THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. No. S 031 of 2016

CR S047/2006

BETWEEN

JASON HOSTEN

Appellant

AND

THE STATE

Respondent

Panel:

A. Yorke-Soo Hon, J.A.

P. Moosai, J.A.

M. Mohammed, J.A.

Appearances:

Mr. John Heath and Mr. Sheldon Mycoo appeared on behalf of the Appellant.

Mr. Roger K. Gaspard, S.C., Director of Public Prosecutions and Ms. Mauriceia Joseph appeared on behalf of the Respondent.

Date of Delivery: July 31, 2020.

JUDGMENT

Delivered by A. Yorke-Soo Hon, J.A.

INTRODUCTION

1. The appellant was charged with the murder of Krysta Lakpatsingh. On June 30, 2016, he was convicted and sentenced to death.

   He now appeals his conviction.

THE CASE FOR THE PROSECUTION

2. The deceased, Krysta Lakpatsingh, was 23 years old and a Probation Officer attached to the Point Fortin Magistrates' Court. She lived at Limefield Road in Cedros with her parents, Steve and Jade Lakpatsingh. On January 20, 2004, around 7:30a.m., she left her home and was last seen alive at her workplace around 8:30a.m. The deceased's parents both left home that day around 8:10a.m. and returned between 3:15pm and 3:20pm. Upon arrival, they noticed that the deceased's car was parked in the garage. Upon entering the house, they found the deceased lying face down on the floor, with a knife in her right hand. The nearby walls were smeared with a red substance which appeared to be blood and there was a dishwashing sponge and a pink towel nearby. There were streak marks on the floor which appeared as if a towel had been dragged on it. Mrs. Lakpatsingh went upstairs and found the deceased's room intact. She recalled that sometime before, the deceased had brought home $1,000.00 from the bank and placed it in a purse in her drawer. She checked the purse and found it to be empty.

3. Mr. Lakpatsingh made a report to the Cedros Police Station. Cpl. Ramtoole, along with Sgt. Palloo of the Point Fortin Police Station and other police officers proceeded to the deceased's home. PC Flaviney, PC Hosein and Ag. Supt. Paul, all of the San Fernando Homicide Office, also made their way to the scene of the murder. Whilst there, the police officers conducted investigations, took photographs, samples of the substance resembling blood and took possession of the knife which was found in the deceased's hand.

4. Dr. Hughvon des Vignes later performed a post mortem examination on the deceased's body and found that she had died from multiple stab wounds (amounting to approximately 24[1]) to her neck, chest and back. Her body also showed signs of blunt force trauma, abrasions and injuries to her chin.

5. Nathaniel Duckeran, also called "Thinners", testified that on January 20, 2004, between 1:30p.m. and 2:30 p.m., he saw the appellant standing at the entrance of the deceased's home. Jared Sherwood, also called "Jarrie", testified that between 3:00p.m. and 3:30 p.m., he saw the appellant walking down the hill in the vicinity of Bamboo Beach. He noticed that the appellant was wearing a grey jersey with a few "brownish" stains at the back. The appellant called out to Sherwood, who asked him if the stains on his jersey were blood stains. The appellant replied in the negative and proceeded to the nearby beach.

6. On January 20, 2004, Cpl. Ramtoole, together with other police officers, continued their investigations and proceeded to the appellant's home at Bamboo Village to execute a search warrant but the appellant was not home at the time. A further search was conducted in the surrounding area and the appellant was found hiding in some bushes at the back of his house. Cpl. Ramtoole and the other officers identified themselves to the appellant and the search warrant was read and

[1] Notes of Evidence at page 75.

shown to him. They cautioned him and informed him of his constitutional rights and privileges. Cpl. Ramtoole told him that he was assisting in the investigation of a report of murder in the Cedros District. He enquired from the appellant as to what articles of clothing he had worn earlier that day. The appellant did not respond but directed him to the kitchen area where he pointed to a discoloured white t-shirt and a pair of black three quarter pants on the counter. The appellant said*, "This is the clothes that I had on this evening"* and Cpl. Ramtoole took possession of them. The officers searched the premises but nothing else was seized and the appellant was conveyed to the Cedros Police Station. On February 19, 2004, Cpl. Ramtoole took the articles of clothing to the Forensic Science Centre for analysis and they were later retrieved along with a Certificate of Analysis in relation to them.

7. The appellant was subsequently conveyed to the Point Fortin Police Station. On January 22, 2004, around 4:45p.m., he was informed that he was a suspect in the matter surrounding the death of the deceased. He was cautioned and informed of his constitutional rights and privileges but he made no requests. PC Flaviney subsequently conducted an interview with him and he stated as follows:

> *"When ah take ah smoke home ah decided to go up by Steve. When ah walking to go, Thinners (Nathaniel Duckeran) pass me before ah reach de corner by Steve house. He blow meh. Ah give him right. When ah reach Steve house ah run through de back with ah piece ah iron… No, ah run through de back and come in front. Ah try to open de door with piece ah iron and ah hear somebody make ah noise and ah run back in de back and drop de iron. Ah run down the hill behind de wall in de razor grass. When ah get up, ah watch to see if anybody coming. Meh mind tell me Shulz move from here boy. Ah trip and pass from the front, then ah gone by de front door and knock de door. Ah hear de gyul say, "Mammy that is you?" Ah knock again then ah hear de gate open. Ah didn't hear nothing again, then she opened de door. Ah say 'Good evening' and ask for some Portugal and she say 'Go ahead, doh raid*

the tree.' Ah asked she if Steve dey. She say no. Ah tell she 'Alright nah' and turn meh back.

When ah walking ah turn back and push de door. When she closing de door, ah run up and ah push de door and she fall down. Ah was done inside ahready when she fall down. Ah see de knife in de kitchen on ah table, a black handle knife and ah end up chooking she [on her abdomen] and she end up falling on de ground. Ah start to give she some fine chook all on she stomach, all on she neck and she start to beg meh and thing." She start to beg and tell meh stop. She start to bawl and beat up on de ground. She blood start to flow and she lie down on she belly.
Ah went up de step inside de house and ah get $1500 in a black purse. [When asked how the money was made up, the appellant replied, "In blues."] Ah come back downstairs and ah take de towel and ah wet it and ting and ah wipe out meh footprint and ting from the floor. Ah wipe off the prints ah meh hand on de wall. Then ah take de knife and ah put it in she hand. [When asked the reason for doing this, he said that he did it to make it look like the deceased killed herself] Den ah open de door and close it back with de back ah meh hand. Ah didn't want to leave prints. Then ah end up running in de back in de bush and ah end up on the beach. Ah buss out on de beach. When ah was going down de beach Jarrie (Jared Sherwood) *ask me if dat is blood on meh jersey. Ah tell him no. Ah was going down de hill…*

Bago son and Bubbles and Harold dem was liming on de beach. Ah went and bathe on de beach and come back out. Ah went home and ah take out de jersey and ah pelt it in de bush right home dere….

Ah went and bathe again on de beach and ah wash out de salt water and ah went down on de Coconut and ah bounce up Elie and we went down by de beach. We went and smoke by de beach. After we come up de hill and we meet Zelma and buy two ice-cream from she. Den ah end up meeting Ms. Bang and we went up on de crime scene. Me eh stop long up there. Ah end up walking back down the road. Ah end up meeting Lion down de road. Ah end up meeting Lion and Hoxnut by de shop and ah end up breezing dey and ah smoke and meh brother tell meh police looking for meh. Ah end up going back in de Coconut and

Elie mother tell meh dey now pick up Elie and dey looking for me, Leeta and Hoxnut. Ah come back home and ah see de jeep pass. Dey stop on de junction. Dey stay a little while. Dey come and dey search home and end up findin meh and carry meh down in de station…"

8. Eli Azeez and Byron Vespry also called "Hoxnut" were eventually arrested and interviewed by the police but were not detained.

9. After the appellant's interview was completed, around 6:00p.m., PC Flaviney read over the notes to him and asked him for a statement in relation to the interview and the appellant agreed. He also offered to take the police officers to the areas which he had mentioned in the interview. Ag. Supt. Paul signed the interview notes and PC Flaviney affixed a certificate, the date and his signature on it.

10. On that same day, the appellant took the police officers to various areas and pointed out certain things to them including a track leading to the deceased's home and said, "*Is here ah pass to go to de back of de house".* He then took the police officers to the back of the deceased's home, pointed to a spot and said, *"Dey is where ah get de piece of steel ah use to try to open de front door".* PC Flaviney took possession of a piece of steel in a wheelbarrow and Mr. Lakpatsingh said that it belonged to him and was kept on his premises. The appellant also pointed to a door to the front of the deceased's home and said, *"Dat is de door ah did try to prise open with de piece of steel. And when ah hear noise in de house, ah run in de back and den ah come back and knock and when de girl open de door ah ask she for some portugal and she did tell me to go and take it but doh raid de tree and I turn and walk away and den she try to close in de door. Ah rush and push she down and ah see a knife on a table in de kitchen and ah went and take it and stab she up."* The appellant also pointed to a wall in the reception area at the front entrance of the house and said, *"That is where I wipe de blood with de towel"*. He then took the police officers to the back of the house and pointed to the wheelbarrow and said, *"Dey is where I put de piece of steel".* The appellant then

took the police officers to his home in McDonald Trace in Cedros. He directed them to a jersey which was hidden in a heap of branches in the yard and said, *"Dat is de jersey ah had on when ah stab up de girl and it did get blood on it and ah throw it dey".* PC Hosein took possession of it and later sent for forensic analysis. The Certificate of Analysis revealed that no blood had been identified on it. At each of the stops and at the time of the making of the utterances, the appellant was cautioned and informed of his constitutional rights and privileges and he made no requests.

11. The officers then escorted the appellant to the Cedros Police Station where he again agreed to give a statement in relation to the incident. After cautioning him and informing him of his constitutional rights and privileges, PC Flaviney recorded the statement which was made in the presence of the appellant’s brother, Gregory Lewis and a Justice of the Peace.

12. On January 23, 2004, the appellant was formally charged with the murder of the deceased.

THE CASE FOR THE APPELLANT

13. The case for the appellant was one of a denial. He stated that he only confessed to the killing of the deceased because his life and the lives of his family members were threatened by Eli Azeez.

14. The appellant gave an account of what transpired on the day in question. Around 4:00 p.m., he met Kateedee Jagroop and Errol Dadaa in front of their home in Bamboo Village. They hired a taxi and were dropped off at the deceased’s house. There were police officers and other persons present at the house. The appellant stood in the front driveway for about five minutes and then left for Bamboo Beach where he took a bath before returning home. He then went to Ms. DP's shop

around 5:00p.m. Whilst there, he saw “Hoxnut”, his brother Gregory and a man known to him as “Lion”. The appellant stayed there until 7:00p.m. and then went straight home.

15. Upon arriving home, he went to a track at the side of his house where he smoked a cigarette. He saw a police jeep driving down the hill and he stooped down in the track. The police jeep stopped in front of his house and more than four police officers alighted. They found the appellant standing in the track and told him to lie on the ground. He hesitated to do so and one of the officers shoved him on the ground and handcuffed him behind his back. The appellant was not told the reason for being handcuffed. A police officer told him that he had a search warrant to search his house and it was shown to him. The appellant was unable to read the details of the search warrant. He was taken upstairs and the same officer who had shown him the warrant enquired about the clothing which he had worn earlier that day. The appellant directed the officer to a pair of pants and a jersey on the kitchen counter. Those were the clothes which he had worn while taking his sea bath earlier. The officer took possession of the clothing. After the search was completed, he was arrested and put into the police vehicle. The police officers questioned him about *"the girl murder"* and he denied having any knowledge of it.

16. The appellant was taken to the Cedros Police Station where he was placed in a cell. Sometime later, Eli Azeez was arrested and placed in the same cell. Azeez told the appellant that he (the appellant) had to accept responsibility for the deceased’s murder. He threatened the appellant that if he refused to do so, he would take the lives of the appellant and his brother. The appellant eventually told him that he would accept responsibility for the murder. Azeez explained to the appellant the details about how the deceased was killed and told him what he should say to the police.

17. On January 21, 2004, around 7:00p.m, the appellant was taken to the Point Fortin Police Station. He tried to tell Sgt. Palloo that he was being threatened but the officer did not pay him any attention. He did not tell anyone else that he had been threatened. He however told his brother of the threats made by Azeez approximately two years before the trial. The appellant was later interviewed and told the police about the circumstances surrounding the deceased's murder in line with what Azeez had told him, except for some minor details which he added and changed.

18. The appellant was then conveyed to the Cedros Police Station. On the way there, he was taken to the scene of the crime and to his home. While at his home, he pointed out a jersey in some branches, which Azeez had told him he had put there earlier. Later that day, the appellant gave a statement to the police in the presence of a Justice of the Peace and his brother, Gregory in which he said things that were different from what he had said in the previous interview. He accepted that the earlier statement was read over to him and that he had signed it but maintained that it contained the account which Azeez had told him to give after making threats against him.

19. During the years 2006 to 2007, he received further threats whilst in prison. He was threatened by Brian Vespry, the brother of Byron Vespry, that if he *"called Byron's name and made him go to jail, he would be dealt with outside".*

20. In cross-examination, the appellant said that on January 20, 2004, between 1:30p.m. and 2:30 p.m., he was standing on the road near to the deceased's house. He had gone there to meet a friend named "Zeffer" who lived in that area. He saw "Thinners" pass by in a truck and he (the appellant) hailed him out and waved at him. The appellant at that time was more than 100 feet away from the deceased's house. The appellant accepted during cross-examination that around 3:30p.m., while heading to Bamboo Beach, he saw Jared Sherwood in the yard of

a house near to the beach. At the time, the appellant was wearing a white jersey with stains on it. Sherwood asked him if the stains were blood stains and he replied in the negative.

THE APPEAL

Ground 1: The Learned Trial Judge neglected to consider whether the issue of felony/murder should have been placed before the jury, so that if they found the appellant guilty, they (the jury) would have the option of considering whether the offence of murder was committed in circumstances where the felony/murder rule was applicable. (sic)

Submissions made on behalf of the Appellant

21. The crux of Mr. Heath's argument under this ground was that there was evidence before the jury which gave rise to the felony/murder construct. This was based primarily on two features of the evidence on the prosecution case, namely:

    (i) The appellant's confession statement to the police which was tendered into evidence in which he said, *"Ah start to chook she up again and she start to bleed on the ground and ah run upstairs and ah went in ah room and ah open ah drawer and ah take fifteen hundred dollars."* This statement was relied upon by the prosecution for the truth of its contents and was also referred to by the prosecution witness PC Flaviney in his evidence.

    (ii) The evidence of Jade Lakpatsingh that sometime before the day of the incident, the deceased had brought home $1,000.00 from the bank which she put in a purse in her drawer. When the deceased's

body was discovered, Jade Lakpatsingh checked the purse and found that it was empty.[2]

22. Mr. Heath contended that it was entirely plausible for the jury to conclude that the appellant's presence at the deceased's home was to break and enter the home and/or commit larceny and that against that backdrop, murder ensued. The judge in her summing up however directed the jury only in relation to murder "simpliciter" (sic) or "classic" murder.

23. Mr. Heath submitted that the appellant's request to plead guilty on the basis of felony/murder was refused by the Director of Public Prosecutions (the DPP). He submitted however that notwithstanding the DPP's exclusive domain to indicate the basis upon which the case against the appellant would be presented, once the evidence suggested an alternative basis than what was raised on the evidence, which the jury were bound to consider, then the trial judge was duty bound to give the jury the requisite directions in law.

Submissions made on behalf of the Respondent

24. Counsel for the respondent, Mr. Gaspard, SC, submitted that while there was an evidential basis to support the triggering of directions in keeping with the felony/murder rule, the learned trial judge's exercise of her discretion not to sum up the case on that basis was unassailable since:

a) The Respondent's case was not advanced on the basis of felony/murder. The decision in **R v Meher**[3] was relied on in support of the proposition that trial judges should refrain from advancing an

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[2] See the Notes of Evidence at page 7.
[3] (2004) NSWCCA 335.

argument in support of the prosecution case that was not raised by the prosecution.

b) The learned trial judge must have been aware of the DPP's rejection of the appellant's offer to plead guilty on the basis of felony/murder, prior to trial;

c) At the Ensor hearing, the issue of felony/murder was not canvassed nor advanced by either prosecuting or defence counsel;

d) During the presentation of the closing addresses on both sides, the issue of felony /murder was neither canvassed nor advanced;

e) The case for the appellant was a denial that he had committed the *actus reus* of the offence. Thus, the issue of *mens rea*, whether in terms of constructive malice or felony/murder on the one hand or express or implied malice on the other hand, did not arise; and

f) Had the judge given directions to the jury on the basis of felony/murder, the jury's route to verdict would have been unnecessarily complicated.

25. Mr. Gaspard further submitted that the exercise of the judge's discretion in not placing the issue of felony/murder before the jury was unassailable, since to have done otherwise would have created a more favourable position for the prosecution and it would have provided an additional basis upon which the liability of the appellant could have been established.

26. Mr. Gaspard also submitted that should this Court find that the judge exercised her discretion in not leaving the issue of felony/murder for the jury's consideration, it was incumbent on the appellant to show that the discretion was exercised wrongly by failing to take relevant factors into account or by taking into account irrelevant factors or by acting unreasonably. It was submitted that the appellant had failed to do so.

The Law, Analysis and Reasoning

The evidence

27. The prosecution led evidence that the appellant gave an interview and a confession statement to the police, both of which were recorded in which he stated that he was armed with a piece of iron and "…*ah run through de back and come in front*". He tried to open the front door but heard some noise inside so he ran to the back of the house and dropped the piece of iron. He watched to see if anyone was coming and then went up to the front door and knocked. He heard the deceased say, *"Mammy that is you?"*. He knocked again and the deceased opened the door and he asked her if Steve (her father) was at home to which she replied *"No".* He then asked her for some portugals and she replied, *"take some but doh raid de tree"*. He walked away but turned back whilst the deceased was closing the door and pushed it and she fell to the ground. He was already inside. He took up a knife from the kitchen table and dealt her multiple stab wounds about her body and then made his way upstairs where he helped himself to $1,500.00 which he found in a black purse. He returned downstairs wiped away his footprints and handprints, put the knife in the hands of the deceased, left the house and made his way to the beach.

28. The felony/murder rule[4] as amended provides that a person who sets out on the commission of an arrestable offence involving violence and death occurs is liable to be convicted of murder even if the killing was done without the intention to kill or to cause grievous bodily harm.

29. The evidence disclosed that the appellant first attempted to break and enter the home of the deceased. However, when he realised that someone was at home he

[4] section 2 A (1) of the Criminal Law Act Chapter 10:04

reconfigured his plan and sought to gain legitimate entry by knocking on the door. The deceased opened up to him, whereupon he enquired whether Steve was at home. Having ascertained that he was not, the appellant forced his way inside, confronted the deceased and inflicted the fatal injuries in such a grievous manner that she remained on the ground bleeding profusely, while he made his way upstairs and retrieved the money.

30. In **Nimrod Miguel v The State**[5] the appellant was convicted of murder. The evidence was that he and four others had set out to find a car to rob. They came upon the deceased car, carried him into the bushes, tied him up, searched his car and one of his confederates shot and killed him. They then drove the car to Princess Town and the next day the appellant assisted in changing the number plates of the car.

31. Although the question before the Board revolved around whether the appellant had withdrawn from the killing itself, the Board in examining the evidence concluded that it was open to the jury to consider whether the appellant's participation was in the course or furtherance of the robbery and that they were also entitled to take into account all that he said and did including the events which occurred after the killing. In delivering the decision of the Board, Lord Clarke of Stone-cum-Ebony stated at paragraph 29:

> *"29. The judge made it clear that the jury had to be sure that the appellant was engaged in the course or furtherance of the robbery at the time of the murder. In answering that question, it was plainly relevant for the jury to consider not only what he said but what he did. It was thus relevant for them to consider the evidence that after the murder he went home in the*

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[5] [2011] UKPC 14

stolen car and indeed the events of the next day. This was not a case in which the events of the next day stood alone. It was open to the jury to conclude that the act of going home in the car with the others was an act in the course or furtherance of the commission of the robbery…"

32. Similarly, in the instant case, the question arises as to whether the deceased met her death in the course or furtherance of the commission of the offence of robbery with violence. In determining that question, the jury was entitled to take into account everything he said and did. Although he inflicted the violence upon the deceased prior to the taking of the money, it was open to them to consider whether the killing facilitated the robbery itself. Unlike **Nimrod Miguel,** the events here did not carry over to the next day, but it was also open to the jury to consider that the events comprised one transaction involving the killing which took place downstairs and the robbery which took place upstairs. Regrettably, felony/murder was never left for the jury's consideration.

R v Meher [6]

33. **R v Meher** is an authority for the proposition that the trial judge should refrain from advancing any argument in support of the prosecution case which was not put forward by the prosecution. In our view, **Meher** dealt mainly, if not exclusively, with arguments based on the evidence. The central issues in **Meher** were whether the appellant or his son had taken the gun to the temple and whether it had been discharged accidentally. During the summing up, the trial judge sought to advance and develop the factual argument that if the shots had occurred prior to the shouting, then that assisted the central issues which had to be determined. Such an argument was never posited by either the prosecution or the defence. Essentially, this argument involved the suggestion that the shouting must have

[6] [2004] NSWCCA 355

accompanied the struggle for the gun, and that if the shots preceded the shouting, then it must have been that the gun was discharged prior to there being a fight over it. This argument suggested that the prosecution version of events was correct. The court held that the summing up as a whole was unbalanced and that there was a miscarriage of justice and stated that:

> *"116. In substance, his Honour was advancing an argument based on a gap between the shots and the shouting, as circumstantial proof in support of the critical issues in the case, without having given consideration to any other rational inference that was open, and in a situation where neither counsel had addressed it."*

34. Indeed it was observed in **Meher** that *"It is quite another thing for a judge to advance an argument, on behalf of the Crown in support of the Prosecution case, which the judge considers was available, but was either overlooked, or not used by the Prosecution."*[7] **Meher**, therefore, makes a distinction between alternative lesser counts which are fairly open on the evidence which the trial judge is permitted to bring to the attention of the jury though not raised by the prosecution or defence, and arguments which the trial judge is strictly prohibited from advancing because they would strengthen the prosecution case and lend themselves to judicial partiality or deprive the parties of the opportunity to admit or meet the argument.

35. Apart from advancing arguments based on an alternative lesser count that is fairly open on the evidence or an available defence, even if not raised by either party, **Meher** also sets out other circumstances in which the court may legitimately raise arguments on the evidence which were not raised by the prosecution or the defence. These are as follows:

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[7] Meher para 87.

(i). where it was *"…necessary to do so in order to ensure that the jury has sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence. Some such occasions are obvious - where, for example, the principal "defence" is one of alibi, yet there is clear evidence of intoxication which would be relevant to specific intention in the event that the alibi fails."*[8]. Since such a direction would weaken the alibi the trial judge should discuss the need for the direction with counsel before the summation commences;

(ii). there will be no miscarriage of justice if arguments which may have been available on the evidence are not put by the judge in the summing up if they had not already been put by counsel; and

(iii). where some matter may have arisen which had not been dealt with by the prosecution and it was necessary to restore a balance to the trial, and where the prosecution had no reason to foresee it, or any opportunity to deal with it.

36. In the instant case, as in every case, the duty of any jury is to return a true verdict in accordance with the evidence. On the evidence, it was open for them to conclude that the deceased met her death during or in the furtherance of the commission of a robbery. Therefore, it was necessary for the trial judge to equip the jury with sufficient knowledge and understanding of the evidence in order to discharge their duty. The appellant denied that he had committed the offence and explained that his confession to the killing was based on threats he received from one Ellie Aziz who told him that if he refused to accept responsibility for the deceased murder he would take the lives of he and his brother. While a direction in conformity with the felony/murder rule may have had the effect of undermining

[8] Meher para 90 where the court referred to R v Heuston (1995) 81 A Crim R 387 at 393.

the appellant's defence of denial, it was open for the trial judge to discuss the issue with counsel on both sides. Subsequently, it was then the duty of the trial judge to make the final call, despite counsels' submissions one way or other. The introduction of this approach would not have had a detrimental effect on the case for the appellant. The judge would have been obligated to give a clear route to verdict direction to the jury. The jury having found the appellant guilty of classic murder meant that they were sure that he was present and that he committed the crime. The application of the felony/murder rule would have given the jury the opportunity to explore the option that the deceased met her death during the course or the furtherance of the commission of the robbery. By not giving the direction the trial judge deprived the appellant of having a full and proper consideration of his case.

Duty of trial judge

37. The court in **Meher**[9] highlighted the task of the trial judge in the following way:

> ***"76. It is trite law that the fundamental task of a trial judge is to ensure a fair trial... So far as the accused is concerned, it is the case which the defence makes that the jury must be given to understand, including any matter that is properly open upon which they might find for the accused : Pemble v The Queen [1971] HCA 20; (1971) 124 CLR 107."*** [emphasis added]

38. In **Pemble v R,** Barwick CJ expressed the duty of the trial judge as follows:

> ***"Whatever course counsel may see fit to take, no doubt bona fide but for tactical reasons in what he considers the best interest of his client, the trial***

[9] Meher at para 76

judge must be astute to secure for the accused a fair trial according to law. This involves, in my opinion, an adequate direction both as to the law and the possible use of the relevant facts upon any matter upon which the jury could in the circumstances of the case upon the material before them find or base a verdict in whole or in part." [emphasis added]

39. Lord Clyde, in delivering the judgment of the Board of the Judicial Committee of the Privy Council in **Von Starck v R**[10] stated at 429:

> ***"…The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside…"*** [emphasis added]

[10] (2000) 56 WIR 424.

40. In **Richard Daniel v The State,**[11] Lord Hughes at paragraph 48 set out the role of the trial judge (albeit in respect of provocation) as follows:

> *"48. The general rule for the conduct of a criminal trial is that questions of law are for the judge and questions of fact are for the jury. Whether there is evidence on a particular issue which requires the consideration of the jury is itself a question of law. It is on the basis of this practice that a judge will direct a verdict of not guilty if satisfied that there is no evidence on which a jury, properly directed, could convict. The same 'gatekeeping' function is performed by the judge in relation to specific issues in a case which does require the jury to decide on guilt. Such issues may be manifold. Simple examples include whether self defence arises on a charge of violence, whether there is a proper evidential basis for the Crown to rely on an unlawful act, as distinct from gross negligence, on a charge of manslaughter, or whether in a murder case there is an evidential basis only for liability as a principal or also as a secondary party, and if so of which kind. This role of the judge is an important aspect of the common law criminal trial; it is part of the necessity to confine the trial to issues which genuinely arise."*

41. In our view, the trial judge had a fundamental task to ensure a fair trial. This means that she ought to have included any matter which was properly opened upon which the jury might find for the appellant. She was obligated to direct the jury as to any applicable principles of law and any non-direction had the potential to lead to a miscarriage of justice. Felony/murder was properly open upon the evidence and the jury might have found in favour of the appellant. It is immaterial that the defence counsel did not raise the issue either in cross-examination, in his address, or at an Ensor hearing. Neither is it of any importance that it was also not raised

[11] [2014] UKPC 3.

by the prosecution, nor that the Director of Public Prosecution had rejected the appellant's offer to plead guilty under the felony/murder rule. Moreover, it is of no consequence that the trial judge was aware of the appellant's approach to the Director of Public Prosecution on this issue. The duty to secure a fair trial rests solely on shoulders of the trial judge and the position of either prosecuting or defence counsel on any issue cannot detract from her responsibility to ensure that there is no miscarriage of justice. The forensic choices of counsel are not determinative. The duty to secure a fair trial rests squarely with the trial judge. In this case, for whatever reason, all the parties were silent on the issue of the application of the felony/murder rule, but that does not absolve the trial judge of her responsibility to direct the jury on any issue properly opened to them. She carried the burden of all applicable principles of law. The satisfactory course would have been for the trial judge to invite the prosecution and the defence to address her on the subject of the necessity of giving such a direction. Thereafter, having heard their views, the ultimate decision of whether this direction was left with the jury would have been within her domain.

42. The trial judge had the gatekeeping function of determining the question of law of whether there was evidence on a particular issue which required the jury's consideration. She had to determine whether the evidence when viewed in its entirety and taken at the most favourable to the defendant, demonstrated that the issue of felony/murder properly arose and was one in which the jury might reasonably conclude on the appellant's guilt. In this case, it was clear that when the evidence was taken at the most favourable to the appellant, it plainly demonstrated that the specific question of felony/murder emerged and it was one in which the jury might have properly found that the appellant had killed the deceased in the course or in the furtherance of a robbery.
Unfortunately, the trial judge did not follow such a course.

Failure to put felony/murder

43. The trial judge having failed to put the prosecution case on felony/murder, the question now emerges whether this creates any prejudice to the appellant resulting in a miscarriage of justice.

44. In **Nimrod Miguel v The State,** the appellant was charged for murder. The trial judge premised the prosecution case on two alternative bases, that is, under joint enterprise and also under the felony/murder rule. On returning their verdict of guilty to murder, the jury was not asked to say on what basis they had convicted him. The appellant was thereafter sentenced to the mandatory death penalty pursuant to **section 4 of the Offences Against the Person Act 1925**. His appeal against conviction and sentence was dismissed by the Court of Appeal and he subsequently appealed to the Judicial Committee of the Privy Council against, inter alia, his sentence on the ground that the mandatory sentence of death for felony/murder under **section 2A of the Criminal Law Act** infringed his right under **section 5(2) (b)** of the **Constitution of the Republic of Trinidad and Tobago** not to be subjected to cruel and unusual punishment. The Board held that the mandatory death penalty constituted cruel and unusual punishment and was inconsistent with **ss 4(a)** and **5(2)(b**) of the **Constitution**. However, its validity was preserved as an 'existing law' for murder by intent to kill or to do grievous bodily harm, but murder contrary to **section 2A of the Criminal Law Act** (the 'felony/murder rule') was not an existing law and the mandatory penalty was not so saved. In such cases the mandatory death penalty was discretionary. The court further held that since it was not known on which of the two bases, joint enterprise or felony/murder, the jury utilised to arrive at their verdict, then the appeal against conviction was dismissed, but the appeal against sentence was allowed. The matter was remitted for sentencing.

45. In **Richard Daniel v The State,** the trial judge left the prosecution case to the jury on alternative bases i.e shooting with murderous intent or killing in the course or furtherance of an arrestable offence namely aggravated robbery. From the verdict of guilty of murder, it was impossible to tell upon which basis the appellant was found to be guilty. He was sentenced to the mandatory penalty of death. The Board dismissed the appeal on conviction, but allowed the appeal on sentence and applied the finding in **Nimrod Miguel v the State** that the mandatory death penalty for an offence committed under **section 2A** under the **Criminal Law Act** (felony/murder) was not an existing law and was not so saved. Since the basis of the conviction could not be known, the mandatory death sentence was declared unconstitutional and quashed. The case was remitted to the Court of Appeal for the imposition of the appropriate sentence.

46. In **Pitman and Anor v The State**[12], the appellant's admission had founded the application of the felony/murder rule, however, the trial judge for whatever reason presented the case to the jury solely on the basis of intention/joint responsibility. The Judicial Committee of the Privy Council commented that even if there was some benefit to Pitman in the way in which the case was left to the jury he had not suffered a substantial injustice if *"twelve years later his conviction was not quashed or a retrial ordered".* Since he was unarguably guilty of murder, in any event, he had not and his conviction stood.

47. In this case, the appellant was in police custody since January 20, 2004, and on June 30, 2016 he was sentenced to death. The failure of the trial judge to direct the jury in accordance with the evidence deprived the appellant of a verdict on felony/murder and a discretionary death sentence rather than a mandatory one. Unlike Pitman, the appellant had only been convicted four years ago and is not yet

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[12] [2017] UKPC 6.

entitled to have his sentence commuted to life imprisonment under the **Pratt and Morgan**[13] guidelines.

48. The guidance on how to approach sentences where the imposition of the death sentence is discretionary is found in **Daniel Dick Trimmingham v R**[14]**,** where the court established the law as follows:

    (i). the death penalty may only be imposed in the worst of the worst or the rarest of the rare cases; and

    (ii). there must not exist any reasonable prospect of reformation of the accused and the object of punishment could not be achieved by any means other than by the ultimate sentence of death.

49. In this jurisdiction, the courts have consistently sentenced persons convicted of felony/murder by imposing a term of imprisonment.[15] The failure of the trial judge to give the appropriate direction resulted in the appellant suffering a substantial loss, in that although he would still stand convicted of murder he was deprived the opportunity of a discretionary death sentence which would have, more likely than not resulted in a term of imprisonment. Having already spent some 16 years in custody this would have redounded in his favour since he would have been entitled to a full discount of time spent.

50. Having regard to the foregoing the majority finds that there is merit in this ground of appeal.

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[13] Pratt and Morgan v Attorney General 1994] 2 AC 1.

[14] [2009] UKPC 25.

[15] Fizul Rahaman v The State Crim. App. Nos.: P 027/2015; Aguillera and Others Crim. App. Nos. 5, 6, 7, 8 of 2015; Ramoutar and Ors v The State Cr. App. Nos. S 028, 029 and 030 of 2015

51. Before departing, we wish to make it abundantly clear that we are not laying down any rule cast in stone to the effect that the trial judge has a duty in law to factor into her considerations the penalty or consequences of the commission of an offence and to tailor her directions in order to give the appellant the best available option. The time may soon come in the appropriate case when there may be the need to address this issue. In the meanwhile, we accordingly leave its determination of this matter for such a time.

Ground 2: The imposition of the mandatory death sentence upon the appellant was unconstitutional.

52. Mr. Heath submitted that the position of the mandatory death sentence was unconstitutional. We have not had the benefit of full arguments on this ground and in the circumstances, we are constrained to refrain from pronouncing upon it. We would rather leave this issue to be determined in the appropriate case with full assistance from counsel on both sides. Moreover, having regard to the ruling of the majority with respect to ground 1, it is not necessary to decide this point of law here and now.

Ground 3: The learned trial judge did not adequately address the evidence in relation to the appellant having blood stains on his jersey and the manner in which the evidence unfolded made that piece of evidence more prejudicial than probative, to the appellant's detriment.

Submissions made on behalf of the Appellant

53. Mr. Heath submitted that the Certificate of Analysis in relation to the clothing which the appellant had worn on the day in question revealed that no blood was found on them. The prosecution led evidence from Jared Sherwood that on the day of the murder, he (Sherwood) saw the appellant walking down the hill. The appellant "hailed him" and he asked the appellant if the stains on his jersey were blood stains and the appellant respondent in the negative. Further, PC Flaviney in his evidence in chief stated that, "*I told the accused that I had information that he was seen in the area of Krystal Lakpatsingh's home or words to that effect and I want him to tell me the truth and also I had information that he was also seen on the beach with blood on his jersey*"[16] Mr. Heath submitted that in the absence of scientific proof showing that there was blood on the jersey, this evidence of PC Flaviney had no probative value and was extremely prejudicial to the appellant. Mr. Heath contended that Sherwood's interaction with the appellant would have been somehow elevated to the appellant having blood on his clothes by time PC Flaviney gave his evidence.

54. Mr. Heath submitted that the judge in her summing up at page 28, line 12 rehashed what was contained in the Certificate of Analysis in respect of the articles of clothing but she failed to place it in the proper context of the case. He submitted that it was incumbent on the judge to tell the jury that there was no evidence that the appellant had blood on his clothing when Jared Sherwood saw him.

55. According to Mr. Heath, although defence counsel did not object to these pieces of evidence, the judge had a duty to prevent inadmissible evidence form going

[16] Notes of Evidence at page 23.

before the jury. The decision in **Stirland v DPP**[17] was relied on in support of this submission.

Submissions made on behalf of the Respondent

56. Mr. Gaspard submitted that the judge's treatment of the issue of the appellant having blood on his jersey did not render the evidence in that regard more prejudicial than probative since:

   (i) The prosecution case was based on direct and circumstantial evidence, including evidence that the appellant was seen wearing a jersey with a substance resembling blood on it, in the vicinity of a scene of a murder which had been committed with a knife;

   (ii) The evidence of PC Hosein which was admitted unchallenged under section 37A of the Criminal Procedure Act Chapter 11:02 by way of formal admissions clearly contained evidence of the appellant's oral, inculpatory utterance, *"Dat is de jersey ah had on when ah stab up de girl and it did get blood on it and ah throw it dey".* This was after the appellant had led PC Hosein and the police officers to his home on the evening of January 22, 2004;

   (iii) The appellant's contention that there was no evidence of blood on the jersey was incorrect. The jury were entitled to find, if they believed the evidence of PC Hosein, that the appellant did in fact have blood on his jersey at the material time, since he had said so himself;

   (iv) The fact that there was no scientific evidence led by the prosecution at the trial to confirm that there was blood on the appellant's jersey must be viewed against the backdrop of the other evidence in the case, including the oral admission of the appellant that, shortly after he stabbed the deceased repeatedly with a knife, he took a bath in the sea wearing the same clothing; and

[17] [1944] AC 315.

(v) The appellant's contention, that it was speculative to say that the stains on the jersey were blood stains, was misplaced having regard to the categorical, unchallenged oral admission made by the appellant.

57. Mr. Gaspard submitted that although the evidence of Jared Sherwood and PC Flaviney could have been forensically handled in a more clinical manner by the trial judge, her summing up read as a whole was adequate. As a result, the appellant would have suffered no substantial miscarriage of justice.

The Law, Analysis and Reasoning

58. In relation to the blood stains on the appellant's jersey, the judge in her summing up said:

> *"When the Accused was almost past Jarrie, Jarrie asked the Accused if that is blood on him and the Accused said no, and then the Accused continued on his way towards the beach. Jarrie told you that he saw stains on the Accused so that is why he asked if it was blood, he wasn't a hundred percent sure so that is why he asked. He saw the stains at the back of the grey tee shirt that the Accused was wearing. He told you it was a few spots, one inch to two inches in size and the stains were brownish. And he explained to you that he asked the Accused if it was blood because this was the first thing that came to him. He told you the Accused was about 13 to 15 feet away from him when he saw these spots and he believes that the Accused was wearing a black pants at the time. He told you [that] the Accused went down on the beach and nothing was blocking his view of the Accused, it was a sunny day and when he saw him no one was with the Accused."*[18]

[18] See the Summing Up dated 20th June, 2016 at page 20, lines 8-25.

> *"Let me deal one time with the clothing which Officer Ramtoole took from the home of the Accused. So you recall he submitted those items of clothing to the Forensic Science Centre and received a Certificate of Analysis in respect of them. So, members of the Jury, the Certificate of Analysis is available, I will summarize what it says. It says that on February 19, 2004, the following exhibits were submitted to the Trinidad and Tobago Forensic Science Centre by Corporal Ramtoole of the Cedros Police Station for analysis and report, one white short sleeved printed jersey, and one pair of black short pants with markings, as outlined by Officer Ramtoole. No blood was identified on the white short sleeved jersey or the black short pants…"*[19]

59. The prosecution case was based on a combination of direct and circumstantial evidence, comprising of evidence from persons who were near to the scene of the crime and the oral and written statements attributed to the appellant. From the evidence, when Jared Sherwood met the appellant at the material time in the vicinity of the scene of the crime, he observed a substance resembling blood on the appellant's jersey. Sherwood asked the appellant if the substance was blood and the appellant replied in the negative. In addition, according to PC Hosein, on the evening of January 22, 2004, during the course of investigations at the appellant's home, the appellant led him to a jersey and said, *"Dat is de jersey ah had on when ah stab up de girl and it did get blood on it and ah throw it dey"*.

60. The jury would have had to consider the totality of the evidence surrounding the "blood stained jersey". They would have had before them the certificate of analysis which revealed that no blood was detected on it. The judge properly highlighted the findings of the certificate of analysis in relation to the jersey in her summing up. There was also a plausible explanation on the evidence for the finding in the certificate of analysis which came from the appellant's oral admission, that shortly after he repeatedly stabbed the deceased, he went to the

[19] See the Summing Up dated 20th June, 2016 at page 28, lines 12-24.

beach where he took a bath wearing the same clothing. The jury also had before them PC Hosein's evidence as to the appellant's confessions, that the appellant had gotten blood on his jersey after he stabbed the deceased. These issues were left squarely within the jury's domain. The evidence of PC Flaviney against this background was therefore not more prejudicial than probative and the judge's manner of dealing with it was not unbalanced and led to no unfairness to the appellant.

We all agree that there is no merit in this ground of appeal.

Moosai J.A.

In this appeal, with regard to grounds 2 and 3, we are all in full agreement.

61. Specific to the 1st ground of appeal however, I agree with Soo Hon JA that the trial judge had a fundamental task to ensure a fair trial; she ought to have included any matter which was properly open upon which the jury might find for the appellant; felony/murder arose on the evidence. I am in further agreement with Soo Hon JA that the conviction of murder stands, but that the appeal against sentence be allowed. Accordingly, the matter ought to be remitted to the judge below for the imposition of an appropriate sentence.

62. Even though we have not had the benefit of full constitutional arguments, I wish to add, from this perspective, a few brief comments of my own on this vexed issue as to whether a trial judge, where murder at common law and felony/murder have arisen on the evidence at the close of the case, is obliged to place before the jury felony/murder.

63. In the watershed case emanating from the Caribbean Court of Justice of **Nervais v The Queen**[20], the protection of the law or due process was regarded as including the right to a fair trial. The trial process does not stop at the prosecution and conviction of the accused, as sentencing is a congruent component of a fair trial. The principles of a fair trial must accordingly be applied to the sentencing stage: See **Nervais** judgment summary, paragraphs [8] and [9]. It is clear that at common law a judge must pass a sentence of death upon a person convicted of murder with the requisite intent. Moreover, the mandatory death penalty for murder amounts to cruel and unusual punishment within the meaning of the Constitution: **Matthew v The State**[21]. Consequently, the judge has to impose the mandatory sentence of death upon a person so convicted notwithstanding. However, in a case where felony/murder arises, a court may very well be called upon to determine whether an accused will be deprived of the right to the protection of the law by the removal of this issue from the jury's consideration. A possible reason being, the risk of exposure to a mandatory sentence of death in circumstances where, should he be found guilty on the felony/murder construct, it is highly unlikely that he would receive such a sentence, which the jurisprudence reveals is reserved for the most extreme and exceptional cases, 'the worst of the worst': See **R v Trimmingham.**[22]

Dissenting Judgment of Mark Mohammed, J.A.

64. I am in agreement with the reasoning of the majority in respect of Ground 3. With respect to Ground 2, I agree with the view expressed by the majority to the extent that any pronouncement on the issue raised therein is best left for an appropriate case in which the court has had the benefit of full arguments. However, for the

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[20] [2018] CCJ 19 (AJ).
[21] (2004) 64 WIR 412 UKPC (TT).
[22] [2009] UKPC 25.

reasons explained below, I regret that I am unable to agree with the analysis and conclusions of my learned colleagues on Ground 1.

Ground 1: The Learned Trial Judge neglected to consider whether the issue of felony/murder should have been placed before the jury, so that if they found the appellant guilty, they (the jury) would have the option of considering whether the offence of murder was committed in circumstances where the felony/murder rule was applicable. (sic)

The Submissions

65. Mr. Heath's core submission is that there was evidence before the jury which gave rise to the felony/murder construct. He submitted that notwithstanding the DPP's exclusive domain to indicate the basis upon which the case against the appellant would be presented, since the evidence suggested an alternative basis for the finding of guilt, on the basis of the felony/murder construct, the judge ought to have directed the jury on that basis as well.

66. Mr. Gaspard SC submitted however that while there was an evidential basis on which directions based on the felony/murder construct could have properly been given, on the facts of this case, the judge's decision not to so direct ought not to be impugned. He submitted that the prosecution case was not advanced on the basis of felony/murder and that, on the authority of **R v Meher**[23], trial judges should refrain from advancing an argument in support of the prosecution case which was not raised by the prosecution. In support of his submission, reliance was placed on the following factors, among others: (i) the issue of felony/murder was not canvassed at the trial by either side during the conduct of the case, in the closing addresses and at the Ensor hearing; and (ii) the trial judge must have been

[23] [2004] NSWCCA 355.

aware of the DPP's rejection of the appellant's offer to plead guilty on the basis of felony/murder, prior to the trial. Mr. Gaspard SC further submitted that placing the issue of felony/murder before the jury would have resulted in their route to verdict being unnecessarily complicated and as well, it would have created a more favourable position for the prosecution since it would have provided an additional basis upon which liability could have been established.

The Law, Analysis and Reasoning

67. At its core, three issues of principle are implicated here in addition to the intersecting lines between them. The first issue of principle is the ultimate responsibility of the court to ensure a fair trial. The second issue of principle is the importance of maintaining an appropriate separation between prosecutorial and judicial functions. The third issue of principle is the ensuing and as well, the overall need for the court to carefully avoid overstepping its own proper role, thereby descending impermissibly into the arena. In my view, this is not an area which lends itself to the formulation of a prescriptive position because it is very much fact and context sensitive. In the factual milieu of this case, for the reasons which I shall explain, my view is that the court would have overstepped its role by proceeding to direct the jury along the lines of the felony/murder construct.

Lines of Authority – Judicial Restraint

68. With respect to the second issue of principle adverted to in paragraph 4 above, trial judges, who have the best feel for the case, as well as the Court of Appeal, should be mindful of the importance of maintaining an appropriate separation between prosecutorial and judicial functions. I am, of course, not suggesting that this principle will always be determinative of the issue of whether a case should be premised on a particular predicate. However, it cannot be casually ignored.

69. This is illustrated in the decision of the High Court of Australia in **James v The Queen**[24]. In that case, the appellant was charged with the offences of "intentionally causing serious injury" and "recklessly causing serious injury". At the trial, defence counsel, for forensic reasons, did not ask the judge to direct the jury on the lesser alternatives of "intentionally causing injury" or "recklessly causing injury". Those alternatives were not perceived by either side as being realistically open. The appellant was convicted. On appeal, one of the grounds advanced was that the trial judge failed to leave the lesser alternatives to the jury. The court considered the issue of the trial judge's legal obligation in relation to lesser alternatives in those circumstances. The majority in that case found that fairness to the appellant did not require that the alternative verdicts be left since to have done so might have jeopardised the appellant's chances of an acquittal and further, it might have resulted in the central issue at the trial becoming blurred with the introduction of additional [and uncharged] pathways to conviction. In their analysis of that issue, the majority referred to the importance of maintaining the separation between prosecutorial and judicial functions. At paragraphs 37, the majority said:

> *[37]* ***The importance under Australian law of maintaining the separation between prosecutorial and judicial functions has been stated in a number of this Court's decisions*** *since Benbolt (1993) 60 SASR 7 [Maxwell v The Queen (1996) 184 CLR; Likiardopoulos v The Queen (2012) 247 CLR 265; Elias v The Queen (2013) 248 CLR 483; Magaming v The Queen [2013] HCA 40].* ***The view that it is the duty of the trial judge to invite the jury to determine the accused's guilt of an included offence at a trial at which the prosecution has elected not to do so is incompatible with the separation of those functions. It is not the function of the trial judge to prevent the acquittal of the accused should the prosecution fail to prove guilt of the offence, or offences, upon which it seeks the jury's verdict. At a trial at which neither party seeks to rely on an included offence, the trial judge may rightly assess that proof of the accused's guilt of that offence is not a real issue. In such an event, it would be contrary to basic principle for***

[24] [2014] HCA 6.

the trial judge to embark on instruction respecting proof of guilt of the included offence. [emphasis added]

70. The majority went on to say at paragraph 38:

> *"[38]* ***The trial judge's duty with respect to instruction on alternative verdicts is to be understood as an aspect of the duty to secure the fair trial of the accused. The question of whether the failure to leave an alternative verdict has occasioned a miscarriage of justice is answered by the appellate court's assessment of what justice to the accused required in the circumstances of the particular case. That assessment takes into account the real issues in the trial and the forensic choices of counsel. As earlier noted, not infrequently defence counsel will decide not to sully the defence case (that the only proper verdict is one of outright acquittal) by an invitation to the jury to consider the accused's guilt of a lesser offence. Such a forensic choice does not prevent counsel from submitting that the alternative verdict should nonetheless be left. Much less does it prevent counsel from making that submission where, as here, he or she is asked about the matter. It remains that the forensic choices of counsel are not determinative. The duty to secure a fair trial rests with the trial judge and on occasions its discharge will require that an alternative verdict is left despite defence counsel's objection."*** [emphasis added]

71. Although the principle set out in the decision in **James v The Queen** relates to directions on alternative lesser verdicts, in my view, it could as well properly lend itself to application on a broader level, to verdicts on the alternative basis of felony/murder.

72. As a creature of the Constitution, the independent Office of the Director of Public Prosecutions has a high level of discretion vested in it which takes into account matters of public interest and policy. In the judgment of **Lord Bingham and Lord Walker in Sharma v Brown-Antoine and others**[25], their Lordships, in discussing

[25] [2007] 1 WLR 780.

the issue of the reviewability of the decision of the Director of Public Prosecutions[26], said at paragraph 14 (pages 788-789):

> *"**The courts have given a number of reasons for their extreme reluctance to disturb decisions to prosecute by way of judicial review. They include:***
>
> > ***(i)"the great width of the DPP's discretion and the polycentric character of official decision-making in such matters including policy and public interest considerations which are not susceptible of judicial review because it is within neither the constitutional function nor the practical competence of the courts to assess their merits**" (Matalulu [2003] 4 LRC 712, 735, cited in Mohit [2006] 1 WLR 3343, para 17);*
> >
> > *(ii) **"the wide range of factors relating to available evidence, the public interest and perhaps other matters which [the prosecutor] may properly take into account**" (counsel's argument in Mohit, at para 18, accepting that the threshold of a successful challenge is "a high one")*
> >
> > *...*
> >
> > *...*
> >
> > *(v) **The blurring of the executive function of the prosecutor and the judicial function of the court, and of the distinct roles of the criminal and the civil courts**: R v Humphrys [1977] AC 1, 24, 26, 46, 53, Imperial Tobacco Ltd v Attorney General [1981] AC 718, 733, 742, R v Power [1994] 1 SCR 601, 621–623, Kostuch 128 DLR (4th) 440, 449–450 and Pretty [2002] 1 AC 800, para 121."* [emphasis added]

73. Although these factors were referred to in the specific context of the initiation of a prosecution and the reviewability of that decision, they also resonate, to some

[26] **Baroness Hale, Lord Carwell and Lord Mance in their judgment** expressed their full agreement with the proposition that judicial review of a decision to prosecute is an exceptional remedy of last resort, for the reasons which Lord Bingham and Lord Walker identify in para 14.

degree, with respect to the manner in which the DPP chooses to conduct a particular prosecution.

74. The issue relating to the permissible area within which a trial judge may draw to the jury's attention an argument that was not put by counsel was discussed in the decision of the Supreme Court of New South Wales in **R v Meher**[27]. In that case, the appellant was convicted of the offences of wounding his ex-wife with intent to murder her; being in possession of and using a pistol without being authorised by a license or permit; and assaulting his son. On appeal, it was argued, inter alia, that there was a miscarriage of justice as the judge's summing up was imbalanced. It was submitted that the judge directed the jury on an argument which was not advanced by the prosecution and that the defence had no opportunity to meet it. The Court found merit in this ground of appeal, quashed the convictions and sentences and ordered a retrial. In giving the judgment of the court, Wood CJ said at paragraphs 87, 88 and 90:

> *"[87] Finally**, it may be observed that trial judges should normally refrain from advancing an argument in support of the Crown case that was not put by the Crown. It is one thing to bring to the attention of a jury an alternative lesser count, that is fairly open on the evidence, or an available defence, even though it was not mentioned by the Crown Prosecutor and defence counsel, in their closing addresses, for example manslaughter in a case where the accused was indicted on a count for murder. It is quite another thing for a judge to advance an argument, on behalf of the Crown in support of the Prosecution case, which the judge considers was available, but was either overlooked, or not used by the Prosecution.***
>
> *[88]* ***There are two reasons for the unacceptability of a judge using the summing up as a vehicle for strengthening the Prosecution case. First it is inconsistent with judicial impartiality. Secondly, to do so***

[27] Meher (n. 23).

denies the Prosecution and the defence the opportunity either to disavow, or to meet the argument.[28]

…

[90] The permissible area within which a trial judge may draw to the jury's attention an argument that was not put by Counsel, was conveniently noted by Hunt CJ at CL in R v Heuston (1995) 81 A Crim R 387 at 393:

> ***"Sometimes, of course, a judge is obliged - even in what might be described as the ordinary case to draw the attention of the jury to an argument which has not been put by counsel,*** *if it is necessary to do so in order to ensure that the jury has sufficient knowledge and understanding of the evidence to discharge their duty to determine the case according to the evidence.* ***Some such occasions are obvious - where, for example, the principal "defence" is one of alibi, yet there is clear evidence of intoxication which would be relevant to specific intention in the event that the alibi fails.*** *Everyone realises that, from a tactical point of view, if counsel were to address upon such an issue of intoxication it would weaken the strength of his client's case on alibi, and trial judges should usually discuss the need to give directions as to such matters with counsel (in the absence of the jury) before the summing up commences. Other such occasions are not always so obvious,* ***and - again, stated in very general terms in relation to the ordinary case - there will be no miscarriage of justice if arguments which may have been available on the evidence are not put by the judge in the summing up if they had not already been put by counsel. Sometimes, indeed, it may produce positive mischief if the judge raises arguments which could have been but which were not put or requested by counsel."*** [emphasis added]

75. Wood CJ went on to say at paragraph 91:

"Additionally, occasion might arise for the judge to draw attention to some matter which had not been dealt with by the Crown, where that is necessary to restore a balance to the trial, and where the Crown

[28] At paragraph 89, the court referred to the observations of Spigelman CJ, Wood CJ at CL and Kirby J in **R v RTB [2002] NSWCCA 104**.

Prosecutor had no reason to foresee it, or any opportunity to deal with it."

76. Although the issue in **Meher**[29] touched on the judge, on his own volition, adding a factor relevant to the assessment of the credibility of a witness which had not been adverted to by either party, the general principles enunciated are nonetheless of broad application. It is evident from paragraph 90 in **Meher**, referred to above, that these principles are equally applicable to issues of law. The decision in **Meher** is but an illustration, in a very specific evidential context, of the broader principle that a judge should not unilaterally leave for the jury's consideration, an issue that has not been explicitly canvased or which has been, in effect, excluded from consideration.

77. In cases where a judge is considering introducing an issue which has not been raised at the trial, Simon LJ, in the decision in **R v Reynolds**[30], issued the following guidance at paragraph 68:

> *"[68] It was clear that,* ***in general and as a matter of fairness, if a judge was considering introducing an issue that had not been canvassed in the course of a trial, he should, at least, warn a defence advocate before final speeches, so that the correctness of the proposed course could be discussed and an opportunity afforded to the defence to deal with it."*** [emphasis added]

78. On the facts of this case, I am of the view that it would have been inappropriate for the judge to direct the jury in line with the felony/murder construct. The judge would have been fully aware of the following material factors:

[29] Meher (n. 23).
[30] [2020] 4 WLR 16.

(i) On April 28, 2016, three days after the appellant was arraigned and pleaded not guilty to the offence of murder (mens rea), defence counsel indicated to the court that she had received instructions from the appellant to write to the DPP to offer to plead guilty to murder under the felony/murder construct. The matter was adjourned to May 9, 2016. On that day, before the prosecution opened its case, prosecuting counsel indicated that she had received instructions from the DPP to proceed to trial.[31] It is evident from this that the DPP had rejected the appellant's request to plead guilty on the basis of the felony/murder construct.

(ii) The prosecution case was premised strictly on "mens rea murder".

(iii) The issue of felony/murder was neither canvassed during the course of the trial nor in the closing addresses.

(iv) Based on the notes taken at the Ensor hearing, neither party raised the issue of felony/murder at that stage[32].

79. In light of these factors, it would have been palpable that the felony/murder issue was not a live one. There was no need for the judge in this case to invite discussions with counsel on whether the issue ought to have been introduced before the jury, consistent with the approach suggested in **R v Reynolds**[33]. For the judge to have done so would be to engage in an exercise in redundancy.

80. On the facts of this case, a direction on both mens rea murder and felony/murder would have had the real potential to confuse the jury as they would have had to differentiate between the concepts of actual malice and constructive malice in a

[31] See the Notes of Evidence at page 3.
[32] See the Notes of Evidence at pages 173-174.
[33] Reynolds (n. 30).

setting where the evidence of actual malice was clear. As a matter of evidence, it would have been practically impossible to intelligibly and realistically demarcate the boundary line between the two concepts of malice. The duty of a judge is to endeavour to bring clarity to the resolution of issues. The duty of a judge is not to endeavour to confuse, especially so where the evidential context is such that a baseline with the potential for generating confusion is already present. It is readily discernible why the facts of this case did not render it strictly **necessary** for the prosecution to rely on the felony/murder construct.

81. In my view, had the judge on her own volition directed the jury on the felony/murder construct, she would have divested herself of the cloak of judicial impartiality and would have inappropriately descended into an arena reserved for the prosecution (see **R v Meher**). Such an approach would have been incompatible with the separation between the executive prosecutorial function and the judicial function (**James v The Queen**; **Sharma v Brown-Antoine and others**). In the context of a case where neither party relied on felony/murder as an alternative basis for the finding of guilt, it was reasonably open to the judge to find that it was not a live issue. She was under no duty to make any further enquiries at the end of the trial. The exercise of her discretion cannot be faulted on any of the well-known applicable principles. What the reasoning of the majority in effect does is to hold the judge up to the expectation of a standard of absolute, abstract and uncontextualized perfection. However, quite realistically speaking, in the context of the evidence in the case, the issues, the evolution of those issues, the history of the matter and the inherent justice of the case, the judge did all that was legally, reasonably and practically necessary.

82. Cases where classic murder and felony/murder intersect are of a peculiar genre in this jurisdiction because of the sentencing issue involved. In my view, it would be inappropriate for a judge in these specific circumstances to consider sentencing

issues in determining whether to direct the jury pursuant to the felony/murder construct, where the prosecution had explicitly renounced its application at the start of the trial and with the issue not having been resurrected thereafter. Implicit in such an approach would mean that the judge would in effect have had to reason backward from the point of sentencing in order to determine whether both concepts of murder should have been left for the jury's consideration. In the circumstances of this case, that would have been a fundamentally flawed approach because it would have involved an inappropriate intrusion by the judge into the selection of the basis upon which the prosecution case was postulated. In most cases, this is entirely a matter for the prosecution. I do not exclude the possibility that in some cases, it will be entirely appropriate and fair to provide the jury with directions on both mens rea murder and felony/murder. This case however, on its peculiar facts, is not one of them.

83. The line separating the executive function of the prosecutor and the judicial function of the court ought not to be blurred (**Sharma v Brown-Antoine and others)**. In the context of cases in this particular genre, an illustration to illuminate the boundary line is that in some cases, the DPP may be seized of certain information which may not be before the court but which may be relevant and rationally connected to his decision to run the case solely on the basis of mens rea murder. In addition, entirely legitimate issues of prosecution policy may be involved. A court may not be optimally placed to go behind the face of such a decision subject to certain obvious exceptions, including those of any resultant unfairness or prejudice to a defendant. Appropriate care must be exemplified by this Court in not overreaching its proper function and by so doing impliedly fettering the discretion of the DPP. I am not suggesting that the position adopted by the DPP is in any way solely determinative of the issue. It is however a factor which must be given appropriate weight in the relevant factual context. If it is evident that the DPP's decision was a careful and considered one and there is no

resulting unfairness or prejudice to the defendant, then the court ought to be mindful of this. In my view, in this very specific subcategory of cases, a somewhat more nuanced and flexible approach is required to that expounded in the decision of the Judicial Committee of the Privy Council in **Von Starck v R**[34] which was subsequently applied by the House of Lords in **R v Coutts.**[35]

The Court's responsibility to ensure a fair trial

84. The admirable sentiment of achieving the broadest possible guarantee of fairness and justice unquestionably permeates the reasons of my colleagues. It is a sentiment that I am not unmindful of. However, in my respectful view, as a matter of strict law, it cannot lead to the conclusion arrived at by the majority.

85. The reasoning of the majority has not demonstrated **how**, in the context of the substantive criminal trial, putting the case on the basis of felony/murder, (i) would have made it any fairer to the appellant, (ii) would have allowed the appellant to have a fuller and more proper consideration of his case; and (iii) would have allowed the jury to return a truer verdict in accordance with the evidence. In respect of both mens rea murder and felony/murder, the prosecution case would have proceeded on the identical evidence and the defence would have been the same. I am unable to discern, based on the reasoning of the majority, how precisely the judge's decision not to direct the jury on the basis of felony/murder deprived the appellant of having a full and proper consideration of his case. In my view, leaving the issue of felony/murder to the jury would not have made the appellant's case any clearer or more complete. The appellant's defence would certainly not have been in any way compromised. The defence case would not have been artificially distorted, more so in any way that was remotely

[34] (2000) 56 WIR 424.
[35] [2006] 4 All ER 353.

advantageous to the prosecution so as to impair the fair balance of the trial. As far as the evidence and the issues in the trial were concerned, not leaving the case to the jury on the alternative basis of the felony/murder construct could not be productive of any evidential and issue-based miscarriage of justice.

86. Postulating the case on the basis of the felony/murder construct would have afforded an **additional route** to conviction by permitting the employment of an abridged concept of mens rea which the prosecution was, adamantly, not relying upon. I fail to see how that would have made the trial any **fairer** to the appellant, that is, by the provision of **an easier route** to conviction rather than the **harder** orthodox route which required the prosecution to prove the unabridged criteria for the mens rea required for murder. I must respectfully confess that although I have endeavoured to follow it, the logic of this reasoning eludes me. An appropriate analogy would be the following one. The prosecution chooses to "build" its evidential "house" on one foundation and after careful deliberation, they choose the orthodox, more difficult method of doing so. The judge, as a neutral arbiter, then unilaterally decides to in effect assist the prosecution by giving them another foundation upon which to rest their case, although they have made it abundantly clear that they do not want that foundation. In my respectful view, this would not have been fairness in action on the part of the judge but rather the antithesis of fairness.

87. The majority has referred to several decisions in support of their finding that the appellant was prejudiced by not having the issue of felony/murder put before the jury, including **Nimrod Miguel v The State**[36] and **Richard Daniel v The State**[37]. In my view, however, those cases are very fact and context specific and are capable of being distinguished from the instant case.

[36] [2011] UKPC 14.
[37] [2014] UKPC 3.

88. In the decision in **Nimrod Miguel v The State**, the judge left the case to the jury on two alternative bases, that he had been part of a joint enterprise and that he had embarked on the commission of an arrestable offence in the course of which someone had been killed. On the issue of sentence, the Board said that since the jury were not asked to say on what basis they convicted the appellant, it followed that they might have convicted him of felony/murder and that it should be assumed that that was the basis of the conviction. The Board also found that the mandatory death penalty constituted cruel and unusual punishment and was inconsistent with sections 4(a) and 5(2)(b) of the Constitution. However, although the validity of the mandatory death penalty was preserved as an existing law by section 6 of the Constitution for mens rea murder, it was not saved in respect of the felony/murder construct as it was not an existing law. The mandatory sentence of death was quashed and the matter was remitted to the Court of Appeal for sentencing.

89. In the decision in **Richard Daniel v The State**, the judge left the case to the jury on the alternative bases of shooting with murderous intent or killing in the course or furtherance of a violent arrestable offence, namely robbery. The jury were not invited to indicate and did not indicate, the basis on which they returned their verdict. The Board stated that since the basis for the conviction was not known, the mandatory death sentence was unconstitutional, as it was in *Miguel*, and ought to be quashed. The Board found that on the authority of *Pratt v Attorney General for Jamaica*[38], since the appellant had been in custody under sentence of death for more than five years without any question of abuse of process or frivolous resort to time-wasting procedures, no death sentence could constitutionally be imposed on him. The matter was remitted to the Court of Appeal for sentencing.

[38] [1992] 2 AC 1.

90. In my view, the decisions in **Miguel** and **Daniel** do not assist in any way with the resolution of the issues in the instant case. In this case, the judge directed the jury on **one** basis, that is, mens rea murder and a guilty verdict was returned. The issues set out in **Miguel** and **Daniel** are not implicated here.

91. At the end of the day, it is evident that the majority appears to have based at least part of its decision on the appellant's loss of a sentencing benefit for a potential term of years which would have resulted if he had been convicted under the felony/murder construct. This was characterised by the majority as a miscarriage of justice. As to whether this is a legitimate line of reasoning, in the absence of specific arguments on this point, I am at this juncture, unpersuaded.

92. However, the majority at paragraph 51 has made it clear that their findings in ground 1 do not represent a general rule that a trial judge has a duty to factor into his consideration the penalty or consequences of the commission of an offence and to tailor his directions in order to give the appellant the best available option. The majority has indicated that this issue is best left for determination in an appropriate case. I agree with this proposition in principle. However, I would formulate the position in this specific way. This case should not be interpreted as being precedent, either explicitly or by implication, for the proposition that in this genre of cases, the differences in sentences, that is, the existing saved law mandatory death penalty for mens rea murder and a term of years in the vast majority of cases under the felony/murder construct, should influence the predicate upon which a case is postulated. In this case, we have not had the benefit of arguments directed to that specific issue. I readily accept that this is an important issue which requires urgent visitation and resolution. A definitive pronouncement on that issue is best left for an appropriate case in which we have had the benefit of full arguments, which may include a constitutional law dimension.

CONCLUSION

93. In my view, the appellant has not established that the trial judge erred in failing to put the alternative basis of felony/murder to the jury. I am of the opinion that there was no ensuing unfairness to the appellant or miscarriage of justice in the circumstances of this case.

94. For all of these reasons, I am unable to agree with the decision of the majority. I would have dismissed the appeal and affirmed the appellant's conviction and sentence.

DISPOSITION

95. The appeal is allowed. The conviction for murder is set aside and we substitute a conviction for murder under the felony/murder rule. The appeal against sentence is allowed. The matter is remitted to the trial judge for the imposition of the appropriate sentence.

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A. Yorke-Soo Hon, J.A.

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P. Moosai, J.A.

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M. Mohammed, J.A.