added no weight whatsoever to the evidence of observation at the scene and that it was not capable of confirming it. The directions plainly instructed that it was up to them to determine the fairness of the identification process. In the circumstances, no unfairness accrued to Junior. There is no merit in this ground.

Appellant No. 3 - Ground 10: Inadequate alibi directions and perfunctory treatment of the evidence

Submissions

[369] Mr. Heath submitted that the judge's alibi directions were inadequate and fell short of the requirements espoused in **Anderson Mapp A/C Weisle and Darryl Charles A/C Pipey v The State**[209]. The judge omitted to caution the jury that they should not assume he was guilty if they

[208] Summing Up: Day 4 dated June 26, 2015 at page 34, lines 22-43.
[209] Cr. App. Nos. 13 & 14 of 2012.

disbelieved his alibi. Additionally, Junior's sole defence at the trial was one of alibi, however the judge referred to him as having multiple defences. Further, his alibi was uncontested since the police failed to properly investigate it.

[370] Mr. Busby submitted that the summing up was replete with examples of the judge telling the jury that the appellants had nothing to prove in respect of their alibis. He conceded that the trial judge did not specifically caution the jury against assuming that Junior was guilty merely because they disbelieved his alibi. However, this danger was nullified in consideration of the summing up as a whole. Relying on **R v Falealili**[210], Mr. Busby submitted that the court must make room to allow for an exception to a general rule where the result would be an affront to common sense. In this case, the failure to include the single phrase *"a false alibi is not equal to guilt"* did not result in a miscarriage of justice.

[371] Mr. Busby further submitted that the prosecution had clearly complied with its duty of disclosure of the information in respect of Junior's alibi and in these circumstances it was the responsibility of those concerned in the preparation of his defence to trace, interview and assess any possible defence witnesses. The respondent stated that the prosecution's duty to disprove an alibi did not equate to a duty to prove an alibi and Inspector McIntyre's failure to complete his investigations into the veracity of Junior's alibi was to the detriment of the prosecution, not Junior. The fact that Junior had told Inspector McIntyre of his whereabouts and that McIntyre failed to follow up on this lead were placed for the jury's consideration. The judge's isolation of this evidence for the jury's consideration benefitted Junior.

The Law, Analysis and Reasoning

[372] The trial judge gave general directions on the burden and standard of proof as it related to alibi[211] and gave the following specific directions in relation to Junior:

> *"…This means, like I have directed you for other accused, he is saying he was not present at the home of Ashook Ramdial on or about the 14th April, 2009, and did not*

[210] [1996] 3 NZLR 664.
[211] Summing Up: Day 4 dated June 26, 2015 at page 35, line 47 to page 36, line 3.

set Ashook Ramdial's house afire and cause the death of Sangeeta Ramdial and Sarah Ramdial who perished in that fire. He is saying he did not commit the offence of murder. It is not for him to prove that he did not commit the offence, the onus is on the State to satisfy you so that you feel sure.

In relation to alibi, I told you what his alibi was already. The directions are the same. It is not for the accused person to satisfy you that he was elsewhere and in this case, Samkist Bar. It is for the State to disprove that beyond reasonable doubt. And in this case, the State is relying on the evidence of Ashook Ramdial, Geeta Singh, and Nigel Ramdial to disprove the alibi with respect to Accused No. 5."[212]

[373] It is apparent from the above-mentioned passage of the summing up that the judge told the jury that Junior did not have to prove his alibi. The ideal direction would have included a specific warning to the jury that if they rejected his alibi, it did not mean that he was guilty and that they had to return to the prosecution case to see if they were sure as to his guilt. In our view however, in looking at the summing up as a whole, in particular, the judge's directions in the route to verdict, this direction was implicitly given to the jury when she said:

"Move on to the case for Accused No. 5, Junior John. Consider the case …..of Accused No. 5 in relation to Count One. Do you accept that he was at Samkist Bar at the time of the fire? If yes, not guilty. If not sure, not guilty; if no, go to two. Do you accept from the evidence of either one or both of the following persons in relation to the events that occurred that night, that is Ashook Ramdial and Geeta Singh, that Accused No. 5 was present at the home of Ashook Ramdial on or about the 14th April, 2009? If no, not guilty; if not sure, not guilty; if sure, go to three…"[213]

[374] It should not be presumed that jurors are incompetent or lacking in common sense and as such, they would have been expected to follow the judge's directions in the route to verdict as to how they should approach Junior's alibi. We do not agree with Mr. Heath's submissions in this regard.

[212] Summing Up: Day 4 dated June 26, 2015 at page 48, line 50 to page 49, line 16.
[213] Summing Up: Day 4 dated June 26, 2015 at page 70, lines 33-44.

[375] Mr. Heath also complained about the failure of the police to properly investigate Junior's alibi. The prosecution must prove its case beyond a reasonable doubt and that includes proving that the accused was not elsewhere but at the scene committing the offence. When an alibi has been raised, the burden is on the prosecution to investigate it. Failure on the part of the prosecution to investigate it, may cast some doubt on the case for the prosecution. Officer McIntyre's failure to complete his investigations into the veracity of Junior's alibi was therefore to the detriment of the prosecution and not to Junior. The judge addressed the issue as follows:

> *"…Junior John told Office McIntyre during his interview that he was at Samkist Bar between the hours of 8:00 p.m. on the 13th April, 2009, and 3:00 a.m. on the 14th April 2009. Officer McIntyre admitted that Junior John told him to go to somebody called Skully to verify his whereabouts.*
>
> *Officer McIntyre said he went to the location and inquired about him and was told that he stepped out for an hour or two, and McIntyre left. McIntyre said it was unfortunate that he did not return. Officer McIntyre said he was engaged in other aspects of the investigation and lost track as to following up on this lead. Officer McIntyre was asked if he agreed that having been given an account of the whereabouts of Junior John, and having been given by him a person specifically, there was a vital importance with regard to what it is he was telling him, and Officer McIntyre's response was, "Yes, he gave me an account, yes". Officer McIntyre accepted that it was unfortunate that he did not find the time to get back to speaking with the person referred to by Junior John."*[214]

[376] The judge undoubtedly placed before the jury the fact that the appellant had told Officer McIntyre about his whereabouts on the material day and that Officer McIntyre had failed to follow up on the lead. Placing this evidence before the jury for their consideration redounded to Junior's benefit. Accordingly, we find no merit in this ground.

[214] Summing Up: Day 4 dated June 26, 2015 at page 22, lines 6-26.

Appellant No. 3 - Ground 11: Inconsistent direction on the confrontation evidence relative to alibi and route to verdict

Submissions

[377] Mr. Heath complained that the judge told the jury that Nigel's evidence was relied on by the prosecution to disprove his alibi. He submitted that this statement was inconsistent with the court's ruling that Nigel's identification of Junior in a confrontation exercise was unfair. Therefore, the statement was apt to leave the jury with some degree of confusion when reconciling which of the prosecution's witnesses' testimony could be relied upon to determine Junior's innocence or guilt.

[378] Mr. Busby conceded that the trial judge erred to the extent that she used the name "Nigel" in her summing up which could be used to disprove Junior's alibi. It was submitted that this was an innocent slip of the tongue which in all likelihood would have escaped the jury's notice and was therefore not likely to cause any confusion. The respondent also pointed out that the error escaped the notice of all trial counsel below and notably, Junior's counsel too.

[379] Mr. Busby further submitted that the route to verdict which was given to each juror made no mention of Nigel in relation to Junior. As such, this tangible document which the jurors had in their possession to read over and study while they deliberated would have in all probability been the direction that they would have followed in coming to their decision.

The Law Analysis and Reasoning

[380] The direction of which complaint is made was:

> *"In relation to alibi, I told you what his alibi was already. The directions are the same. It is not for the accused person to satisfy you that he was elsewhere and in this case, Samkist Bar. It is for the State to disprove that beyond reasonable doubt. And in this case, the State is relying on the evidence of Ashook Ramdial, Geeta Singh, and* ***Nigel Ramdial*** *to disprove the alibi with respect to Accused No. 5."*[215] [emphasis added]

[215] Summing Up: Day 4 dated June 26, 2015 at page 49, lines 9-15.

[381] While we agree that the judge erred to the extent that she said that Nigel's evidence could be used to disprove Junior's alibi, she also gave the jurors a route to verdict in which did not mention Nigel. The judge indicated that this was a suggested approach they could take because there was so much evidence. The judge explained the route to verdict in respect of each of the accused and said the following in relation to Junior:

> *"Move on to the case of Accused No. 5, Junior John. Consider the case, and I am at page 10, consider the case of Accused No. 5 in relation to Count One. Do you accept that he was at Samkist Bar at the time of the fire? If yes, not guilty. If not sure, not guilty; if no, go to two. Do you accept from the evidence of either one or both of the following persons in relation to the events that occurred that night, that is Ashook Ramdial and Geeta Singh, that Accused No. 5 was present at the home of Ashook Ramdial on or about the 14th April, 2009? If no, not guilty; if not sure, not guilty; if sure, go to three.*
>
> *Three, do you accept that Accused No. 5 either destroyed Ashook's house with intent to kill or do grievous bodily harm, or, knowing or realizing that any of the accused persons intended to destroy Ashook's house assisted by his conduct with other persons? If no, in relation to Ashook, consider your position in relation to Geeta. If no in relation to both, not guilty; if not sure in relation to Ashook, then consider your position in relation to Geeta. If you are not sure in relation to both, then not guilty. If you are sure in relation to at least one of them, guilty."*[216]

[382] It is evident that the route to verdict did not refer to Nigel's evidence as capable of proving Junior's presence at the Ramdial home on the night of the incident. Thus, the route to verdict cured the aberration in the judge's summing up. This was an extremely long trial involving voluminous evidence. The law recognizes that a trial judge may make occasional slips in recounting details of evidence. The judge invited all trial counsel appearing in the matter to indicate whether there was anything in terms of the evidence, the directions, or anything that she might have left out. All counsel indicated in the negative. [217]

[216] Summing Up: Day 4 dated June 26, 2015 at page 70, line 33 to page 71, line 6.
[217] Summing Up: Day 4 dated June 26, 2015 at page 53, line 37 to page 54, line 17.

[383] Mr. Heath had every opportunity to point out any errors or omissions the trial judge may have made in summarizing the evidence. He failed to avail himself of this opportunity, most likely because he did not notice the judge's mistake in recounting the evidence, as the jury might have as well. The error was not repeated in the route to verdict provided to the jury in written form. We are satisfied that Junior suffered no prejudice by reason of the judge's error. Accordingly, we find no merit in this ground.

Appellant No. 4; Appellant No. 5; Appellant No. 6 - Ground 1 - Inadequate and erroneous directions and failure to marshal and identify weaknesses in the identification evidence

[384] Shiva, Visham and Ryan made similar challenges to the judge's treatment of the identification evidence, and conflation of the issues of mistaken identification and alibi. Ms. Chote S.C. submitted that the prosecution case against them was based on Ashook's evidence, which was replete with inconsistencies and omissions. Further, the judge failed to meticulously separate the identification evidence against each appellant, which could have led the jury to believe that if one of them was guilty, then they all were. Counsel also submitted that the directions on the treatment of Ashook's evidence were inadequate, and the jurors did not receive sufficient guidance in their approach to such a complicated matter. She submitted that greater care should have been taken to separate the evidence and legal directions in the summing up.

[385] In relation to the weaknesses in Ashook's evidence, she submitted that these were not put in a fair and balanced way, and there was no direction on what other evidence could be used to support his testimony. Counsel contended that there was a miscarriage of justice because the judge failed to identify and marshal the weaknesses in Ashook's evidence, which related to his credibility. It was submitted that the judge ought to have assisted the jury with legal directions, tailored for them to be able to adequately assess Ashook's credibility and reliability.

[386] Ms. Chote S.C. also submitted that the main challenge to Ashook's credibility actually came from the evidence of his wife, Geeta. However, the judge failed to point out the main inconsistencies between Ashook and Geeta's testimony. These inconsistencies were crucial matters to be considered by the jury when dealing with Ashook's credibility. The jury had to be directed that if they were in doubt as to Ashook's credibility, this could not be bolstered by a subsequent confrontation of the appellant(s) after their arrest. As a result of these misdirections, there was a real likelihood that there had been a miscarriage of justice in this case.

[387] Mr. Busby submitted that the trial judge made it clear to the jury that each accused's case should be considered separately.[218] The judge also specifically stated that the prosecution case against each accused was different and thus the verdicts against each accused need not be the same.[219] Further, the judge dealt separately with the identification evidence of Ashook as it related to Shiva, Visham and Ryan[220], and specifically detailed the opportunities he had to see them, having regard to the **Turnbull**[221] guidelines and the possible weaknesses.

[388] On the issue of Ashook's credibility and reliability, Mr. Busby submitted that the judge drew the jury's attention to several issues, including whether he was an independent witness; whether he had a motive to lie; his conduct after the fire; and the fact that he had a previous conviction and pending matter which involved a crime of dishonesty. The trial judge also gave details of the inconsistencies and contradictions in Ashook's evidence.[222]

[389] Mr. Busby also submitted that the judge told the jury that the identification of the appellants at the police station was merely a verification exercise to ascertain whether the persons present were the same persons that Ashook said that he knew. Mr. Busby concluded that there was no substance in this ground of appeal.

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[218] Summing Up: Day 1 dated June 22, 2015 at page 14, lines 38-44.
[219] Summing Up: Day 1 dated June 22, 2015 at page 15, line 43 to page 16, line 2.
[220] Summing Up: Day 2 dated June 24, 2015 at page 47, line 34 to page 50, line 15.
[221] **Turnbull** (n. 63).
[222] Summing Up: Day 3 dated June 25, 2015 at page 6, line 31 to page 9, line 45.

The Law, Analysis and Reasoning

(i) Separate Treatment of Identification Evidence and Weaknesses in the Evidence

[390] The separate treatment of the identification evidence and the judge's treatment of the weaknesses in the evidence will be dealt with in detail at Ground 5 of the appellants' appeal.

(ii) Inconsistencies and contradictions

[391] Complaint was made of the judge's failure to address the inconsistencies in Ashook's evidence and conflicts between his testimony and that of Geeta. On Day 3 of the summing up, the judge addressed the inconsistencies and contradictions in Ashook's evidence:

> *"Now, I move on to the inconsistencies and contradictions, if any, in the evidence of Ashook …*
>
> *…*
> *…*
> *… Ashook spoke about having a conversation with Geeta, his wife, about dogs barking and asking her to let go the dogs, and she did, and he jumped through the window. That is what he said in his evidence here. But Ashook did not say this before to the police in his statement which he gave on the 14th of April, 2009….*
> *…*
> *…*
> *…The second point I want to refer to, in evidence in this court he said as follows: "Well earlier on my wife tell me how the police did come looking for me and thing, and "Toppy" and Ryan and Shiva and them dey dey, and she hear "Toppy" say he coming back to burn down the house." His response: Accepted that this was not in his statement, for the same reason which I just read through a while ago, that he said. He said that all the things that happened at the police station, the police cuffing him, that was the explanation that he gave.*
>
> *…The third inconsistency is Ashook accepts that in court was the first time that he mentioned anything about the lighting from Vasha's and the other light.*
>
> *The Fourth point, in Ashook Ramdial's evidence in this court you would recall he said he saw two men entering his house and then they approached his nephew's door, as*

he heard the shooting. However, in the Magistrates' Court, he said that 'he saw the two men in front of my door…'"[223]

[392] The judge also pointed out the other inconsistencies in Ashook's evidence, listing seven, and then raised some further points regarding fresh evidence given by Ashook during the trial. The judge then went on to consider the evidence of Geeta and highlighted some of the weaknesses in her evidence. Later on in her summing up, the judge reviewed some of the inconsistencies in Geeta's evidence. For example, the judge indicated that Geeta stated that after she got shot, she went to the caraili tree, however in her statement to the police she stated that she went to the savannah.

[393] On Day 1 of her summing up, the judge indicated to the jury that they could accept all of the evidence of a particular witness or reject all of the evidence of that witness, or accept part of the evidence of a witness and reject part of the evidence of that witness.[224] On Day 2, the judge directed the jury that if two witnesses on the same side were giving contradictory evidence on an issue, it was open to them to accept the evidence of one and reject the evidence of the other, or reject the evidence of both witnesses on the issue if they felt unsure of the evidence.[225] In addition, on Day 4 of the summing up, the judge directed the jury that as judges of fact, they had to make a determination on each and every one of the issues. She stated certain questions that the jury could ask themselves as it related to the evidence. She drew their attention to questions such as: "*Was Geeta present at her house at the time of the fire … Was Ashook present at the house at the time of the fire? There is evidence which Geeta said at the Magistrates Court that she went to the Savannah and told him what happened. You have to consider that. Does it mean because she told him what happened that he didn't observe the fire?"*

[394] Other inconsistencies were apparent in the evidence. For example, Ashook testified that he jumped through the window when Geeta informed him that she saw people coming towards the

[223] Summing Up: Day 3 dated June 25, 2015 at pages 6-8.
[224] Summing Up: Day 1 dated June 22, 2015 at page 6, lines 35-40.
[225] Summing Up: Day 2 dated June 24, 2015 at page 21, lines 7-12.

house. However, Geeta suggested that Ashook jumped from the window to avoid the police. The Court notes that the judge might not have done a comparative study of all the inconsistencies that arose in the trial. Her directions however were clear, that the jury were the judges of the facts and that it was entirely up to them to determine the factual issues. The overall effect of the judge's directions to the jury, in our estimation, was that they had to consider the inconsistencies in the matter and decide upon them. It is important to note that the members of a jury are deemed to be sensible persons, fully able to identify inconsistencies in a matter and to properly decide upon them.

[395] We note further, that there is no duty on the trial judge to highlight every single inconsistency in the prosecution case. The duty of the judge is to advise the jury as to the significance of the evidence and to direct them on those inconsistencies which are most relevant to the matter[226]. In our view, this duty was fulfilled by highlighting Ashook and Geeta's evidence and clearly laying out the relevant inconsistencies.

(iii) Credibility

[396] The third ground of complaint was that the jury were not adequately assisted in their approach to the evaluation of Ashook's credibility and reliability. On Day 1 of her summing up, the judge explained the issues that might affect a witness' credibility and reliability[227].

[397] On the following day, the judge signaled her intention to address the evidence impacting Ashook's credibility and reliability:

> *"… **I am first dealing with Ashook Ramdial. And the evidence that is, that might be capable of impacting on his credibility or reliability and truthfulness, depending on what assessment you make of it**…*
>
> *He is one of three eyewitnesses presented by the State. As I said, he is alleged to have identified Accused Nos. 1 to 5 as being at his house and being responsible for the death of his children.*

[226] **Franklyn Jalipa v The State** Cr. App. No. 23 of 2009.
[227] Summing Up: Day 1 dated June 22, 2015 at page 12, lines 15-25.

Now, you would recall I dealt with the assessment of witnesses and I suggested to you that it might be useful, when assessing witnesses, to ask yourself certain questions. And that's for all witnesses, so some of the questions which I referred to, if you will recall, is whether, for example, the witness is an independent witness. So, in the case of Ashook, is he an independent witness, does he have any motive to lie? Is there any other evidence that diminishes his evidence? Is his evidence reliable and credible? Are there any inconsistencies in his evidence, or any contradictions with other witnesses? Those are just some of the things, I just suggest. It is up to you, of course, how you approach it.

So let's look at the first question, is Ashook an independent witness?… ***Now, it is open to you to find that he has an interest in the outcome of this case because he is the father of the two children who died, he is the husband of Geeta who was shot, he was the uncle of Nigel who was shot, if you accept the evidence of them being shot from the medical and from the circumstances in which they were shot****…*

Now, it is crucial to ask yourself another question, does he have a motive to lie? Now, why this is a crucial question, it is in light of the fact that one of the main points or planks of the Defence for Accused Nos. 1 to 4 is fabrication, that he lied.

You may want to ask yourself would Ashook Ramdial lie simply because he has an interest in the outcome of the case? You will recall he said that he wants justice for his children. You have to apply your common sense. Would this be a motive for him to lie?

…

…

…You, therefore, heard about his convictions and a pending matter because in this trial, the credibility of Ashook Ramdial is of substantial importance.

I direct you that you are entitled to take into account the fact that Ashook Ramdial has convictions, in particular, one for a crime of dishonesty, robbery with violence, and also that he has a pending charge for another, which is a crime of dishonesty, robbery with aggravation. Members of the jury, the fact that Ashook has a conviction for a crime of dishonesty and a pending charge for a crime of dishonesty does not, of course, mean that Ashook's evidence is not true. It is for you to assess whether, and to what extent his previous behavior, in particular, the conviction for robbery with violence and the pending charge for robbery with aggravation, may

assist you in assessing his evidence and in resolving whether or not he is a credible, reliable and truthful witness.

Another thing that you might want to consider and wonder if it is affecting his credibility, is Ashook's conduct. His conduct after the fire, that's the first thing I want to say. It is his conduct after the fire…

…As I said Ashook is not on trial here, but the conduct of witnesses in and around the time of such an incident could sometimes assist you in assessing a witness' evidence."[228] [emphasis added]

[398] As can be seen from the foregoing extract from the summing up, the judge spent much time explaining to the jury the pieces of evidence that impacted on Ashook's credibility. The weaknesses in his identification evidence were also highlighted. The judge specifically referred to the evidence which suggested that Ashook might have had a motive to lie. The cumulative effect of the judge's careful directions on credibility and reliability and her detailed underscoring of the material weaknesses and inconsistencies in Ashook's testimony was that the jury were well equipped to conduct their assessment of his identification evidence. These directions were sufficient to prevent any possible miscarriage of justice.

(iv) Confrontation

[399] On day 2 of the summing up, the judge referred to Ashook's identification of Visham, Shiva, Ryan at the police station after their arrest:

"this was merely a verification exercise, just to ascertain whether this is the same Shiva that he knew before

…

"…Based on the fact that he said he knew Ryan before, what was carried out was a verification procedure, merely for him to say whether this is the Ryan that he was referring to."[229]

[228] Summing Up; Day 2 dated June 24, 2015 at pages 15-16.
[229] Summing Up: Day 2 dated June 24, 2015 at page 52, lines 8-10; page 54, lines 24-27.

[400] The judge did not describe the identification as a confrontation, but indicated to the jury that this was merely a means used to verify that the persons at the police station were the same Shiva and Ryan that Ashook had mentioned to the police before. It was not probative of guilt. It definitely was not presented to the jury in that manner. In **Brown v The State**[230], Lord Hoffman, at paragraph 18, addressed the value of identification via confrontation in the following terms:

> *The confrontation in the police station was not arranged to provide evidence of identification in substitution for a parade but simple to reassure the police that they had not arrested the wrong people. It was not relied upon at the trial as having any evidential value… It must have been obvious to the jury that the prosecution case stood or fell according to whether the witness had correctly identified the accused on the night of the murders.*

[401] Likewise, in the matter at bar, we are of the view that the judge's directions would have made it clear that what took place at the police station was nothing more than a verification exercise. It was therefore unlikely that the jury would have used this evidence in support of Ashook's credibility. A direction in that regard would not have made any material difference. Accordingly, we find no merit in these grounds.

Appellant No. 4 - Ground 3; Appellant No. 5 - Ground 3; Appellant No. 6 - Ground 4: **Conflation of mistaken identification and alibi**

Submissions

[402] Ms. Chote S.C. submitted that the testimonies of Corporals Gopaul and Cassie, which placed the appellants at the Freeport Police Station around 1:40 a.m. on the night of the incident, did not raise the issue of alibi. The judge, in conflating the issue of alibi with the identification evidence, could only have thrown the jury "off course". Counsel submitted that the evidence concerning the appellants' presence at the police station should not have been left to the jury, as it would have distracted them from a proper assessment of the identification evidence which was of poor quality. Additionally, the trial judge appeared to have suggested that the appellants bore the

[230] [2003] UKPC 10.

burden of proving that they were in fact at the Freeport Police Station at the time of the fire. Counsel contended that this reversal of the burden of proof was fatal to the conviction and was not cured by any subsequent direction.

[403] Mr. Busby submitted that the assertion that the judge conflated the issues of mistaken identification and alibi is a "non-starter" since the judge never purported to raise the issue of mistaken identification in respect of these appellants. He also submitted that the evidence elicited from Corporals Gopaul and Cassie supported the defence of alibi and, in accordance with **R v Watson**[231], the judge had a duty to put the defence of alibi to the jury.

The Law, Analysis and Reasoning

[404] The case of **Charles v The State**[232] is instructive on the circumstances in which the onus to give an alibi direction arises. In that case the appellant was unrepresented at the trial but gave evidence on his own behalf. The evidence raised the issue of alibi, however, the judge did not identify that as an issue in the case and gave no directions on the matter to the jury. Ibrahim JA stated:

> *"Where in the course of the trial there emerges evidence from the prosecution or the defence that raises the issue of an alibi it is incumbent on the trial judge to identify that issue and to give the jury full and proper directions in law relating to that issue. They must be told that there is no onus on the prosecution to negative the issue and none on the accused to establish it. Also, the trial judge must identify the evidence relating to that issue and assist the jury fully both in fact and law in order for them to come to a proper resolution of that issue. In this case he had done none of the two things however that by itself was sufficient in our view to dispose of the matter.*

[231] [1992] Crim LR 434.
[232] TT 1991 CA 17.

[405] In **Sankar v The State**[233], the appellant argued that the judge had given grave misdirections to the jury on the defence of alibi. Ibrahim JA stated:

> *"The trial judge gave no directions to the jury on the question whether the onus is on the appellant to establish the alibi or on the respondent to negative it. When the issue of an alibi is raised by sufficient evidence that makes it a live issue to be left for the jury's consideration, the trial judge must make it clear to the jury that there is no onus on the defence to establish it but that the onus rests on the state to negative the alibi. If the jury reject the alibi by deciding the issue in favour of the state that does not by itself prove that the accused was where the identifying witness said he was for a false alibi might be put forward for a variety of reasons. In short, rejection of an alibi does not prove the case for the prosecution. This he [the trial judge] did not do either by clear words or from language from which it could be said that the jury were in no doubt about that. That, in our opinion, was a grave misdirection."*

[406] In **DPP (Jamaica) v Bailey**[234], the Privy Council held that even though a defence had not been explicitly put before the court by counsel for the accused, where such a defence could prima facie be made out from the statement of a witness, the judge should explain that defence to the jury and leave it to them to decide whether it was made out on the facts.

[407] The issue of alibi was raised during the cross-examination of Corporals Gopaul and Cassie and in the closing addresses of trial counsel. It was undisputed that the fire occurred at around midnight on the night in question. Corporal Gopaul's responses under cross-examination placed the appellants at the Freeport Police Station before he received the wireless transmission about the house on fire, and immediately after, he returned from his inquiries relative to that call. In his cross-examination of Corporal Cassie, the appellants' trial counsel was clear that he had instructions from them that they were at the Freeport Police Station from 11:00 p.m. on the night of the fire to about 4:00 a.m. the next day.

[233] TT 1993 CA 17.
[234] [1995] 1 Cr App Rep 257.

[408] The authorities cited above unambiguously instruct that where the evidence raises the issue of alibi, the judge must identify that issue and give the jury full and proper directions on the law in relation to it. In the present case, the evidence and questions posed during the cross-examination of Corporals Gopaul and Cassie, raised the issue of alibi. We agree with Mr. Busby that one possible interpretation of the evidence was that the appellants were relying on the defence of alibi. It is our view that the judge did not fall into error by leaving the issue of alibi to the jury.

[409] First, the trial judge gave the jury directions on the burden of proof in relation to alibi:

> "…*The prosecution has the onus of proving the guilt of the accused person to satisfy you so that you feel sure, the accused person does not have to prove that he was elsewhere at the time of the offence was committed. On the contrary, it is for the prosecution to disprove the issue of alibi*."[235]

[410] Each appellant was said to have been at the Freeport Police Station at the time of the fire and so the alibi direction was given in turn for each of them:

> *"My directions with respect to the issue of alibi would also apply to this accused. The same issues arose; that he was at the Freeport Police Station between 11:00 p.m. and 4:00 a.m., and it is not for him to prove that he was elsewhere but for the State to satisfy you so that you feel sure that he was present at Ashook's home and participated in the deaths of the two victims."*[236]

[411] In addition to her thorough directions on the burden and standard of proof relative to the issue of alibi, the judge was careful to remind the jury that an accused might raise an alibi simply to bolster their defence, and that this did not necessarily mean that they were untruthful. There can be no justifiable complaint made of the judge's directions in this regard.

[412] The judge was also careful to distinguish between the issues of mistaken identification and alibi early on in her summing up:

> *"Each accused raised the issue of alibi, that is they said that they were elsewhere at the time of the fire. Accused Nos. 1 to 4, although they did not testify, suggested by*

[235] Summing Up: Day 4 dated June 26, 2015 at page 35, line 48 to page 36, line 3.
[236] Summing Up: Day 4 dated June 26, 2015 at page 44, line 47 to page 45, line 4.

the thrust of their cross-examination that they were in the police station from 11:00 p.m. on the night of the 13th of April, 2009, to 4:00 a.m. on the morning of the 14th of April, 2009."[237]

[413] Shortly thereafter, the judge stated:

"Additionally, in relation to Accused Nos. 1 to 4, from the thrust of the cross-examination, it was suggested that the thrust of the cross-examination, it was suggested that Ashook, Nigel and Geeta fabricated their evidence against them. And in relation to Accused Nos. 5 and 6, they further rely on mistaken identification, that is, they are saying that Ashook and Geeta were mistaken when they identified them." [238]

[414] In this way, the judge prudently distinguished that these appellants were chiefly alleging fabrication, while it was Kenny and Junior who were raising mistaken identification. On the following day, the judge reminded the jury that the issue of mistaken identification was not raised for these appellants:

"In relation to accused Nos. 1, 2, 3, and 4, while the thrust of the cross-examination raised the issue of denial, fabrication and alibi, ***and not mistaken identification,*** *the Court directs you that if you find the identifying witness to be honest, you should go on to consider if such witness could have been mistaken…"*[239] [emphasis added]

[415] We have observed that the judge dealt with the issue of alibi on Day 4 of her summing up. This was done separate and apart from her instructions on the treatment of Ashook's identification evidence on Day 2, and whether he was possibly mistaken when he said that he saw the appellants at the scene of the crime. These directions did not conflate the appellants' defences. The issues of alibi and mistaken identification were dealt with separately, carefully and in great detail. In these circumstances, the submission that the jury could have been distracted from a

[237] Summing Up: Day 1 dated June 22, 2015 at page 30, lines 5-11.
[238] Summing Up: Day 1 dated June 22, 2015 at page 30, lines 19-25.
[239] Summing Up: Day 2 dated June 24, 2015 at page 12, lines 34-40.

proper assessment of the identification evidence, cannot be sustained. Accordingly, this ground of appeal fails.

[M] GOOD CHARACTER

Appellant No. 6 - Ground 2: Flawed good character direction

Submissions

[416] Ms. Chote S.C. submitted that the good character direction given by the judge was formulaic and was not linked to the evidence in the matter, in particular, evidence which pointed to an absence of motive on Ryan's part. She submitted that this was unbalanced and unfair especially in light of the prosecution's considerable evidence of motive, based on a history of land disputes.

[417] Ashook's evidence was that Ryan was a friend of his nephew, Nigel. Counsel argued that a man of good character like Ryan would not participate in a joint venture to set ablaze the car and home of a good friend with whom, it appeared he had gone on an "excursion" on the same day. Counsel submitted that this was a matter to which the jury's attention ought to have been directed.

[418] Mr. Busby submitted that the judge was within her realm of discretion on how to tailor the good character direction. He also submitted that the alleged criminal conduct by Ryan was hotly contested and as such, could not be described as "indisputable". He submitted that in the circumstances, it was prudent of the judge to refrain from making any qualifying remarks based on the case.

The Law, Analysis and Reasoning

[419] The trial judge's good character direction in relation to Ryan was as follows:

> *"…In relation to his good character, I will give you the directions in relation to him. You have heard that Accused No. 2, Ryan Bajnath is a … man of good character, in the*

sense that no convictions are recorded against him. Good character cannot, by itself, provide a defence to a criminal charge but when deciding whether the Prosecution has proved the charges against him to satisfy you so that you feel sure you should take it into account in their favour in the following way: The fact that he is of good character may mean that he is less likely than otherwise might be the case to commit these offences now. This is a matter to which you should have regard in the accused's favour. It is for you to decide what weight you should give to it in this case. In doing so, you are entitled to take into account everything that you have heard about the accused.[240]

[420] Generally, an accused with no previous convictions is entitled to a good character direction. The standard direction adopted by the judge accords with this fundamental rule. Ryan did not testify and evidence of his good character was not distinctly raised. However, his counsel submitted that Ashook's evidence of a close familial relationship with Ryan ought to have been explicitly taken into account in his favour.

[421] The overarching principle in this area of law is that a trial judge is required to paint a fair and balanced picture of the evidence. Discretion is required in tailoring the directions concerning good character. The evidence against Ryan was based primarily on identification. That identification was bolstered by the fact that the appellant was well known to Ashook, the identifying witness.

[422] Recent authorities on the issue of good character, assert that the trial judge is not obliged to give a good character direction that would be meaningless or absurd. In **R v Hunter**[241] the Court of Appeal of England and Wales held that a trial judge has a residual discretion to decline to give a good character direction where it would be an insult to common sense in the context of the evidence of the case as a whole. This would include instances where there was overwhelming evidence of criminal conduct. That discretion entitles the trial judge to choose whether to treat an accused with an arguably spurious claim to good character, as in fact having good character.

[240] Summing Up: Day 4 dated June 26, 2015 at page 43, lines 19-35.
[241] [2015] EWCA Crim 631.

[423] Placing the burden on the trial judge to sift through the prosecution evidence to give an enhanced good character direction would strain the principles beyond their intended bounds. Indeed, the fact that Ryan was a frequent visitor to Ashook's house does not immediately stand out as beneficial character evidence. A good character direction should not be misleading. The evidence of the relationship between Ryan and the Ramdials would have carried little weight in contrast to the overwhelming evidence of criminality adduced by the prosecution. A good character direction drawn from that relationship would have been meaningless and potentially misleading. Ryan was provided with the full standard direction which invited the jury to take into account all they had heard about him. The only effective character evidence to his credit was his lack of convictions. The jury were directed to take this into account to his credit in assessing his propensity to participate in the attack. These directions met with the justice of this case and accordingly this ground fails.

Disposition

[424] The appeals of all six appellants are dismissed and their convictions and sentences are affirmed.

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A. Yorke-Soo Hon, J.A.

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R. Narine, J.A.

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M. Mohammed, J.A.

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