GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEAL NOS. 5 AND 6 OF 2002

BETWEEN:

[1] MICHAEL MATTHEW SWAYNE DAVID
[2] STEPHEN SANDY

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Albert Redhead — Justice of Appeal
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]
The Hon. Mr. Denys Barrow — Justice of Appeal [Ag.]

Appearances:

Mr. Lloyd Noel for No. 1 Appellant
Mr. Anselm Clouden for No. 2 Appellant
Mr. Hugh Wildman for the Respondent

2003: March 12; 13;
2004: March 8.

JUDGMENT

[1] REDHEAD, J. A.: Both Michael David and Stephen Sandy were tried and convicted on 1st July 2002 for the murder of Fabian Bishop. Michael David was sentenced to life imprisonment and Stephen Sandy, oddly in my view, was given an 18-year sentence. Nevertheless he has appealed against conviction and sentence. However, no argument was advanced on his behalf by learned Counsel against the sentence.

[2] I shall deal first of all with the appeal of Michael David. Initially seven grounds of appeal were filed on his behalf on 12th July 2002. Thereafter, on 2nd September, 2002, two

additional grounds of appeal were filed. Learned Counsel, Mr. Noel, was granted leave to argue the appeal as follows:

[3] The original ground 1 and b of 1 in the additional grounds of appeal be argued together.

The original 2 and 4 as combined

The additional ground 1(a) and (c)

The additional ground 2

The original ground 6

The original ground 7

[4] The first ground of appeal advanced on behalf of Michael David was as follows:

> "In a joint trial of two or more persons, the evidence of any one of them, in a statement to the police, or in an unsworn statement from the dock is not evidence against the co-accused and although the Judge gave the jury a warning during his summation of the case against Swayne David his omission to repeat and emphasize that warning when he was dealing with the actual statements of Stephen Sandy - during Stephen Sandy's part of the summation – was so serious that it must have confused the jury, which must have resulted in the eventual verdict."

[5] The learned trial Judge emphasized to the jury at the commencement of his summation that he was drawing a distinction between the case of Michael Matthew Swayne David and that of Stephen Sandy. He dealt with each case separately. He dealt with Swayne David's first.

[6] The case against Michael David is based largely on an admission that he made to Derrick Christopher in the early hours of 7th July 1994, that he, Michael David, had shot someone in a car at Mt. Gay with a gun which Christopher claimed that he lent David because he, David, said, he was going to collect some drugs.

[7] The case against Stephen Sandy is based on a caution statement which he dictated to Inspector Mason. Stephen Sandy in that caution statement implicated Michael David.

[8] The gist of that statement is that he was at his brother's residence on Green Bridge together with one 'Pepe'. Swayne David came and checked him. Swayne David told him "let us go and rob the gas station in Tempe." Swayne David showed him a gun. He, Stephen Sandy, Swayne David, and Pepe left to go and rob the gas station. They passed through Darbeau and went through Mt. Gay. While going through Mt. Gay about, two cars passed. They hid in the bush. "After the first car passed, Swayne got up and told us stay dey. I saw he went out in the road when the car reached about three or four feet away from him he point the gun at the car. The lights from the car was spotting on him. After that the car stop and he went around the car from the back, when he reach in the back of the car, the car drive off then he fired the gun behind of the car. When he fired the gun we came out from the bush and I asked him what he doing, when I asked him that he left and ran behind the car when he left and run behind the car, we were behind him when we reach by the car, Swayne say like the man got shot and he playing dead".

[9] The learned trial Judge in directing the jury told them at page 19 of the record:

> "Now, there is a very important aspect of this case I need to tell you about in relation to the case against Swayne David. That is, that the statement of Stephen Sandy that was tendered by Inspector Mason in this case, allegedly made by Stephen Sandy to Inspector Mason, seeking to implicate Swayne David that is the statement that was made out of Court and not in the presence of the accused Michael Matthew Swayne David, so it is not evidence against him and you must therefore disregard the statement when considering the evidence in the case against the No. 1 [appellant]. It is a simple safeguard put into the law to ensure that one accused doesn't seek to implicate the other one and get himself out of it. So then that statement has nothing at all to do with the No. 1 [Appellant]. You must therefore disregard it when you consider the case against Swayne David".

[10] The learned trial Judge also told the jury that they should treat the unsworn statement of Stephen Sandy in the same manner as his caution statement to the police i.e. it is not evidence against Swayne David. This to my mind was a clear direction and no jury could possibly have been misled or be confused by it. However Mr. Noel submitted, "his [the Judge's] omission to repeat and emphasize that warning when he was dealing with the actual statement of Stephen Sandy – during Stephen Sandy's part of the summation – was so serious that it must have confused the jury, which resulted in the eventual verdict".

[11] Mr. Noel in his written submission again repeated the allegation. I do not agree. (See paragraph 5). The learned trial Judge's warning was very clear. There was no ambiguity in the words used in the summing up by the Judge. The summing up was not capable of being misunderstood by any jury. If the jury understood the direction given to them by the learned trial Judge, and they must have understood it, there was no need to repeat it. 'Brevity in summing up is a virtue not a vice.' In my judgment a summing up that is repetitive is boring and achieves nothing.

[12] It is generally desirable to give directions on the law at the beginning of the summing up. [See Archibald 2003 Ed para 4-376] That is what the learned trial Judge did in the instant case. Learned Counsel in support of his argument referred to Roger Jelliseau – Godfrey Bridgeman and The Queen (Criminal Appeal Nos. 10, 6, 11 of 1995 – Grenada).

[13] I think it is pertinent to make the observation that Stephen Sandy made an unsworn statement from the dock before the jury.

[14] The Court of Appeal in Jelliseau and Bridgeman followed the Privy Council case of Lobban v R. (1995) 2 AER 602.

[15] In Jelliseau Matthew J. A. [Ag.] said at page 7:

> "The Court is of the view that it is a serious misdirection not to make it abundantly clear to the jury that the statement, made by one co-accused is not evidence against another co-accused."

[16] In Lobban (Supra) Lord Steyn delivering the opinion of the Board in the Privy Council at page 643 said:

> "Inevitably, the legal principles as their Lordships have stated them result in a real risk of co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants.
>
> One remedy is for a co accused to apply for a separate trial. The Judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interest of the implicated co-defendant must be protected by the

> most explicit directions by the trial Judge to the effect that the statement of one co-defendant is not evidence against the other."

[17] In the case at bar the learned trial Judge adequately fulfilled that duty by telling the jury emphatically that the statement made by Stephen Sandy is not evidence against Michael Matthew Swayne David and that they must disregard that statement when they are considering the case against Michael Matthew Swayne David. He told the jury so repeatedly.

[18] Learned Counsel for this appellant argued that although the learned trial Judge said that he was dealing with the case against the appellant separately, when he dealt with the actual statement of Stephen Sandy - during Stephen Sandy's part of the summation –was so serious that it must have confused the jury. Mr. Noel contended that nowhere in the summing up in relation to Stephen Sandy did the learned trial Judge ever refer to the evidence of Stephen Sandy against the appellant and tell the jury that it was not evidence against the appellant, Michael David.

[19] The record does show that when the learned trial Judge was making reference to the statement given by Stephen Sandy, the learned trial Judge did tell the jury then that allegation made in that statement by Stephen Sandy against his co-defendant Michael Matthew Swayne David was not evidence against him. Mr. Noel argued. The learned trial Judge did tell the jury at page 19 line 5 of the record:

> "Now, there is a very important aspect of this case I need to tell you about in relation to the case against Swayne David. That is the statement of Stephen Sandy that was tendered……seeking to implicate Swayne David … it is not evidence against him and you must disregard the statement when you are considering the evidence in the case against the No. 1 accused. [Swayne David]"

[20] In addition, as I have said earlier, the learned trial Judge gave clear and emphatic directions on this issue and in my opinion, there was no need for the learned trial Judge to repeat that warning every time. Mr. Noel contended under 1(b) in his additional ground said that the prosecution case against the appellant David was based solely on the evidence of Derrick Christopher "whose initial evidence was that the appellant [David] had

borrowed the gun to go and hunt for marijuana in Beaulieu-whereas the shooting took place at Mount Gay, and this latter evidence from the second accused was not evidence against the appellant [David]."

[21] Learned Counsel for the appellant Michael Matthew Swayne David in his skeleton argument took issue with the learned trial Judge when he told the jury that the evidence that is crucial to Swayne David is the evidence of Derrick Christopher. He also told the jury that the case in relation to this appellant will stand or fall on the evidence of Derrick Christopher.

[22] I do not think that there could be any criticism of the learned trial Judge for saying that because the only evidence against the appellant David was the evidence given by, Christopher. So if the jury did not believe Christopher's testimony or rejected it that was the end of the case against David. The learned trial Judge was therefore correct in saying that the case in relation to David will stand or fall on the evidence of Derrick Christopher.

[23] Learned Counsel also complained that although the learned trial Judge stressed the importance of the testimony of Michael David he did not analyze Derrick Christopher's evidence in order to determine his credibility, whereas he did so in relation to the evidence given against the appellant Stephen Sandy.

[24] At page 30 line 16 and following the learned trial Judge told the jury:

> " Now in relation to Derrick Christopher and Stephen Sandy, let me see if I can put it in context what he said in relation to Stephen Sandy….he never mentioned Stephen Sandy in his examination- in-chief. When he was led by Mr. Wildman, never mentioned him at all. It was when he was cross-examined by Mr. Noel that he had this to say. First he said he told Inspector Mason that Turkey [Michael David] was the only person on the boat with him. Then he said he couldn't remember if he told the trial Judge at a previous trial that Turkey's, friend "Cufum" [Stephen Sandy] was with him, although he admitted that Cufum frequented the boat. Then he said again, I did tell the Judge that after I gave Turkey the gun he and Cufum left the boat."

[25] The learned trial Judge then told the jury that Derrick Christopher thereafter his evidence was somewhat confusing and because he could not summarize his evidence in an effective fashion he read back that part of the evidence to the jury. The learned trial Judge then commented, properly in my view:

> " Now Madam Foreman and ladies and gentlemen of the jury is this the kind of evidence that could make you feel sure? In my view, he vacillated. And he could not make up his mind what exactly transpired. You also need to remember the purpose for which Derrick Christopher said Turkey took the gun, is a different purpose from the one which is set out in the statement. If Derrick Christopher is saying the gun was taken to go and rob a marijuana field and the statement talks about the gun being used to go rob a gas station you have to decide whether that has any bearing on the credibility of Derrick Christopher in relation to Stephen Sandy. You must not put Christopher's evidence any higher than it is. You must treat it for what it is, don't try to speculate on what he might have been saying. If you are not sure what he was saying, you must use that doubt in favour of Stephen Sandy. Can it really be said that he was sure that Cufum was on the boat from the evidence of Christopher."

[26] This evidence which is of doubtful admissibility and is hardly credible was elicited in cross-examination by Mr. Noel, learned Counsel for Michael David. Having regard to the quality of that evidence the learned trial Judge was under a duty to remind the jury, as he did, that they had decide on the credibility of Stephen Sandy. At the beginning of the summation (page 5) the learned trial Judge instructed the jury that the crux of this case was deciding the truthfulness of the witness. He told them that if they found that a witness was telling lies they should disregard the testimony of that witness.

[27] In giving the jury a 'few pointers' on how to approach the case the learned trial Judge told the jury:

> "You would recall that at some stages of the evidence of Derrick Christopher there were long pauses before he answered and I may point out one or two to you. That would give you some indication as to whether you feel he is telling you the truth or perhaps he is holding back something."

[28] There can be no valid criticism on this aspect of the Judge's summing up.

[29] This ground of appeal is dismissed.

[30] I now deal with grounds 2 and 4 of the original grounds of appeal. Mr. Noel argued that the witness Derrick Christopher was clearly an accomplice before and or after the fact-based on his evidence – and the learned trial Judge should have so directed the jury.

[31] An accomplice, like corroboration, is a matter of law and it is within the province of the learned trial Judge to so direct the jury then leave it to them as a matter of fact according to Mr. Noel.

[32] Learned Counsel also argued that the learned trial Judge having left the jury to find as a matter of fact whether Derrick Christopher was an accomplice he confused them by his direction.

[33] Learned Counsel also complained (under ground 4) that the learned trial Judge's direction on what amounts to circumstantial evidence was grossly misleading. At page 14 of the record the learned trial Judge told the jury that if they find Derrick Christopher, to be an accomplice that it was dangerous for any jury to convict on the uncorroborated evidence of an accomplice.

[34] He then went on to instruct the jury in the following manner:

> "Now it is also my duty as the Judge to point out any evidence that can amount to corroboration, but I need to tell you in this case against Swayne David there is no corroborative evidence of the evidence of Derrick Christopher. Nothing in the case against Derrick Christopher can amount to corroboration.
>
> … Corroboration is [independent] evidence that connects or tends to connect the accused to the crime. In this case we have no such connection from the evidence. So this case in relation to Michael Matthew Swayne David will stand or fall on the evidence of Derrick Christopher, and I need to emphasize that to you."

[35] I do not agree with learned Counsel that the learned trial Judge confused the jury by giving them the direction as contained in the above quoted paragraph. The Judge said in clear language that there is no corroborative evidence of Derrick Christopher. And nothing in the

evidence of Derrick Christopher can amount to corroboration in the case against Michael Matthew Swayne David.

[36] Derrick Christopher is the only witness who gave testimony against the appellant Michael Matthew Swayne David.

[37] In Ashby [Glen] v The State (1994) 45 WIR 360 it was held inter alia:

> "Where it was not clearly established that a witness was a participant in the offence but there was evidence on which the jury could have found that he had been such the issue of "accomplice vel non" should be left to the jury and they should be directed that (if they considered that the witness was an accomplice) it should be dangerous for them to convict on his evidence unless corroborated; the failure of the trial judge to leave that issue and to give them such warning constituted a flaw in the summing up…"

[38] The learned trial Judge explained to the jury the law on accomplice and told the jury if they find the witness is an accomplice it was dangerous to convict the appellant on his uncorroborated evidence.

[39] As a consequence of which the learned trial Judge made the comment:

> "So this case in relation to Michael Matthew Swayne David will stand or fall on the evidence of Derrick Christopher and I need to emphasize that to you."

[40] The learned trial Judge having previously told the jury that there was no corroboration of Derrick Christopher's evidence. There cannot be anything wrong in his direction to the jury that the case in relation to Michael Matthew Swayne David will stand or fall on his evidence.

[41] Derrick Christopher's evidence, if believed, was the only credible evidence against the appellant Michael Matthew Swayne David. He was an accomplice. It was not corroborated. If therefore the jury rejected that evidence the case against the appellant Michael Matthew Swayne David falls. Whereas if they accepted it, the case against him stands. In my judgment there could be nothing wrong with this direction to the jury.

[42] Finally on this ground learned Counsel for the appellant took issue in his skeleton arguments with the learned trial Judge emphasizing the importance of the caution statement of Stephen Sandy to Inspector Mason.

[43] Learned Counsel concluded and since the jury must have considered it the conviction of Michael Mathew Swayne David was unsafe and unsatisfactory and should be set aside.

[44] There is no doubt that the statement given by Stephen Sandy to Inspector Mason implicated the appellant Michael Swayne David. The learned trial Judge however in his charge to the jury dealt with this issue adequately. He told them how they should approach the statement, he told them emphatically that this statement was not evidence against the appellant Michael Swayne David. He also told them that when they are considering the case against this appellant they must disregard the statement made by Stephen Sandy.

[45] The submission made by learned Counsel that the statement made by Stephen Sandy must have been considered [my emphasis] by the jury and therefore the conviction is unsafe, is highly speculative and without any merit, because to so urge is in effect saying that the jury would have disregarded the Judge's warning.

[46] I now deal with ground 3.

[47] Under ground 3 the appellant alleges because the prosecution case was based on circumstantial evidence which can be relied upon as pointing to a fact, and furthermore that it can be liken to a jigsaw puzzle and it is said that if one of the pieces does not fit then the conclusion cannot be drawn.

[48] Learned Counsel in his written submissions said " the learned trial Judge's failure to direct the jury on the evidence given by Inspectors Mason and Dunbar in relation to the cause of death, the empty cartridge shells found and the evidence of Derrick Christopher about missing bullets, the total absence of any post mortem evidence. As well as the absence of

cartridge shells although both police officers gave evidence about finding three and having labeled and kept them in their possession. These failures greatly prejudiced the appellant.

[49] At page 8 of the record the learned trial Judge told the jury:

> "The prosecution is seeking to rely on circumstantial evidence, as against direct evidence, to prove that Fabian Bishop was killed by gunshots fired from behind his car from a gun in the hands of Michael Swayne David."

[50] The prosecution's case was that there was a joint enterprise between the two appellants to rob a gas station at Mt. Gay.

[51] The case against Michael Swayne David, the number one appellant was that he borrowed a gun from Derrick Christopher for the purpose, he represented to Derrick Christopher, to collect some drugs.

[52] According to the testimony of Derrick Christopher, Michael Swayne David returned the gun to him at about 3.00 a.m. the following morning. He told Christopher that he had shot a man in a car at Mt. Gay. Christopher said that when David returned the gun to him, he noticed two bullets missing.

[53] The police found the body of Fabian Bishop in a car at Mt. Gay. The back windscreen of that car was shattered, Dr. Trevor Friday who was called to the scene examined the body and pronounced it dead. He said he saw blood oozing down the back of Bishop's neck with a wound at the base of the right skull. He, the doctor, opined:

> "It would be a wound from an object traveling at a very high speed with a lot of speed with a lot of force."

[54] Stephen Sandy's statement to the police which implicated him in the shooting and the part which he played gave direct testimony as to how the incident occurred. It is true that according to his account he did not pull the trigger and his evidence is not admissible against Michael Swayne David but he is equally culpable on the basis of the law of joint

enterprise. If the jury accepted Christopher's evidence they would have come to unmistakable conclusion that Fabian Bishop was shot.

[55] In my judgment having regard to the evidence of Derrick Christopher and on the totality of the evidence there is sufficient evidence from which the jury could have properly come to the unmistakable conclusion that Fabian Bishop was killed as a result of gunshot from the hands of Michael Swayne David.

[56] I cannot agree with the learned trial Judge that the prosecution was seeking to rely on circumstantial evidence to prove that Fabian Bishop was killed by gunshots fired from behind his car from a gun at the hands of Michael Swayne David.

[57] In my view the prosecution's case was not based on circumstantial evidence.

[58] However for the sake of completeness, I look at the Judge's direction on circumstantial evidence.

[59] At pages 8 and 9 of the record the learned trial Judge addressed the jury on circumstantial evidence. At page 9 he told the jury among other things circumstantial evidence can be relied on as pointing to a fact. He also told the jury that they must be sure that the conclusion the crown was asking them to draw is the only conclusion. The learned trial Judge also told the jury that "circumstantial evidence has been likened unto a jigsaw puzzle, and it is said that if one of the pieces doesn't fit, then the conclusion cannot be drawn. That is one way of explaining circumstantial evidence."

[60] Although the learned trial Judge did not give the classic direction on circumstantial evidence, (See per Lord Normand in Teper v R 1952 AC488 at 489)

[61] I am of the view that the direction was adequate and would have been understood by the jury.

[62] Moreover having regard to the fact that the prosecution's case was not based on circumstantial evidence there could have been no prejudice suffered by this appellant even if the direction on circumstantial evidence was inadequate.

[63] Grounds 3 is therefore dismissed.

[64] I now deal with ground 5. The appellant alleges under this ground that the evidence of Shirline Harris was far more prejudicial that probative as against the appellant. Shirline Harris was the Judge's secretary at the time of the appellant's retrial. At his original trial he gave evidence on oath. At his retrial he made a statement from the dock in which he contradicted a material aspect of his previous testimony on oath. The evidence given by the appellant on oath at his trial supported the prosecution's case. The prosecution therefore called Shirline Harris to put in the notes of the trial Judge to rebut the statement of the appellant that arose ex improviso. This was in my opinion permissible.

[65] The learned trial Judge properly dealt with the rebuttal evidence. He instructed the jury:

> "all you can use the rebuttal evidence for is for the purpose of testing the credibility of Stephen Sandy, that is all you can use it for. You must not use the contents of the rebuttal evidence as evidence against Sandy. All you can say is that by virtue of the rebuttal evidence, if you accept it, that is what he is saying in relation to him not being at the scene is not true."

[66] The rebuttal evidence, if believed by the jury could have only served the purpose of rebutting his alibi which the appellant was attempting to raise by his unsworn statement.

[67] Even if the jury concluded that he was on the scene, that of itself, did not make him liable for the offence of murder.

[68] This ground of appeal is therefore without merit and is dismissed.

[69] The appellant was sentenced to life imprisonment. Learned Counsel in his written submission argued that the sentence was harsh and oppressive. I totally reject that

argument. When I deal with the sentence of the other appellant I shall address this issue more fully.

[70] I turn now to deal with the appellant Stephen Sandy. His case was based solely on a confession statement which he dictated to Inspector Mason. Under ground 1. Learned Counsel argued that the learned trial Judge in his summation to the jury failed to provide the jury with a comprehensive direction on the law on a possible verdict of manslaughter having regard to the state of the evidence and the state of the law with respect to secondary party.

[71] What is the evidence? This appellant in his statement to the police said that he was at his brother's residence when the other appellant came and told him "let us go and rob the gas station" the other appellant showed him a gun.

[72] He said he left with the number one appellant and one "Pepe" to go to rob the gas station. The number one appellant having showed him the gun, it must have been obvious in this appellant's contemplation that in carrying out the robbery the first named appellant might use the gun with the intention of causing really serious harm to the person he intended to rob. The appellant would be guilty of the offence of murder as a secondary party in the joint enterprise if violence was used as part of the planned robbery and some dies as a result of that violence.

[73] This was explicitly explained by Sir Robin Cooke in Chan Wing-Siu & Ohers v Te Queen 1985 3 ALL ER89 7 at 899:

> "The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts of the primary offender of a type which the former foresees but does not necessarily intend that there is such a principle is not in doubt it came on the contemplation or putting the same idea in other words authorization which maybe express but not usually."

[74] This appellant also said in his statement to the police:

> "I saw he [the first named appellant] went out in the road when the car reached almost three feet away from him he point the gun at the car, the light of the car was spotting on him after that the car stop and he went around the car from the back, when he reached in the back of the car, the car drive off, then he fired the gun we came out from the bush and I ask him what he doing."

[75] Mr. Clouden, learned Counsel for the appellant, argued that even if there was an agreement to participate in the robbery of a gas station there was evidence of a withdrawal of this appellant from this agreement. The learned trial Judge failed to direct the jury on this aspect of this act, he therefore urged this court to set the verdict aside.

[76] I do not agree. The evidence in my view cannot support a withdrawal from the joint enterprise. According to his own statement to the police he saw the first named appellant left and went to the car with the gun. He did not dissociate himself from the act at that time. After the first named appellant, the principal, fired the shot he asked what are you doing? This in my view cannot be regarded as dissociating himself from what was going on.

[77] Moreover according to this appellant even after Michael fired the shot behind the car and he (Michael) was running behind the car, this appellant "went behind" Michael.

[78] This cannot be regarded as a withdrawal. I so hold.

[79] Mr. Clouden also argued on behalf of this appellant that even if the plan was to rob a gas station the attempted hijacking of a car could not be part of that plan and therefore this appellant should not be held liable for the murder.

[80] In my view that argument is fraught with fallacies and speculations, because if it is accepted that this appellant did not dissociate himself from the car hijacking and in my view his statement supports that, then it can be reasonably inferred that the car hijacking was part and parcel of the robbery. It is not unreasonable to assume that the car was to be used as the get away vehicle after the robbery.

[81] It appears from the record that the learned trial Judge gave no direction on manslaughter in respect of this appellant. The question is, was the appellant prejudiced as a result of this non-direction? Having regard to the state of the evidence, I think not. Moreover in view of the strength of the evidence against this appellant, even if this was so I would have been prepared to apply the proviso and uphold the conviction.

[82] Under ground 2 the appellant's Counsel argued that the learned trial Judge failed to give a Lucas direction on lies.

[83] Mr. Wildman argued that the prosecution did not rely on the telling of lies by this appellant as supporting and inference of guilt.

[84] In Phillip Rahming v R Privy Council Appeal No. 330 of 2001 Lord Hobhouse of Woodborough at page 7 said:

> "In the present case the judge was entitled to take the view that a Lucas direction was not appropriate or required. The prosecution adduced no evidence as to the truth or falsely of the appellant's explanations of his various injuries save for one exception, the statement of Sergeant Cox that he had checked with Grove Street police station whether the appellant had made a report of a robbery to them. This was a peripheral point and had not been supported by any direct evidence. Their Lordships are of the view that to have given a Lucas direction would not have benefited the appellant nor added to the fairness of the trial."

[85] Under ground 3 learned Counsel argued that the learned trial Judge failed to put the defence case before the jury in a fair and balanced manner.

[86] Mr. Clouden referred to page 35 of the record when the learned trial Judge told the jury:

> "He [the appellant] just stood there and said what he wanted to say, he wasn't asked any questions he wasn't sworn, so obviously it wouldn't have the same amount of value like sworn testimony. So you must give it the kind of weight that you think it deserves."

[87] Before the Judge used those words he had instructed the jury that the appellant elected to make an unsworn statement. He told the jury that the appellant was entitled to make that statement and that it was his right to do so.

[88] The comments objected to by learned Counsel "he just stood there and said what he had to say" cannot in my view be regarded as an adverse criticism by the Judge of what the appellant said. In my judgment such a statement cannot be regarded as adverse to the appellant's rights or in anyway compromised the fairness of the trial. The Judge was merely explaining to the jury how they should deal with an unsworn statement.

[89] When the summing up is looked at as a whole. No other complaint can be made about the fairness of the summing up because it was a fair and balanced summing up in my view.

[90] It is unfair to my mind for learned Counsel to pick out a very small portion of the Judge's summing up, comment on it adversely, say that the summing up was inadequate and that the Judge misdirected the jury. A summing up must be looked at as a whole. This ground of appeal is without merit and is dismissed.

[91] Mr. Clouden submitted under ground 6 that the learned trial Judge erred in law when he said to the jury "you have to decide whether the statement was made voluntarily or whether it was made as a result of improper circumstances."

[92] Learned Counsel also submitted that the determination of voluntariness is within the province of the Judge and not for a jury to decide.

[93] In support of this submission Mr. Clouden referred to State v Gobin and Griffith [1976] 23WIR 256.

[94] The appellants at their trial challenged the admissibility of their confession statement that was tendered by the prosecution.

[95] Gobin objected to the admissibility of the statement on the ground that it was not made by him.

[96] He alleged that the signature was elicited from him by threats of violence and actual violence and was forced to sign it and write on it. The trial Judge admitted the statement without holding a voir dire telling the jury that as the accused was saying it was not his own statement, its admissibility was a matter of fact for them to decide.

[97] At Griffith's trial he objected to the admissibility of the confession statement on the ground that force and violence were used against him, he alleged that he had been pushed about, cuffed in the abdomen and as a result was induced to sign the confession. At the voir dire it turned out that he was complaining that the statement had been prepared before hand by the investigating officer and he was ill-treated in the manner described to sign it. Whereupon the trial Judge halted the trial within a trial and ruled that as the accused was not saying he was beaten to sign a statement of which he was the author but a statement which another person in fact was the author, it became a question of a fact for the jury whether or not the statement was that of the accused. He thereupon refrained from ruling on the voluntariness although he admitted the statement and caused it to be read to the jury.

[98] The Court of Appeal held, inter alia,

[99] In each (case above mentioned) the trial Judge erred in ruling that the objection did not raise the issue of voluntariness and in not ruling on all the evidence on the voir dire including the defence evidence of inducement whether the statement was voluntary or not.

[100] In Gobin's case the trial Judge was wrong in ruling that the admissibility of a confession statement was a matter of fact for the jury to decide, because admissibility of evidence is always a question of law for the trial Judge and not for the jury to decide.

[101] (See also Ajodha v the State 1982 AC 204).

[102] In the instant case the learned trial Judge did not leave the question of admissibility of the statement for the determination of the jury. He held a voir dire after which he gave a detailed written ruling setting out quite clearly his reasons for admitting the statement.

[103] It cannot be said with any reason that the learned trial Judge left the issue of the voluntariness of the statement to the jury or that he did not determine the voluntariness of the statement. When the Judge said to the jury at page 33:

> "You have to decide whether the statement was made voluntarily" was obviously a harmless slip and could not in anyway compromise the fairness of the trial.

[104] Finally I deal with the question of sentence.

[105] As I have said above, oddly, in my view, the appellant Stephen Sandy was only given 18 years imprisonment.

[106] The court must think out its sentencing policy seriously. There are some jurisdictions in our region where the penalty for some sexual offences is life imprisonment. If a Judge in one of these territories is faced with a situation where a criminal is convicted with a serious sexual offence, would that Judge be entitled to pass a sentence imposing a term of imprisonment for 20 years e.g. for that serious sexual offence when in a different part of our jurisdiction another Judge imposes a term of 18 years on one who was convicted of murder?

[107] On what should the court place a higher premium? I hope it is the sanctity of life.

[108] For the foregoing reasons both appeals are dismissed. The convictions and notwithstanding my comments the sentences are affirmed.

Albert Redhead
Justice of Appeal

[Sgd.]
I concur. Ephraim Georges
Justice of Appeal [Ag.]

[109] Barrow, J.A. [AG.]: As appears from the opinion of my brother Redhead JA the two appellants were convicted upon a joint trial. Swayne David's principal ground of appeal rests upon the prejudice that often flows from a joint trial. Swayne David argues that an out-of-court statement made by Sandy that was not evidence against Swayne David and which the jury should not have considered in the case against him was very much in the jury's mind when they were considering the case against Swayne David and that the jury must have been influenced by it in convicting him.

[110] In Archbold 1997, at paragraph 15–368, it is shown to be a fundamental rule of evidence that an out-of-court statement by one accused is not evidence against a co-accused unless the co-accused adopts the statement and thereby makes it his own.

[111] The likelihood that a co-accused may be prejudiced by such a statement upon a joint trial sometimes leads defence counsel to apply for separate trials and this is a factor to which a trial Judge must always give deep consideration in balancing the competing interests of the public in a joint trial and a co-accused in a separate trial.

[112] There was no application for separate trials in this case. That was no doubt a reflection of experienced counsel's recognition that separate trials are not usually ordered because it is normally desirable that persons who are alleged to have jointly committed an offence should be tried together.

[113] The rationale for the norm is expressed in Archbold 1997, at paragraph 1-157, as follows:

> "It has been accepted for a long time in English practice that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely the saving of time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those conc erned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly, it is accepted practice that a joint offence can properly be tried jointly even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that. The practice requires the trial judge to warn the jury that such evidence is not admissible against a particular defendant(s): R v. Lake, 64 Cr. App. R. 172 at 175, C.A. The court recognised that there could be exceptions to the ordinary

> practice. … The individual facts of cases will, of course, always affect the application of the general principles."

[114] In R v. Blackstock 70 Cr. App. R. 34 at p.37 the English Court of Appeal spoke in support of the trial Judge refusing separate trials in the comparable situation where the evidence on some charges was not admissible on another:

> "Every trial judge is familiar with the requirement, where more counts than one of a similar kind are joined in an indictment, of adding a warning to the jury that they must not … use the evidence on one count as evidence on the other. They should consider each count separately in light of the evidence upon that particular count against the accused person, but no other. Juries have shown themselves well able over the years to follow such a direction and apply it".

[115] In this case, argues Mr. Noel for Swayne David, although the direction was given, that was not sufficient in the circumstances to secure a fair trial for Swayne David. The warning needed to have been repeated, counsel argues, and he cites as authority for the requirement of a repeat of the warning the Privy Council case of Dennis Lobban v. The Queen [1995] 2 All E.R. 602 at 613.

[116] In that case three armed robbers invaded the home of reggae star Peter Tosh and killed him and two others. Two persons were jointly indicted for the crimes. A caution statement given by the driver of the car which took the invaders to and from the home admitted his presence but denied knowledge of and participation in the enterprise. The statement materially implicated Lobban, the other accused. It was not admissible in evidence against Lobban, of course, but it was admitted in evidence against the driver in its entirety over the objection of counsel for Lobban who sought to have it edited before its admission to have the references to Lobban excluded. A belated submission of no case to answer by the driver was upheld by the trial Judge and this left the case in the striking position that the statement which had been placed before the jury was now evidence against no one. In his summing up the Judge gave a strong direction to the jury that they must entirely ignore the statement and not allow it to colour their judgment against Lobban.

[117] The leading ground of appeal was that the trial Judge should have edited the statement of the driver so as to exclude a particular paragraph that implicated Lobban. On this aspect of the case their Lordships' observation and guidance are cogent:

> "Inevitably, the legal principles as their Lordships have stated them result in a real risk of prejudice to co-defendants in joint trials where evidence is admitted which is admissible against one defendant but not against the other defendants. One remedy is for a co-accused to apply for a separate trial. The judge has a discretion to order a separate trial. The practice is generally to order joint trials. But their Lordships observe that ultimately the governing test is always the interests of justice in the particular circumstances of each case. If a separate trial is not ordered, the interests of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other. And that duty the trial judge fulfilled in the present case by emphatic and repeated directions that the last paragraph of Russell's statement was irrelevant to the case against Lobban. The judge could not have been more explicit. For all these reasons the ground of appeal under consideration is rejected."

[118] Mr. Wildman for the prosecution argues, correctly in my respectful view, that Lobban does not establish any rule of law that in a summing up there must be a repeated direction to the jury that the material in an out-of-court statement by one accused person is not evidence and cannot be relied upon by the jury in considering the case against a co-accused. The observation of the Privy Council was that the Judge had repeated the direction, and that obviously this was appropriate, but not that it was required as a matter of law.

[119] It is not likely that there would be a rule of law to such an effect because whether a repetition of the direction is necessary in a particular case must depend on the facts and circumstances of that case. Undoubtedly there will be cases where the need will be strong for the warning to be repeated. In other cases the appropriate direction, once given, may be sufficient. Whether the failure to repeat the direction amounts to unfairness to a co-accused must be determined by an examination of the evidence and the contents of the summing up in the particular case and not by reference to some rule of law on when to repeat a direction.

[120] In this particular case the evidence against Swayne David was singular. It consisted solely of what the witness Derrick Christopher testified. In short Christopher testified that in the

afternoon of the day of the murder Swayne David borrowed a gun from Christopher saying that he wanted to go and collect some drugs and that Swayne David returned around 3 or 4 the following morning and told Christopher that he did something wrong, that he had shot somebody in a car at Mount Gay. Christopher told how he had Swayne David hand the gun over to him and how Christopher hid the gun and eventually sold it.

[121] Both counsel sought to impeach the testimony of Christopher. The Judge left it to the jury to find that Christopher was an accomplice and warned them that if they so found then it was unsafe to convict on the uncorroborated evidence of an accomplice and that there was no corroboration of Christopher's evidence. (It is another ground of appeal that the Judge should have directed the jury, as a mater of law, that Christopher was an accomplice.) So that was the totality of the evidence against Swayne David.

[122] What was not evidence against Swayne David and what ought not to have been used by the jury in deciding the case against him but what must have been very much in the minds of the jury was what Sandy said in his out-of-court statement. It is appropriate to reproduce that statement.

> "I was at my brother's residence on Green bridge together with Pepe and Swayne David came an check me he told me let's go an rob the gas station in Tempe, he showed me a gun, then me, he and Pepe left to go and rob the gas station, we pass through Darbeau and went through Mt. Gay, while going through Mt. Gay about two cars pass, when the cars passing we hide in the bush, then couple other cars passing we did the same thing, then when about the fifth or sixth car was coming we hide in the bush again, then Swayne get up and told us stay dey, I saw he went out in the road when the car reach almost three feet or four feet away from him he point the gun at the car, the lights from the car was spotting on him after that the car stop and he went around the car from the back, when he reach in the back of the car, the car drive off, then he fired the gun behind of the car, when he fired the gun we came out from the bush and I asked him what he doing, when I asked him that he left and run behind the car when he left and run up behind the car, we went behind him, when he reach by the car, Swayne say like the man get shot and he playing dead, after that me and Pepe left off running we went through the river and then run off through Kirplannies, when we reach Kirplannies we stop and Swayne came after and he said don't tell anyone about that, then we left him there and I went home and Pepe went at his home an I said I won't tell anybody about that cause I don't want to get in trouble, the next day Pepe told me heard that the man dead."

[123] Sandy challenged the admissibility of the out-of-court statement and on the voir dire testified that the police obtained the statement from him by improper means. The Judge ruled that the statement be admitted. When it came for Sandy to put his defence he chose to make an unsworn statement in court. He stated that he had been pressured to give the statement and went on to deny all knowledge of the death. He denied ever being present at Mt. Gay on the particular date.

[124] This defence of Sandy resulted in the calling of rebuttal evidence. Evidence was given that Sandy had testified at a previous trial for the same crime and the notes of his evidence were produced and read to the jury. The version of events that he gave at that earlier trial was essentially the same as in his out-of-court statement: he said he was present, that Swayne David went into the road and stopped a car, that Swayne David went around the back of the car, that the car took off, that Swayne David fired the gun from behind the car and that Swayne David said like the man got shot or he playing dead.

[125] At the beginning of his summing up the Judge told the jury that "I must implore you and beg you and insist that you must deal with each accused separately in this case; it's very important". He advised the jury that he would deal first with one accused and when he had dealt with that accused completely he would turn to the other and do the same thing.

[126] In the course of dealing with the case against David the Judge gave a clear and full direction to disregard what Sandy said in his out-of-court statement. At page 19 of the Record he said:

> "Now, there is a very important aspect of this case I need to tell you about in relation to the case against Swayne David. That is, that the statement of Stephan Sandy that was tendered by Inspector Mason in this case, allegedly made by Stephan Sandy to Inspector Mason, seeking to implicate Swayne David, that is the statement that was made out of court and not in the presence of the accused Michael Matthew Swayne David, so it is not evidence against him and you must therefore disregard the statement when considering the evidence in the case against the No. 1 accused. That is why I was insisting that you consider each accused separately. That statement, in this case, as a matter of law, has nothing to do with the No.1 accused. It's a simple safeguard put into the law to ensure that one accused doesn't seek to implicate the other one and get himself out of it. So

then the statement has nothing at all to do with the No.1 accused. You must therefore disregard it when you consider the case against Swayne David.

"You must note also that the same applies in relation to the unsworn statement and the evidence in rebuttal in relation to the statement and Stephan Sandy. The unsworn statement that was given by Stephan Sandy standing right there, that doesn't form any part of the case against Swayne David, it relates only to Stephan Sandy. Similarly, the rebuttal evidence that was given by Miss Harris, who is taking the notes here, that evidence only relates to Stephan Sandy, has nothing to do with Swayne David and therefore must be disregarded when you are considering the case against Swayne David. In a nutshell, the case against Swayne David is what Derrick Christopher had to say about him."

[127] After he finished summing up the case in relation to Swayne David the Judge turned to the case against Sandy and was careful to begin by reminding the jury that he was now dealing with Sandy and Sandy alone. But the very next sentence that the Judge uttered after that reminder confirmed the inherent difficulty with maintaining that separation. Because, as he told them, the case for the prosecution was that the accused Swayne David committed this offence together with the other accused Stephan Sandy. That remark really set the canvas for the picture that the evidence forced him to paint. That was a picture of a joint enterprise devised and led by Swayne David. The entire premise of the case against Sandy was that Swayne David murdered the driver of the car. The case against Sandy depended entirely on that premise and thereafter on the proposition that Sandy, by his accompaniment and shared criminal intent, shared in the guilt of Swayne David.

[128] This premise, as it was put to the jury, emerges strikingly in the following passage from the summing up (p. 29):

"If you find that Stephan Sandy was on the scene and intended and did by his presence alone, encourage Swayne David to commit the offence, then he is guilty. If there was a plan to rob the gas station and if what Swayne David did, that is in shooting at the car, if you are sure of it, went beyond what was agreed, or what might have been contemplated, then Swayne David alone is responsible, if he went beyond what was agreed, or he went beyond what would have been contemplated, within this arrangement to rob the gas station, then Swayne David alone is responsible for the act, and you must therefore find Stephan Sandy not guilty. But if you are sure that Stephan Sandy did realize that Swayne David might shoot at a passing car, the law is that by participating in the plan to rob the gas station with that knowledge, he is taken to have accepted the risk, that the other

> person would act in that way, and so would have adopted those acts, and is equally responsible for them. It is thus open to you to acquit, if you are not sure if Swayne David acted alone or went beyond anything that was agreed, and in this regard you must consider the statement of Stephan Sandy very carefully."

[129] Near the end of the summing up (at pages 34 to 35), when dealing with the out-of-court statement of Sandy as evidence of the common intention, the Judge examines the evidence of what Swayne David did. His comments all accept and convey to the jury that what Sandy said took place, that what Sandy said Swayne David did, was the truth. Thus, the Judge told the jury:

> "He said a number of cars passed and after the fifth or sixth car passed Swayne David got up and told them to "stay dey" and he say he saw him go out into the road and when the car was about three feet away he pointed the gun at the car, the car stopped and when he was going around the back of the car, the car drove off. Now you can imagine that state of affairs, where the driver stopping when confronted with a gun pointing at him, and then the person goes around to access the car he drives off".

The truth of Sandy's narrative seems again to be unconditionally assumed in this next passage:

> "The statement said he fired the gun from behind the car, and after the gun had been fired he, Sandy and Pepe came out of the bush, and this is what he said to Swayne David, "I asked him what he was doing". Now this is going to be very important in considering the case against Stephan Sandy, because this will help you to determine whether Swayne David went beyond this joint plan of robbing a gas station or whether this was totally outside the contemplation of the joint arrangement".

There are other examples of the Judge conveying to the jury that it is a fact that Swayne David did what Sandy said he did and that the sole issue was whether Sandy shared in that guilt. I have no doubt that the Judge was clear in his mind that Sandy's narrative was to be accepted as true only in relation to Sandy but was not even to be considered in relation to Swayne David. However, as Mr. Noel for Swayne David complained, the Judge nowhere tells this to the jury when dealing with the out-of-court statement.

[130] There can be no gainsaying that the jury had at the forefront of their mind the contents of the out-of-court statement as to the respective roles of Swayne David, as the shooter, and Sandy, as the accomplice, when considering the case against Sandy. It could not be otherwise since this was the case that they were being asked to consider.

[131] Opinions will vary as to whether and to what extent they had in mind the direction to ignore all that Sandy said in that statement when they were considering the case against Swayne David. There is nothing that provides a reliable answer to that inquiry. I am, therefore, not satisfied that the direction that was earlier given was adequate, in the particular circumstances, to enable the jury to perform the exercise of excluding from their consideration of the case against Swayne David the evidence of what Sandy said that Swayne David did.

[132] Even assuming, however, that they bore that direction in mind when considering the case against Swayne David it is a real problem to imagine how the jury thought they were to act on that direction. What was the mental process by which they were to ignore what Sandy said?

[133] The jury were never told that they could return different verdicts against the two accused; that they could find one guilty and the other innocent. To be told that they should return separate verdicts did not specifically convey that the verdicts could be dissimilar. In a case like the present the jury needed that extra assistance.

[134] It seems to me that in a real and practical way the jury needed more guidance than they received to have been able to reach a properly considered verdict. They needed to have been enabled to escape the logic that if they accepted Sandy's admission that he accompanied Swayne David and they found Sandy guilty as an accomplice to murder then Sandy's guilt was ineluctably premised on the guilt of Swayne David.

[135] Given the way that this case developed the only way that the jury could have escaped the compulsion of that logic was for them to have been told to first consider the case against Swayne David *and agree on a verdict* in relation to him before proceeding to consider the case against Sandy.

[136] In Archbold 2003 at paragraph 4 - 405 appears a summary of the guidance that the English Court of Appeal provided in the case of R v. Hickey and Robinson [1997] 8 Archbold News 3 in these terms:

> "Where an out-of-court statement or confession of one defendant incriminates one or more co-defendants, it will often be sensible for the judge to adopt the practice of advising the jury to consider the case of the defendant who is alleged to have made that statement or confession after considering the case of the co-defendant; this will minimize the risk of inappropriate use of material that is inadmissible against the co-defendants".

[137] The need for such guidance from the Judge to the jury is confirmation that in some cases further steps, beyond directing the jury to disregard inadmissible material, may need to be taken to minimize the risk of injustice to one co-accused of the jury taking into consideration against him the inadmissible contents of an out-of-court statement made by another co-accused.

[138] Other steps that may be taken include editing the statement to omit identifying references to the co-accused, discharging the jury if it subsequently becomes clear that it would be impossible on a joint trial for a jury to avoid reliance on the inadmissible statement and summing up the case of one defendant separately and taking the verdict on that defendant before starting to sum up the case against the other defendant. (As to the limitations on this last approach, see Archbold 2000 at paragraph 4 – 370)

[139] It seems to me that the summing up in this case did not go far enough to ensure that inadmissible material was not relied upon by the jury in arriving at their decision in relation to Swayne David. It is no answer to this conclusion to say, as I accept was the fact, that independently of Sandy's inadmissible out-of-court statement the evidence of Derrick Christopher, if believed by the jury, was sufficient material upon which the jury could have

found Swayne David guilty. There is significant doubt that in convicting Swayne David the jury acted on Christopher's evidence alone.

[140] In my respectful view the conviction of David is unsafe and unreliable and cannot be allowed to stand. I would allow his appeal and order a retrial.

[141] Sandy's appeal was argued first on his Ground 5 which is that the trial Judge's direction on joint enterprise was inadequate and inappropriate and that the jury was misdirected when they were told "If you find that Stephan Sandy was on the scene and intended and did by his presence alone encourage Swayne David to commit the offence then he is guilty". Mr. Clouden, for Sandy, argued that this direction overlooked the requirement as stated in Chan Wing-siu [1984] 3 All ER 877 that foresight is necessary to make a secondary party criminally liable for the act of a primary offender.

[142] There is force in Mr. Wildman's observation that the Judge's direction went further than the law required by setting a stronger mental element. The Judge required not mere foresight but intention when he directed the jury:

> "Now joint responsibility means that each accused must have shared the intention to commit the offence and each took part in it to a greater or lesser extent to further the plan or agreement. Now the mere presence, and it's very important in this case, the mere presence at the scene is not enough to prove guilt. If you find that Stephan sandy was on the scene and intended and did by his presence alone, encourage Swayne David to commit the offence, then he is guilty. If there was a plan to rob the gas station and if what Swayne David did, that is shooting at the car, if you are sure of it, went beyond what was agreed, or what might have been contemplated, then Swayne David alone is responsible, if he went beyond what was agreed, or he went beyond what would have been contemplated, within this arrangement to rob the gas station, then Swayne David alone is responsible for the act, and you must find Stephan Sandy not guilty. But if you are sure that Stephan Sandy did realize that Swayne David might shoot at a passing car, the law is that by participating in the plan to rob the gas station with that knowledge, he is taken to have accepted the risk, that the other person would act in that way, and so would have adopted those acts, and is equally responsible for them. It is thus open to you to acquit, if you are not sure if Swayne David acted alone or went beyond anything that was agreed, and in this regard you must consider the statement of Stephan Sandy very carefully."

> As I understand it, the Judge directed the jury that Sandy must have intended and encouraged the primary party to commit the act for them to find Sandy guilty and that if that act went beyond what was agreed or contemplated Sandy was not guilty. The Judge also directed that if the jury were sure that Sandy must have realized that the primary party might have committed this act of shooting at a passing car and decided to participate in the gas station robbery with knowledge of that risk and so adopted the risk, then Sandy was responsible. The requirement that Sandy needed to have realized that there was a risk that the primary party might have shot at a passing car and that Sandy must have participated with knowledge of that risk is a clear requirement of foresight.

[143] The direction of which Sandy complains rather than being inadequate or inappropriate was clearly adequate and fair. I find no merit in this ground.

[144] Sandy's Ground 1, that the Judge failed to direct the jury on a possible verdict of manslaughter, was not argued on the hearing. In Sandy's written submissions a number of cases were discussed to show an alleged divergence in judicial opinion as to whether a secondary party would be guilty of murder or manslaughter when the primary party did an act beyond what was authorized as part of the joint enterprise. R v. Gilmour (2000) The Times June 21, cited by Mr. Clouden, shows that a manslaughter verdict will be appropriate where the act that was done was the one that had been contemplated but the secondary party lacked the intention to inflict grievous bodily harm with which the primary party did the act and which intention resulted in the homicide.

[145] There was nothing in the written submissions that pointed to any fact situation or possible view of the evidence that gave rise to the possibility of a verdict of manslaughter against Sandy. Without the benefit of counsel's assistance I can see nothing that alters in any way the case that the prosecution presented and which the Judge directed the jury to consider. That case was that Sandy set out with others to rob a gas station with the use of a gun and on the way to that target one of his accomplices used the gun to rob a driver of his car and to kill him. The straight question for the jury was whether that act was authorized by

Sandy, in which case he was guilty as a secondary party, or whether that act went beyond what Sandy authorized, in which case Sandy was not guilty of any crime. There was no room for a verdict of manslaughter on the evidence. In my view this ground also fails.

[146] Sandy's ground 2 was that the Judge erred in failing to give a Lucas direction. The requirement expressed in R v Lucas (1981) 73 Cr. App. R. 159 is that in appropriate cases juries should be reminded by the Judge that people sometimes lie other than to hide guilt, for example in an attempt to bolster up a just cause or out of shame. Such a direction will be required where there is a danger that the jury, having concluded that the accused lied, may regard the fact that the accused told a lie as proof of his guilt, see R v Burge and Pegg [1996] 1 Cr. App. R.163 at 172 D.

[147] Mr. Wildman relied on Rahming v R Privy Council Appeal No. 33 of 2001 to make the point that a Lucas direction is not always required even when it is the prosecution's case that the defendant lied and that to give such a direction when it is not required can do more harm than good.

[148] In this case there was no need for a Lucas direction because while the jury were being asked to conclude that Sandy lied when he said, in his statement from the dock, that he was not present at the killing, they were also being asked to disregard the lie. The jury were not being asked to nor was there a danger that they would regard that lie as probative of guilt. Because the prosecution was saying to the jury that Sandy had made a truthful statement to the police, and the prosecution was asking the jury to believe that statement as proof of Sandy's guilt. In the circumstances there could have been no need for the Lucas direction. I would therefore reject this ground of appeal.

[149] Sandy's Ground 3 was that the Judge failed to put the case for the defence to the jury in a fair and balanced manner and that the jury were not directed how to determine factual issues. A summary of what the Judge told the jury reveals that this ground is unfounded.

[150] In summary, the Judge begins by telling the jury to disregard the fact that Sandy was recently released from prison in considering the case against Sandy. The Judge went on to tell the jury that the evidence needed to show that Sandy shared the intention to commit the offence with which he was charged and that his mere presence was not enough. Sandy, the Judge directed, needed to have realized that his accomplice might have shot at a passing car and must have decided to proceed with the joint endeavour with that knowledge.

[151] As regards the evidence of Derrick Christopher against Sandy the Judge gave clear directions as to its weaknesses, pointing to the fact that Christopher vacillated, could not make up his mind and gave confusing testimony. The Judge further directed on the testimony of the probation officer and showed how to relate this evidence to that of Christopher.

[152] The core of Sandy's defence was that the statement that he gave to the police was not true and the Judge identified for the jury the two issues that were thereby raised, namely, whether Sandy made the statement and, if so, whether the contents were true. In relation to the evidence adduced by the prosecution to rebut Sandy's alibi, the Judge directed the jury on the limited use to which they could put that evidence.

[153] As to the contents of the out-of-court statement the Judge raised in clear terms for the jury to consider whether the directive to Sandy from the shooter to "stay dey" and Sandy's question to the shooter, "what he doing?" indicated that the shooting of the deceased went beyond the common design. The Judge made clear to the jury that they were to give the benefit of any doubt on this score to Sandy.

[154] Mr. Clouden pointed to the Judge's direction to the jury on the weight they were to give to Sandy's unsworn statement in court and the Judge's expression that Sandy just stood there and said what he wanted to say. This, said counsel, was like a rebuke to Sandy for giving an unsworn statement. I did not get that sense from the passage in which the expression occurred. The Judge had just finished telling the jury to give to Sandy the

benefit of any doubt they may have about whether the shooting of the car driver was part of the joint enterprise, then he went on to say:

> "Now, let me for a moment turn to the evidence of Stephan Sandy, his unsworn statement. Here again, quite like I told you in relation to Swayne David, he elected to make an unsworn statement, I told him that he could do it and that's what he did. He is entitled to do that, that's his rights. But, of course, an unsworn statement cannot have the same value like sworn testimony that is tested by cross-examination. He just stood there and said what he wanted to say, he wasn't asked any question, he wasn't sworn. So obviously it couldn't have the same amount of value like sworn testimony. So you must give it the weight that you think it deserves."

Viewed in its context, the passage of which Sandy complains seems fair to me.

[155] The summing up next dealt at length with Inspector Mason who took Sandy's out-of-court statement and with Sandy's version of the oppression and inducement that he said came from Mason. The Judge then ended by telling the jury that even if they disbelieved Sandy as to his alibi the jury must not then say that Sandy is guilty.

[156] Upon reviewing the summing up I am satisfied that it was fair and balanced and I find no merit in the appellant's contention.

[157] Ground 4 was not argued and I do not propose to pass upon it except to say that Sandy has advanced nothing more, to take further the contention that the Judge should not have admitted, in rebuttal, evidence of what Sandy testified on oath at a previous trial, than was advanced and rejected in the Ruling of the Judge on this point at the trial.

[158] The remaining Ground 6 contends that the out-of-court statement ought not to have been admitted and that the Judge ought not to have left the matter of whether it was voluntarily made to the jury. The submission that the statement ought not to be admitted in evidence was canvassed at the trial on the voir dire and the Judge gave a fully reasoned Ruling on it. Counsel has put nothing before this court that, in my view, casts doubt on the soundness of that ruling. Nothing turns, so far as I can see, on the fact that the Judge told the jury that in considering Sandy's assertion that his statement was not true the jury should decide whether the statement was made voluntarily or whether it was made as a

result of improper circumstances. The Judge had already ruled that the statement had been made voluntarily; it was not as if he were abdicating to the jury his responsibility to decide the issue. I find that there is no merit in this ground of appeal.

[159] In the result, I would dismiss the appeal of Sandy.

[Sgd.]
Denys Barrow
Justice of Appeal [Ag.]