THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Crim. App. Nos. P005 and P006 of 2017

Case Nos. 75/2012

Between

BALDATH RAMPERSAD

First Appellant

SUNIL SINGH

Second Appellant

And

THE STATE

Respondent

Panel:

A. Yorke-Soo Hon, J.A.

P. Moosai, J.A.

M. Mohammed, J.A.

Appearances:

Ms S. Chote, S.C. and Mr P. Carter appeared on behalf of the first appellant, Baldath Rampersad.

Mr J. Heath and Ms S. Kalipersad appeared on behalf of the second appellant, Sunil Singh.

Mr T. Sinanan and Ms M. Joseph appeared on behalf of the Respondent.

Date of Delivery: September 10, 2020.

JUDGMENT

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

On June 23, 2020, this court gave its oral decision in this matter. We now proceed to give our written judgment.

INTRODUCTION

1. The appellants Sunil Singh a/c "Kenny Basdeo" ("Singh") and Baldath Rampersad a/c "Sick" ("Rampersad") were both charged between September and October 2007, for the murder of Kamal Harripersad ("the deceased'). On March 9, 2017, they were each found guilty and sentenced to death.

CASE FOR THE PROSECUTION

2. The appellants and Jagdeo "Goolie" Persad ("Persad") were friends. Around 5:10 pm on August 2, 2007, Persad met Singh at a friend at Fireburn, Freeport. They were later joined by Rampersad. Persad subsequently transported the appellants in his motor vehicle to "Guyanese's" hardware. Guyanese" also called "Tuppy's Boss", wanted the deceased to be beaten so that he would not interfere with persons concerning him. They left Guyanese's hardware, had some drinks at a few bars and then made their way to the home of Rampersad's home at Freeport. Around 8:00 pm, Persad transported the appellants to the home of the deceased at St John Road, Carapichima. They arrived at around 12:30 am and Persad recognised the house since he had done some construction work there. He knew that the deceased lived there with his family. Persad parked his vehicle on the roadway at the entrance to the house and waited in the car for the appellants who had entered the house.

3. Taramatie Lochan (Taramatie), the wife of the deceased was asleep inside the house with the deceased and their children. She awoke to the shouts of the

deceased that bandits were inside. She saw two men. The shorter of the two (Singh), was wearing a red jersey and the taller (Rampersad), was wearing a light blue jersey. They were both armed with guns and Rampersad who also had a cutlass, began chopping the deceased and asking him for money and jewels while Singh stood next to the bed holding a gun. She gave them $300.00 and jewellery and Rampersad struck her on the head with a gun.

4. Persad heard the sound of children bawling and crying. He came out of the vehicle and observed Singh exiting the house and holding his left hand which was bleeding. Rampersad was behind holding a cutlass and they told him to start the car.

5. Persad saw two men standing behind his vehicle and one of them was armed with a cutlass. Rampersad cuffed one of them and an altercation ensued. Persad took away the cutlass and placed it inside his car. A woman started running towards the vehicle and Rampersad pointed a gun at her and told her to lie down. The appellants then boarded Persad's vehicle and went to Rampersad's home. Upon their arrival, Persad threw the cutlass inside a drain located at the front of Rampersad's house. He asked the appellants what had transpired in the house and Rampersad told him that he had chopped the deceased for interfering Guyanese. Singh told Persad that when Rampersad was going to chop the deceased, he tried to prevent him from doing so and he (Singh) got chopped instead.

6. Rampersad then instructed Persad to burn the vehicle and to lie low. He then threatened to harm Persad and his family. Persad left the two appellants and proceeded to hide his vehicle at Singh mother's home in Diamond, San Fernando. Some three weeks later, Singh told him that the Rampersad was paid by Guyanese to do that job.

7. Around 1:00 am on August 3, 2007, PC Linsley Coombs and PC Nelson of Freeport Police Station went to the home of the deceased where they saw the body of the deceased lying on the floor. A post-mortem examination on the body of the deceased revealed that he died as a result of multiple chop wounds to his face and body.

8. Around 2:35 am on September 23, 2007, PC Rishi Boodai arrested Singh along the SS Erin Road, Santa Flora who told him of his investigations and cautioned him. Singh made no reply. PC Boodai handed over Singh to Cpl Basdeo at the Santa Flora Police station and Cpl Basdeo observed that he had some scratches on his forehead. Singh told Cpl Basdeo that he had sustained during an argument with his girlfriend the previous day. He was then taken to the Point Fortin Hospital for medical attention.

9. The next morning, around 7:30 am Insp Parriman and Sgt Ramjag met with Singh who told them that his girlfriend had struck him in the forehead with a glass on September 22, 2007. He was cautioned, advised of his rights and he replied: *"I was dey. I didn't chop the man. Is another person chop the man and kill him."* Insp Parriman interviewed Singh in the presence of his sister, Angela Jaimungal and Sgt Ramjag made contemporaneous notes. Later that day he gave a written statement to Insp Parriman in the presence of his sister and a Justice of the Peace, Mr Dexter Soodeen. He told him that A ("Rampersad") told him, and Persad that he was going to give the deceased some "licks" and that he did not want them getting involved. A gave him a toy gun and Persad drove them to the deceased's home. Upon their arrival, Persad remained in the car and he and A entered the premises where the deceased and his family were asleep. The deceased woke up and reached for something close to the foot of his bed and A held on to him and started to punch him. Singh noticed that A had a cutlass which he did not see before. A began to chop the deceased and Singh intervened in order to save the deceased but instead

he got chopped too. A then demanded money and jewels and Taramatie gave Singh $300.00.

10. The following day, Singh was placed on an identification parade but was not positively identified. On September 25, 2007, he was charged.

11. On October 29, 2007, Sgt Ramjag recorded a statement from Balraj Harripersad (now deceased) at Homicide Office, San Fernando.

12. Around 10:00 am, on December 13, 2007, Cpl Ramdeen and WPC Taylor met with Persad at Homicide Office, San Fernando. WPC Taylor informed him of their investigations, cautioned him and told him of his legal rights and privileges to which he replied: "*I happen to be dey, but I was the driver of the car".* He was interviewed by WPC Taylor and Cpl Ramdeen made contemporaneous notes. He described Singh as about 5 feet tall, fair-skinned, short hair, stumpy, about 28 years, with a mole on his face and a tattoo on the left side of his moustache with the words "Short Boss". He described the Rampersad, whom he knew as "Sick" as a tall "Indian fellah" about 5 feet 8 inches with a low haircut and a scar on the top of his head, brown-skinned, muscular, with a tattoo of a gun on his back and two teardrops tattoos on his face in the vicinity of his left eye. At the end of the interview, Persad signed the interview notes and WPC Taylor requested a statement from him to which he replied: *"Ah done tell yuh what happen. Leh we leave it right dey".* On January 5, 2017 (ten years later), Sgt Ramjag recorded a statement from Persad.

13. Around 11:30 am, on October 28, 2007, Insp Parriman and WPC Taylor met with Rampersad at the Princess Town Police Station and informed him of their investigations to which he responded, *"I ain't know nothing about that"*. He was cautioned and informed of his rights and requested that his brother, Soman

Rampersad be present. Later, Insp Pariman conducted an interview with Rampersad in the presence of his brother whilst WPC Taylor made a written record of what was said. At the end, the notes were read aloud by his brother to Rampersad and he was invited to alter or correct it. The notes were signed by Rampersad and his brother as well as the officers. The next day an identification parade was conducted and Rampersad was positively identified by Balraj Harripersad. Thereafter, he was again cautioned and informed of his rights and privileges and formally charged.

CASE FOR THE FIRST APPELLANT

14. Rampersad did not give any evidence on his behalf but called Supchan Harrypersad ("Supchan") as a witness.

15. Supchan was the nephew of the deceased. He testified that around 12:13 am on August 2, 2007, he returned home from catching crabs when he heard screaming coming from his uncle's home. He assumed that the deceased was performing kali puja. Shortly thereafter, he made his way to St. John's Road where he observed his father and brother standing behind a silver car. He saw a man exiting the trace where the deceased lived. The man struck Supchan with a gun and a knife and told him to go home. He observed that there were two other men, one had curly hair and one had a rasta hairstyle and wore a big yellow and green rasta hat. He then made his way home and called the police. From his yard, he saw his brother and his father involved in an altercation with the men who left in the silver car shortly afterwards. He then went to meet his brother and father and found them lying on the road. His father was lying face down and was unconscious whilst his brother was lying on his side. He revived his father and took both of them home. He then went to the deceased's home and observed that the deceased was injured. The police subsequently arrived. Sometime later he attended an identification parade but was unable to identify anyone.

CASE FOR THE SECOND APPELLANT

16. Singh did not give any evidence neither did he call any witnesses on his behalf.

Grounds of appeal in relation to Rampersad

Five grounds of appeal were advanced on behalf of Rampersad.

GROUND 1

The Learned Trial Judge erred in law by admitting the evidence of Jagdeo Goolie Persad as fresh evidence and having done so, failed to adequately direct the jury as to how they should properly assess his evidence.

SUBMISSIONS ON BEHALF OF THE APPELLANT

17. Ms Sophia Chote SC, on behalf of the appellant Rampersad, submitted that the trial judge incorrectly applied the legal test in admitting the evidence of the prosecution witness Persad. She also submitted that Rampersad was prejudiced by the introduction of this evidence at a very late stage, especially since the evidence fundamentally changed the case against Rampersad. There were a number of issues raised in Persad's evidence, which the defence was not in a position to answer because of the passage of time.

18. Ms Chote SC contended that Persad could be characterised as a witness who might have had an interest to serve and this made his evidence more prejudicial than probative. She submitted that as a result, a full "accomplice direction" ought to have been given. The trial judge's directions to the jury to simply *"approach Persad's evidence with caution"* was wholly insufficient.

19. Ms Chote SC also submitted that the trial judge found that the evidence was cogent without consideration of the fact that Persad was a man of bad character.

Further, Persad gave evidence that a man known to him as "Sick" told him that he had chopped the deceased. However, Rampersad was never confronted with this allegation and Persad did not indicate that he knew the proper name of the man whom he knew as "Sick" nor was he asked to identify Rampersad as the man whom he knew as "Sick". It was only on January 5, 2017, that a police officer for the first time asked Persad whether he knew "Sick" by any other name and he said that he also knew him as "Baldath." At that time, however, Rampersad had been before the court on several occasions and reports of the case might have been circulated in the media. Ms Chote SC further submitted that the trial judge ought to have specifically directed the jury that Persad did not identify Rampersad, either in court or anywhere else. Ms Chote SC also submitted that the trial judge ought to have directed the jury on the recency of Persad's statements taken on January 5, 2017, as well as the difficulty of the defence to respond to this evidence.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

20. Counsel for the respondent, Mr Travers Sinanan took the position that the trial judge had properly exercised a discretion which this Court ought not to interfere with. He submitted that the trial judge properly directed the jury on how they should approach Persad's evidence. She directed them that he might have given a version of the events which was favourable to himself in order to avoid being charged for the murder of the victim. She brought to their attention his bad character and how it affected his credibility. She also told them to approach his evidence with caution because he was treated as a hostile witness.

21. In relation to the contention by counsel for Rampersad that Persad was never asked to identify Rampersad when he spoke of his involvement in the incident, Mr Sinanan submitted that there was no requirement for the trial judge to direct the jury on that issue. This was because Persad gave a comprehensive and detailed description of the person whom he referred to as "Sick" and stated that he also

knew him by the name "Baldath". Persad also stated that he knew where "Sick" lived as well as the name of his brother.

LAW, ANALYSIS AND REASONING

22. It was submitted that Persad's evidence was improperly admitted at the hearing and that the trial judge's directions to the jury on how they were to treat with that evidence fell short of what was required.

The Admission of Persad's Evidence

23. It is necessary to first set out the record as to how Persad's evidence came before the court. Persad was initially held by the police as a suspect in the matter during the course of the investigations. He was interviewed and released and no charges were laid against him in respect of this incident. The prosecution made an application to lead fresh evidence from Persad. In support of that application, they filed interview notes given by him on December 13, 2007, and January 5, 2017. The trial judge raised questions as to why the interview notes dated December 13, 2007, were not previously disclosed, whether they were available at the preliminary enquiry and whether it was fair to admit them at the stage of the hearing[1]. The trial judge also raised questions as to whether the proposed evidence changed the nature of the cases which the appellants had to answer[2]. Prosecuting counsel, Mr Pilgrim, indicated that all of the documents in respect of witnesses not called as well as unused statements, were disclosed to the defence prior to the preliminary enquiry. However, Persad's interview notes were not included with those documents. The prosecution were unaware of the interview notes until they were discovered on January 2, 2017. The notes were disclosed to the defence on the next day and they were informed that the prosecution might

[1] Transcript of the Proceedings dated January 19, 2017 at pages 9, 15, 16 and 46.
[2] Transcript of the Proceedings dated January 19, 2017 at pages 20 and 46

seek to lead them as evidence at the hearing. Persad's criminal records were also disclosed.

24. After hearing counsel for the respective parties, in the absence of the jury, the trial judge gave an oral ruling on the issue[3]. In arriving at her decision to admit Persad's evidence, she considered the relevant principles set out in **R v Sang**[4] and **Tiwarie v The State**[5]. She gave reasons why she found that the "additional" evidence was relevant, that it supported evidence upon which the prosecution was already relying to prove its case against the appellants.[6] She considered the reasons for the failure to disclose the evidence and found that it was not deliberately withheld by the prosecution since it had the effect of strengthening their case.[7] She also factored in whether the evidence changed the case which the appellants had to meet and found that it did not.[8] The trial judge found that the appellants would suffer no actual prejudice by the introduction of the evidence[9]. She gave detailed reasons as to why it was fair in all of the circumstances to admit the evidence and why she found it to be more probative than prejudicial. She indicated that the defence would be given a reasonable time to deal with the additional evidence.

25. A trial judge has an inherent jurisdiction to admit evidence at any stage of a trial. In our view, the trial judge's decision to admit the evidence was one which was reasonably open to her based on the material before her. Rampersad has not shown that, in admitting Persad's evidence, the trial judge wrongly exercised her discretion, erred in principle or ignored or misapplied a relevant factor. We find

[3] Transcript of the Proceedings dated January 20, 2017 at pages 12-15.
[4] (1979) 3 WLR 263.
[5] Cr. App. No. 4 of 2004.
[6] Transcript of the Proceedings dated January 20, 2017 at page 13, line 35 to page 14, line 10.
[7] Transcript of the Proceedings dated January 20, 2017 at page 15, lines 7-18.
[8] Transcript of the Proceedings dated January 20, 2017 at page 14, lines 33-51 and at page 19, lines 19-24.
[9] Transcript of the Proceedings dated January 20, 2017 at page 15, lines 25-32.

that the judge's discretion was properly exercised. This court will not lightly interfere with a judge's findings in accordance with the principle of appellate deference to the exercise of a judicial discretion.

The Trial Judge's Directions on Persad's Evidence

26. The trial judge in her charge to the jury directed them on how they were to approach Persad's evidence. At the very inception of her directions on Persad's evidence, the trial judge told the jury that they must approach his evidence with care for three main reasons. She said:

> *"Now, Members of the Jury, you must approach the evidence of Jagdeo "Goolie" Persad with caution, for three reasons:* ***The first reason that you must treat his evidence with caution is because he was treated as a hostile witness. The second reason that you must treat the evidence of Jagdeo "Goolie" Persad with caution is because he may have an interest of his own to serve, when he gave the police his interview and his further statement, and the third reason you must treat the evidence of Jagdeo "Goolie' Persad with caution is because he is a person of bad character, meaning he has previous convictions****."*[10] [emphasis added]

27. The trial judge then expounded on those three reasons. She explained to the jury the concept of a hostile witness, reminded them of the circumstances in which Persad was deemed hostile and instructed them that they must exercise caution in assessing his evidence.

28. The trial judge then developed the issue in relation to Persad's protection of his self-interest and said:

> *"The second reason you should approach the evidence of Jagdeo "Goolie" Persad with caution, is that* ***in giving the interview and the statement to the***

[10] Summing Up dated March 7, 2017 at page 24, lines 23-35.

police, he may have been motivated to protect his own interest. What I mean is, he may have given a version of events to the police that implicated the two Accused, but was favourable to himself … so that he would not be charged for the murder of Kamal Harrypersad."[11] *[emphasis added]*

29. The trial judge went on to direct the jury on Persad's bad character, in the following terms:

> *"…**So Jagdeo "Goolie" Persad has two previous convictions.***
>
> ***The reason you have heard about these convictions is because the credibility of Jagdeo "Goolie" Persad is a very important issue in this case. You will have to decide whether you believe his testimony in this court or whether you believe, and you can act upon, what he said in his interview to the police, and his further statement to the police; whether and to what extent his previous convictions assist you in assessing his evidence, and determining whether you believe his testimony or whether you believe what he said in his interview and statement, and can act upon them, or whether you don't believe anything; you don't believe his evidence or what he said in his interview and statement. These are matters for you to decide."***[12] [emphasis added]

30. The trial judge then went through in great detail the statement attributed to Persad dated December 13, 2007[13]. On the next day of the summing up, she went through his subsequent statement, dated January 5, 2017[14]. There were different levels of detail given by Persad in both statements and together, they referred to a description of and knowledge about Rampersad. Persad stated that he knew Rampersad's first name as "Baldath" and that his nickname was "Sick". He knew

[11] Summing Up dated March 7, 2017 at page 25, line 45 to page 26, line 2.
[12] Summing Up dated March 7, 2017 at page 25, line 45 to page 26, lines 34-48.
[13] Summing Up dated March 7, 2017 at page 28, line 39 to page 35, line 18.
[14] Summing Up dated March 8, 2017 at pages 3-4.

"Sick" for approximately two years and stated that he used to reside at Fireburn in Freeport. Persad described Rampersad as *"a tall Indian fella, low haircut, five feet eight inches, scar on the top of his head, brown skin, muscular, a tattoo with a gun on his back and a tattoo of two teardrops near his eye."* He also knew Rampersad's brother by the nickname "Tuppy". On the day of the incident, he was having drinks with the appellants at Tom's Bar, where they spent some time before going to the place where the offence was committed.

31. The trial judge proceeded to direct the jury in the following terms:

> *"So, Members of the Jury,* ***bearing in mind my warning to you, to exercise caution when considering the evidence of Jagdeo "Goolie" Persad, it would be for you to decide whether you believe his testimony before this Court or whether you can rely on his statements to the police in this case; whether you believe them and whether you are prepared to act upon them, that is, his previous inconsistent statements****. If you are sure that what Jagdeo "Goolie" Persad has said in any of his versions: whether in testimony in the Witness Box or whether in his previous statements -- if you are sure that any of his versions are true, then you can rely on it, but if you are not sure which version is true, if any, then you must put it aside and not take account of anything he has said, whether at this trial or previously in his statements and interview.*[15] [emphasis added]

32. In our view, based on the foregoing extract from the trial judge's summing up, it was sufficiently brought home to the minds of the jury that they must exercise caution when considering Persad's evidence. This was reinforced by the trial judge's constant reminder to the jury to exercise caution when dealing with his evidence.

[15] Summing Up dated March 8, 2017 at page 4, line 43 to page 5, line 7.

33. We agree with Mr Sinanan that based on what was contained in the two statements attributed to Persad, there was no need for the trial judge to specifically direct the jury that he did not identify Rampersad or the person whom he referred to as "Sick", either in court or anywhere else. The trial judge was also not obligated to direct the jury on the recency of the statement given on January 5, 2017, since this would have been apparent. Further, she was mindful that the defence would have needed time to deal with the additional evidence.

34. The argument put forward by Ms Chote SC, that the trial judge's directions in relation to Persad's evidence were inadequate, is, in our view, untenable.

This ground of appeal is without merit.

GROUND 2

The Learned Trial Judge erred in law by failing to give directions on what constituted circumstantial evidence in law and failed to identify what constituted it factually. As such, the jury were left to evaluate a case premised to a significant extent on this specie of evidence without the necessary directions.

SUBMISSIONS ON BEHALF OF THE APPELLANT

35. Ms Chote SC submitted that the jury ought to have been directed to narrowly examine the circumstantial evidence in the case since such evidence may be fabricated to cast suspicion on another person. She also submitted that the trial judge ought to have directed the jury that before drawing an inference of guilt based on the circumstantial evidence, they had to be sure that there were no other co-existing circumstances which would weaken or destroy the inference.

36. We also understood Ms Chote SC to be submitting that the judge, in identifying four links in the chain of circumstantial evidence (Persad's interview notes; Balraj Harripersad's deposition; Taramatee Lochan's evidence; and the evidence of the Forensic Pathologist), which were then juxtaposed with the response of the defence to each of them, might have given the prosecution case the appearance of being stronger than it actually was. She submitted that this approach would have led the jury away from a legal consideration of the circumstantial evidence in a holistic way and might have corralled them along the lines of choosing either the prosecution version or the "abbreviated version" (sic) of the defence.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

37. Mr Sinanan submitted that the trial judge explained to the jury what constituted circumstantial evidence and they were warned to distinguish between forming conclusions based on reliable circumstantial evidence and mere speculation. He submitted that the trial judge, in the "route to verdict" document which was given to the jury, set out the various items of circumstantial evidence upon which the prosecution relied, their relevance, and how they were linked. The trial judge also told the jury to carefully consider the strands of circumstantial evidence and determine whether they were reliable and proved guilt.

LAW, ANALYSIS AND REASONING

38. Ms Chote complained that the trial judge, in her directions to the jury on the circumstantial evidence in the case, omitted certain important directions and inadequately marshalled the evidence in respect of the prosecution and defence cases.

The material non-directions

39. In the decision in **Teper v R**[16], Lord Normand said at page 3 that circumstantial evidence must always be *"narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. …It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."*

40. In **McGreevy v DPP**[17], it was argued on the basis of **R v *Hodge***[18], that if the case against an accused depends wholly or substantially on circumstantial evidence, the trial judge should direct the jury that not only must they be satisfied that the circumstances are consistent with the accused having committed the offence, but they must also be satisfied that the circumstances are inconsistent with any other rational conclusion than that of the accused's guilt. The House of Lords held that there is no rule of law requiring such a direction. It suffices, in such a case, to give the usual direction that the jury must be satisfied of the guilt of the accused beyond reasonable doubt. The House of Lords explained that *"circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence"* (per Pitchford LJ in **R v Kelly**[19]).

41. The trial judge, early on in her summing up, alerted the jury that the prosecution case against Rampersad was based on direct evidence, circumstantial evidence

[16] [1952] UKPC 15.
[17] [1973] 1 WLR 276.
[18] (1838) 2 Lew CC 227.
[19] [2015] EWCA Crim 817.

and the felony-murder construct[20]. Later on, in her summing up, she directed the jury on the circumstantial evidence against Rampersad. She said:

> *"**The State is also relying on what is called "circumstantial evidence," to prove that it was Accused No. 2 who chopped the deceased with a cutlass.** First of all, what is circumstantial evidence? Circumstantial evidence consists of pieces of evidence relating to different circumstances, none of which, on their own, directly proves that the Accused is guilty, but which, say the Prosecution, when taken together, leave no doubt that the Accused is guilty. So, for example, if you were to see someone come into the courtroom with a raincoat on and carrying an umbrella, and both were dripping wet, and if you were also to hear the sounds of thunder in the distance, you may conclude that it is raining outside of the courtroom even though you cannot see outside, so the wet raincoat, wet umbrella, and thunder, would be circumstantial evidence.*
>
> *In terms of visualising in your mind what circumstantial evidence is like, it can be considered like the strands of a rope which is comprised of several cords. One strand of the rope might be insufficient to hold the weight, but three cords together may be of quite sufficient strength. **Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the Prosecution relies, in proof of its case, is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Prosecution's case.***
>
> ***Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing or making up***

[20] Summing Up dated March 7, 2017 at page 17, lines 3-9.

theories without good evidence to support them, and you should not do that."[21][emphasis added]

42. From the foregoing extract of the trial judge's summing up, it is evident that contrary to what was submitted by Ms Chote SC, the trial judge did in fact direct the jury that before drawing an inference of guilt based on circumstantial evidence, they had to consider whether it revealed any other circumstances which could or might be of sufficient reliability and strength to weaken or destroy the prosecution case.

43. The trial judge highlighted the various strands of circumstantial evidence which the prosecution relied upon[22]. She then warned the jury that:

> ***"You must decide which, if any, of these pieces of evidence you think are reliable, and which, if any, you do not. You must then decide what conclusions you can fairly and reasonably draw from any pieces of evidence that you do accept, taking these pieces of evidence together. You must not, however, engage in guesswork or speculation about matters which have not been proved by any evidence.***
>
> ***Finally, you must weigh up all the evidence and decide whether the Prosecution have made you sure that this evidence proves the guilt of Accused No. 2.***[23]. [emphasis added]

44. The trial judge proceeded to direct the jury on the defence position in respect of the various strands of circumstantial evidence relied upon by the prosecution[24].

[21] Summing Up dated March 8, 2017 at page 17, line 31 to page 18, line 17.
[22] Summing Up dated March 9, 2017 at page 17, line 31 to page 18, line 22.
[23] Summing Up dated March 9, 2017 at page 19, lines 30-42.
[24] Summing Up dated March 9, 2017 at page 19, line 48 to page 20, line 28.

45. In our view, the judge's directions to the jury on how they ought to deal with the circumstantial evidence in the case were unassailable. We do not agree with the submission of Ms Chote SC that the jury ought to have been explicitly directed that circumstantial evidence has to be narrowly examined as such evidence may be fabricated to cast suspicion on another person. In any event, we find that intrinsic in the judge's directions to examine the circumstantial evidence "*with care and consider whether the evidence upon which the Prosecution relies, in proof of its case, is reliable and whether it does prove guilt"* is an indication to examine the evidence "narrowly".

46. The trial judge correctly directed the jury that they must engage in an examination of the strands of circumstantial evidence relied on by the prosecution and thereafter decide which, if any, they accepted and which, if any, they did not, and must decide what fair and reasonable conclusions could be drawn from any evidence which they accepted. She properly directed the jury that they must not speculate, guess or make theories about matters, which in their view, were not proved by any evidence. Finally, the trial judge left it for the jury to decide, having weighed up all the evidence put before them, whether the prosecution had made them sure that the accused was guilty.

47. In our view, the trial judge correctly and adequately assisted the jury on how to reach a true verdict according to the evidence.

The inadequate marshalling of the circumstantial evidence

48. In respect of the position of the defence as it related to the strands of circumstantial evidence, the trial judge directed the jury in the following way:

> *"Now, before I move on there, Members of the Jury, just on the issue of the circumstantial evidence and the various strands that I have identified for you,*

I am going to remind you of what the Defence is saying with respect to those various strands.

With respect to the evidence of Jagdeo "Goolie" Persad, the Defence is saying that you should not act upon the previous statements of Jagdeo "Goolie" Persad to the police, because Jagdeo "Goolie" Persad came and gave evidence in the Witness Box, and when Jagdeo "Goolie" Persad came and gave evidence in the Witness Box, under oath, he said he did not know Accused No. 2 or Accused No. 1. So the Defence is saying Jagdeo "Goolie" Persad has given evidence on oath that he does not know the Accused, and you should act upon his evidence that he gave on oath, as opposed to the evidence in his statements, which he gave to the police, which are not under oath. It is a matter for you, Members of the Jury.

With respect to the evidence of Balraj Harrypersad, the Defence is saying that you should not act upon the evidence of Balraj Harrypersad because Balraj Harrypersad did not give evidence in this trial; Balraj Harrypersad could not be cross-examined, and so, the evidence of Balraj Harrypersad about his opportunity to see the person he says is Accused No. 2, could not be tested by cross-examination. And so, the Defence is saying do not act upon the evidence of Balraj Harrypersad.

With respect to the evidence of Taramatee Lochan, the Defence is saying, Taramatee Lochan came here; she gave evidence on oath, and she said that the Accused No. 2 was not one of the men in her home on that night. I dealt with that evidence, Members of the Jury, earlier on, but I am reminding you that this is what the Defence is saying on why you should not act upon the evidence of Taramatee Lochan. All right. So that, Members of the Jury, is the circumstantial evidence."[25]

[25] Summing Up dated March 8, 2017 at page 19, line 43 to page 20, line 28.

49. In the recent decision of the Court of Appeal of England and Wales in **R v Reynolds**[26], Simon LJ set out some general observations on the purpose and nature of a summing up. He said at paragraphs 53-55:

> ***"53. … the summing-up need not rehearse all the evidence and arguments. As Lord Morris of Borth-y-Gest said in McGreevy v Director of Public Prosecutions[1973] 1 WLR 276 at p 281: "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also on the view formed by a Judge as to the form and style that will be fair and reasonable and helpful.***
>
> ***54.*** *What is helpful will depend on the case.* ***A recitation of all the evidence and all the points made on each side is unlikely to be helpful; and brevity and a close focus on the issues is to be regarded as a virtue and not a vice, see Rose LJ in R v Farr[1999] Crim LR 506 cited in R v Amado-Taylor at p 192A. Since a summing-up of the evidence is by its nature a summary, it is bound to be selective; and providing the salient points are covered and a proper balance is kept between the case for the prosecution and the defence, this court will not be lightly drawn into criticisms on points of detail."***
>
> ***55.*** *Second, a succinct and concise summing-up is particularly important in a long and complex trial, so as to assist the jury in a rational consideration of the evidence, see R v D [2007] EWCA Crim 2485; [2008] Lloyd's Rep FC 68, CA at para 33: "One principle is, however, of cardinal importance in assessing the fairness of the trial process. A summing-up must accurately direct the jury as to the issues of fact which it must determine (see R v Lawrence [1982] AC 510, 519).* ***The summing-up must: 'fairly state and analyse the case for both sides. Justice moreover requires that [the judge] assists the jury to reach a logical and reasoned conclusion on the evidence.*** *(See per Simon*

[26] [2020] 4 WLR 16.

Brown LJ in R v Nelson [1997] Crim L R 234 …' The directions given by the judge to the jury should provide the jury with the basis for reaching a rational conclusion. The longer the case the more important is a short and careful analysis of the issues." [emphasis added]

50. In the decision of the Court of Appeal of Ontario in **R v Hayes**[27], **Tulloch J.A. said at paragraph 72:**

> *"72.* ***When assessing an alleged error in a trial judge's jury instructions, an appellate court "must examine the alleged error in the context of the entire charge and of the trial as a whole"****: R. v. Araya, 2015 SCC 11, [2015] 1 S.C.R. 581, at para. 39.* ***The instructions must not be held to a standard of perfection and appellate courts "should not examine minute details of a jury instruction in isolation": at para. 39. Rather, what matters is the "overall effect of the charge":*** *at para. 39, quoting R. v. Daley, 2007 SCC 53, [2007] 3 S.C.R. 523, at para. 31"*

51. We are of the view that the trial judge's decision to juxtapose the strands of circumstantial evidence with the response of the defence to each of them was unobjectionable. She quite adeptly marshalled the case for both the prosecution and defence and linked them to her directions on circumstantial evidence. There was no need for her to rehearse all the evidence and arguments on the issue. She fairly stated and analysed the case for both sides. In so doing, it was unlikely that the jury would have been left with the impression that the prosecution case was stronger than it actually was. We wish to emphasize that, as set out in the decisions in **Reynolds** and **Hayes**, there is no precise formula to be employed in a summing up, once the essence of the direction is adequately conveyed to the jury.

[27] 2020 ONCA 284.

52. In this case, the trial judge carried out her duty by properly assisting the jury to reach a logical and reasoned conclusion based on the circumstantial evidence in the case.

This ground of appeal is without merit.

GROUND 3

The Learned Trial Judge erred in law by giving inadequate directions to the jury as to the treatment of purported identification evidence admitted via deposition. This resulted in a miscarriage of justice since there was no other direct identification evidence in the case.

SUBMISSIONS ON BEHALF OF THE APPELLANT

53. Ms Chote SC submitted that the trial judge failed to marshal the evidence surrounding the identification of Rampersad by Balraj Harripersad and the evidence of the defence witness Supchan. We understand Ms Chote SC to be submitting under this ground that it would have been preferable if the potential weaknesses in Balraj's evidence, by virtue of Supchan's testimony, would have been dealt with at the point in the summing up where the trial judge directed the jury on the actual and potential weaknesses in the identification evidence.

54. Ms Chote SC submitted that the trial judge erred in later directing the jury that, *"the Defence for Accused No. 2 is saying that if you accept the evidence of Supchan Harrypersad, then it throws doubt on the identification of Accused No. 2 by Balraj Harrypersad, because Supchan Harrypersad would have said that he wasn't able to point out any of the men."* We understand her to be submitting that in categorizing the potential weakness in Balraj's evidence as an argument of the defence, this might have had the effect of diminishing the significance of that evidence.

55. At the second hearing of the appeal on December 10, 2019, the Court raised the issue of whether the judge erred in not leaving the "middle-ground" position in respect of Supchan's evidence to the jury. Ms Chote SC submitted that this was an error on the part of the trial judge[28].

SUBMISSIONS ON BEHALF OF THE RESPONDENT

56. Mr Sinanan submitted that the trial judge gave a full, balanced, comprehensive and clear direction in accordance with the guidelines in **R v Turnbull**[29]. He submitted that the jury were properly directed as to how they should assess and evaluate the evidence of the witness, Balraj Harripersad. The trial judge further directed the jury that they should exercise special caution when considering the visual identification made by this witness and highlighted the weaknesses in the identification.

57. Mr Sinanan, at the second hearing of the appeal on December 10, 2019, conceded that the trial judge ought to have left the "middle-ground" position in respect of Supchan's evidence to the jury[30].

LAW, ANALYSIS AND REASONING

58. A trial judge should be mindful of pointing out the weaknesses in the evidence in accordance with **Turnbull**. In **R v Fergus**[31], 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***

[28] Transcript of the Proceedings dated December 10, 2019 at page 16, line 3.
[29] [1977] QB 224.
[30] Transcript of the Proceedings dated December 10, 2019 at page 35, lines 16-20.
[31] [1994] 98 Cr. App. R. 313.

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…"

59. The trial judge directed the jury in accordance with the **Turnbull** principles and informed them on how they should evaluate the evidence of the witness Balraj Harripersad.[32] She went on to point out to the jury the weaknesses in the visual identification by that witness.[33] The trial judge said, inter alia:

> *"In assessing the overall quality of the identification evidence of Balraj Harrypersad, you will bear these things in mind. First thing: Balraj Harrypersad could not be cross-examined about what he said in his statement, and the reason he could not be cross-examined is because he is deceased. But, of course, you know that Counsel for Accused No. 2 could have cross-examined him, if he was here, about all the issues that I just raised with you -- the five questions that I just gave you. He could have been cross-examined about the issues raised in those questions. He could have been cross-examined about how close the men came to him that night. He could have been cross-examined about what the lighting was like at the time he was observing the men. He could have been cross-examined about how long he paid attention to any particular man. How long he would have paid attention to the person he says was Accused No. 2. He could have been cross-examined about whether he was looking at their faces; whether he saw their faces. He could have been cross-2 examined about what direction they were facing and what direction they were not facing. And you recall that he said in his statement that the Rasta man told him to get on the ground.* ***And you***

[32] Summing Up dated March 8, 2017 at page 5, line 39 to page 9, line 28.
[33] Summing Up dated March 8, 2017 at page 9, line 29 to page 11, line 1.

recall the submissions of attorney for Accused No. 2, that he must have been face-down because he was kicked on the back. Well, he doesn't say he laid face-down but it's a reasonable inference to draw from the fact that he was lying on the ground and he was kicked on the back. He could have been lying face-up, but the thing is, we don't know. He didn't tell us in his statement. So he could have been cross-examined about that. *He could have been cross-examined about how long the incident lasted. You remember he said in his statement, it lasted about five to ten minutes, but we don't know how good he is at telling time; what is five minutes to him, and so on…"*[34]

60. Later in her summing up, in dealing with the case for Rampersad, the trial judge directed the jury on the evidence of the defence witness Supchan and juxtaposed his evidence with the evidence of Balraj Harripersad as set out in his deposition. The trial judge said:

> ***"Members of the Jury, the Defence for Accused No. 2 is saying that if you accept the evidence of Supchan Harrypersad, then it throws doubt on the identification of Accused No. 2 by Balraj Harrypersad, because Supchan Harrypersad would have said that he wasn't able to point out any of the men. He said, at some point, the place was dark, and he did say that when he got to his father, the father was lying face down, which, if you accept, may lead you to the inference -- you recall the evidence of Balraj Harrypersad that the Rasta man planassed him, and then told him to lie down, but he didn't say whether he was lying face down or face up, and so, you may think, if you accept the evidence of Supchan Harrypersad -- that when he got to his father, he was lying face down; you may think that when his father went to lie down, he was lying down face down, and, therefore, in that position, it would have been difficult or he could not have seen persons who were standing above him.***

[34] Summing Up dated March 8, 2017 at page 9, line 24 to page 10, line 17.

So the Defence is saying that if you accept the evidence of Supchan Harrypersad, it may throw some doubt on the identification by Balraj Harrypersad of Accused No. 2..."[35] [emphasis added]

61. From the extract of the summing up at paragraph 59 above, the trial judge, in pointing out the weaknesses of the identification evidence of Balraj Harripersad, referred to the submission of defence counsel for Rampersad in the court below, and said *"…you recall the submissions of attorney for Accused No. 2, that he must have been face-down because he was kicked on the back."* The trial judge did not at that point refer to the testimony of Supchan. However, when the trial judge eventually refers to Supchan's evidence, as set out in the preceding paragraph, it is manifest that the potential weakness brought about by Supchan's evidence was that he saw Balraj lying face down at the relevant time, which leads to the inference that it would have been difficult or nearly impossible for him to see the persons who were standing above him. This potential flaw was in fact referred to by the trial judge earlier in her summing up when she dealt with the actual and potential weaknesses in Balraj's identification evidence, albeit, without reference to the witness Supchan. These two sets of directions, taken together, in our view, were more than adequate to inform the jury's decision on how they were to treat with Balraj's identification evidence.

62. In relation to the issue raised by the court as to whether the trial judge erred in not leaving the "middle-ground" position in respect of Supchan's evidence to the jury, we are of the view that this was not a material non-direction on the part of the trial judge. The summing up, read as a whole, more than sufficiently brought home to the jury the relevance of Supchan's evidence.

This ground of appeal is without merit.

[35] Summing Up dated March 9, 2017 at page 27, lines 11-32.

GROUND 4

The Learned Trial Judge failed to adequately place the defence of the appellant Baldath Rampersad squarely and in a balanced way to the jury.

SUBMISSIONS ON BEHALF OF THE APPELLANT

63. Ms Chote SC submitted that the trial judge's summing up suggested that the totality of the case for Rampersad was set out in the evidence of the witness called by the defence. She submitted that Rampersad's case also depended on his statement under caution which was not mentioned by the trial judge in her summing up. She submitted that although the statement might be considered exculpatory, it was material which the jury should have considered, especially since Rampersad did not testify at the trial.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

64. Mr Sinanan submitted that the trial judge directed the jury on Rampersad's defence in a proper, adequate, fair and balanced manner. She correctly directed the jury that he denied chopping and killing the deceased and that he also denied being present at the deceased's home on the night that he was chopped.

LAW, ANALYSIS AND REASONING

65. The core complaint under this ground is that the trial judge ought to have referred to the contents of Rampersad's interview notes in directing the jury on his defence. In the decision in **R v Curley & Cadwell**[36], May LJ underscored that in a criminal trial, due process requires that a defendant's case be placed before the jury in a manner which is fair, adequate and proper. At paragraph 73, May LJ said:

> *"**It needs to be emphasised and emphasised again that it is the plain duty of a judge summing up a criminal case to a jury to put fairly and sufficiently the defence case. Where [an appellant] has not given evidence, and in***

[36] [2004] EWCA Crim 2395. See also **R v Clarke** [2010] EWCA Crim 684.

addition not called any evidence on his behalf, there is no evidence from the witness box in support of that defence other than such evidence as has been gleaned by one way or another from other witnesses who have been called. Where that [appellant] who has not given evidence has been interviewed in detail and has given an account in interview which is relevant to their defence and which so far as it goes contains their defence, that is evidential material in the way that we have described and it is the duty of the judge, in our judgment, in putting the defence case properly and fairly to make such proper and structured reference in summary to the material in the interviews which constitutes the defence case in the criminal trial." (emphasis added)

66. Rampersad was interviewed by the police on October 28, 2007, at the Princes Town Police Station, in the presence of his brother, and contemporaneous notes were taken. In the interview, Rampersad denied entering the deceased's home and chopping him or causing injury which resulted in his death. He said that he knew someone by the name of Sunil Singh while he was incarcerated but could not recall the last time that he had seen him. He said that he had never been to St. John's Trace in Carapichima, where the deceased lived. These interview notes were subsequently tendered into evidence.

67. In her summing up, the trial judge makes two references to Rampersad's interview notes. Those references were in the context of directions given in respect of the witness Persad and related to Rampersad's address and the address of his siblings.[37]

68. In directing the jury on Rampersad's case, the trial judge did not make mention of his interview notes. She directed the jury in the following way:

[37] Summing Up dated March 9, 2019 at page 16, lines 21-34.

"The case for Accused No. 2 is a denial that he committed this offence; that is, a denial that he chopped the deceased, resulting in his death. Through questions put to the witnesses for the State by his attorney, Accused No. 2 is saying that he was not at the home of the deceased on the night the deceased was chopped, and anyone who says that he was there is either mistaken or not speaking the truth.

Once again, Accused No. 2 has the right to remain silent. That is his right in law, and I direct you that you cannot and must not draw any adverse inference; that is, any inference against the Accused because he has chosen to remain silent. And you cannot, and must not, conclude that he is guilty because he has chosen to remain silent. The accused has nothing to prove. He does not have to prove his innocence. It is the State that has to prove that he is guilty. However, Accused No. 2 chose to call a witness in this case. He called one witness, Supchan Harrypersad…"

69. The trial judge went on to direct the jury on the evidence of the witness Supchan, who was called on behalf of Rampersad[38].

70. This was not a case where the trial judge failed to put before the jury in any form what the appellant's defence at the trial was. While we agree that the trial judge, in the interest of completeness, ought to have referred in her summing up to Rampersad's interview notes when dealing with his case, this, in our view, does not affect the safety of his conviction. We are unable to detect any prejudice which might have accrued to him in light of the trial judge's directions to the jury that his case was one of a denial of the commission of the offence and that he was not at the deceased's home on that night that he was chopped. This is wholly in line with what was contained in his interview notes.

[38] Summing Up dated March 9, 2017 at page 25, line 3 to page 27, line 10.

In the circumstances, this ground of appeal is without merit.

Ground 5

The Learned Trial Judge erred in law by failing to ensure that the verdict of the jury was clear and unambiguous.

SUBMISSIONS ON BEHALF OF THE APPELLANT

71. Ms Chote SC submitted that when the verdict was requested for Rampersad, the Foreperson's response was unclear, not on the question of guilt but on the basis on which the jury had arrived at their conclusion. She submitted that this was contrary to the principle of law that a verdict must be clear and unambiguous.

72. She submitted that the proper course would have been for the Foreperson to be given the opportunity to clarify what she meant when she said that, *"she believed that Baldath's guilt was found on the same basis as the verdict in relation to Sunil."* She contended that the failure to clarify the basis of the verdict in respect of Rampersad was a fundamental error which rendered the conviction unsafe.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

73. Mr Sinanan submitted that the verdict in respect of Rampersad was not ambiguous. He submitted that in delivering the verdict of guilty, the Foreperson stated quite clearly that the basis for the jury's verdict against Rampersad's co-accused, Singh, was not under the felony-murder rule. It was then made clear that Singh was found guilty under the basis of secondary party liability. This was in the context of the trial judge directing the jury on the principles of joint enterprise/secondary party liability and the felony murder rule. In respect of Rampersad, the Foreperson stated that the same rule was used in deciding his verdict. Mr Sinanan added that the failure of the trial judge to make further

enquiries as to the basis of guilt in respect of Rampersad was merely a technical error.

LAW, ANALYSIS AND REASONING

74. The general rule is that if a verdict on a count is ambiguous, the trial judge should not accept it in the form it is given, but should ask questions to resolve the ambiguity and, if required, give further directions on the issue[39].

75. At the conclusion of the trial, the jury found Singh guilty of the offence. The foreperson indicated that the verdict was based on secondary party liability. When it came to Rampersad's verdict, the jury also found him guilty of the offence. The trial judge enquired whether the verdict was based on the felony murder rule. The foreperson responded, *"I cannot recall which one of the rules we actually agreed to, with respect to Accused No. 2, but we did go through it in detail and we came upon the verdict."* The following exchange then occurred between the trial judge and the foreperson[40]:

> *"THE COURT: Would your notes assist you, Madam Foreman, with No. 2?*
> *MADAM FOREMAN: If I see the verdict; the Route of Verdict -*
> *THE COURT: Yes.*
> *MADAM FOREMAN: I would be able to guide you.*
> *THE COURT: All right. So let us show it to you. That's your own?*
> *MADAM FOREMAN: No, this is not mine, but...*
> *THE COURT: All right. Let's find yours. You can use any or do you need your own?*
> *MADAM FOREMAN: No, I could...*
> *THE COURT: Yes, sure.*

[39] See R v Hawkes (1931) 22 Cr. App. R. 172.
[40] Transcript of the Proceedings dated March 9, 2017 at page 37, lines 14-32.

MADAM FOREMAN: ***Yes. I believe we actually used the very same rule when we decided on this decision.***

THE COURT: Yes. All right. Thank you. Thank you, Madam Foreman, you may sit." [emphasis added]

76. In this case, there was a positive duty on the trial judge to give the benefit of any doubt to the defendant Rampersad about the basis on which he was convicted. In our view, the verdict given by the foreperson was ambiguous having regard to the wording of her response, in particular, by the use of the words *"I believe".* The trial judge ought to have interrogated the issue further in order to obtain a more definitive response. The ambiguity of the verdict related to the issue of sentencing and the penalty to be imposed, that is, the imposition of the mandatory death penalty for "classic" murder and a possible term of years for felony/murder. For this reason, we find that the error was material and fatal to the conviction.

This ground of appeal is meritorious.

Grounds of appeal in relation to Singh

Five grounds of appeal were advanced on behalf of Singh.

GROUND 1

In her summation to the jury, the learned trial judge conflated the principles of law in relation to 'joint enterprise and secondary-party liability' and 'the felony-murder rule'. This conflation of legal principles left the jury to grapple with principles of law that consisted of diverse elements and considerations simultaneously.

Joint enterprise and felony/murder

SUBMISSIONS ON BEHALF OF THE APPELLANT

77. Counsel for the appellant, Mr John Heath submitted the case for the prosecution was based on the principle of joint enterprise and secondary party liability. The trial judge erred when she left the prosecution case to the jury on both joint enterprise and secondary party liability and the felony/murder rule conjunctively. This left the jury in a state of confusion which was compounded when she gave them a written route to verdict which placed both bases alternatively.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

78. Counsel for the respondent, Mr Travers Sinanan submitted that there was nothing to suggest that the jury was left to grapple with principles of law. The trial judge clearly articulated the principles concerning joint enterprise and that of felony/murder. Both sets of principles were correctly differentiated and reinforced by classic examples as she went through the evidence. Further, she provided the jury with the principles of law in writing as well as a written route to verdict.

79. He further submitted that the fact that the state's case was put alternatively on both limbs is not uncommon and referred to **Daniel Agard v The State**[41]**.** Such a course is appropriate where the strength and nature of the evidence lent itself to such an approach.

LAW, ANALYSIS AND REASONING

80. At the commencement of the trial, the prosecution specifically indicated that its case was being premised on the principle of joint enterprise and not on the

[41] Cr App No. P023 of 2013.

felony/murder rule. The trial judge, however, put the prosecution's case to the jury on both sets of principles.

81. In **R v Jogee; Ruddock,**[42] Lord Hughes and Lord Toulson made reference to the long-established and uncontroversial principle of joint enterprise in the following way:

> *"[1] In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial."*

[42] (2016) 87 WIR 439.

Their Lordships went on to hold that the mental threshold necessary to ground a secondary party's liability arising from a joint enterprise was the intention to assist or encourage the principal. It was stated that the law under **Chan Wing-Siu**[43] had taken a wrong turn in so far as it equated foresight with an intention. A secondary party's foresight was merely evidence which may be used to infer an intention and on its own was insufficient to ground liability.

82. Where the necessary evidential basis is established it is open to the prosecution to conduct its case in accordance with the principles of joint enterprise and secondary party liability. This was such a case. The evidence was that Singh had knowledge that the principal "A" (Rampersad) was going to the home of the deceased to harm him. Although "A" told him that he did not want him getting involved, when "A" gave him a toy gun he accepted it. He then voluntarily accompanied "A" to the deceased home armed with the said toy gun. There, Singh voluntarily proceeded to enter the home of the deceased together with "A" who chopped the deceased in Singh's presence. Although there was evidence that Singh attempted to save the deceased from being chopped, it was still open to the jury to consider whether this was in fact true. If they were to conclude that it was not, it was open to them to find that Singh shared the culpability as a secondary party to the principal precisely because he encouraged or assisted him by accompanying him and by being present during the chopping.

83. The felony/murder rule which re-emerged under **Act No 16 of 1997** which was an amendment to **section 2 A of the Criminal Law Act Chapter 10:04. Section 2 A (1)** of the **Act** provides that:

> ***"Where a person embarks upon the commission of an arrestable offence involving violence and someone is killed in the course or furtherance of that offence (or any other arrestable offence involving violence), he and all***

[43] [1984] 3 All ER 877.

other persons engaged in the course or furtherance of the commission of that arrestable offence (or any other arrestable offence involving violence) are liable to be convicted of murder even if the killing was done without intent to kill or to cause grievous bodily harm." [emphasis added]

84. Weekes JA, in **Albert Edwards v The State**[44], while explaining the felony/murder rule described it as follows:

"2. By the operation of the felony/murder rule, a person who participates with others in a crime involving violence, robbery is taken to be such a crime, which results in death of the intended victim, is liable, as is the principal, for murder. No consideration need be given to the intention of the secondary participant beyond that in respect of the original offence."

85. In **Nimrod Miguel v The State (supra)**, although the prosecution had put felony/murder as their primary case to the jury, the judge also invited them to consider the case of joint enterprise. The Judicial Committee of the Privy Council held that there was no misdirection by the trial judge putting the case on these alternative bases. Lord Clarke of Stone-Cum-Ebony JSC stated that:

" 24. Although the prosecution had put felony murder as their primary case, the judge invited the jury to consider first the case of joint enterprise and then, if they were not sure of guilt on that basis, to consider the case of felony murder.

…

30. In all the circumstances the Board concludes that there was no misdirection as to joint enterprise or felony murder in general or as to withdrawal in particular."

[44] Cr. App. No. 58/1992

86. In **Pitman; Hernandez v The State**[45] although the prosecution sought to premise its case on both intention/joint responsibility and felony/murder, the trial judge elected to leave the case to the jury solely on the basis of joint responsibility. In delivering the Board of the Judicial Committee of the Privy Council, Lord Hughes had the following to say:

> *[24] It is true that in the present case the judge elected to leave the case to the jury solely on the basis of intention/joint responsibility, rather than on the basis of felony-murder. He did so after hearing submissions in which the state invited him to leave felony-murder. It may be that he wished to simplify the case for the jury as far as possible. Whatever his reasons, they cannot have included any possible view that the conditions for felony-murder were not made out, providing of course that the jury accepted that Pitman was present and participating in the robbery when the victims were killed. The consequences for the defendant of this way of leaving the case were mixed. In a sense murder on the basis of intention/joint responsibility required something more to be proved than felony-murder. On the other hand, murder on the basis left carried a mandatory sentence of death whereas felony-murder carries a discretionary death penalty. But even if the view be taken that there was some benefit to the defendant in the way that the case was left to the jury, it does not begin to follow that he has suffered a substantial injustice if, 12 years later, his conviction is not quashed, and a re-trial considered, by reason of a change in the understanding of the law which was not foreseeable at the time of trial. Since he was unarguably guilty of murder in any event, he has not. For the same reasons, even if leave to appeal on this point were granted, the conviction must stand. The defendant was guilty of the offence (murder) of which he stands convicted. The question of sentence is considered below.*

[45] [2017] UKPC 6. See also Agard v The State Cr App No. P023 of 2013

87. It is clear therefore that once there is no miscarriage of justice a conviction for murder, where the trial judge only left felony/murder and or joint enterprise to the jury, will stand even though the trial judge ought to have left it open for the jury to consider both in the alternative.

88. In deciding whether to direct the jury on the felony/murder rule the trial judge no doubt considered the evidence of Taramatee in which she stated that before the tall man (Rampersad) began chopping the deceased "*they asked for money, jewels*"[46]. The deceased replied that they had "none", and Rampersad began chopping him. She then told them that she had $300, a chain and an identification band which she placed on the bed and Rampersad took possession of them. In both the interview notes and the caution statement Singh said that after they entered the home, the principal "A" (Rampersad) chopped the deceased and then demanded money and jewels. In the interview notes, he said: *"We went inside and I see 'A' started to chop up the man and demand money and jewels."*[47] Similarly in the caution statement, he said: *"A hold him and started chopping the man and then demanded money and jewels".*[48]

89. Based on this evidence it was open to the jury to find that Singh went to the home of the deceased that night to commit a robbery and therefore it was open to them to find him guilty of murder without giving any consideration to his intention beyond that of robbery.

90. In this case, the evidence lent itself to the principles under both joint enterprise and secondary party liability and felony/murder. The trial judge was therefore correct to premise the prosecution case on both principles of joint enterprise and secondary party liability and felony/murder.

[46] Transcript of the Proceedings dated January 31, 2017 at page 52 lines 13 -19.
[47] Summing Up dated March 8, 2017 at page 29 line 48-49.
[48] Summing Up dated March 8, 2017 at page 31 line 21-22.

91. The next issue which arises is whether the approach adopted by the trial judge can be faulted. Mr Heath complained that the trial judge erred by putting both sets of principles to the jury conjunctively which had the effect of confusing rather than clarifying the principles.

92. On the first day of her summing up the trial judge directed the jury as follows:

> ***"So the State's case against Accused No. 1 is based on a principle of law called "joint enterprise and secondary-party liability." The State says that the man who actually did the chopping of the deceased is the principal and Accused No. 1, who was present assisting or encouraging him, is the secondary party. The State's case against Accused No. 1 is also based on another principle of law called "the felony-murder rule." Now, Members of the Jury, I am going to give you written directions later on both of these legal principles which I will take you through. At this point, I am just highlighting for you the difference in the case for the State against Accused No. 1 and the case for the State against Accused No. 2."***[49]

93. The trial judge, on the third day of her summing up, gave the jury two documents containing the legal principles of joint enterprise and secondary party liability and felony/murder rule. She proceeded to explain each principle and used examples to further illustrate them to the jury. She then sought to assist them with applying the principles to the case. The trial judge also supplied them with a route to verdict document through which she guided them. It contained a list of questions which they should ask themselves before arriving at a verdict in relation to Singh.

94. We note that twice the trial judge used the word "also" in describing the bases upon which the case against Singh was based. She stated:

[49] Summing Up dated March 7, 2017 at page 16 lines 39 – page 17 line 2.

> *"**So the State's case against Accused No. 1 is based on a principle of law called "joint enterprise and secondary-party liability."** The State says that the man who actually did the chopping of the deceased is the principal and Accused No. 1, who was present assisting or encouraging him, is the secondary party. **The State's case against Accused No. 1 is also based on another principle of law called "the felony-murder rule."**[50]*

The trial judge further stated:

> *"**The State's case against Accused No. 1 is based on two alternate premises. First, it's based on a principle of law called Joint Enterprise and Secondary Party Liability, and secondly, it's also based on a principle of law called the Felony Murder Rule**."*[51]

95. The trial judge, in going through the written documents with the jury, first considered the principles of joint enterprise and secondary party liability[52]. Thereafter, she highlighted that the prosecution had relied on the alternative basis of felony/murder and proceeded to direct them on this principle.[53] She then went through the written route to verdict where she considered both issues of joint enterprise and secondary party liability. She directed them that if they did not find that Singh had the intention for murder or manslaughter as a secondary party, or was unsure then they should go on to consider felony/murder.[54] Contrary to Mr Heath's submissions, the two bases which were put to the jury were not conflated although the word "also" was used. In our view, taking the summing up as a whole, the trial judge left the bases of joint enterprise and secondary party liability and felony/murder in the alternative and she cannot be faulted for doing so.

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[50] Summing Up dated March 7, 2017 at page 16, lines 39 – 47.
[51] Summing Up dated March 9, 2017 at page 8, lines 27 – 31.
[52] Summing Up dated March 9, 2017 at page 8, line 40 to page 15, line 1.
[53] Summing Up dated March 9, 2017 at page 20, line 41 to page 22, line 24.
[54] Summing Up dated March 9, 2017 at page 28, line 45 to page 31, line 43

96. The trial judge, as manager of the trial proceedings, is charged with the responsibility of ensuring that the summing up is sufficient to achieve the primary purpose of the case through aiming for "precision over complexity and conciseness over prolixity"**.**[55]

97. The trial judge directed them painstakingly explained each set of principles giving examples in order to ensure that the jury fully understood and appreciated their applications. She coupled that with the written route to verdict which demonstrated the use of the principles in the context of the case and guided them to their final determination. Therefore, we do not agree that the trial judge conflated the principles of law in relation to 'joint enterprise and secondary-party liability' and 'the felony/murder rule' and that the jury was left to grapple with them. In fact, she attempted to provide as much assistance to them as she could by helping them to understand the difference. We note that prior to the route to the verdict being given to the jury, it was made available to counsel on both sides with no objections.

Accordingly, in our view, this ground of appeal has no merit.

GROUND 2

The learned trial judge misdirected the jury in relation to the alternative verdict of manslaughter. Such misdirection was never corrected and was left with the jury when they were sent to deliberate on their verdict. The effect of this is that it rendered the verdict unsafe.

[55] Chris Singh v The State Cr App No 18 of 2009.

Manslaughter Direction

SUBMISSIONS ON BEHALF OF THE APPELLANT

98. Mr Heath submitted that the trial judge misdirected the jury in relation to the alternative verdict of manslaughter. He further submitted that the manslaughter direction on the route to verdict which the trial judge discussed with counsel, in the absence of the jury[56], was substantially different from that which was given to them[57]. The later direction wrongly equated the intention for manslaughter as both to kill and cause grievous bodily harm as well as the intention that the deceased would suffer at least some harm, less than grievous bodily harm. He contended that these directions must have had the effect of confusing the jury. He further argued that the trial judges use of the word "*atleast*"[58] in describing the degree of harm intended may have resulted in additional confusion. Counsel submitted that such misdirection was neither acknowledged by the trial judge nor corrected by her in line with the settled principles of law, rendering the verdict unsafe.**[59]**

SUBMISSIONS ON BEHALF OF THE RESPONDENT

99. Mr Sinanan submitted that the trial judge, in her route to verdict document, clearly set out the principles concerning the alternative verdict of manslaughter.

100. In her summing up and in the route to verdict document, the trial judge correctly directed the jury with respect to the requisite intent of the appellant Singh and the requisite intent of the principal Rampersad. He contended that the use of the word "*at least*" was not confusing because they were immediately directed that it was "*less than grievous bodily harm".* He argued that when the route to the verdict

[56] Summing Up dated March 9, 2017 at page 3, lines 17-27
[57] Summing Up dated March 9, 2017, page 14 lines 39- 48
[58] Summing Up dated March 9, 2017, page 14 lines 47.
[59] R v Moon (1969) Crim LR 545. Jason Jackman and Chet Sutton v The State Cr App Nos 13714 of 2005.

is scrutinized against the trial judge's other directions, there were no significant changes but only a difference in the structure/format and this did not change the principles of law nor affect the jury's deliberation.

101. Counsel accepted that in the trial judge's directions, there may have been some parts that may have been confusing but argued that they were subsequently corrected by her and reinforced within the written route to verdict. Hence there was no need for a corrected direction. The case against Singh was formidable and he was neither prejudiced nor was there a miscarriage of justice. He submitted that in any event any concerns can be properly addressed by the application of the proviso under **section 44 (1)** of the **Supreme Court of Judicature Act, Chapter 4:01.**

LAW, ANALYSIS AND REASONING

102. In **Jogee; Ruddock**, the approved approach on the alternative verdict of manslaughter within a joint enterprise was clarified by Lords Hughes and Toulson as follows at para 96:

> *[96]* ***If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results:*** *R v Church [1965] 2 All ER 72, [1966] 1 QB 59, approved in DPP v Newbury, DPP v Jones [1976] 2 All ER 365, [1977] AC 500 and very recently re-affirmed in R v JF [2015] EWCA Crim 351, [2015] 2 Cr App Rep 64.* ***The test is objective. As the Court of Appeal held in Reid, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm,***

but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these." [emphasis added]

103. In this case, the issue of manslaughter was dealt with by the trial judge at three stages. Firstly, she went through the route to verdict with the attorneys in the absence of the jury. Next, she directed the jury on the principles of joint enterprise and secondary party liability and how to apply them to this case. Finally, she gave the jury copies of the route to verdict and read it to them.

104. In her discussion with counsel, the trial judge set out the following direction in relation to manslaughter:

"Based on the evidence we accept as true, at the time that Accused No. 1 was present, intentionally assisting or encouraging another man to chop the deceased, did the other man have the intention to kill or cause grievous bodily harm, and did Accused No. 1 also have the intention that the deceased would suffer some harm, less than grievous bodily harm? If the answer is, yes, we are sure that they had the respective intentions, return a verdict of not guilty of murder, guilty of manslaughter…."[60] [emphasis added]

105. Later, she proceeded to direct the jury on the principles of joint enterprise and secondary party liability and had the following to say as it related to the issue of manslaughter:

"Intention of a Secondary Party for Manslaughter: the law is that in order to find a secondary party guilty of manslaughter, the secondary party must have an intention to assist or encourage the principal to kill or to cause

[60] Summing Up dated March 9, 2017 at page 3 lines 17 -29

grievous bodily harm to the deceased, and at the time of the killing the principal had the intention to kill or cause grievous bodily harm, but the secondary party intended that the deceased would suffer some harm, less than grievous bodily harm."[61] [emphasis added]

106. The trial judge further directed the jury that:

"Alternatively, the State is saying, if you accept that evidence as true, you can find that the Accused No. 1 had the intention for manslaughter, which is, he had the intention to assist or encourage the principal to kill or cause grievous bodily harm to the deceased. At the time, you can infer that the person who chopped had the intention to kill or cause grievous bodily harm, and you can also infer that Accused No. 1 intended that the deceased would suffer, at least, some harm, less than grievous bodily harm". [62] [emphasis added]

107. The trial judge later read the route to verdict document to the jury, and in relation to the issue of manslaughter, directed them in terms of what was previously discussed with counsel.[63]

108. The intentions required for murder in a joint enterprise and secondary party liability and that required for manslaughter are separate and distinct. The necessary intention for murder is an intention to assist or encourage the infliction of grievous bodily harm and any foresight by the secondary party is evidence from which the jury may infer that intention. In **Jogee; Ruddock**, Lords Hughes and Toulson put it in this way: *" If a jury is satisfied that D2 intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary, and D1 did act with intent to cause serious bodily injury*

[61] Summing Up dated March 9, 2017 at page 13 lines 3 - 11
[62] Summing Up dated March 9, 2017 at page 14, lines 39 - 48
[63] Summing Up, dated March 9, 2017, at page 31, lines 12 - 24

and death resulted, D1 and D2 will each be guilty of murder."[64] With respect to manslaughter, where the secondary party encouraged or assisted the principal and he had no intention to cause grievous bodily harm but to cause some harm (less than grievous bodily harm) and death results, he is guilty of manslaughter.[65]

109. The trial judge, in her directions correctly directed the jury that the requisite intention of a secondary party for murder is the intention to assist or encourage the principal to kill or to cause grievous bodily harm[66]. However, with respect to the intention of a secondary party for manslaughter, the trial judge directed the jury that such a party's intention had to also comprise of assisting or encouraging the principal to kill or to cause grievous bodily harm[67]. Such a direction is plainly wrong. The trial judge equated the intention for a secondary party for murder with an intention for manslaughter. Immediately thereafter, she went on to accurately direct them that at the time of the killing the secondary party must have intended that the deceased would suffer some harm, less than grievous bodily harm.

110. At a later point, the trial judge again directed the jury on the question of a secondary party's intention for manslaughter and repeated her earlier error.[68] She told them that the intention of a secondary party for manslaughter was the intention to assist or to encourage the principal to kill or cause grievous bodily harm. In the same breath, she correctly directed them that at the time of the killing that the secondary party must have intended the deceased would suffer at least, some harm, less than grievous bodily harm. Her use of the word "atleast" clearly meant that she was now directing them that the secondary party had some intention to cause harm but less than grievous bodily harm.

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[64] Jogee; Ruddock para 95
[65] Jogee; Ruddock para 96
[66] Summing Up dated March 9, 2017 at page 12, lines 44 to page 13, line 2.
[67] Summing Up dated March 9, 2017 at page 12, lines 3 -11.
[68] Summing Up dated March 9, 2017 at page 14, line 39 - 48.

111. We are concerned about the trial judge's manslaughter directions. Twice she clearly confused the intention for manslaughter by importing into it the intention for murder and then proceeded to give the correct intent. Since the trial judge misdirected the jury on the law in relation to manslaughter on more than one occasion during her summing up we are yet hard-pressed to hold that her correct direction in the route to verdict document cured her mistakes. The jury had before them versions of the misstatements of law. In such circumstances, the trial judge ought to firstly have acknowledged her wrong and then proceed to correct herself in the plainest terms. In **R v Moon**[69]**,** the court misdirected the jury throughout on the burden of proof. At the end of the summing-up counsel drew attention to the misdirection, and an attempt was made to correct it. On appeal the court was not satisfied that the attempt to put right the misdirection was effective and held that the correct approach is for the trial judge to repeat the misdirection, acknowledge that it was wrong, tell the jury to put out of their minds all they had heard from the court about the misdirection and then direct them on the correct law in simple and clear terms which are incapable of being misunderstood.

112. Mr Sinanan suggested that although the trial judge may have been a bit unclear, that the written route to verdict ultimately crystalised the direction and in effect there was no need to follow **Moon**. We disagree. Trial judges play an important role throughout the entire trial process and more particularly during the summing up where they direct the triers of fact on the relevant law and how to apply them. Whether an accused obtains a fair trial is to a great extent dependent on the precision and clarity with which the trial judge sums up the case. When errors occur and the trial judge is aware of them, he has a duty to the administration of justice and to all the parties concerned to ensure that such errors are corrected in accordance with the principles and guidelines in **Moon**. While the jury must be accorded a fair amount of commonsense and understanding, the trial judge has

[69] [1969] 1 WLR 1705

to ensure that the proper guidance is imparted to them so that they can arrive at a fair and just verdict.

113. Mr Sinanan suggested that if we were to find favour with this ground of appeal that this was an appropriate case for the application of the provisio in **section 44 (1) of the Supreme Court of Judicature Act** having regard to the overwhelming nature and strength of the prosecution case. We disagree. In determining the safety of the conviction and whether there was a miscarriage of justice, the test is "*whether the conviction was rendered unsafe*."[70] The trial judge's handling of the direction in relation to manslaughter meant that the jury had before them different versions of the law in relation to joint enterprise and secondary party liability for manslaughter. Without the necessary guidance, the jury would not have known which version was correct. At the very least the correct version as set out in the route to verdict ought to have been highlighted and the incorrect versions withdrawn. The trial judge failed to take this course of action. Had the jury been properly instructed in this regard they may have convicted Singh on the lesser charge. He was therefore deprived of the benefit of such a verdict and consequently, we are not satisfied that the conviction was safe.

In the circumstances, we find merit in this ground of appeal.

GROUND 3

In her direction to the jury on how to approach the evidence in relation to the interview and caution statement tendered against the appellant, the learned trial judge merely recited the incriminating and exculpatory portions of the interview notes and caution statement and unfairly suggested to the jury that more weight should be paid to the incriminating portions of the statement. This

[70] Agard v The State Cr App No P023 of 2013.

was prejudicial to the appellant as the learned trial judge failed to analyse the contents of the statement in the round and the possible defence to the charge of murder when the statement is taken as a whole.

The interview notes and caution statement

SUBMISSIONS ON BEHALF OF THE APPELLANT

114. Mr Heath submitted that the interview notes and the caution statement attributed to Singh were not voluntarily obtained. He argued that although it was admitted into evidence, the trial judge failed to treat with it fairly. She merely recited the incriminating and exculpatory portions of the interview notes and the caution statement and unfairly suggested to the jury that more weight should be paid to the incriminating portions. She unfairly commented on the credibility of the incriminating parts over the exculpatory parts and her comments were prejudicial. She also failed to analyse the contents of both the interview notes and the caution statement regarding the possible defence of lack of intention.

115. Counsel further submitted that the trial judge ought to have highlighted the incriminating and exculpatory parts in the context of the entire evidence in the case, in particular, that of the state's witness Persad who supported the version of events given by Singh.

116. Mr Heath also submitted that the statement ascribed to Singh, by itself, notwithstanding the evidence of Persad, on a favourable interpretation raised a possible defence of lack of intention which was not put to the jury by the trial judge per **Bashir.**[71] He submitted that both the interview notes and the caution statement suggested that Singh may have visited the home of the deceased to embark upon a criminal enterprise limited to actual bodily harm, "to hit the

[71] (1983) 77 Cr App R 60.

deceased two slap". On a favourable interpretation, both the interview notes and the statement showed that Singh was not complicit in the murder of the deceased, either through joint enterprise or the felony/murder rule and had this defence been put to the jury it would have been open to them to acquit him.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

117. Mr Sinanan submitted that throughout the trial judge's review of the interview notes and caution statement she identified and directed the jury on the aspects which were either exculpatory or incriminating and gave them full and proper directions on how to approach them. He argued that at the beginning of her summation, the trial judge informed the jury that she was entitled to comment on the evidence and that they were free to accept or reject her comments. That approach was not prejudicial she reiterated that it was entirely a matter for them.

118. Counsel further submitted that the trial judge gave a full **Mushtaq**[72] direction to the jury setting out how they should approach the interview notes and the caution statement. He argued that she carefully went through the actual recording of the interview notes and the caution statement taken by the police officers and the circumstances which existed prior to and during the recording. The trial judge also reminded the jury that they must consider all the evidence.

119. Mr Sinanan submitted that since the trial judge pointed out in great detail the exculpatory parts and inculpatory parts of both the interview notes and caution statement, no fault can be attributed to the particular approach she adopted.

[72] R v Mustaq [2005] UKHL 25

LAW, ANALYSIS AND REASONING

Interview Notes and Caution Statement

120. During her summing up, the trial judge directed the jury as follows:

> *"**All right. So those, Members of the Jury, are the admissions and exculpatory statements contained in the Interview Note and Caution Statement. So, Members of the Jury, you may think that the incriminating parts are more likely to be true, otherwise, why say them? While the exculpatory parts may carry less weight. But this is entirely a matter for you."***[73]

121. In **R v Sharp**[74] the accused was charged with burglary and upon being interviewed gave a statement which was partly inculpatory and partly exculpatory in nature. The House of Lords approved of the following statement of Lord Lane CJ in **R v Duncan**[75]**:**

> *"Where a "mixed" statement is under consideration by the jury in a case where the defendant has not given evidence, **it seems to us that the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies.** It is, to say the least, not helpful to try to explain to the jury that the exculpatory parts of the statement are something less than evidence of the facts they state. **Equally, where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight. Nor is there any reason why, again where***

[73] Summing Up, March 8, 2017, page 32 lines 32-38.
[74] [1988] 1 All ER 65
[75] (1981) 73 Cr App R 359

appropriate, the judge should not comment in relation to the exculpatory remarks upon the election of the accused not to give evidence".

122. The principles in the cases of **Duncan** and **Sharp** were subsequently approved by the Judicial Committee of the Privy Council in **Whittaker v R**[76]. In that case, the Board stated that a pre-trial mixed statement made by an accused had an equivalent evidential value as outlined in **Duncan** and **Sharp** whether or not the accused chose to remain silent or to give evidence.

123. In **R v Aziz and Ors,**[77] the House of Lords was asked to reconsider the law in **Sharp** to the effect that it was wrongly decided. The court rejected such a notion. Indeed the court reaffirmed the law as stated in **Sharp** and **Duncan**. Lord Steyn had the following to say:

> *"This is the context in which counsel for the Crown invited their Lordships to depart from the decision in Sharp. Counsel did not suggest that the rule affirmed in Sharp was not clear and workable. The sole ground on which he urged a reversal in policy was that, as he put it, the law was unduly favourably stated to the defendants who do not testify. There has been no academic criticism of the decision in Sharp. On the contrary the decision has been welcomed: [1988] Crim.L.R. 305-306. Subsequent decisions of the Court of Appeal have not suggested that the principles laid down in Duncan and Sharp have caused practical difficulties. Moreover, I would reject the suggestion that the law as stated in Sharp is unduly balanced in favour of the defendants who do not testify. On the contrary, as was emphasised in Duncan and Sharp, a judge is entitled to comment adversely on the quality of the exculpatory parts of a mixed statement which has not been tested by cross-examination. The right balance has been found. The*

[76] (1993) 43 WIR 336
[77] [1995] 3 All ER 149.

decisions in Duncan and Sharp made a valuable contribution to the correct explanation of this part of our law. Moreover, in 1984 the rationale of Duncan was approved by Parliament: see section 76(1) of the Police and Criminal Evidence Act 1984 and the definition of "confession" in section 82(1) of that Act. In these circumstances the proposed challenge to Sharp was bound to fail. My perception was that the application was rejected on this substantive ground."

The principles in **Duncan, Sharp** and **Aziz** were reaffirmed by the Judicial Committee of the Privy Council in **R v Gordon**[78] and also by this court in **Walter Borneo v The State**[79].

124. In this case, Singh did not give evidence but it made no difference to the application of the principles set out in **Duncan, Sharp** and **Aziz** which are now firmly entrenched. We note that the trial judge directed the jury in line with these settled authorities by highlighting the inculpatory and exculpatory parts and also appropriately commenting that the inculpatory parts were likely to be true whilst the exculpatory parts did not carry similar weight. Regrettably, however, the judge failed to direct the jury that they must consider the whole of the interview notes and the whole of the caution statement, both the incriminating and exculpatory parts in order to decide where the truth lies. In our view, such an error is fatal in light of the fact that the trial judge, having emphasised both the incriminating and exculpatory parts went on to comment that the incriminating parts may be true and the exculpatory parts may be of less weight. Her segregation of both the incriminating and exculpatory parts may have led the jury to consider them separately rather than as a whole.

[78] (2010) 77 WIR 148.
[79] Cr. App: 7 of 2011.

The Defence

125. It is trite that where the evidence at a trial raises a defence which was not previously relied on by the defendant, the trial judge should ensure that such a defence is placed before the jury for their consideration. In **R v Williams[80],** Vincent J had the following to say at paragraph 13-14:

> *"13. There is no need for recourse to the large number of authorities from a number of jurisdictions which have made clear* ***that a trial judge must be astute to ensure that an accused person is not to be denied the consideration by the jury of any defence which may be legitimately open on the evidence. The judge's duty in this regard is clear, is not dependent upon any defence advanced on behalf of the accused and great care must be taken by the Judge to ensure that full effect is given to this principle even in the face of the express disavowal by the accused of the possible defence involved****.*
>
> *14. Presented with such a situation in Pemble v The Queen [1971] HCA 20; (1971) 124 CLR 107 at 118 Barwick, CJ stated:*
>
> > *"Here, counsel for the defence did not merely not rely on the matters now sought to be raised; he abandoned them and expressly confined the defence to the matters he did raise. However, in my opinion, this course did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused."*

126. In **Darryl Samnarinesingh v The State[81]** the appellant, and four others, were convicted of kidnapping and false imprisonment. The appellant's defence was that he was innocently present and had nothing to do with the plot. On appeal, it was contended that the trial judge erred in not instructing the jury that if they were

[80] [2000] VSC 20 (8 February 2000).
[81] Cr Appl No. 52 of 2006.

satisfied that he and the victim were involved in the plan to kidnap, that he ought to be acquitted. The court held that a trial judge is under no duty to put forward a defence that had not been raised by the appellant when such a defence conflicts with the one which he had put forward.

127. In this case, the trial judge put forward Singh's defence of denial. On the first day of her summing up, the trial judge told them:

> *"**The case for Accused No. 1 is a denial that he committed this offence; that is a denial that he participated in the killing of the deceased. Through*** questions ***put to the witnesses for the State by his attorney, Accused No. 1 is saying that although he signed both the Interview Notes and the Caution Statement, those documents do not accurately reflect what he told the police and also he signed those documents under oppressive circumstances.*** *So that is the case for Accused No. 1. I will explain more about this later."*[82]

On the third day of her summing up she proceeded to put the case for Singh as follows:

> "***Let's look at Accused No. 1. The case for Accused No. 1 is a denial that he committed this offence; that is, a denial that he participated in the killing of the deceased…"*** [83]

128. In his interview notes and caution statement, Singh told the police that he accompanied "A" (Rampersad) to the deceased home with a toy gun. The intention was to frighten the deceased. In his interview notes, he also said that "A" intended to give the deceased some "licks". Later, in his caution statement, he said that he understood that "A" was going to give the deceased "one or two

[82] Summing Up dated March 7, 2017 at page 17, lines 17-28
[83] Summing Up dated March 9, 2017 at page 24 lines 4-7

slaps" and frighten him. The reason that he and Persad had accompanied "A", was basically for "A" to "beat" and "threaten" the deceased. These statements give rise to the position that Singh did not accompany "A" with the intention to kill the deceased. He was taken ex improviso when "A" took the cutlass and began chopping the deceased. His intervention suggests that he had no intention to kill or to cause really serious harm to the deceased but only to cause some harm by hitting him two slaps or giving him some licks. If the jury were to accept what he said in those statements as true then it would be open to them to find that "A" went beyond the scope of what was agreed upon by them, and therefore Singh would not be guilty of murder but of manslaughter. The judge addressed this in her route to verdict.[84] Nonetheless, in light of the trial judge's error in respect of her directions on manslaughter especially in the context of the errors in relation to the intention required for manslaughter, which were never corrected in accordance with the established principles in **Moon**, we are constrained to hold that this ground must succeed.

Accordingly, we find merit in this ground.

Ground 4

The learned trial judge misdirected the jury in relation to the principles of joint enterprise and secondary party liability. This rendered the verdict on the basis of joint enterprise and secondary party liability against the appellant unsafe.

Principles of joint enterprise and secondary party liability

[84] Summing Up dated March 9, 2017 at page 31, lines 12 - 22

SUBMISSIONS ON BEHALF OF THE APPELLANT

129. Mr Heath submitted that the trial judge misdirected the jury on the principles of law in relation to joint enterprise and secondary party liability[85]. She ought to have directed them in accordance with the principles set out in **Jogee; Ruddock[86].** Her error was never corrected in accordance with the **Moon[87]** direction and this rendered the verdict against Singh unsafe.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

130. Mr Sinanan submitted that the trial judge gave clear and comprehensive directions on joint enterprise and secondary party liability in both her oral directions and in the route to verdict document. He contended that she directed them on the distinction to be drawn between joint enterprise and secondary party liability and that she also dealt with the principles as they related to each appellant. He further contended that the trial judge's directions on joint enterprise were supported by classic examples and argued that they had to be read in context along with her distinguishing examples to fully understand her explanations.

LAW, ANALYSIS AND REASONING

131. As previously indicated under ground 1, the law on joint enterprise and secondary party liability is stated in **Jogee; Ruddock**. Their Lordships, disapproved of the established principles in **Chan Wing-Siu[88]** in so far as it equated a secondary party's foresight with his intention to assist or encourage the principal. In the case of murder, the rule extended "*liability for murder to a secondary party on the basis of a low degree of culpability, namely foresight only of the possibility that the principal may commit murder, but without there being any need for intention to*

[85] Summing Up dated March 9, 2017 at page 10, lines 31-39 and lines 46-50.
[86] (2016) 87 WIR 439.
[87] (1969) Crim LR 545.
[88] [1984] 3 All ER 877.

assist him in doing so"[89]. In **Jogee; Ruddock**, their Lordships held that foresight could only be regarded as evidence of an intention and not conclusive of it. Their Lordships restated the principles as follows:

> *[87] It would not be satisfactory for this court simply to disapprove the Chan Wing-Siu principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles. We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn*. ***The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose."*** [90] [emphasis added]

132. The restatement of the law in **Jogee; Ruddock** has been applied in several cases in our jurisdiction[91]. In directing the jury, the onus was on the trial judge to specifically explain to them that if they were satisfied that the secondary party had realised or foreseen that the principal might commit a second crime whilst committing the first crime or that he had foreseen a particular consequence, that realisation or foresight may be evidence that the secondary party intended to assist or encourage the principal. However, it is important for the trial judge to direct them that that evidence by itself may be insufficient to ground the secondary party's intention.

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[89] Jogee;Ruddock, para 83.
[90] Jogee;Ruddock, para 87.
[91] Michael Maharaj and Ors v The State Cr. App. Nos. 56, 57, 58, 59, 60, 61, 62, 63, 64 and 65 of 2001; Soman Rampersad and Ors v The State Cr. App. Nos. 17, 18, 19, 20, 21 and 22 of 2015; Daniel Agard v The State Cr. App. No. P023 of 2013.

133. The trial judge, in her summing up, gave the following direction to the jury in relation to joint enterprise and secondary party liability. She directed them that:

> *"(7) If 'A2' agrees with 'A1' to commit Crime 1, in the course of which 'A1' commits Crime 2, 'A2' will be guilty of Crime 2 if he shared an intention that the second crime should be committed, if this became necessary. If you were satisfied that 'A2' must have foreseen that when committing the first crime, the victim might resist, and 'A1' might well commit the second crime, it would be open to you, the Jury, to find that 'A2' did intend that the second crime should be committed."*
>
> *So just to explain that, Members of the Jury, if there was a plan or agreement to commit one crime, and one of the parties foresaw that the victim might resist and because the victim resisted, the principal might commit another crime, then you might well conclude that the secondary party intended that the second crime would be committed.*
>
> *"(8) But if 'A1' -- that's the principal -- goes outside of the criminal enterprise and commits another crime that could not have been foreseen by 'A2', 'A2' would not be guilty of that crime, even if he was present at the time it was committed."*[92]

134. She also directed them as follows:

> ***"Now, Members of the Jury, once again, if you accept the admissions of Accused No. 1, contained in his statement and his Interview Note, that he went to the home of the deceased with another man, to give the deceased some licks, and teach him not to interfere with any one concerning "Guyanese"; and if you were also to find that before they entered the home of the deceased, Accused No. 1 knew that the other man was armed with a cutlass; and if you were to find, Members of the Jury, based on the evidence you accept as true, that Accused No. 1 must have foreseen that if***

[92] Summing Up dated March 9, 2017 at page 10, lines 31 – 50

the deceased resisted this attack on him, the cutlass would be used to inflict injuries on the deceased, resulting in his death; and if you were to find that Accused No. 1 was present, intentionally assisting or encouraging the other man, at the time he inflicted the chops to the deceased, then you are entitled to find that this ingredient has been established."[93]

135. In our view, the trial judge's summing up on joint enterprise and secondary party liability as set out above, when taken as a whole and read in context demonstrated that her directions and examples were given in accordance with the principles set out in **Jogee; Ruddock**. She also later accurately directed the jury that they may infer that Singh had an intention to assist or encourage the principal by considering Singh's actions before, at the time of and after the offence.

136. We also note that in her route to verdict document, the trial judge correctly identified the necessary intention for secondary party liability in relation to Singh in respect of murder and manslaughter. She stated as follows[94]:

"Question 9. Based on the evidence we accept as true, at the time that Accused No. 1 was present, intentionally assisting or encouraging another man to chop the deceased, did the other man have the intention to kill or to cause grievous bodily harm to the deceased, and did Accused No. 1 also have the intention that the deceased would suffer at least grievous bodily harm? If the answer is, yes, we are sure they both had the respective intentions, return a verdict of guilty. If the answer is, no, or we are not sure they had the respective intentions, go on to answer Question 10," which is the question on Intention for 13 Manslaughter.

"Question 10. Based on the evidence we accept as true, at the time that Accused No. 1 was present, intentionally assisting or encouraging another

[93] Summing Up dated March 9, 2017 at page 12, lines 7 - 22
[94] Summing Up dated March 9, 2017 at page 29, lines 25 to page 31, line 24.

man to chop the deceased, did the other man have the intention to kill or cause grievous bodily harm, and did the Accused No. 1 also have the intention that the deceased would suffer some harm, less than grievous bodily harm? If the answer is, yes, we are sure they had the respective intentions, return a verdict of not guilty of murder/guilty of manslaughter, and do not go on to consider questions 11 and 12, under the Felony Murder Rule. If the answer is, no, or we are not sure they had the respective intentions, go on to answer Question 11," which is on the Felony Murder Rule."

137. In our view, the trial judge correctly directed the jury on the principles of secondary party liability both orally and in her written route to verdict document.

Consequently, we hold that this ground is without merit.

Ground 5

A material irregularity occurred when the finding of guilt in relation to the appellant's co-accused was given in uncertain terms by the foreperson and the learned trial judge failed to clarify, thereby leaving the basis of the verdict ambivalent.

Uncertain verdict

SUBMISSIONS ON BEHALF OF THE APPELLANT

138. Mr Heath submitted that when the trial judge inquired from the foreperson about the basis upon which the verdict against Rampersad was arrived at, she could not recall and replied that she believed that it was based on the same rule on which Singh was found guilty. He argued that the trial judge ought to have clarified the

basis upon which the verdict against Rampersad was arrived at in order to achieve certainty. He submitted that this failure cast doubts on the validity of the verdicts against both appellants.

139. He submitted that if the words of the foreperson were taken for their true meaning, then the jury would have wrongly utilised the secondary party liability rule to arrive at the basis upon which Rampersad was found guilty. Counsel argued that secondary party liability did not apply to Rampersad.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

140. Mr Sinanan submitted that the argument raised by Mr Heath relates to Rampersad and does not affect the verdict against Singh. He contended that the verdict against Singh was unambiguous and plain and referred to **R v Larkin**[95] and **R v John Joseph Howell**[96]**.** Counsel further contended that when the foreperson was asked about the basis of the verdict, she clearly stated that they had found Singh guilty under the secondary party liability rule.

LAW, ANALYSIS AND REASONING

141. Where there is an inconsistency or ambiguity in the verdict, a trial judge may put questions to the jury to clarify the meaning of their finding. However, if they return a verdict which is plain and unambiguous, no questions should be asked by the trial judge as to the meaning of such a verdict. In **R v Larkin (supra) a**fter the jury returned a verdict of manslaughter, the trial judge proceeded to ask them on what basis had they reduced the ground of murder to manslaughter. The court found that their verdict was "plain, unequivocal and unambiguous".

[95] [1943] 1 All ER 217.
[96] (1940) 27 Cr App R 5.

142. In **R v John Joseph Howell**[97], the appellant was charged with manslaughter which arose from the driving a motor vehicle. The trial judge, in his summing up, whilst dealing with the possibility of a verdict of dangerous driving, directed the jury in the following terms: "*If you think that [the prisoner] was guilty of a mere error of judgment, then you should find him not guilty"*. The jury found *him guilty of* dangerous driving owing to an error of judgment. On appeal, it was held that when the questions and responses which were put to the jury were taken as a whole, it was difficult to escape the conclusion they meant to say: "*We know, when we look at the consequence and see the results of the event, that the driving was in fact dangerous, but, so far as the driver is concerned, we impute to him no more than a mere error of judgment".* It was held that the not guilty verdict of the jury was free from ambiguity and the appellant's conviction was quashed.

143. In this case, the verdict against Singh was given in the following way:

> *"JSO: Jurors all present, Ma'am.*
>
> *Madam Foreman, please stand. Madam Foreman, have you and all the other Members of the Jury arrived at a verdict upon which you all agree, with respect to Accused No. 1, Sunil Singh?*
>
> *MADAM FOREMAN: Yes, we have.*
>
> *JSO: Madam Foreman, what is your verdict?*
>
> *MADAM FOREMAN: Guilty.*
>
> *THE COURT: Yes.*
>
> *Now, Madam Foreman, can you indicate whether your verdict was based on the Felony Murder Rule?*
>
> *MADAM FOREMAN: No, it was based on the Secondary --*
>
> *THE COURT: -- Party Liability.*
>
> *MADAM FOREMAN: Yes, Party Liability.*
>
> *THE COURT: Thank you."*[98]

[97] (1940) 227 Cr App R 5 (1938).

[98] Summing Up dated March 9, 2017 at page 36 lines 29 – 45.

144. The verdict against Singh was one of guilty on the basis of secondary party liability. This verdict was plain, unequivocal and unambiguous.

Accordingly, we hesitate to interfere and dismiss this ground of appeal.

DISPOSITION

145. In light of our findings in relation to Rampersad, his appeal is allowed. His conviction and sentence are set aside. We invite submissions as to whether this is an appropriate case to follow the principles in **Nimrod Miguel**. We direct attorneys particularly to paragraphs 48 and 65.

146. In light of our findings in relation to Singh, his appeal is allowed. His conviction and sentence are set aside. We invite submissions as to whether the court can exercise its discretion under the **Supreme Court of Judicature Act, Chapter 4.01,** to substitute a verdict of manslaughter given the evidence in this case.

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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.