ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CRIMINAL APPEALS NOS. 13, 14, 15, 16, 17 & 18 OF 2003

BETWEEN:

[1] HENRY WEEKES
[2] EVERETTE CRUMP
[3] KENAZ WHYTE
[4] PAUL EPHRAIM
[5] KESTER BAILEY
[6] DALE CHRISTIAN

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC — Chief Justice [Ag.]
The Hon. Mr. Michael Gordon, QC — Justice of Appeal
The Hon. Mr. Hugh A. Rawlins — Justice of Appeal

Appearances:

Mr. Dane Hamilton for the 1st, 2nd, 3rd, and 4th Appellants
Mr. Hugh Marshall for the 5th Appellant
Mr. Jason Martin for the 6th Appellant
Mr. Anthony Armstrong, Director of Public Prosecutions, with him Ms. Jo-Ann Walsh, Senior Crown Counsel, for the Respondent

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2006: November 28, 29;
2007: March 23.

JUDGMENT

[1] RAWLINS, J.A.: The 6 appellants were jointly charged, with 4 other persons who were acquitted by the jury, for the murder of Andrew Owen Douglas. They were also charged for kidnapping Douglas, Odebo Benjamin and Miguel Walcolm, and for causing grievous bodily harm with intent and for causing grievous bodily harm with intent to murder Odebo Benjamin and Miguel Walcolm. Douglas, Benjamin

and Walcolm were taken, held and beaten by a number of persons in March 2002 and Douglas died as a result of the injuries that he sustained from that beating. The gravamen of the case for the Crown was that the appellants were responsible for the death of Douglas by those acts that were committed in furtherance of a joint unlawful enterprise.

[2] At the end of her summation, the learned trial judge invited the jury to consider murder first. The jury found appellants, Christian, Weekes, Crump, Ephraim and Bailey guilty of murder. They were sentenced to imprisonment for life with hard labour. The appellant, Whyte, was convicted of manslaughter and sentenced to 25 years imprisonment.[1] They appealed on various grounds.

The grounds of appeal

[3] There were aspects of the submissions, which highlighted the legal principles that relate to joint unlawful enterprise. Those aspects of the submissions were made in a manner which seemed to question the sufficiency of the evidence to satisfy the ingredients of the offences for which the appellants were charged. Thus, for example, Mr. Hamilton, learned counsel for Whyte, Weekes, Crump and Ephraim, said that one issue that arises is whether there was a common plan by the appellants to capture, hold and inflict grievous bodily harm on Douglas, Odebo Benjamin or Miguel Walcolm. By extension he said the issue also requires a consideration of the question as to who inflicted the injuries that caused the death of Douglas. A second question, he said, was whether the injuries which Douglas sustained were inflicted pursuant to a common plan or design, and, if so, whether the appellant Whyte was the originator, designer or guiding force behind that plan. The third question, he said, was whether all of the persons who allegedly participated in the beating agreed or consented expressly or impliedly to the infliction of those injuries. A fourth question was whether the appellants all acted

[1] Randy "Chive" Simon, Clairfoster "Sexy" Hunte, Larry Kester and Kareem Frederick were the other 4 persons who were acquitted on all charges.

together to achieve a common purpose or design to kill or to inflict grievous injury to Douglas.

[4] I think that these would have been the critical issues if the appellants complained that the trial judge erred by dismissing a no case submission that was made for them. However, at the end of the case for the prosecution at the trial, no case submissions were made only on behalf of 3 accused: Clairfoster Hunte, Kareem Frederick and Randy Simon.[2] Their no case submissions were overruled,[3] but they were eventually acquitted by the jury.

[5] In the main, the appeals seek to impeach the directions of the learned trial judge to the jury on intention for the offence of murder. They also seek to impeach the directions on intention in joint unlawful enterprise. They also question the correctness of the directions on manslaughter in the context of joint unlawful enterprise.

[6] Further grounds of appeal state that the learned trial judge did not adequately address the jury with respect to the evidence of some witnesses and did not adequately put the cases of the appellants to the jury. Kester Bailey complains, for example, that the learned trial judge misdirected the jury when she stated in the summation that, in his evidence, Bailey said that Police Officer Sergeant Burnette was "good" to him, when he had in fact said that the Sergeant was "rude" to him. He insisted that this was one aspect of the summation which shows that the judge did not properly consider or put his testimony or defence to the jury.

[7] The appellants all complain that the trial judge erred in that she rendered no assistance to the jury in assessing the evidence in the case as it related to each of them. They contend that the judge erred because she failed to explain their various roles in the alleged joint unlawful enterprise and did not assess any evidence which indicated that any of them (the appellants) may have withdrawn

[2] See Volume VI of the Record of Appeal, pages 3-20.
[3] See Volume VI of the Record of Appeal, pages 46-62.

from such an enterprise. When the learned judge gave directions on this latter aspect of the case, she assessed the evidence only in relation to Clairfoster Hunte.

[8] The appellants Whyte, Weekes, Crump, Bailey and Ephraim further complain that the learned trial judge wrongly exercised her discretion when she permitted prosecution witnesses, Alex Davis and Arthur James, to be cross-examined as hostile witnesses notwithstanding that there was evidence that at the committal proceedings they had denied that they gave police statements voluntarily. In response, the learned DPP submitted that since these witnesses conducted themselves in the witness box in a manner that was decidedly adverse to the prosecution, the trial judge properly exercised her discretion to have them cross-examined.

[9] Further, the appellants Whyte, Weekes, Crump, Bailey and Ephraim complain that they were severely prejudiced in their trial when the learned trial judge permitted one Javid Myers to be called into court only for a witness, Arthur James, to identify him (Myers) as the person who had witnessed a statement which James had allegedly given to the police. The same appellants also alleged that they suffered substantial prejudice during the course of that identification when Myers blurted out an exhortation to James, in the presence of the jury, to tell the jury the truth. The learned judge, they stated, did not refer to this remark in the course of the summation. In his submissions in response, the learned Director of Public Prosecutions conceded that this was a "procedural irregularity". He insisted, however, that it did not prejudice these appellants in a manner which denied them a fair trial.

[10] The appellants also stated that the trial judge erred when she included caution statements given by other accused persons as a part of the evidence tendered by the prosecution. In reply, the learned Director of Public Prosecutions submitted that the caution statements were admitted into evidence without any objection

from defence counsel. He said that after they were admitted, they became evidence for the consideration of the jury.

[11] A brief background to the case will be first given as a precursor to considering the grounds of appeal.

The Background

[12] The appellant, Kenaz Whyte, resides at Greenbay, St. John's. Persons from the surrounding area frequent and "hang out" in his yard there, which is known as Kemwah Yard. On the night of Saturday 9th March 2002, there were about 8 persons in the yard when 2 men walked in. The appellant, Paul Ephraim, who was in the yard at the time said that the 2 men were Odebo Benjamin, who was armed with a gun, and Miguel Walcolm, who was armed with a cutlass. He said that there was a third person outside driving a get-away car. The intruders proceeded to rob everyone who was in the yard. A shot was fired during the robbery. The intruders made their get-away.

[13] During the afternoon of Sunday 10th March 2002, Kenaz Whyte was at Cooks Hill. He received a telephone call. It was from appellant Henry Weekes who informed him that the persons who committed the robbery were at a horse racing meet at the Cassada Gardens racecourse. Whyte walked from Cooks Hill to Perry Bay where he met Weekes. Weekes took Whyte by motor jeep to the Cassada Gardens racecourse. Appellants, Kester Bailey, Dale Christian and Ephraim were also in the jeep. When the jeep arrived at Cassada Gardens, Weekes parked it close to the ticket booth. After Whyte alighted from the jeep he met Odebo Benjamin who was leaning on one of the horse stalls. He spoke with Benjamin about the robbery in Kemwah Yard. He also pointed to Ephraim who walked over and said that Benjamin was one of the persons who carried out the robbery with Miguel Walcolm. Walcolm was close by.

[14] The evidence for the prosecution is that Odebo Benjamin, the deceased, Douglas, and Miguel Walcolm were all assaulted and forced to go into the jeep at the racecourse. According to Whyte, however, the 3 men agreed to go voluntarily to Greenbay to clear their names. Whyte did not travel to Greenbay in the jeep which Weekes drove. In addition to the 3 men, Weekes was accompanied by appellants Dale Christian and Kester Bailey. Whyte travelled in another vehicle which Randy 'Chive' Simon (who was acquitted) drove. Clairfoster 'Sexy' Hunte (who was also acquitted), the appellant Ephraim and one Moses travelled in the vehicle which Simon drove. Both vehicles were driven to Kemwah Yard.

[15] When the vehicle in which Whyte travelled arrived at Greenbay, Whyte stood outside his yard at a neighbour's place on the east side to await the arrival of the jeep, which was driven by Weekes, and which carried Benjamin, Douglas and Walcolm. When that jeep arrived the persons in it alighted and went into the yard. There was conversation between Whyte and Odebo Benjamin on the north side of the yard behind an old building. At that time Walcolm and the deceased Douglas were sitting under the shed in the yard. Benjamin's uncle, Samuel 'Manee' Josiah, had arrived at Kemwah Yard. He spoke with Benjamin briefly.

[16] As a result of the conversations, Whyte decided to go to the home of Benjamin's aunt, Olive Josiah, at Yorks. Samuel Josiah also left with Whyte for Yorks. They wanted to speak to Desmond 'Jah man' George, who lived with Olive Josiah. According to Whyte, when they left the yard to go to Yorks there were many persons there, some of whom were saying that the 3 men deserved to be beaten, but he (Whyte) told them loudly and on at least 3 occasions that no one was to beat the 3 men. This was corroborated by the evidence of other witnesses. Whyte intended to collect $2,000.00, which was, allegedly, the proceeds from the robbery in Kemwah Yard, from "Jah Man" George.

[17] Whyte and Samuel Josiah were driven from Kemwah Yard to Yorks by Randy Simon. On their arrival at Yorks, Whyte spoke to Olive Josiah and then to George. A telephone call was then made to Kemwah Yard and George spoke with Odebo

Benjamin. Benjamin told George that the men had beaten him (Benjamin) at the race track, put him in a chain and pulled him. He also said that Douglas, Walcolm and himself were badly beaten in Kemwah Yard. When at the trial the jury asked Odebo Benjamin to name all of the persons who had beaten Douglas he did not include Whyte. The evidence is that the 3 men were beaten by a number of persons while Whyte was at Yorks. Odebo Benjamin said that they were beaten by the appellants Henry Weekes, Dale Christian, Kester Bailey, Everette Crump and Paul Ephraim; and also by Larry Kester, Randy Simon and Clairfoster Hunte who were acquitted. There was other evidence that other persons, including one Barry "Izu" Cornelius, another "Jah Man", one "Pluto" and other men participated in the beating in the yard.

[18] Whyte, Samuel Josiah and Odebo Benjamin's brother, Kevin Edwards, arrived at the Yard from Yorks at about 8:30 p.m. Some persons had left the Yard but many were still there. Douglas was then lying on the ground. He was in a bad condition. Benjamin and Walcolm walked out of the yard. Whyte asked appellant, Dale Christian, and one Moses and another person to help him to put Douglas into a vehicle and take him to the hospital. Douglas succumbed to his injuries and died on March 12th 2003.

The medical evidence

[19] Dr. Lester Simon, Pathologist, performed a post mortem examination on Douglas on the 22nd March, 2003. He found, externally, that Douglas had a sutured incision (medical) to the left scalp and a surgical drain. He also had bruises to the right shoulder and to the face; a single puncture wound to each of both legs below the knees; abrasions at the back of the right elbow and a sutured abdominal incision (from a surgical laparotomy).[4]

[4] Pages 27 – 30 Vol. XI Record.

[20] The Pathologist found no internal injuries. He found that Douglas had a massive left side sub-dural hemorrhage, which caused his death. The Pathologist reported that there was no blood in the chest or abdominal cavities. He stated that on opening the chest cavity there was no injury to the sternum. He saw some congestion of the lung but nothing of great significance. There was no blood in the chest cavity. There was no hemorrhage in the lungs, the abdomen, the spleen or the kidneys. The Pathologist could not say whether the 2 puncture wounds that he observed were caused by dog bites.[5]

[21] In his submissions, Mr. Hamilton said that the significant medical evidence showed that Douglas sustained a severe blow or blows to the left side of his head with a blunt instrument. He said that the absence of other internal injuries cast doubt on the evidence of Odebo Benjamin, in particular, that Douglas was given a horrific beating with iron pipe, cutlass or heavy dumbbells, or that anyone stomped on him. It is obvious, said Mr. Hamilton, that Douglas was struck on the left side of his head and that this caused the comatose state in which he was found when the appellant Whyte returned to Kemwah Yard from Yorks.

[22] However, medical doctor, Dr. Joey John expressed the opinion that although Douglas had no broken bones, the injuries which he sustained could have damaged his lungs significantly. As he explained it, the effect of an injury does not stop at the point of impact but travels within, so that while there may be no external evidence there could still have been internal injuries.

The directions on Intention

[23] The submissions on this and other grounds of appeal relating to joint unlawful enterprise were mainly made by Mr. Hamilton and adopted by learned counsel for the 5th and 6th appellants. It will be convenient to set out fully the aspects of the summation, which learned counsel for the appellants seek to impeach, beginning

[5] Evidence was given during the trial that there were persons who were on the scene at Kemwah Yard with dogs.

with the directions on intent for murder.

Directions on intent for murder

[24] The following were the directions on intention to murder:

> "The next element is one of most fundamental elements, I would say. We are dealing with the area of intent. The killing must be committed with malice aforethought either expressed or implied. Malice aforethought does not mean pre-meditation, it means either an intention to cause death or really serious bodily harm or knowledge that the act which causes death will probably cause the death of or really serious bodily harm to some person. Now, express malice means that prior to or at the time of the act which caused the death there existed in the mind of the accused either an intention to cause the death of or serious bodily harm to any person whether such person is the person actually killed or not or that he had knowledge that the act which caused the death would probably cause death or really serious bodily harm to some person whether such person is the person they actually killed or not. And it does not matter that he was indifferent as to whether death or really serious bodily harm was caused, or that he wished that it may not be caused. So the question for you, one of the questions for you is whether the unlawful and voluntary act or acts which one or more of the accused did – here the acts alleged was the common beating of Andrew, Odebo and Miguel was of such a kind that death or serious bodily harm was the natural and probably result".[6] (My emphases, which are used to show the aspects of the summation which the appellants complain about.).

[25] The directions on intention continued:[7]

> "As I explained to you earlier, in order to prove murder the Prosecution must, among the other ingredients, establish malice aforethought on the part of the accused. That is to say that the Accused intended to kill or cause serious bodily harm to any person whether such person is the person actually killed or not or foresaw that death or really serious bodily harm would result to any person. However, if you find that anyone of the accused did not intend to cause death or serious bodily harm to Andrew or to any of the three men, or did not foresee a substantial risk of death or serious bodily harm, then it is open to you to consider the offence of manslaughter". (My emphases. They are used to show the aspects of the summation which the appellants complain about.).

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[6] Page 14 line 21 to page 15 line 14 of Volume XI of the Record of Appeal.
[7] Page 20 line 17 to line 27 of Volume XI of the Record of Appeal.

[26] The judge continued, further:[8]

> "What was their intention? Now, and I've said it again. An essential ingredient of murder in the context of this case is the intent to kill or to cause really serious bodily harm or foresight **or contemplation of a substantial risk that a person would be killed or seriously injured. That is the intent for murder**. (My emphasis. It is used to show the aspects of the summation which the appellants complain about.).

[27] Mr. Hamilton submitted that the above directions on intent were fundamentally flawed in that, in the first place, they blurred the subjectivity of the intent required in law to be possessed by a person who is accused of murder with the outdated objective test in the case **D.P.P v Smith**[9] that an accused person intends the natural and probable consequences of his act. Mr. Hamilton insisted that insofar as **D.P.P v Smith** introduced the objective test: that a man intends the natural and probable consequences of his action, that is not part of the Common Law of Antigua and Barbuda. He cited as authority **Frankland v The Queen**.[10]

[28] Mr. Hamilton submitted, further, that insofar as the object of the directions on intent was to introduce "probability" of a consequence as an evidentiary tool, then the trial judge failed to explain its significance within the context of the law and the evidence adduced in the case. He cited as authority the following passage in **R. v Hancock**[11] in which Lord Scarman re-examined Lord Bridge's construct of intention as explained in **R. v Moloney**:[12]

> "He referred to the rule of evidence that a man is presumed to intend the natural and probable consequences of his acts, and went on to observe that the House of Lords in D.P.P v. SMITH had treated the presumption as irrebutable, but that Parliament intervened by Section 8 of the Criminal Justice Act 1967 to return the law to the path from which it had been diverted, leaving the presumption as no more than an inference open to the jury to draw if in all circumstances it appears to them proper to draw it. Yet he omitted any reference in his guidelines to probability … in the meaning which he attributed to 'natural'. … I very much doubt whether a

[8] Page 21 Line 25 to page 22 line 3 of Volume XI of the Record of Appeal.
[9] [1961] A.C. 290.
[10] [1987] A.C 576 P.C.
[11] [1986] 1 All E.R 641 at page 650, letter f.
[12] [1985] 1 All E.R 1025.

> jury without further explanation would think that 'probable' added nothing to natural. I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn, specifically to the attention of the jury and to be explained. In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability. If the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge noted and Lord Lane C.J emphasized, be seen as overwhelming evidence of the existence of the intent to kill or injure. Failure to explain the relevance of probability may, therefore, mislead a jury into thinking that it is of little or no importance and into concentrating exclusively on the causal link between the act and its consequence." (My emphases.).

[29] Mr. Hamilton concluded that Hancock recognized that 'the natural consequence' formulation does not form part of the substantive law of specific intent required for murder but belong to the law of evidence and operates by way of inference. I agree, particularly because having in a number of instances directed the jury that they were entitled to consider whether the acts which caused the death of Douglas were such that death or serious bodily harm was the natural and probable result, the learned judge did not explain the relevance of probability to them.

[30] In the second place, Mr. Hamilton submitted that the directions on intention utilized the concept of constructive and/or transferred malice without any adequate explanation of what constructive/transferred malice is or how it comes into play given the factual circumstances of the present case. In this regard, he said that when the trial judge made references in the summation to intention to cause death or serious bodily harm to any person whether the person is actually killed or not, that formulation tended to destroy the requirement that the intent must be subjective and does not consider the factual circumstances in the case. He insisted that the directions must take account of the requirement of a subjective intent towards the person who is killed and the learned judge erred to the extent that she did not so direct. He cited as authority R. v Moloney.[13]

[13] [1985] 1 All E.R. 1025 at page 1036.

[31] In the third place, Mr. Hamilton complained that when the trial judge used the words "indifferent" and "substantial risk" in the summation, she blurred the lines between intention and recklessness and enlarged the scope of the mental element required for murder. In this regard, he pointed out that, in Moloney, Lord Bridge deprecated the use of the word 'serious risk' in the mental element necessary for murder as coming too dangerously close to the concept of recklessness as typified in causing death by dangerous driving cases.[14] He also noted that, in R. v Woolin,[15] the House of Lords rejected the use of the words 'substantial risks' on the ground that they blurred the line between intention and recklessness and hence between murder and manslaughter, and, in effect, enlarged the scope of the mental element required for murder. Their Lordships held that such a direction was a material misdirection[16] and quashed the conviction for murder. Mr. Hamilton invited this court to do likewise in the present case on the basis that the cumulative effect of the misdirections on intention that he complained of deprived the appellants of the opportunity to have a verdict of not guilty of murder entered for them.

Did the judge err?

[32] There is now no constructive malice for murder in Antigua and Barbuda. The doctrine applied where a person caused death in furtherance of a felony. It was abolished by section 10(1) of the Offences against the Persons Act.[17] However, the statute did not abolish the doctrine of malice aforethought. Therefore, in order to render any person guilty of murder, the prosecution is required to prove an intention to kill or to cause grievous or really serious bodily harm or some other form of express or implied malice. This requires a subjective intention on the part of an accused. It is sufficient for an accused to foresee that serious harm 'might'

[14] At page 1039a.
[15] [1998] 4 All E.R 103.
[16] See page 112h.
[17] Chapter 300 of the Revised Laws of Antigua and Barbuda, 1991. The Parliament of the United Kingdom had done so by Section 1 of the Homicide Act, 1957 (UK).

or 'may' occur, although it is not necessary that the accused foresees that it would definitely occur.[18] Recklessness and indifference provide a sufficient intention for manslaughter, but is insufficient to ground a conviction for murder.

[33] In the foregoing premises, I agree with the submissions of Mr. Hamilton that the formulation that the learned judge used in the summation in relation to intention to murder was flawed. I have already found that the learned trial judge erred when she directed the jury that they were entitled to consider whether the acts which caused the death of Douglas were such that death or serious bodily harm was the natural and probable result, without explaining the relevance of 'probability' to them.[19] In my view, therefore, the appeals succeed on this ground.

Directions on intention and manslaughter in joint enterprise

[34] The learned judge gave the following general directions on joint unlawful enterprise:[20]

> "…[T]he Prosecution in this case does not suggest that all of the defendants beat Andrew or that any specific one of them inflicted the fatal blow or blows to his head. In fact there is evidence, if you believe it, that some of the blows to his head were inflicted by two persons who are not before this Court now, namely Izu, Barry Cornelius and Jah Son. But it is not necessary for the Crown to prove which particular individual caused the fatal blows which resulted in the death of Andrew or even that any of the accused laid a finger on him. The Crown says that in the circumstances of this case it is not necessary for the Crown to prove precisely who struck the fatal blow or blows and that it is sufficient if it proves that Andrew died as a result of injuries inflicted in the course of a joint unlawful enterprise by the defendants acting in concert."

[35] The learned judge continued:

> "The Crown says the joint unlawful enterprise commenced at Cassada Gardens where three young men: Andrew, Odebo and Miguel were abducted and concluded at Kenaz Whyte yard where the three men were held and beaten in an attempt to get them to confess to an alleged

[18] See Rushworth (1992) 95 Cr. App. R. 252; DDP v A [2001] Crim. L.R. 140, and, generally, Blackstone's Criminal Practice, 2005, at paragraph A2.7, pages 27 and 28.
[19] See paragraph 29 of this judgment.
[20] At page 16 line 21 to page 18 line 22 of Volume XI of the Record of Appeal.

robbery the night before at Kenaz Whyte yard and to obtain the money which was alleged to have been stolen from them and Andrew died from injuries sustained during the course of that beating. The Prosecution's case, therefore, is that the Defendant committed this offence together. There is no doubt that a plan to abduct someone and to hold and beat him to make him confess to a crime or to return the proceeds of a crime is a plan to commit an unlawful act or an unlawful enterprise which in itself would involve a physical assault on the person abducted. The Law is that where a criminal offence is committed by two or more persons each of them may play a different part but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The words 'plan' and 'agreement' do not mean that there has to be any formality about it. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It can be made with a nod and wink or a knowing look. An agreement can be inferred from the behaviour of the parties."

[36] She continued:

"The essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence and took some part in it however great or small to achieve it. Your approach to this case should, therefore be as follows: if looking at the case of each one of the Defendants you are sure that with the intention I have mentioned he committed the offence on his own or he took some part in committing it with others, he is guilty. He is guilty of murder if he beat Andrew intending to kill him or cause him really serious bodily harm or he took some part in someway in the joint unlawful enterprise however small, and when he did so he foresaw that there was a substantial risk that Andrew or any of the three men would be killed or seriously harmed by any other Defendant." (My emphases, which are used to show the aspects of the summation which the appellants complain about.).

[37] The learned judge concluded this aspect of the summation as follows:

"Alternatively, he will be guilty of manslaughter if he took some part in some way in the joint unlawful enterprise and when he did so, he intended to cause harm to any of the three men, or that he foresaw that some harm to any of the three men would be caused by any other defendant. Mere presence at the scene of the crime is not enough to prove guilt, but if you find that a particular individual was on the scene and intended and did by his presence alone encourage the other in the offence he is guilty. (My emphasis, which is used to show the aspects of the summation which the appellants complain about.).

[38] Mr. Hamilton submitted that the direction contained in paragraph 36 foregoing fell far short of explaining the law on joint responsibility to the jury because it did not indicate what the shared intention was. It did not say whether it was a shared intention to abduct the men or it was an intention to beat the men or inflict grievous bodily harm on them. He said that it is clear from the evidence that only the deceased sustained serious bodily harm from which he died and if we accept the medical evidence this was caused by a blow or blows to the head by someone with blunt instrument. He complained that the direction did not take into account the act or actions of persons other than the appellants and did not take into account the possible use of a weapon to inflict the fatal injury. Rather, he said, it was given on the premise that merely because persons may have attacked Douglas together each of them had the intention to inflict serious harm on him.

[39] Mr. Hamilton submitted, further, that the direction contained in the highlighted portion of the summation that is reproduced at paragraph 37 of this judgment was wrong and inaccurate in law. He said that could have undone the statement that came immediately before them that mere presence on the scene of a crime was not sufficient to prove guilt and could have communicated to the jury that mere presence on the scene was sufficient to render a person liable for murder even if his presence is not active. He said that this also amounted to misdirection on manslaughter in the context of a joint unlawful enterprise. I agree.

Findings

[40] The directions of the learned trial judge on joint unlawful enterprise were further deficient in 2 other respects. First, the evidence shows that the appellant, Everette Crump was not present at the commencement of the action at Cassada Gardens when the 3 men were allegedly assaulted and caused to travel to Kemwah Yard. Although the other appellants were present at Cassada Gardens, it is not clear what role appellants Dale Christian and Kester Bailey played, if any, in the initiating actions there. The evidence also shows that not all of the appellants participated in the beating of the men at Kemwah Yard. There was evidence, as

the learned judge pointed out, that other persons, to wit, Izu, Barry Cornelius and Jah Son, who did not take part in the commencement events at Cassada Gardens were present and may have participated in the beating of Douglas at Kemwah Yard. I think that those circumstances required the judge to make a distinction between the liability of principal parties and the liability of the secondary parties. This was not done in the summation.

[41] Although the learned trial judge did not make the distinction, she gave a direction which indicated that she was aware of the need for a direction on the liability of secondary parties when she stated:[21]

> "Now, I must tell you even if there was a plan just to capture and hold the three young men which in itself is a crime and involved a physical assault on the young men and if what any of the accused did in beating Andrew, so that he died from injuries sustained in the beating, went beyond anything that the others had agreed or realized that one alone might do, that accused is alone responsible for his act and would be guilty of the offence of murder. If you find that when he beat Andrew he intended to kill him or to cause him really serious bodily harm, alternatively he would be guilty of manslaughter if he intended to cause some harm short of serious harm. The others would not be guilty of either murder or manslaughter as the beating of Andrew or any of the three men was not foreseen by them. But if you are sure that those who did not take part in the beating of Andrew or the other men realize that one or the other of them might kill or seriously injure one or all of the three men in furtherance of the capture and holding of the three men, the law is that by taking part in the joint unlawful enterprise with that knowledge he is taken to have accepted the risk that one of the three would act in that way, and so he adopts those acts and is responsible for them, even if he would have preferred that one of them had not acted like that at all." (My emphasis.).

[42] The direction further stated:

> "It is for you the jury to decide whether the beating of Andrew Douglas which resulted in his death was part of a joint unlawful enterprise or went beyond it and so was an act unauthorized by the joint unlawful enterprise. Therefore, before you can convict each one of the accused so as to make each one of them liable for the acts of the others, you must be satisfied, first, that they agreed to commit the crime in question, or had a common purpose to commit it, and, secondly, that what each did was part of what

[21] From page 18 line 23 to page 20 line 13 of Volume XI of the Record of Appeal.

had been agreed or of that common purpose and that each intended to kill or cause really serious harm to all or any of the three young men or foresaw that one of them would kill or cause really serious harm to all or any of the three young men and they participated in the joint unlawful enterprise."

[43] The direction continued:

"If you conclude that what any one defendant did departed or may have departed completely from what was agreed or from that common purpose, then you cannot convict the others as a result of what was done by that one defendant unless each could have foreseen that that defendant would have acted in that manner i.e. would have beat any one of the three men with the intention of killing him or them or of causing him or them serious harm. Alternatively a Defendant would be guilty of manslaughter if he intended to cause some harm to any one or all of the three men or only foresaw that some harm short of serious harm would be caused to all or any one of the three men in the course of the joint unlawful enterprise."

[44] It is my view that this direction cannot be impeached as it related to secondary parties in a joint unlawful enterprise. In Chan-Win Sui v The Queen,[22] Sir Robin Cooke, in giving the judgment of the Privy Council, authoritatively stated the law with regard to the *mens rea* of secondary parties in joint enterprise as follows:

"The case must depend rather on the wider principle whether a secondary party is criminally liable for the acts by the primary offender of a type which the former foresees but does not intend. That there is such a principle is not in doubt. It turns on the contemplation or putting the same idea in other words, authorization, which may be express but more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

[45] Sir Robin Cooke's formulation, and, in particular, a definition of "authorization" were explained by the Privy Council in Hui Chi-Ming v the Queen[23] when Lord Lowry stated:

"Their Lordships consider that Sir Robin used this word – and in that they do not differ from Counsel – to emphasize that fact that mere foresight is not enough: the accessory in order to be guilty, must have foreseen the relevant offence, which the principal may commit as a possible incident of the common unlawful enterprise, and must with such foresight, still have

[22] [1985] AC 168, at page 175.
[23] [1992]1 AC 34 ,at page 53

> participated in the enterprise. The word "authorization" explains what is meant by the contemplation, but does not add a new ingredient. That this is so is manifest from Sir Robin's pithy conclusion to the passage cited: "The criminal culpability lies in participating in the venture with that foresight."

[46] These formulations were further explained in R. v Powell; R. v English,[24] in which the House of Lords considered the requisite *mens rea* required of a secondary party in a joint unlawful enterprise with reference to Chan Win-Sui and Hui Chi-Ming. Lord Steyn stated:[25]

> "The accessory principle requires proof of a subjective state of mind on the part of a participant in a criminal enterprise, viz foresight that the primary offender might commit a different and more serious offence. Professor Sir John Smith, "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 L.Q.R. 453, 464, explained how the principle applies in the case of murder: Nevertheless, as critics point out it is enough that the accessory is reckless, whereas, in the case of the principal, intention must be proved. Recklessness whether death be caused is a sufficient mens rea for a principal offender in manslaughter, but not murder. The accessory to murder, however must be proved to have been reckless, not merely whether death might be caused, but whether murder might be committed; he must have been aware, not merely that death or grievous bodily harm might be caused, but that it might be caused intentionally, by a person whom he was assisting or encouraging to commit a crime. Recklessness whether murder might be committed is different from recklessness whether death may be caused by accident." (Emphasis added.)"

[47] Lord Steyn concluded:

> "The foresight of the secondary party must be directed towards the real possibility of the commission of the primary offender in the course of the criminal enterprise of the greater offence. The liability is imposed because the secondary party is assisting in and encouraging a criminal enterprise which he is aware might result in the commission of a greater offence. The liability of an accessory is predicated on his culpability in respect of a greater offence as defined by law ..."

[48] In my view, the learned judge's directions on this aspect of the case were deficient because, in the first place, she did not make a clear distinction between the liability

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[24] [1999] AC 1.

[25] At page 13F-H; and page 14A–C. See also the analysis by Bedlam L.J. in The Queen v Uddin [1998] 2 All E.R. 744, at page 751.

of the principal or principals and the liability of the secondary parties so as to assist the jury in identifying each actor, and, in that event, to identify the intent and liability of each appellant. It was necessary to make the distinction because, as the learned judge indicated early in the summation, there was evidence that the fatal injury to Douglas could have been inflicted by persons other than the appellants. Evidence was given, for example, that Izu hit the deceased, Douglas about his head with an iron pipe.

[49] In the second place, these directions were deficient in that they seem to have taken away the contemplation of the subjective state of any appellant who was a secondary party as to what he thought the primary party's intention was. I think that it was also a misdirection in that it may have suggested to the jury that participants in a joint venture which led to a killing could all be guilty of murder even if none of them possessed the intention to kill or cause serious bodily harm.

[50] In the third place, the summation on joint unlawful enterprise as well as other elements was deficient because very little was done to assist the jury by relating the evidence to the legal elements involved in the case. The learned trial judge did not, as a case of this complexity required, assist the jury with the evidence on the respective role that each appellant played in the events that led to the death of Douglas. The volume of evidence and the issues raised required a careful exposition of the law. They also required the judge to relate the evidence to the legal issues, and to assist the jury to identify the respective role that each appellant played on the evidence.

[51] In Regina v Lawrence (Stephen)[26] the House of Lords stated, in the words of Lord Hailsham, that the purpose of a direction to the jury is not best achieved by a disquisition on jurisprudence around the area of the law applicable in the case, or by a copious recitation of the evidence by the judge. According to Lord Hailsham, an adequate direction must include a succinct but accurate summary of the facts

[26] [1982] AC 510.

in issue; a correct summary of the evidence, and a correct statement of the inferences which the jury are entitled to draw from their conclusions about the primary facts.[27]

[52] The defendant in Lawrence was charged with causing death by reckless driving. The House of Lords observed that the case was not a complex one.[28] On the other hand, the trial in the present case was rather lengthy. It involved various charges and relatively complex legal issues for a jury. In the main, the learned trial judge gave directions on the law in the first segment of the summation, with little reference to or analysis of the related evidence.[29] She then repeated the evidence presented by the prosecution, almost verbatim, with little reference to the law.[30] For example, there was evidence that the appellant, Whyte, did not take part in the beating of the men at Kemwah Yard and told persons there not to beat the men. The judge did not direct the jury on the manner in which they should have considered this evidence against other evidence on the role which Whyte played in the enterprise. In the premises, it is my view that the appeals should succeed on this ground.

[53] The learned judge also gave directions on alibi and on lies in the context of alibi.[31] However, there was no reference to any evidence on which this arose or to any of the defendants to whom these might have applied, notwithstanding that the statements of appellants Ephraim and Crump seemed to raise the defence of alibi. In my view, therefore, the appeals also succeed on this ground.

[54] The State v Singh (Clement)[32] confirms my view on this finding. In this case, Persaud JA (Ag.) re-iterated that a paramount principle for a fair criminal trial is that a trial judge must put the defence fairly and fully to the jury, regardless of how weak that defence is. This, he said, requires a judge not only to direct the jury on

[27] See per Lord Hailsham at page 519F-H.
[28] See per Lord Hailsham at page 519D-E.
[29] See from page 2 to page 25 line 14 of Volume IX of the Record of Appeal.
[30] See from page 25 line 15 to page 120 of Volume IX of the Record of Appeal.
[31] See from page 208 line 19 to the end of page 209 of Volume IX of the Record of Appeal.
[32] [1995] 51 WIR 128.

the nature of the defence, but, also, to remind them of the evidence in support of that defence.[33]

[55] Whyte and some of the other appellants gave caution statements to the police. The judge merely referred to those statements in the course of the summation.[34] No assistance was given to the jury by analyzing the contents of the statements as evidence. The jury were simply told that since the statements were admitted in evidence, they would have them during their deliberations so that they could consider their contents with the other evidence.

Result and order

[56] The misdirections that I have identified are sufficiently serious, in my view, to render the trial of the appellants unsafe. I think that the convictions are even less safe because of the omission of a warning on the way in which the jury were to treat statements contained in unsworn statements which tended to incriminate a co-defendant. The trial judge quite correctly informed the jury that the mention of any of the co-defendants in the unsworn statements which appellants Crump and Ephraim gave to the police could not be used as evidence against the co-defendants. She explained to the jury that the reason for this was that the co-defendants had no opportunity to contradict such statements. She further explained that for this reason, the names of the co-defendants were deleted from those statements. The learned trial judge instructed the jury to ignore such references in all of the caution statements that were given by the accused to the police.[35]

[57] However, the principle which relates to the evidential status of co-defendants in caution statements is also applicable in relation to unsworn statements which are

[33] See page 135b-e.
[34] See from page 123 line 21 to page 125 line 14, and from page 133 to page 134 line 5 of Volume IX of the Record of Appeal.
[35] See pages 207 and 208 of Volume IX of the Record of Appeal.

given by a defendant during the course of a trial.[36] During the course of the trial, appellant Paul Ephraim gave an unsworn statement in which he tended to implicate appellants Whyte and Henry Weekes. The learned judge erred when she gave no warning on this in the summation. There was also a "procedural irregularity" when Javid Myers was called into court, which the learned Director of Public Prosecutions has conceded.[37]

[58] I am satisfied that, cumulatively, the errors, which in this judgment I have found to have occurred in the trial, render the convictions unsafe. I am also satisfied that they led to a miscarriage of justice so that the proviso is not applicable to override the errors and confirm the convictions of all of the appellants. I would therefore quash their convictions and set aside their sentences. I think, however, that in all of the circumstances, their cases should be tried again in the High Court. I would therefore further order the retrial of all of the appellants.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal

[36] See R. v Gunewardene [1951] 35 Cr. App. R. 80.
[37] This was referred to at paragraph 9 of this judgment.