BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CRIMINAL APPEALS NOS. 2, 3 & 4 OF 2006

BETWEEN:

[1] LORNE PARSONS
[2] CLINTON HAMM
[3] SELENNA VARLACK

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Dr. Henry Browne and Ms. Benedicta Samuels Richardson for the Appellant Parsons
Mr. Hayden St. Clair Douglas and Mr. Kevon Swan for the appellant Hamm
Mr. Richard Rowe and Ms. Anthea Smith for the appellant Varlack
The Director of Public Prosecutions, Mr. Terrence Williams, and Ms. Tiffany Scatliffe for the Crown

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2007: January 16; 17;
February 13.

JUDGMENT

[1] BARROW, J.A.: On Monday 30th August 2004, around 7:30 in the morning, the lifeless body of Tristan Todman Industrious was found in his motor vehicle on a turn-off from an isolated, unpaved, dead-end mountain road on Nottingham Estate near East End. The deceased had been shot seven times. His body was "hanging" from the open right front or passenger door. Empty shells were found in close

proximity to the car and in different locations inside the car. When the investigating police officer checked the key was in the ignition in the on position and the engine of the car was warm.

[2] Selenna Varlack, with whom the deceased had ceased cohabiting less than two weeks before, was the last person to report seeing him alive. She said he had left her home, from which the road leading to the murder location could be seen, about 11:30 on the night of Sunday 29th August. The prosecution relied on a neighbour's testimony to say the deceased left Varlack's home around10:00 that night.

The gun

[3] On Saturday, 4th September 2004, shortly after midnight, a party of police officers who had seen a boat coming in from sea caught up with the boat being towed on a trailer by a jeep. Mario Pemberton was driving the jeep and Lorne Parsons sat in the passenger seat. An illegal entrant was found hiding in the boat. The jeep was registered in the name of Parsons' mother and the boat belonged to Parsons. The police searched the jeep and found an Uzi semi-automatic 9 mm pistol under the passenger seat on which Parsons had been sitting. The police took the three men and the jeep and boat to the police station and on a further search found a 9mm Kel-tec pistol in the captain's seat of the boat. Cellular telephones were taken from each of the three men. An expert witness testified that the Uzi was the weapon used to kill the deceased.

[4] Parsons testified at the trial and denied any knowledge of the Uzi or the other firearm. He denied being on the scene of the homicide and any involvement or knowledge of the occurrence.

The car

[5] On the Sunday night, the 29th August, a man who lived on the road beyond the turn-off on which the car and body were found saw a green Toyota Tercel or Corolla motorcar on the road when he was going home. The car was stationary with its hood up. The man testified he thought someone was in need of assistance and so he slowed and looked with a view to rendering assistance but he saw no one in or around the car. So he went along. The time was about 11:30 p.m.

[6] The police contacted all owners of green Toyota Tercel and Corolla motorcars in Tortola and these persons gave evidence at the trial. Each owner, except one, accounted for his or her car that night and testified that his or her car was not on the Nottingham Estate road that night. The exception was the owner of a driving school who owned a green Toyota Tercel that he used in the course of the driving school business. He testified that three persons had the use of that car. Two of them were he and a female driving instructor who worked with him. They both testified that they did not use the car that night. The third person that had the use of the car was Clinton Hamm, who was also a driving instructor. The owner and the female instructor testified that the person who had the car that night was Clinton Hamm.

[7] The owner and the instructor also testified that the car had a problem. It would often overheat and when that happened it would have to be parked with the hood raised and allowed to cool down before water was poured into the radiator.

[8] Although counsel for Hamm tested the reliability of the evidence of the identification of the car in the trial, counsel has not taken issue with that evidence on appeal

[9] When the police questioned Hamm he gave a statement in which he denied that he was in possession of the driving school's car at the material time. He also told

the police that on the Sunday night he had been at home, in the company of a friend, working on a car. The friend stated he had not been with Hamm that night. Hamm did not testify at the trial.

Telephone contacts

[10] The prosecution adduced evidence of telephone calls made and received by the three accused to link them to each other and to the deceased in the days and in the hours before the murder. The prosecution's expert was able to place the general area in which the caller and the person called were located by identifying the location of the telephone relay stations that processed the telephone calls. In a period of some five months before 25th August 2004 there were sixteen telephone calls between Parsons' mobile or home telephone and Hamm's mobile or home telephone. On 25th August 2004 there were three calls by Varlack from a neighbour's telephone to Hamm's mobile telephone, and one call from Parsons' home telephone to Varlack's neighbour's telephone. These calls were all within the space of 6 minutes. On the following day there was one call from Parsons' home telephone to Hamm's home telephone.

[11] On 28th August 2004, in less than an hour beginning at 7:15 in the morning, Varlack called Hamm three times and Hamm called Varlack five times. That evening Hamm called the deceased at the latter's home and later Parsons called Hamm.

[12] On 29th August 2004, the last day the deceased was seen alive, in the morning Hamm made three calls, two to the work place and the third to the home of the deceased. Varlack called three times to the deceased's home telephone, apparently reaching him once.

[13] That evening, at 8:49 Varlack telephoned from the neighbour's home and spoke with Hamm on his mobile phone. At 9:31 the deceased made his final telephone call: it was to Hamm's mobile. Three minutes later Hamm used his mobile telephone, from an East End location, and spoke with Parsons on his mobile telephone. Five minutes later Hamm again telephoned Parsons on his mobile. Twenty minutes after that call (at 9:58) Varlack, from another neighbour's telephone, called Hamm on his mobile. Hamm was still in the area of East End. Less than a minute after that, Hamm telephoned Parsons, who was in the Road Town area of Tortola, on his mobile. Five minutes later, at 10:04, Hamm telephoned Varlack at the same neighbour's home. The final call that night was at 10:57 when Hamm called the telephone company's balance check number.

[14] The following morning, the morning that the body was discovered, Hamm telephoned for Varlack twice and in the afternoon Varlack telephoned Hamm. On the next day, 31st August 2004, Hamm and Varlack each telephoned the other a number of times, Parsons and Hamm each telephoned the other a number of times and Parsons telephoned Varlack twice. On 1st September 2004, after the police interviewed Varlack, Parsons telephoned Hamm twice and Varlack telephoned Hamm twice.

[15] At 4:11:33 and at 4:11:37 in the morning of 2nd September 2004, after the Uzi firearm was recovered from Parsons' mother's jeep, Varlack telephoned Hamm.

[16] At the conclusion of their investigations the police charged Parsons, Pemberton, Hamm and Varlack with the murder of Tristan Todman Industrious. The police also charged Parsons and Pemberton with possession of the two firearms, the Uzi from under the seat of the jeep and the pistol from the captain's seat of the boat. Pemberton was acquitted on all charges and the other three were convicted of murder. Parsons was also convicted of unlawful possession of the firearms.

No case submissions

[17] At the close of the prosecution's case counsel for each accused made a submission of no case to answer on the murder charge. The trial judge upheld the submission in respect of Pemberton and rejected the submissions in respect of the other three. Each appellant complained that the judge erred in law in rejecting the submissions because the evidence was all circumstantial and was not sufficient to enable a reasonable jury to safely return a verdict of guilty. The law is that if a submission of no case to answer was wrongly rejected, even if later evidence proved the guilt of the accused, the conviction must nonetheless be quashed because the trial is unfair. The unfairness lies in the fact that the accused was entitled, in law, to a verdict of acquittal at the point when the submission was made and the wrongful denial to him of that verdict cannot be cured by subsequent evidence of his guilt: see R v Smith.[1] It is therefore necessary to consider the submission in relation to each appellant.

Parsons

[18] The submission on behalf of Parsons was essentially that "before the jury could properly convict Parsons they had to be sure that he personally had been present and participated in the attack on the deceased. But there is no evidence of this nor is there any evidence from which such an inference could be drawn." [2] This submission rested upon another submission on behalf of Parsons, which was that the finding of the murder weapon in his mother's jeep in which he was travelling did not equate to possession by him of the murder weapon. Parson's case was that the weapon could have been placed in the vehicle at any time, including when he had gone off in his boat on the trip from which the police saw him returning. He testified that the jeep had been left unlocked for hours. Counsel observed that there was no forensic evidence that connected Parsons to either the firearms or the crime scene. Counsel also submitted there was no evidence of the joint

[1] [1999] 2 Cr. App. R. 238
[2] Paragraph 60 of the written submissions on behalf of Parsons ("Parsons' submissions")

enterprise that the prosecution stated in its opening address was the premise of its case. In his written and oral submissions leading counsel for Parsons expatiated fully on these and other factual propositions, on the applicable law relating to possession and circumstantial evidence, as well as to the duty of the judge to stop a trial when the evidence is insufficient.

[19] Counsel did not make a submission of no case to answer in relation to the charge of possession of the Uzi. I would humbly agree with counsel's favourable judgment of himself, as he expressed it in his written submissions, that his decision not to make a no-case submission on the possession charge, was "quite properly"[3] taken. However, counsel's decision necessarily contained the acknowledgement that there was sufficient evidence before the jury, at the end of the prosecution's case, upon which the jury could properly convict Parsons of being in possession of the Uzi firearm. That having been the case, as a matter of reasoning it was simply not open to counsel to submit – and this is the heart of his submission, even though unarticulated – that there was no evidence on which the jury could find that Parsons was in possession of the murder weapon. Especially when coupled with the evidence of the telephone calls it was open to the jury to conclude Parsons was in possession of the murder weapon on the night of the murder and that he was the murderer. That conclusion was available (not inevitable) as a matter of common sense and I would have thought so even without a statement to that effect in Archbold 2006[4] that the Director laid before the court.

[20] A helpful discussion, in this regard, is contained in Phipson On Evidence[5] on the recognition by the courts of presumptions of fact. It is explained that where a presumption operates the court may draw a certain conclusion. The effect of a presumption may be to require less evidence than would otherwise be necessary, or to make it unnecessary to call any evidence at all. A presumption of fact, of course, may be rebutted. Strictly speaking, the term presumption of fact is a

[3] Paragraph 17 of Parsons' submissions
[4] At 14-66
[5] 16th edition at 6-16

misnomer. It is simply a term of convenience that describes the readiness of the court to draw certain repeated inferences as a result of certain common human experiences.

[21] In an earlier edition of Archbold[6] presumptions of fact are divided into three classes, according to their strength: *Violent presumptions*, where the facts and circumstances proved raise a presumption so strong that guilt almost necessarily follows; *Probable presumptions*, where the jury may be directed that if satisfied that the facts alleged by the prosecution are established and no explanation is offered, they may find a verdict of guilty; and *Light or rash presumptions*, which have very little weight or validity at all. One of the examples given suffices to illustrate the point:

> "If, upon an indictment for murder, it were proved that the deceased was murdered in a house, and that the prisoner was immediately afterwards seen running out of it with a bloodstained sword in his hand, these facts would raise a violent presumption that the prisoner was the murderer; for the blood, the weapon, and the hasty flight, are all circumstances necessarily attending the fact presumed, namely, the murder: Co.Litt. 6 b."[7]

It was eminently a matter for the jury to decide what strength to give to the presumption that arose from the fact of possession, if they so found, of the murder weapon.

[22] While an accused in a criminal trial does not have to prove his innocence, if in a particular case the prosecution has adduced evidence tending to prove his guilt, although the evidential burden does not shift to the accused[8] to introduce evidence to defeat the presumption that the prosecution has established, he runs the risk that if he calls no evidence the jury will draw the inference of guilt to which the presumption leads.[9] In my view, at the close of the prosecution's case in this trial, the evidence was capable of proving and tended to prove the guilt of Parsons. I

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[6] 37th edition (1969) at paragraph 1143
[7] 37th edition (1969) at paragraph 1144
[8] Phipson, 16th ed., at 6-17 (c)
[9] Phipson, 16th ed., at 6-14

would therefore conclude the judge properly rejected the submission of no case to answer.

Hamm

[23] The submission on behalf of Hamm, that the judge should have held that the prosecution had not made out a case for him to answer, rested on the argument that "the prosecution's case lacked evidence of the "unlawful act" which it was said was planned and which led to the shooting of the deceased."[10] Counsel submitted that without this evidence there was no case. I do not see why this should be so.

[24] It was clearly open to the jury to find that Hamm was the person who had possession of the driving school's green Toyota Tercel motorcar on the night the deceased was killed, that the car was seen stationary "a short distance away"[11] from where the deceased was killed, that the time when the car was seen was after the deceased was last known to be alive, that there was no innocent explanation for the car's location at this "extremely isolated and lonely area",[12] that the driver of the car was present at the killing, and that the driver was the killer or one of the killers. It seems to me, again, a matter of common sense that, in the particular circumstances of this case, Hamm's presence at the scene of the murder was capable of leading to the conclusion that he was the killer or one of the killers. At the close of the prosecution's case this was not a foregone conclusion but it was a conclusion properly open to the jury. It was a presumption that arose from the evidence, if the evidence was believed. For that reason, in my view, the judge was right to reject the submission of no case to answer made on behalf of Hamm.

[10] At paragraph 33 of the written submissions on behalf of Hamm ("Hamm's submissions").
[11] Paragraph 9 of Hamm's submissions
[12] Paragraph 3 of Hamm's submissions

Varlack

[25] The submission of no case to answer made on behalf of Varlack stood on different ground from the submissions made on behalf of the other appellants. There was no evidence, and not even a suspicion, that Varlack was present when the deceased was killed. Therefore, she could have a case to answer only if the prosecution's evidence was capable of proving not only that she knew there was going to be a meeting of the deceased and her co-accused, but also that she knew and accepted that a possibly lethal weapon might be used. The prosecution's case, both in its opening address and in reply to the no-case submission, was that Varlack was party to a criminal joint enterprise. It was only if that joint enterprise contemplated the killing of the deceased that Varlack could have been found guilty of murder. It is therefore necessary to consider the evidence that the prosecution had adduced at the point when it closed its case to see if there was any evidence, not of a joint enterprise *simpliciter*, but of a joint enterprise that contemplated the murder of the deceased.

[26] In his written submissions the Director began by setting out a number of facts that he stated the jury was capable of inferring without irrationality and these asserted facts constituted the essence of the prosecution's case. After dealing with inferences of the presence of Parsons and Hamm at, and their participation in the killing, the submissions asserted the following facts could be inferred against Varlack:

i. "Varlack tipped off Hamm as to the deceased commencing his journey on the lonely road where he would meet his death. This inferred by way of her telephone contact with Hamm at that time.

ii. "Parsons, Varlack and Hamm planned this murder as shown by a pattern of telephone contact between the 3 parties that started a few days before the killing and resumed at significant stages of the investigation.

iii. "During the investigation Varlack betrayed knowledge of features of the murder (i.e. the murder weapon and Parsons' involvement) that must have come through her involvement.

iv. "Varlack further showed consciousness of guilt by her conduct during the aftermath of the murder.

v. "Varlack and Hamm told material lies to the investigators to cover up their role in the murder."

[27] In Taibo v R[13] Lord Mustill cautioned, in the context of directing a jury on the nature of circumstantial evidence, that

> "… there can be an element of risk unless the jury has clearly in mind that the facts relied on must really be facts, and not simply unproved assertions of fact: for otherwise the inferences will be built on sand. This is something which a jury might easily overlook, believing that what must be added together when considering whether to draw the inference of guilt is the evidence given, rather than such facts if any as are established by that evidence."

While Lord Mustill was there concerned with warning a jury against falling into that trap, it is a warning that judges must also heed when considering, on a no-case submission, what facts are capable of being proved by the evidence that has been adduced.

[28] It is a well established principle, seen for instance in the current statutory provision in England dealing with drawing adverse inferences from the failure of a defendant to give evidence, that before any inferences can be drawn the prosecution must have established a case to answer.[14] Inferences of fact can only be drawn from precedent facts.

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[13] (1996) 48 WIR 74 at 84 - 85

[14] Section 35 of the Criminal Justice and Public Order Act 1994 is the section that permits the court or jury to draw such inferences as appear proper from the defendant's failure to give evidence or refusal, without good cause, to answer any question. R v El-Hannachi [1998] 2 Cr. App. R. 226 makes the point that the prosecution's case must first be established before any inferences can be drawn.

The deceased had agreed to meet

[29] On the evidence it was open to the jury to infer the first fact that the Director asserted, that the telephone call Varlack made was to advise Hamm that the deceased was on his way. But that inference illuminates an underlying inference that was integral to the prosecution's case but that was given very little, if any, attention: as gathered from the telephone calls that Hamm had made to the deceased earlier that day, and from the telephone call that the deceased had made to Hamm at 9:31 that night, and from the extremely lonely and isolated location where the deceased met his death, the deceased had agreed to meet with Hamm.

[30] That underlying inference shows the second inference asserted by the Director to be a foundation of sand. The second inference was that Parsons, Hamm and Varlack planned the murder and that the telephone calls between the three, both before and after the murder, showed this. That is a leap. If the telephone calls that were made between Hamm and the deceased do not show that the deceased planned to be murdered, only that he planned to meet, how could the telephone calls that Varlack made to and received from Hamm (and the one call from Parsons three days before) show that Varlack planned to murder the deceased and not just for he and Hamm to meet?

[31] The alleged presence of Parsons and Hamm at the murder raised a presumption of fact that they committed the murder. I will examine later the centuries-old judicial recognition of the inferences that flow from presence at the commission of a crime. But the assumed participation by Varlack in arranging for the deceased to meet with Hamm and/or Parsons raised no presumption that she knew, any more than the deceased did, that the deceased was going to be murdered. There was a purpose for which the deceased agreed to meet; he was not at the particular location at the particular time by chance. The prosecution did not have to prove that purpose and it really did not matter what that purpose was. Varlack's

statements to the police that the deceased had been involved in drugs, which was why she broke off their relationship, and that in September 2004 three masked men came to her home demanding drugs, would have provided fertile ground for the jury to suspect and speculate about the purpose of the meeting. Whatever the purpose, it was as likely that Varlack was a party only to that purpose as that she was a party to murder. There was no basis but speculation on which to ascribe to Varlack participation in one as opposed to the other.

[32] The other inferences on which the Director relied are either logically invalid or subject to limitations that have been ignored in their expression. Thus, in relation to the third inference, there was no basis for stating that because Varlack knew features of the murder, namely the murder weapon and Parsons' involvement, she must have been involved in the murder. Her involvement in setting up the meeting at which the deceased was murdered and her conversations with Hamm after the murder could as readily explain the knowledge on which the prosecution relied. In R v Blastland[15] the House of Lords upheld the refusal by a trial judge to allow a defendant to prove a third party's knowledge that a murder had been committed before the victim's body was found so as to invite the jury to infer that he had come to that knowledge because he was the perpetrator. Their Lordships declared that there was "no rational basis whatever on which the jury could be invited to draw an inference as to the source of that knowledge." As was commented in a leading work,[16] "It would have been mere speculation for the jury to infer that the third party came by the knowledge as perpetrator rather than as a witness." The same process of reasoning meant that it was not open to the jury in this case to draw an inference as to the source of Varlack's knowledge of the crime: it was something on which they could only speculate.

[15] [1986] A.C. 41
[16] Phipson on Evidence, 16th edition, at 16-21

[33] Again, the consciousness of guilt that the prosecution alleged in the fourth and fifth propositions is equally consistent with guilt for setting up the meeting that ended so fatally as with guilt for participating in the murder. On the state of the evidence the lies that Varlack told were as capable of being referable to guilt for unintentionally setting up the deceased to be killed as for intentionally doing so. It is clear that lies told by an accused, on their own, do not make a positive case of any crime but they may indicate a consciousness of guilt and in appropriate circumstances may be relied upon by the prosecution as evidence supportive of guilt.[17] It was important in this case to be guided by the premise that lies do not make a positive case. There must be some other evidence of guilt that the alleged consciousness of guilt goes to support as proof of guilt.

[34] Thus, in Goodway[18] the issue was the need to direct the jury on how they should proceed before they could rely on the lies the appellant told as support for other evidence of the appellant's guilt. That evidence included blood on the appellant's clothes and also identification evidence. This demonstrates the point that factual evidence, capable of proving the fact in issue, must exist before the lie can serve as support. Further, it was recognized in that case that prosecutions commonly rely on lies as corroboration, where that is required, or as support for identification evidence. The court decided there was no reason in principle or logic for drawing a distinction between such cases and other cases in which lies may be relied upon in support of prosecution evidence. That last observation confirms that lies, and other conduct from which consciousness of guilt may be inferred, may only be relied upon to support or confirm other evidence that goes to establish the commission of the crime by the defendant; not to prove by themselves that the defendant committed a crime.

[17] Blackstone's Criminal Practice 2005, F1.12 citing Strudwick (1994) 99 Cr. App. R. 326 at 331 and Goodway [1993] 4 All ER 894
[18] (1994) 98 Cr. App. R. 11 at 15

[35] It is appreciated that the prosecution's case was that the evidence capable of being construed as consciousness of guilt was not to be taken by itself but was to be taken together with all the other evidence in the case. There have been notable pronouncements to the effect that the strength of circumstantial evidence derives from its combination and the following direction to a jury, approved in the New Zealand case of Thomas v The Queen,[19] is a clear statement of the principle:

> "… the law says that a jury may draw rational inferences from facts which it finds to have been proved, and a jury may ultimately find a verdict of guilty by this process of reasoning … Now whilst each piece of evidence must be carefully examined, because that is the accused's right and that is your duty, the case is not decided by a series of separate and exclusive judgments on each item or by asking what does that by itself prove, or does it prove guilt? That is not the process at all. It is the cumulative effect. It is a consideration of the totality of the circumstances that is important."

[36] That truth, however, does not assist the prosecution in this case because even when the five propositions in relation to Varlack, upon which the prosecution relied, are taken together they remain a foundation of sand, to repeat Lord Mustill's metaphor in Taibo, and do not support any primary fact that is capable of proving guilt. The primary fact, as the Director expressed it, was that Varlack, along with the others, planned the murder. There was simply no evidence capable of establishing that fact. Varlack's alleged tipping off Hamm, her telephone calls, her alleged knowledge of the murder weapon and the alleged murderer, and her lies and other behaviour pointing to consciousness of guilt of 'something' were incapable of establishing the primary fact. Without evidence capable of proving the primary fact, these supporting facts support nothing.

[37] In her summing up the judge drew an apt distinction between drawing inferences and speculating. Speculation, she stated, was arriving at conclusions without good evidence to support them. In my view there was no good evidence to support a conclusion that Varlack knew a gun would be brought to the meeting and might be used. The inferences that the prosecution sought to draw from Varlack's conduct,

[19] [1972] NZLR 34 at 36, cited by Lord Carswell CJ in McLean and McCready [2001] NICA 32 at paragraph 5

cut down to their proper limits and accurately restated, are not capable of supporting that conclusion. The judge should not have allowed a case to go to the jury that could only be made out on the basis of speculation. I would allow the appeal of Varlack on the ground that she was entitled to succeed on the no case submission.

Issues of fact

[38] Much of the ground covered by the challenges made by counsel for Parsons and Hamm consisted of issues of fact. The root of the challenges was that the prosecution's case was built purely on circumstantial evidence. Counsel approached it from the obverse, that there was no evidence of many facts that the prosecution needed to prove. Counsel for Parsons, in particular, was comprehensive in identifying the things on which he submitted there was no evidence. The submission should more accurately have been that there was no direct evidence of these things. But it is well settled that there will often not be direct evidence of the commission of a crime "and where such testimony is not available, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence."[20]

[39] Among other things, counsel complained there was no evidence of:

- A preconceived plan between the accused persons;
- What was the joint enterprise;
- What was said in the telephone calls;
- That either man was present when the murder occurred;
- Who used the murder weapon;
- What was the intention of either man;
- Parsons being in possession of the murder weapon when it was found under his passenger seat;

[20] Archbold 2003, 10-3

- Parsons being in possession of the murder weapon on the night of the murder, even if he was in possession of the weapon when it was found.

Most of these complaints were made in the form of a submission that the judge failed to direct the jury as to these alleged gaps in the evidence, and I will deal with the misdirection aspect of the complaint in due course, but first it is necessary to repeat somewhat and to expand briefly on what was stated in considering the no-case submissions.

[40] From the fact that a meeting took place between the deceased and another or others after 10:00 at night at that isolated location it was clearly open to the jury to infer that the meeting was planned. From the fact that the firearm was used it was open to the jury to infer that it was taken to the meeting to be used. The fact that the deceased was shot seven times makes it conclusive that he was not shot accidentally but was murdered. From his telephone calls with Varlack and the deceased, and the presence of the driving school's green Toyota motorcar at the scene it was open to the jury to infer that Hamm was present at the scene. From the fact of finding the murder weapon under Parsons' seat in his mother's jeep it was open to the jury to find that Parsons was in possession of the murder weapon. From the facts of the telephone calls between Hamm and Parsons, Hamm's presence at the murder and Parsons' later possession of the murder weapon it was open to the jury to infer that Parsons had the murder weapon on the night of the murder and that he was present at the murder. As a matter of common sense it was open to the jury to conclude that whoever was not the shooter was a party to the shooting. Those inferences, it seems to me, could all be reasonably and properly made and the appellants cannot succeed on the basis that there was insufficient evidence to support their conviction.

[41] In relation to the submission that the judge failed to direct the jury as to the gaps in the prosecution's case I find no substance in it. There were no gaps to which to direct the jury. They were clearly told that the case was based on circumstantial

evidence and how to deal with circumstantial evidence. They were told there was no direct evidence of the guilt of the accused. I see no reason why that obvious feature, which was the very nature of the prosecution's case, needed to be reinforced by identifying for the jury each or any of the things of which there was no direct evidence.

Inconsistent verdicts

[42] Counsel for Parsons sought to support his submission that the evidence was insufficient to convict Parsons by submitting that the conviction of Parsons was logically inconsistent with the acquittal of Pemberton because the evidence in relation to Pemberton did not differ from the evidence in relation to Parsons. The verdict on that submission is that it is simply not true. The evidence differed in material respects: the vehicle in which the gun was found belonged to Parsons' mother; it was found under Parsons' seat; Parsons was connected to Hamm who (if the prosecution evidence was believed) was present at the murder; Parsons was in telephone contact with Hamm in the days leading up to the murder and just before the opening of the time frame within which the murder occurred; Parsons was therefore linked to the murder by both his possession of the murder weapon and his telephone contact at a critical juncture with Hamm.

[43] In contrast, Pemberton had no connection with the vehicle except through Parsons, on whose boat he testified he did mechanical work; the gun was not found under Pemberton's seat; Pemberton was not said to have any connection with Hamm; Pemberton had no telephone contact with any relevant person; Pemberton was therefore not linked to the murder. In addition, it was fully permissible for the jury to believe Pemberton but not Parsons, in relation to the possession charges. I would therefore reject the submission that there were inconsistent verdicts.

The summing up generally

[44] Among the general complaints about the summing up counsel for Parsons complained that the judge merely rehearsed the evidence rather than analyse it to assist the jury; that she failed to highlight for the jury's consideration the facts which amounted to circumstantial evidence from which inferences of Parsons' guilt could properly be drawn; that she failed to identify aspects of the evidence that were favourable to Parsons including the absence of any evidence of knowledge of the gun, criminal intent or action on his part. Counsel for Hamm made complaints of a similar nature, including that the judge failed to direct the jury on how to approach and deal with circumstantial evidence. I will identify and consider later specific complaints about the directions on lies, false alibi and joint enterprise.

[45] In the introductory parts of her summing up the judge directed the jury on the nature of circumstantial evidence and the approach they should take to such evidence. This is what she said[21]:

> "Now, reference has been made to the type of evidence which you have received in this case. You have heard circumstantial evidence. Sometimes a jury is asked to find some fact proved by direct evidence. For example, if there is reliable evidence of a witness who actually saw a Defendant commit a crime, if there is a video recording of the incident which clearly demonstrates his guilt or if there is reliable evidence of the Defendant himself having committed it, these will all be good examples of the direct evidence against him. Of course, you will instantly recognize that you don't have that type of evidence implicating the Accused directly with these offences. We have what we call, as I said, 'circumstantial evidence'. This is what the law has discerned."
>
> "On the other hand, it is often the case that direct evidence of a crime is not available and the Prosecution relies upon circumstantial evidence to prove guilt. This simply means that the Prosecution is relying upon evidence of various circumstances relating to the crime and the Defendants which they say when taken together, remember that when taken together will lead to the sure conclusion that it was the Defendants who committed the crime. I will tell you all that again."

[21]Volume 5 of the Record pages 11 – 13 of the judges summation to the jury

> "The Prosecution is relying upon evidence of various circumstances relating to the crime and the Defendants which they say when taken together would lead to the sure conclusion that it was the Defendants who committed the crime."
>
> "It is not necessary for the evidence to provide an answer to all the questions raised in the case. You may think it would be an unusual case indeed in which a jury can say we now know everything that we need to know or there is to know about this case. But the evidence must lead you to the sure conclusion that the charge which the Defendants face is proved against them."
>
> "Circumstantial evidence can be powerful evidence, but it is important that you examine it with care and consider whether the evidence upon which the Prosecution relies in proof of its case is reliable and whether it does prove guilt."
>
> "Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the Prosecution's case."
>
> "Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculation in a case amounts to no more than guessing or making up theories without good evidence to support them and neither the Prosecution, the Defence, nor you should do that."
>
> "I must also tell you when you are drawing inferences that are reasonable inferences, you must not speculate. You must not wonder about what evidence there might have been or allow yourselves to be drawn into speculation. That is arrive at a conclusion for which there is no factual basis and if there is more than one reasonable inference to be drawn from any findings of fact, you must draw the one most favourable to the Accused. That is the law."
>
> "I must tell you that again. If there is more than one reasonable inference to be drawn from any findings of fact, you must draw the one most favourable to the Accused."

[46] I do not see that the judge was required to give any more direction on circumstantial evidence than that. As I stated earlier, there was no need for the judge to highlight that there was no direct evidence of particular facts that the jury was being asked to find as a matter of inference. There was no need for the judge

to tell the jury that no one testified to seeing Hamm at the scene of the murder and that was why they were being asked to infer from the presence of the driving school car on the scene that Hamm was present. There was no need for the judge to tell the jury that no one testified to seeing Parsons with the murder weapon on the night of the murder and that was why they were being asked to infer from the fact of his later possession that he was in possession on the night of the murder. Directions of that sort were quite unnecessary.

[47] The House of Lords pronounced in McGreevy v Director of Public Prosecutions[22] that even when the case for the prosecution depended wholly on circumstantial evidence the essential duty of a judge was to give the usual direction that the prosecution must prove the case beyond reasonable doubt.[23] No particular further direction needed to be given. It was also stated that it was not essential that the trial judge should make every point that can be made for the defence.[24] In Byers v R[25] the Privy Council commented,

> "It must be a matter for the judge to determine in the exercise of his discretion what evidence requires detailed scrutiny and what merely merits a passing reference. It will normally be quite sufficient if the judge draws the attention of the jury to material discrepancies and weaknesses going to the root of the prosecution case."

[48] It is noteworthy that apart from repeating the matters in respect of which the prosecution could offer no direct evidence and the failure of the judge to emphasize this lack to the jury, counsel did not direct the court's attention to any example of the judge's failure to fairly sum up the case.

Joint enterprise

[49] A more particular complaint that both counsel addressed was the judge's direction on joint enterprise. The appeal by Varlack having succeeded, on my view, joint

[22] (1973) 57 Cr. App. R. 424
[23] At 428
[24] At 429
[25] [1996] UKPC 31

enterprise pales into insignificance. The prosecution needed to rely upon a case of joint enterprise to make Varlack a party to a murder in which she took no physical part. I have indicated my view that the prosecution had no evidence on which to do so. The case for the prosecution against the two men was always that they were both present at a killing that no one disputes was a murder. The case for the prosecution was that if only one of the two did the actual shooting it was an available presumption of fact that the other man was present not as an innocent bystander but as a party to murder.

[50] Presence at the commission of a crime was closely analysed by a twelve-member panel of the Queen's Bench Division in 1882 in R v Conway[26] in which Lord Coleridge C.J. and two other members found themselves in the minority with the view, as summarized in the head note, "that the legal inference to be drawn from mere presence, as a voluntary spectator, at a prize-fight is, in the absence of other evidence to rebut such inference, that the person so present is encouraging, aiding, and abetting such fight, and consequently guilty of assault."

[51] The majority view, as expressed in the judgment of Cave J, reflected a difference of opinion that was really as to the strength of the inference that flowed from presence and not a disagreement that an inference of guilt could flow from presence. Cave J thought that the manner in which the judge summed up the law to the jury was capable of being understood in two different ways. He said:

> "It may mean either that mere presence unexplained is *evidence of* encouragement, and so of guilt, or that mere presence unexplained is *conclusive proof* of encouragement, and so of guilt. If the former is the correct meaning, I concur in the law so laid down, if the latter, I am unable to do so. It appears to me that the passage tending to convey the latter view is that which was read by the chairman in this case to the jury, and I cannot help thinking that the chairman believed himself, and meant to direct the jury, and at any rate I feel satisfied that the jury understood him to mean, that mere presence unexplained was conclusive proof of encouragement, and so of guilt; and it is on this ground I hold that this conviction ought not to stand."[27] (Emphasis added)

[26] (1882) 8 Q.B.D. 534
[27] (1882) 8 Q.B.D. 534 at 543

[52] It will be seen that there was no doubt that presence alone was sufficient to permit the jury to infer participation in the crime. This proposition emerged very clearly in several of the judgments that were rendered. An apt instance is contained in the following passage from the judgment of Cave J:

> "So in Foster's Crown Law, p. 350, it is said that "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary, and therefore if A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoureth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him, this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory." "I would be here," he continues, "understood to speak of that kind of homicide, amounting in construction of law to murder, which is usually committed openly and before witnesses, *for in the case of assassinations done in private, to which witnesses who are not partakers in the guilt are very rarely admitted, the circumstances I have mentioned may be made use of against A, as evidence of consent and concurrence on his part*; and in that light should be left to the jury, if he be put upon his trial." (Emphasis added)
>
> "This seems to me to hit the point. Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is prima facie not accidental it is evidence, but no more than evidence, for the jury."[28]

[53] It has, therefore, been accepted by English courts and Books of Authority for centuries that presence at a murder, depending on the circumstances, may be used against an accused as evidence of consent and concurrence in murder. In this case, where the hour and the location would have conclusively ruled out accident, presence at the murder would have been stronger evidence before the jury of aiding and abetting.

[54] That proposition also meets the submission by counsel for both men that the judge failed to direct the jury that they could return a verdict of manslaughter. As already repeated, the persons who were present at the killing of the deceased were present at a murder. That was the crime to which their presence was capable of

[28] At 539 - 540

serving as evidence of consent and concurrence. There was no evidence upon which to direct the jury that a person present could have been culpable of a lesser crime.

[55] Before leaving the complaints that counsel for each man made about the judge's direction on joint enterprise, I should note there was no submission that the judge made any wrong statement of law to the jury. The submissions, in essence, were that the judge failed to apply the law to the facts of the case. Counsel again advanced challenges as to the sufficiency of the evidence. In particular, counsel for both men argued there was no evidence of the joint enterprise upon which it was said the men were engaged and nor was there evidence as to what was in the contemplation of the party who did not do the shooting. I believe the guidance that emerges from R v Conway, on the inferences that may be drawn from presence, disposes of these submissions.

Lies

[56] The complaint about the direction on lies, as it appeared in the grounds of appeal, was that the judge failed to give any or any sufficient direction to the jury on the issue of lies told by Hamm to the police and the way in which the jury should approach the matter of the lies. Since the judge gave the classical English Judicial Studies Board Direction on lies, as counsel acknowledged in oral argument, there was no substance to that complaint. However, counsel did not abandon the ground but submitted that the judge should have tailored the direction to this particular case that was built so heavily on circumstantial evidence. Counsel gave no clue as to the tailoring that the judge should have done and the complaint amounts to no more than a vague criticism.

False alibi

[57] In the grounds of appeal counsel for Hamm asserted that the judge failed to give any or any sufficient direction on a failed alibi and failed to direct them that a failed alibi could have been put forward for any of a number of reasons but could be used in support of the prosecution's case only if they concluded that the failed alibi betrayed a consciousness of guilt and had been put forward to mislead the police and jury. Again, the judge gave the full English Judicial Studies Board Direction and it is simply untrue that she failed to direct the jury on how to approach a failed alibi and that she failed to tell them that a failed alibi could have been put forward for an innocent reason. This is what the judge said [29]:

> "Let me tell you how to deal with alibi. The Defence is one of alibi. That is Hamm. The Accused told the police that he was not at the scene of the crime which was committed. That he was at his home at Harrigan's Estate with his friend working on his car, so on the evening, on the night of the 29th of August, 2004."
>
> "Now the Prosecution has to prove his guilt so that you are sure of it. He does not have to prove that he was elsewhere at the time. On the contrary, the Prosecution must disprove his alibi which is what they have attempted to do by putting the deposition of Bobo into, reading it into the record; and we will tell you about that in a minute. About how to treat this alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the Accused. It is a matter which you may take into account that you should bear in mind that an alibi is sometimes invented to support a genuine defence."

[58] The last part of the ground of appeal, that a failed alibi could be used to support the prosecution's case only if it betrayed a consciousness of guilt and had been put forward to mislead, attempts to tag on to the failed alibi ground the requirements of the law relating to directions on lies. But the judge had already given this direction to the jury, when she directed them on lies, as follows: "It is only if you are sure that he or she did not lie for an innocent reason that his lies

[29] Volume 5 of the record, Pages 61 to 62 of the Judge's Summation

can be regarded by you as evidence going to prove guilt and supporting the prosecution's case."[30] I see no reason why this direction needed to be repeated.

Conclusion

[59] In my view, none of the grounds of appeal advanced on behalf of Lorne Parsons and Clinton Hamm succeeds and I would dismiss their appeals. For the reasons given I would allow the appeal of Selenna Varlack.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal

[30] Volume 5, Record of Appeal, Summing up, p. 46 lines 5 to 9