SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 10, 11 AND 12 OF 2002

BETWEEN:

[1] EVANSON MITCHAM
[2] VINCENT FAHIE
[3] PATRICE MATTHEW

Appellants

and

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Adrian D. Saunders — Justice of Appeal

Appearances:

Dr. H. Browne with Mr. H. Benjamin for the Appellants
The D. P. P., Mr. D. Merchant, with Mr. V. Warner for the Respondent

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2003: July 21; 22;
November 3.

JUDGMENT

[1] BYRON, C.J.: I have read the Judgment of Saunders, J.A. and concur with the conclusion and reasoning. The procedure employed by the trial Judge in imposing sentence after the pleas for mitigation were advanced does not seem an appropriate manner of giving effect to the new procedure that should be adopted upon a conviction for murder. It does not accord with the tenor of what was outlined in the consolidated cases of Hughes and Spence. I think there is a need for detailed procedural guidelines to be provided by this Court, and the time has come for us to do so. Already, the OECS Bar Association has discussed the

matter and has helpfully submitted views to me on the matter. We have discussed the issue and have agreed on procedural guidelines.

[2] Accordingly, I put forward the following as a procedural guide:

> If the prosecution intend to submit that the death penalty is appropriate in the event that the accused is convicted of murder, then notice to that effect should be given no later than the day upon which the offender is convicted. The notice may be given immediately upon conviction in which case it may be given orally. In any event the notice should contain the grounds on which the death penalty is considered appropriate.
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> Upon conviction by the jury, and the Prosecution having given notice that the death penalty is being sought, the trial Judge should, at the time of the allocutus, specify the date of a sentencing hearing which provides reasonable time for preparation. Where the Prosecution and the trial Judge consider that the death penalty is not appropriate, a separate sentencing hearing may be dispensed with if the accused so consents and the offender may be sentenced right away in the normal fashion.
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> When fixing the date of a sentencing hearing, the trial Judge should direct that social welfare and psychiatric reports be prepared in relation to the prisoner.
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> The burden of proof at the sentencing hearing lies on the prosecution and the standard of proof shall be proof beyond reasonable doubt.
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> The trial Judge should give written reasons for his/her decision at the sentencing hearing.

[3] The procedures followed in this case did not include providing Mitcham with notice that the death penalty would be sought against him, nor were the other Appellants given notice of the sentencing hearing or other information. In the circumstances I would order that the matter of sentencing must be remitted to the trial Judge so that the procedural guides I have set out may be followed as far as is practicable. I would suggest that in this case, the prosecution, as soon as possible, give notice in relation to Mitcham. Having not earlier imposed the death sentence upon either Fahie or Matthew, it would be inappropriate for the trial Judge to revisit the sentences passed on them so as to increase the penalty originally imposed to death sentences. It would be for Counsel and the trial Judge to determine whether there is any need to revisit those sentences at all.

[4] In light of the foregoing the convictions of all three Appellants should be affirmed and the matter remitted to the trial Judge for sentencing.

Sir Dennis Byron
Chief Justice

[5] SAUNDERS, J.A.: Arlene Fleming used to sell barbecue chicken at the top of Marshall Alley in Basseterre. She was there shortly after midnight on 3rd February, 2001 when three masked men approached her. One of the men demanded money. He held on to her apron. Although he was armed with a gun she resisted. Vernal Nisbett was seated close by on a wall. Nisbett came to her assistance. The gunman stepped back and fired a shot. Nisbett was mortally wounded. The three masked men then ran off.

[6] Evanson Mitcham, Vincent Fahie and Patrice Matthew were jointly tried for the murder. The prosecution's case was that they were engaged in a joint enterprise. When arrested, Fahie and Matthew gave caution statements. They made certain admissions. Mitcham made no statement save to tell the police that at the material time he was at home. None of the men testified before the jury. Nor was any witness called by any of them. They were all convicted. Mitcham was sentenced to death. Fahie and Matthew were given life sentences. The men have appealed their convictions and sentences.

[7] Before this Court, Counsel argued that there was insufficient legally admissible evidence against Mitcham. Counsel submitted that the trial Judge was wrong to have disallowed a no case submission made at the trial. As regards Fahie and Matthew, Counsel submitted that their respective caution statements did not disclose evidence of a joint enterprise. Counsel also took issue with the trial Judge's directions to the jury on the issue of manslaughter.

[8] The case against the Appellants was somewhat complicated as a matter of strict law. The trial Judge had ruled that the admissions made by Fahie and Matthew in their caution statements should be treated as evidence only against the respective maker. Every effort was therefore made to edit the statements so as to reduce if not eliminate the risk of prejudice to the co-accused. In determining the respective appeals, it is best to assess the position first of Fahie and Matthew before examining the position of Mitcham.

Vincent Fahie's Caution Statement

[9] In his caution statement, Fahie admitted that on the night in question he was in the company of a group of persons. The size of the group eventually dwindled to three, including himself. One of the three declared an intention to rob Ms. Fleming. Fahie was aware that one of the three was armed with a gun. He said that he and his companions proceeded towards Ms. Fleming but he dawdled a good distance behind the others. He heard some talking, and then a "Baw". Then he saw a man fall down. He said he was shocked because he never knew that was intended. He said the persons ran and after a while he too began to run. He met up with the others by a bridge at Greenlands. One of the others gave him the gun to hide and they all then ran down the road.

[10] On the Sunday following the murder, Fahie took police officers to a ghaut at College Housing. He unearthed a black Glock gun. About 20 feet further down the ghaut, Fahie showed the officers a black Glock magazine and a plastic bag containing four 9 mm. cartridges. Fahie also produced and gave to the police a long khaki pants. A black "Knicks" tam, with two eye holes cut into it, fell out of the right foot of the pants. Forensic experts later determined that a cartridge case found at the scene of the shooting had been discharged from the Glock gun that was produced by Fahie. Further, the khaki pants was found to have contained evidence of gun shot residue.

Patrice Matthew's Caution Statement

[11] Matthew admitted that he was present on the night of the murder. Shortly before arriving on the scene he had been given the gun to hold. Matthew was present when it was suggested that he and others should go and stick up Ms. Fleming. According to him, he said he wasn't going. In fact, he did go. And before going he admits changing into clothing provided by a companion. He and the others proceeded to the place where Ms. Fleming was selling her barbecue chicken. While on their way, said Matthew, he was accused of being coward. The gun was taken from him. Matthew said he was present and saw when Ms. Fleming was accosted. Her assailant was the person to whom Matthew had passed the gun. This person demanded money from Ms. Fleming. Matthew claimed that at this point he suggested to his companions that they should leave. He said that he heard the gun being cranked and at that juncture he started to leave. He saw when Nisbett was fatally shot. He then ran ahead of his companions who also ran off.

The Mens Rea of Fahie and Matthew

[12] The prosecution led no evidence that either Fahie or Matthew said or did anything at the scene of the crime. Counsel's attack on their convictions went towards proof of their *mens rea* and towards the Judge's directions on manslaughter. Defence Counsel invited us to find that the prosecution were unable to establish that Fahie and Matthew were part of a common design and/or that each intended to kill or to cause grievous bodily harm.

[13] Baptiste, J. directed the jury along the following lines:

> "The Prosecution must make you feel sure that the accused persons had intention to kill or cause grievous bodily harm. Grievous bodily harm means really serious bodily injury……..In order to reach that decision you must pay regard to all the relevant circumstances including what was said and what was done……."

I pause here to note that, for reasons that I shall explain later, in relation to Fahie and Matthew, this was a somewhat favourable direction to the jury, given that the prosecution's case was one of a joint enterprise. The Judge also told the jury:

> "It is for you the jury to decide in every case whether what was done was part of the joint enterprise or went beyond it and was in fact an act unauthorised by that joint enterprise. The normal principles of criminal liability in joint enterprise apply in cases of unlawful killing so that, a person who takes part in a joint enterprise which results in the unlawful killing of the victim and who is a party to the acts of the person who carries out the killing is guilty of either murder or manslaughter.
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> In order for such a person to be guilty of murder, three elements must be proved. 1. A common unlawful joint enterprise. 2. That what was done by the person who carried out the killing was within the scope of that common joint enterprise. 3. That the action must have been seen as a possible result of that unlawful joint enterprise. Where, however, two or more persons embark on an unlawful enterprise and goes on to commit something beyond the contemplation or foresight of the others, those other persons are not in law responsible for the act of the person".

The Judge then went on further to explain in classic fashion the meaning of a joint enterprise and then said, after reviewing the evidence:

> "With respect to ..[Fahie and Matthew].. you have to be sure that they knew or foresaw that [Mitcham], based on the Crown's case, would or might use a gun with the intention of killing or causing grievous bodily harm and that with that knowledge or foresight of his intention they continued to take part in the joint enterprise.

[14] It is my view that on the evidence presented, the jury had ample material before them to return guilty verdicts against both Fahie and Matthew. No one of course recognised them at the scene of the shooting. They were masked. The evidence against them was, however, much more than what was contained in their respective caution statements. The eye witnesses to the murder testified that the three masked men came on the scene together. They all ran off after the fatal shot. Other witnesses saw three men running in the area shortly after the shot was heard. In relation to Fahie, the discovery of the gun and the items of clothing went towards confirming his participation in the crime. As to Matthew, he described as being in his possession at one time during that night, a black Glock 9 mm. It was established by other evidence that such a gun was indeed used to commit the

murder. When the content of the respective caution statements is juxtaposed against all the other evidence in the case, the inescapable inference is that Fahie and Matthew were among the three men involved in at least a common design to commit armed robbery.

[15] It is true that in each of the caution statements there are to be found passages that might, in a vacuum, suggest a change of heart or a withdrawal from or an intention not to be a part of a common design to rob. For example, as previously mentioned, Fahie said that he lingered behind while the others proceeded to the place where Ms. Fleming was selling her barbecue. He said that when the others got to the top of the alley he was still behind. He said he was shocked when he heard the "Baw" because he didn't know that was intended. Similarly, Matthew in his statement says that when the idea was mooted that they should go and stick up Ms. Fleming, he told his companions that he was not going. He nonetheless donned a long sleeve shirt that was handed to him. He also said in his statement that he started to go up the alley and then he turned back. It was, he says, at this point that he was accused of being afraid and the gun was taken from him. At the scene of the crime, while his armed companion was accosting Ms. Fleming, Matthew said he told his friends, let's go. He said that he had actually started to leave when Nisbett was shot.

[16] Some of these self-serving passages from Fahie and Matthew do not quite square with the corresponding bits of evidence given by the eye witnesses. Arlene Fleming for example testified in this vein: She saw the masked men approaching from a distance of about 30 feet. The gun man was in front. The men all came up the alley. The gun man approached her, held on to her apron and demanded money. All this time the other two men were standing behind her, one on the right, one on the left. As soon as the shot was fired these other two ran off in the Soho direction.

[17] John Foster was another eye witness. Immediately before the shooting he was on the scene chatting with Arlene Fleming and the deceased. Foster's evidence was that all of a sudden three men appeared. They appeared from down the alley. He saw the gun man approach the lady and try to put his hands in her apron. Foster said that he concentrated on the gun man. But he testified that the other two guys were standing at the back of Ms. Fleming, "not far, just basically behind her. Vernal Nisbett was basically the same distance to Arlene, about six feet".

[18] A less sympathetic picture of the degree of involvement of Fahie and Matthew is presented in these eyewitness accounts. The jury must have preferred the eye witness accounts. The law on withdrawal from a common design was set out in Antonio Becerra et al v. R.[1] It is not enough to evince a mental change of intention or a physical change of place. One cannot lay down rigid guidelines to cover every situation. Generally however, if one desires to withdraw from the common plan, then, where reasonable and practicable, there must be timely communication of the intention to abandon the common purpose. Unequivocal notice must be served on the others involved that if they proceed with the plan they are doing so on their own. It cannot be said here that either Fahie or Matthew unambiguously signaled any such intention. However reluctant and timorous they regarded their own conduct that night, given the evidence disclosed at the trial, the jury were entitled to take the view that down to the end they remained part and parcel of the common design to commit armed robbery.

[19] Counsel also submitted, on behalf of Fahie and Matthew, that the prosecution had failed to establish the requisite *mens rea* for murder. In my view, that submission cannot succeed. Once the jury had formed the view that these men had embarked upon a common design to rob and that they were both fully aware that a 9 mm. firearm was to be used in the robbery, it can hardly be said that they did not foresee the risk of really serious bodily injury resulting in the course of the robbery.

[1] [1975] 62 Cr. App. R. 212

See: Chan Wing-siu et al vs. The Queen[2] and Alexis Prince et al vs. The State[3]. The Judge's directions, quoted at paragraph 10 above, were adequate for this purpose. Later in the summation, the Judge dealt with the case against Fahie and Matthew separately. The Judge reminded the jury of the contents of the Appellants' caution statements and instructed the jury that mere presence at the scene was not enough to prove guilt.

[20] The question as to the requisite mental element for the conviction of secondary parties in cases where there is a joint criminal enterprise was discussed recently in the House of Lords case of R. vs. Powell et al[4]. All the members of the House agreed with the leading speech delivered by Lord Hutton who carried out a thorough review of all the authorities. Lord Hutton concluded that participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant in the enterprise. This remained the law in cases where the crime charged was murder and in spite of the fact that the law requires of the principal party a specific intent to kill or cause really serious harm.

[21] The jury in this case needed to determine that Fahie and Matthew had contemplated that in carrying out the robbery, death or really serious harm could possibly have resulted. From their verdict, the jury must have been so convinced. As was said by Sir Robin Cooke in Chan Wing-siu, it would indeed be rare for a party to know that a lethal weapon is to be carried along on a criminal expedition and not contemplate the possibility of the use of that weapon resulting in at least really serious harm.

[22] Jurisprudential difficulties have been raised regarding the perceived anomaly that results from the law as posited above. *See* the remarks of Steyn, L.J. in Powell. The intent required by the law of the secondary party to a murder differs from the

[2] (1984) 3 A.E.R. 877
[3] Dominica Crim. App. No. 12 of 1992
[4] (1998) 1 Cr. App. R. 261, H.L. (E).

specific intent that is essential for the principal offender. To a great extent this anomaly is framed within the context of the varying levels of culpability of the secondary and the primary parties allied with the mandatory nature of the penalty for murder in England. Now that, in this jurisdiction, the automatic death penalty for murder has been ruled unconstitutional and Judges currently retain a measure of flexibility in the sentencing of those convicted of murder, it is open to trial Judges to ameliorate the consequences of the perceived anomaly by imposing sentences that are appropriate to each offender. As Lord Hutton observed however, there are very good public policy reasons for maintaining this dichotomy in the requisite *mens rea.*

[23] Counsel also submitted that the trial Judge's directions on the possible verdict of manslaughter were deficient; that the Judge erred in failing to direct the jury on the issue of manslaughter and the real possibility that the Appellants had no mens rea in relation to the crime of manslaughter.

[24] The Judge directed the jury in these terms:

> "In relation to manslaughter, the common intention means either that the defendants each intended to cause some injury but not to kill or cause really serious injury or that the defendant whose case you are considering knew that there was a real possibility that one or more of his co-defendants would cause some injury to the victim but would not kill or cause really serious injury and nevertheless took part in the enterprise".

I find nothing wrong in that direction. I would therefore dismiss the appeals of both Fahie and Matthew.

Evanson Mitcham

[25] I now turn to examine the position of Evanson Mitcham, the No. 1 accused at the trial. The learned trial Judge, Baptiste, J., imposed the death sentence upon him. The Judge felt sure that Mitcham was the masked man who fired the fatal shot. What was the admissible evidence against Mitcham?

[26] The case against Mitcham was based entirely on circumstantial evidence. Very shortly before Ms. Fleming saw the arrival of the three masked men, Kayane Lake and another man were in the company of the three Appellants. Lake testified that Fahie went into a yard and came out with something wrapped in a red cloth. Fahie gave the thing to Matthew. Matthew put it in his (Matthew's) pants. The five men then proceeded to Dorset Park Court. Mitcham went off and returned with a plastic bag. From the bag, Mitcham took out and distributed, each to Fahie and Matthew, a long sleeve shirt. Mitcham then took out a black tam and a small scissors. He cut eye holes and fashioned a mask from the tam. Matthew unfolded the thing in the red cloth. It was a gun. He checked the gun and replaced it in his pants. The three Appellants then went off together. As they were going off, Mitcham turned to Lake and the other man that had been left behind. He pointed his finger at them and warned them that they had not seen him. The fatal shooting took place not far away, very shortly after the three Appellants left Lake.

[27] Arlene Fleming did not recognize any of the three men who robbed her. She testified that the one with the gun had very dark skin. He was wearing a long sleeve plaid shirt, mostly red in colour and a long jeans pants, beige or khaki in colour. John Foster also witnessed the shooting. His evidence was that he was there speaking with Ms. Fleming and the deceased when the three masked men suddenly appeared. He saw the one with the gun in an altercation with Ms. Fleming. He began backing away but he kept his eyes on the gun man. He saw the gun man shoot the deceased. He then ran away faster than he had ever run in his life. He testified that the gun man was wearing a dark jean pants and a plaid shirt.

[28] Around the time of the fatal shooting, Jacqueline Hendrickson saw three men "running up the road from Wendell Lawrence's house", a distance of about 600 yards from the shooting. The place where she saw the three men was consistent with the route taken by Fahie and Matthew in their respective statements. Ms.

Hendrickson recognised one of the three men running. It was Mitcham. She said that he had on a jean and a dark blue shirt.

[29] Counsel for Mitcham submitted that there was no evidence against his client. It was said that the statements of Fahie and Matthew were inadmissible hearsay against Mitcham and that all the items discovered as a consequence of Fahie's statement were equally inadmissible as against Mitcham because those discoveries could only make sense, regarding the case against Mitcham, if one first had regard to the hearsay material linking the items to the crime.

[30] The learned DPP's response to this was that there was powerful circumstantial evidence against Mitcham that was independent of the hearsay material. This circumstantial evidence lay principally in "the factor of three". Lake's testimony clearly implicated Mitcham in a conspiracy to commit a robbery in which a gun and masks were to be used. The eye witnesses to the murder testified that the crime was committed by three masked men. Three men were seen running shortly after the shot was fired. One of these was positively identified as Mitcham. Fahie and Matthew admitted that they formed part of the trio, it was open to the jury to infer on the admissible evidence that Mitcham was the third man. In my view it cannot be said that there was insufficient circumstantial evidence against Mitcham. His appeal accordingly fails.

The Appeal Against Sentence

[31] I have read and fully agree with the guidelines put forward and other views contained in the judgment of the learned Chief Justice and in all the circumstances I too agree that this matter should be remitted to the trial Judge so that, as far as is practicable, the learned Chief Justice's views and guidelines can be adopted.

Adrian D. Saunders
Justice of Appeal

I concur.

Albert Redhead
Justice of Appeal