GRENADA

IN THE COURT OF APPEAL

CRIMINAL APPEALS NOS.5, 9 AND 10 OF 2004

BETWEEN:

[1] ELVON BARRY
[2] ZOYD CLEMENT
[3] KENTON PHILLIP

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Michael Gordon, QC	Justice of Appeal
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Anselm Clouden for Elvon Barry
Dr. Francis Alexis for Zoyd Clement
Mr. Derrick Sylvester for Kenton Phillip
The Director of Public Prosecutions (Mr. Christopher Nelson) for the Respondent

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2007: March 26;
May 14.

JUDGMENT

[1] BARROW, J.A.: The three appellants were convicted of the murder of Mrs. Omelia Roberts in her home in the early morning of 8th October 2002 in the course of a robbery. They were sentenced to terms of imprisonment ranging from life imprisonment to detention at the court's pleasure for a period not exceeding 15 years. They appeal their convictions and sentences.

The eyewitness evidence

[2] Garvin Roberts and his brother, Damien, the sons of the deceased, were both asleep the Monday night in the living room of their home in Belmont, St. George's.

Their little sister, mother and sister in law were in the house. The house had two bedrooms and the mother and little sister slept in one and the sister in law slept in the other. Garvin and Damien normally slept in the living room.

[3] Sometime before one o'clock in the early morning of Tuesday, Garvin heard the dogs barking and he woke. He opened his eyes and saw a man inside the house, by the living room window, with a gun in his hand. The man looked outside and then walked to Garvin and put the gun to Garvin's neck. The man asked, "Where is the money"? Garvin said he did not know. The man then commanded Garvin to get up and open the door. Garvin did so with the man behind him with the gun at Garvin's neck. Garvin opened the sliding glass door, which leads onto the veranda and to the steps. The man took Garvin near the steps and said to come up. Garvin looked down and saw two men. These men came up the steps and the three brought him back inside the house.

[4] The man with the gun told one of the others to wake up Damien. One of the men went and kicked Damian behind the head. Damien had been lying on the floor sleeping. The gunman knelt over Damien and put the gun to Damien's head. One of the men got up and went and stood by the door. When that one went and stood by the door, the gunman was near to Garvin and he asked Garvin, "Where is the woman"? Garvin answered in the room. The man standing by the door spoke; he said, "Go and kill the mother. Kick down the door."

[5] The one with the gun went immediately. The gunman went to the bathroom door, opened the bathroom door and closed it back. The gunman then tested the lock on the sister in law's bedroom door. That door was locked. The gunman went to the mother's room door and Garvin said he heard that door "start banging". The gunman went inside the room and Garvin heard banging on the partition. Then he heard a loud explosive sound that sounded like a gunshot. He heard something fall to the ground from the direction of his mother's room. The gunman ran out into the living room and shouted, "Let's go". All three men ran outside, went down the step and ran to the main road.

[6] After the men left Garvin went into his mother's bedroom and saw her lying on the floor, bleeding. The police were called. A doctor was also called who, pronounced the mother dead from a gunshot wound she received to the chest.

[7] Garvin testified that throughout the time the gunman was in the house Garvin was able to see the gun. The gun was in the gunman's hand. He gave evidence as to the veranda light being on and shining through the sliding glass door, and he gave evidence that there was no obstruction to the window in the living room. He was not challenged on this testimony.

[8] Damien Roberts confirmed what Garvin said. He testified that he was asleep on the living room floor on some cushions and he felt a blow to his head that woke him up. He looked around and saw three masked men. One was kneeling with a metal object on his, Damien's neck, the other was by the window and the third was by the entrance to the kitchen. The one who was kneeling by him went in the direction of the mother's room. That person had a metal object in his hand that looked like a gun. Damien demonstrated the manner in which the man held the object. He testified that the other two men were in a position to see this object. While Damien was trying to get up, the one who had been by the front door told Damien don't move otherwise he would shoot him.

[9] Damien testified that after the person went to his mother's room he heard some scrambling and some banging coming from the mother's room. Then he heard a loud explosion that appeared to come from his mother's room. The man ran out of his mother's room and said, let's go and the two others followed. They jumped down the veranda and ran towards the main road. Damien testified as to the lighting in the house at the time and he testified that the men were wearing masks and all three of them were wearing latex gloves.

[10] Oliver Williams was the driver of the vehicle that took the three appellants, whom he identified, along with others, to a spot near the Roberts' home. He testified to being engaged by one Sheldon Bain, known as "Dutch", to collect the men and to take them all to the spot. Williams testified that the three appellants and Dutch left his vehicle when he stopped at the spot, that he drove around for about 5 minutes and returned to the drop off spot. He said he met Dutch there and a few seconds later the three appellants came running towards the vehicle from a certain direction. Williams said the three men had objects that looked like masks and Kenton Phillip had a gun in his hand. Williams told of driving the men away from the spot and hearing the appellant Elvon Barry tell Dutch "We didn't get the money. Kenton shoot the woman and he shoot himself." Williams claimed to have seen Barry get the gun from Kenton Phillip and pass the gun to Dutch while they were in the vehicle.

[11] Counsel for the defence cross-examined Williams vigorously to show that he was the organizer of the robbery and one of the three men who entered the home and participated in the enterprise. Sheldon Bain, who was tried and convicted along with the appellants, gave sworn evidence to this effect. The judge directed the jury that Oliver Williams was the main witness for the Crown and they needed to pay particular attention to his demeanour and credibility. In reviewing his testimony the judge pointed out the manner in which Williams testified and a number of instances where he lied or may have been doubted.

[12] There was other evidence that confirmed that on the Monday night Kenton Phillip came to the house where the other two appellants were living and they all three went off. In fact the various statements that each of the three men gave from the dock put them all together up to the point where Williams stopped the vehicle at the spot near the Roberts' home so that, on their statements, there was no dispute about their presence near the scene, in the case of Elvon Barry, or outside the house, in the case of Zoyd Clement, or inside the house, in the case of Kenton Phillip.

Statements by the appellants

[13] The three men gave caution statements to the police. Each of them challenged the admissibility of his statement on the ground of voluntariness and the judge held a separate *voir dire* in respect of each. The judge ruled that the statements of Elvon Barry and Kenton Phillip were voluntarily given and were admissible in evidence. However, the judge edited the statements to substitute letters for the names of co-accused that were mentioned in the statements to comply with the rule that what one accused said in an out-of-court statement about a co-accused may not be used as evidence against that co-accused. Subsequent to the admission of the statements into evidence each man made certain admissions in his dock statement, so that caution is no longer necessary.

[14] In his statement Elvon Barry told how Kenton Phillip came to fetch him and Zoyd Clement, who is his brother. Barry told how they went to the Belmont area and down a track. On the way down the track Dutch pulled out a gun and showed Kenton Phillip how to operate the gun. Dutch pointed out the house to the three men and Dutch turned back. The three went on. Kenton Phillip climbed on the shoulder of Zoyd Clement and entered the house. Barry stated that he saw Kenton put the gun to a little boy's head and got him to open the door. Kenton then told them to come inside. Barry and Zoyd went inside and stood up in the hall and then Kenton went into the room. Barry heard like Kenton and someone were fighting inside. He heard a shot go off and he and Zoyd ran outside. When he looked back he saw Kenton running behind. He stated he saw the gun in Kenton's right hand and his left hand on top of the gun. Kenton's left hand was bleeding. He told of how they went back in the vehicle and their movements thereafter.

[15] In his dock statement Elvon Barry gave a version of events that differed in key respects from his caution statement. He said when Oliver Williams stopped the vehicle in Belmont, Williams told Kenton and Zoyd "let's go" and they went with him. He did not go. About seven minutes later Barry said he saw the three coming back. He asked Kenton and Zoyd "where they come out" and they did not answer.

[16] The statement Zoyd Clement allegedly gave to the police was ruled inadmissible. However, Zoyd Clement gave a dock statement in which he told of being awakened by his brother, Elvon Barry, who told him Oliver Williams wanted to see them. He saw Kenton and Dutch standing outside. They joined Oliver who told them to accompany him. When they reached Belmont Oliver told him and Kenton to accompany him and they walked through a track to a house where Oliver stopped and told them he was going for "ten grand". Oliver told Zoyd to help Kenton up the window and Kenton climbed on Zoyd's shoulder and entered the house.

[17] Shortly after, Zoyd Clement stated, he saw the door open and a small boy in front and Kenton behind. Oliver rushed up the stairs and called him up. Kenton went back inside together with Oliver and the small boy. Oliver told him to stand outside on the veranda. Three minutes later he heard an explosion. Kenton rushed out followed by Oliver. Zoyd jumped off the veranda. They all ran. Oliver told him not to tell anyone what he heard.

[18] The caution statement of Kenton Phillip was to the same general effect as the caution statement of Elvon Barry except that he said that Dutch gave Elvon the gun and Elvon then gave him, Kenton Phillip, the gun. However, in his dock statement Kenton Phillip said that Oliver was the one who accompanied them down the track, not Dutch as he had said in his caution statement. Kenton Phillip also said in his dock statement that Oliver took out the gun, cracked it once and told him, Kenton, that the gun was empty.

[19] Kenton Phillip said when he had gotten inside and let the others in one of them told him to check the doors. On the way into one of the rooms somebody grabbed him. During the wrestling, he said, the gun went off and he ran out of the house. Before they reached the main road he said he told Oliver Williams he thought he, Oliver, had told him the gun was empty. Williams told him not to tell anybody anything "or he go f… me up."

[20] The three men each expressed regret in their dock statements to the Roberts family for the incident. In particular Kenton Phillip stated that he had apologized to the husband and two sons of the deceased and that he did not have any intention to kill anyone.

Elvon Barry's appeal

[21] The principal grounds of appeal for Elvon Barry were, firstly, that the judge wrongly admitted the caution statement that Barry made and secondly that the caution statement was obtained in breach of the Judge's Rules in that he was not offered the opportunity to contact a lawyer or his mother. In relation to voluntariness it was only after a full voir dire had been held that the judge decided to admit the statement. Counsel argued that there was overwhelming evidence that Barry was beaten and that this was supported by the testimony of various witnesses so the judge was wrong to find that Barry was not beaten. In support of this ground Mr. Clouden, counsel for Barry, relied on Bennett (Andre) and John (Augustus) v R.[1] That case provides a helpful comparison.

[22] In that case the appellants were charged with murder. At their trials confession statements by both were admitted in evidence after voir dires, although both men complained that their statements had been made after violence by two police officers. The Court of Appeal allowed John's appeal by finding that his statement had been obtained by violence and should not have been admitted but applied the proviso that allows the court to leave the verdict undisturbed, notwithstanding. On appeal to the Privy Council their Lordships held that the court of appeal erred in applying the proviso.

[23] For present purposes the relevance of the case is its demonstration that the findings of a trial judge on a voir dire are not immune to reversal. In that case two independent witnesses for each appellant supported the evidence of the

[1] [2001] UKPC 37; on appeal from Grenada

appellants that they had been beaten. For Bennett, a prison officer stated that he saw Bennett two days after the date of the alleged statement and asked Bennett if there was anything wrong with him. Bennett said he had some bruises on his skin. When he asked how he got the bruises he said from the police officers. The prison officer looked and saw the bruises and made a note of his observations. Further, a medical doctor testified that four days after the date of the alleged statement he examined Bennett who complained that he had some bruises on his right arm and abdomen. The doctor saw Bennett had a few abrasions on his right arm and some abrasions and bruising on the upper abdomen. A blunt trauma could have caused the injuries. The abrasions were not fresh.

[24] In the case of John a prison officer similarly testified. He observed bruises on the lower part of the left hand. John told the officer he got them as a result of lashes from a police officer and told him the name of the police officer. The same medical officer testified to seeing abrasions on John's left shoulder. The abrasions were fresh and were about a day or two old. John's alleged statement was dated two days before the doctor saw John.

[25] In reversing the trial judge on his findings the Court of Appeal stated that John's "evidence as to the violence used on him by the police to extract the statement was not only overwhelming, but it was amply supported by the evidence of a doctor and prison officer. The judge should have rejected the statement …"[2]

[26] In the present case it was the prosecution who called medical evidence in support. They called two doctors. On the same evening after Barry had allegedly given the statement, because he had complained of feeling ill, the police took him to the hospital. The first doctor, the casualty officer, diagnosed Barry to be suffering from the common cold. He testified Barry presented no signs of tenderness from pain; he did not complain of any discomfort in his feet (which is where Barry said the police beat him) and did not make any other complaints to the doctor. The doctor replied in cross-examination that he was sure Barry did not complain of being

[2] Quoted in the judgment of the Privy Council at paragraph [23]

beaten under his feet; he would have noted it if Barry had complained. If beaten with moderate force with regularity for 45 minutes, as Barry claimed occurred, the doctor said Barry would have had soft tissue injuries or bones might have been broken.

[27] The other doctor saw Barry 9 days after the date of the statement, in the course of his weekly prison visit. The doctor spoke with Barry and examined him. Barry had a cold. The doctor said it was customary for prisoners to complain about beatings but he did not recall this prisoner making any such complaint. The doctor said he made no such note. To his recollection Barry was not in any discomfort and if he had been the doctor "would most certainly have recorded it."

[28] On the voir dire Barry testified in detail to the treatment that he allegedly received. He told how he was not fed, was punched in the belly and beaten on his foot with a truncheon. Three officers beat him he said. One of them slapped him in the face and burst his mouth in two places, he said. His mouth bled. That left him with "a big lip", which was painful and hurt a lot. The swelling went down by the Friday but the cut was still there. He caved in to the pressure, he said, and after signing the statement the police officers took him to the hospital. Barry testified that he showed the doctor his foot and the doctor told him to put down his foot, he did not want to see it. Barry said when he saw the other doctor the following week he showed that doctor his bruises and burst mouth.

[29] Zoyd Clement testified to hearing Barry screaming. Barry's mother testified that she visited him on the Wednesday (the day after the statement) and he told her his knees were hurting him and his chest was hurting him. He was crying and she cried with him. "His lip had something", she said, and described it as something reddish, like someone have a bruise.

[30] The difference between the evidence in the present case and in the **Bennett** case is strong. In **Bennett** the doctor confirmed the physical injury and that the appellant had complained of police violence. In the present case the doctors confirmed there was no complaint and no sign of physical injury. Barry's testimony

that the casualty doctor refused to look at his foot when he tried to show him was inherently difficult to believe because it spoke to gratuitous malpractice. Barry's statement that he complained to the prison doctor the following week about the injuries to his mouth raises the questions: why didn't he complain to the casualty doctor who he saw the very day – an hour later, at most – that he received the injuries? Why did the casualty doctor not include mention of it in the notes he made? And why did the prison doctor fail to include the complaint in his notes and fail to see the injuries? More difficult to believe is that Barry made no complaint to his mother, the day after he was beaten, of this treatment. Impossible to believe is that the mother did not see the two 'bursts' on his lip or even the big, swollen lip. The most she could say she saw was redness, like a bruise.

[31] This evidence was of a far different quality than the evidence given in **Bennett**. I can find no basis for concluding the trial judge erred in deciding that the statement to the police was voluntarily obtained. I would dismiss this ground of appeal.

[32] Logically, the quality of Barry's testimony on the voir dire must have impacted his claim, to which he testified on that hearing, that he asked to see a lawyer and he asked to see his mother and both requests were denied. This claim was the substance of Barry's ground of appeal that the statement was taken from him in breach of the Judge's Rules. The Detective Sergeant leading the investigation testified that he asked Barry if he wished to contact a lawyer and Barry said no. The inspector, who was the officer in charge, testified that the sergeant asked Barry if he wanted to have a lawyer or his mother present and he said no. The judge's decision to admit the statement meant he believed the police officers. As counsel conceded in argument before this court, there is no factual evidence that he can point to that shows the judge erred. It was open to the judge to believe the police officers.

[33] Counsel fell back on the argument that the failure of the police officer to include in the formal parts of the statement a notation that Barry was offered the opportunity to contact a lawyer or to contact his mother left the matter in an undesirable state.

With respect, the absence of such a notation or certificate was simply a factor for the judge to consider in deciding whether to believe the police officers that the right to contact a lawyer or his mother was offered to Barry. The absence of that notation does not mean the right was not given to Barry. There was no suggestion that it is usual for the police to include such a notation in statements so as to make the absence of such a notation in this statement raise the inference that it was not given. I would dismiss this ground of appeal

[34] Another ground of appeal argued for Elvon Barry was that the summing up was unfair. The unfairness Mr. Clouden alleged was that the judge failed to point out the weakness in the testimony of Oliver Williams and to point to the conflict between the testimony of Williams as to the preparation and planning of the incident and the testimony of Sheldon Bain (Dutch). The cross examination of Oliver Williams was very clear in its thrust that Williams, not Dutch, was the master mind and that he, instead of Elvon Barry, was one of the three men who actually entered the home of the deceased. The defence brought out clear instances of lies and misstatements by Williams in cross-examination and these would have been clearly in the minds of the jurors. The judge specifically directed the jury as to these. This was not a case in which the contents of Williams' testimony and the contradictions needed any assessment or analysis by the judge to assist the jury to understand what to make of the evidence. This was a clear case of the jury having to decide whether to believe that Williams was the mastermind and the organiser of this enterprise as opposed to Sheldon Bain and, more importantly, whether it was Williams and not Elvon Barry who entered the house. With respect, it seems what counsel really wanted was for the judge to have dwelt more on the lies which Williams undoubtedly told so as to convey to the jury that they should not believe a word he said. This was the function of counsel not the judge, whose duty is not to assist any party but to deliver a summing up that is fair to all parties and helpful to the jury.

[35] Beyond the emphasis that counsel thought the judge should have given to the weakness of Oliver Williams' testimony counsel also submitted the judge erred in failing to point out to the jury that on Sheldon Bain's testimony Barry remained at the vehicle and was not one of the three who entered the house. It is true that the judge did not do so but it is not every aspect of the evidence that is favourable to an accused person (or to the prosecution) that the judge is obliged to highlight for the jury. Again, this is the function of counsel.

[36] Sheldon Bain testified in his own defence and not as a witness for Barry. His exculpation of Barry was incidental to his exculpation of himself. Fairness did not require the judge to do more than direct the jury, as he did, that what Bain said was evidence for the entire case. That direction confirmed the legal position that Barry was entitled to the benefit of Bain's testimony. I do not see that the judge needed to assist the jury beyond that. It was for counsel to argue to the jury that they should believe Sheldon Bain when he said Barry did not go to the house. Neither side is entitled to complain if the judge does not endorse or repeat a given argument that tells in its favour. Were it otherwise the judge would need to repeat all the arguments of counsel to the jury. The central issue concerning Barry's presence in the house on which the judge needed to direct the jury was whether to believe Barry's self-exculpatory dock statement, which was flatly contradicted by the confession Barry gave in his caution statement that he was one of the three persons who entered the house. The judge so directed the jury. He did not need to do more, as I have said. I would dismiss this ground of appeal.

[37] Mr. Clouden abandoned the ground of appeal that complained that the judge in giving his direction on joint enterprise failed to leave manslaughter to the jury as a possible verdict in relation to Barry. The record reveals[3] that the judge quite clearly did so.

[38] However, counsel argued the ground of appeal that the judge failed to give a Lucas direction on lies. In this case counsel argued that Barry was shown to have

[3] Page 14, line 10

lied when he first told the police he knew nothing of the event but in his dock statement told of accompanying the other men to where the vehicle left them. R v Lucas[4] states that where a defendant admits to lying or it is proved that he lied and the prosecution relies on that lie, or it is possible the jury may rely on the lie, as corroborative or supportive of the defendant's guilt, the judge must direct the jury on how to treat lies told by a defendant. The direction, in an appropriate case, that the judge should give to the jury is that they must not treat a lie told by a defendant as consistent only with guilt because people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. This is called a "Lucas direction".

[39] One pre-condition for requiring a Lucas direction to be given is that the lie must be relied on or likely to be relied on as supporting other evidence of guilt. In this case it is simply impossible to see how the lie in the form of the initial denial, followed by an admission of guilt that is itself followed by a denial of participation, could have been relied on as supportive of guilt. What was relied on as supportive and, if believed, would have been conclusive of guilt was the admission. Instead of relying on a lie the prosecution relied on what it said was the truth: the caution statement. In that situation the lie was utterly immaterial and required no direction, in my view. I would dismiss this ground of appeal.

[40] The net result in relation to Elvon Barry, therefore, is that I do not see any basis for allowing the appeal against his conviction and I would dismiss his appeal against conviction.

Zoyd Clement's appeal

[41] A number of the grounds of appeal for Zoyd Clement focused on knowledge that the gun would be used. The contention on behalf of Zoyd Clement was that he did not know that a gun was going to be employed in the robbery that he ultimately

[4] [1981] 2 All ER 1008

admitted he set out to commit. Dr. Alexis, counsel for Clement, submitted that at no time did anyone say that Zoyd Clement knew of the gun beforehand. It is this last word that marks the limit of the case that Clement is able to put forward on appeal. That he did not know of the gun *beforehand.*

[42] That qualifier can only refer to knowledge before the men were all inside the house, because the evidence is overwhelming that Kenton Phillip displayed and used the gun in clear sight of the other two men. The evidence of Garvin and of Damien Roberts that the gunman threatened each of them with the gun at a time when all three men were in the living room, distinctly before Kenton Phillip went to the mother's bedroom with the gun, was strong evidence for the prosecution that all three knew that a gun was being used in the commission of this crime. It was strong evidence for the jury to infer that the use of the gun was within the scope of the joint enterprise. On that evidence, if accepted, all three were responsible for the consequences that flowed from the use of the gun. The principle stated in the headnote of R v Anderson and Morris[5] calls for no discussion:

> "Where two persons embark on a joint enterprise, each is liable criminally for acts done in pursuance of the joint enterprise, including unusual consequences arising from the execution of the joint enterprise; …"

[43] Dr. Alexis contended on behalf of Zoyd Clement that it was unrealistic to expect Zoyd to withdraw from the joint enterprise at this stage when the three of them had already embarked on it and were in the course of the robbery. With respect, it is a desperate submission. The evidence showed clearly that there was nothing to stop Zoyd from saying to the others or to the gunman "Boy, I didn't know you had a gun. I do not want to be involved with this. I am leaving." Zoyd Clement had ample opportunity after the gun was first used to threaten Garvin for him to open the door and let in Zoyd and the third man, if that was the first time he was seeing a gun and knew that a gun was involved, to withdraw. He could have simply left. It is revealing that in his dock statement he said he remained outside the house. He could have done precisely that by way of withdrawing from the use of the gun. Zoyd Clement did not do that. He continued his participation in the intended armed

[5] [1966] 2 All ER 644

robbery. It is simply not possible for Zoyd Clement to escape guilt for his participation by saying that when he realised that there was a gun it was too late for him to withdraw. I would reject the grounds of appeal that rest on the proposition that Zoyd Clement did not know a gun was being used in the course of the joint enterprise until it was too late.

[44] Counsel argued the further ground of appeal that Zoyd Clement put his good character in issue when in his dock statement he said if he had in any way played a role in causing the death of the victim he was deeply sorry. Counsel argued that this expression of contrition constituted evidence that Clement was not the sort of person to have the intention for murder or to be part of a joint enterprise whose scope included murder. Therefore, counsel submitted, the judge ought to have given a direction in relation to good character.

[45] The question whether that expression of remorse was sufficient to informally raise the issue of character and the need for a direction as to good character does not require much exposition. I do not accept that Zoyd Clement's expression of regret for the incident having happened amounted to evidence that he was a person of good character. It is the fact that one of the other men had a previous conviction and he, too, expressed regret. On Dr. Alexis' argument that man's expression of regret amounted to evidence that he was a person of good character. That obviously could not be the case.

[46] In Johnson Thomas v R[6] this court reviewed the principles relating to good character as stated in the leading authorities, including the proposition that it is the obligation of counsel to raise the issue of good character "distinctly". This court relied on the dictum of Lord Carswell in Brown v R[7] that the judge "not only had no duty to raise the issue of good character but would have been ill advised to mention the appellant's character unless he was given information from which he could properly and safely do so." Johnson Thomas was a case in which the

[6] St. Lucia Criminal Appeal No 7 of 2006, judgment delivered 16th May 2007
[7] [2005] UKPC 18 at paragraph 36

appellant distinctly, even though informally, spoke to his character and this court held that on those exceptional facts the judge was obliged to consider and give the good character direction. In that case the appellant testified he was not the sort of person to hold a grievance against someone who attacked him, that he would not seek revenge, that he had avoided a fight on previous occasions when the deceased had attacked him, that he did not smoke, drink or go to parties, that he avoided trouble and that persons who knew him would say these things about him. In this case Clement's expression of remorse came nowhere close to raising the issue of good character.

[47] Beyond that, it is a matter for the discretion of the judge whether to give a good character direction. It is not in all instances that such a direction is required, even when there is evidence that is consistent with good character. Such evidence has to be relevant to the jury's consideration whether the accused had the propensity to commit crime or was likely to be telling the truth on his version of events. The submissions of counsel in this case address propensity. It is difficult to see a good character direction on propensity, in this case, being other than a "charade" in view of the fact that this appellant went to break into someone's home to rob her. I do not see how the judge could have given a good character direction in those circumstances where by the appellant's own admission he had the propensity to commit violent crime. Violence or the threat of violence is the essence of the crime of robbery. The evidence before the judge was that the appellant Zoyd Clement was a person of bad character. I would therefore dismiss this ground of appeal.

[48] The trial judge's directions on accident are the subject of the remaining ground of appeal for Zoyd Clement. Kenton Phillip also complains of these directions and it is convenient to reproduce them at this point. The judge directed:[8]

> "Now the No. 1 Accused in this case [Kenton Phillip] is saying to you that the death of the deceased was an accident. Now I am raising this because I did say to you that the Prosecution must prove that the No. 1 Accused intentionally killed the deceased.
> Now what is an accident? An accident is an occurrence that is not foreseen and that is not expected. In law, it is a good defence that the

[8] Record of Appeal page 9, line 15 to page 11, line 10

death of the deceased happened by accident. If a person kills without intention in the doing of a lawful act without criminal negligence, it is a misadventure or an accident. An accident can be described as an unforeseen or unexplained event that is not intended. The Prosecution must prove, because the burden is upon them as I did say, they must prove that the death of the deceased was not an accident. The accused, the No. 1 accused has raised the issue of accident, but the burden is not upon him to prove it. The Prosecution must prove that the death of the deceased was not an accident. In other words, the burden of disproving the defence of accident rests on the Prosecution. If you consider that there was a possibility of an accident or you are in doubt upon it, it is your duty to return a verdict of not guilty.

Just to look at the evidence briefly in relation to the question of accident, I will commend to you the evidence Professor Vigoa, who I will go into detail with in due course. He said that the bullet traversed downwards and he referred to a powder burn at the back of the deceased hand; and you heard from Cpl. Merrit Jones, who said that when a gun is discharged and the projectile leaves the barrel, powder is dispensed from the nozzle. You heard the evidence of the Roberts' brothers, who spoke of wrestling and the partition banging. And you have heard the evidence of the No.2 Accused, Elvon Barry, who said he heard people fighting, in his caution statement.

Now you will have to take all these matters into account and decide whether you can arrive at a conclusion as to accident. You'll recall that in his unsworn statement the No.1 Accused said, "On my way into one of the rooms somebody grabbed me and during the wrestling, the gun went off and I ran out of the house." Now you will have to decide if you accept what the accused have said, meaning that the shooting was not intended and not foreseen. If you do accept that or you find that the No.1Accused could be believed, then you must acquit the accused. If you find that there is an accident and that the accused, No.1 Accused must be acquitted, that is the end of the case. It means that you must find each and every one of the accused not guilty.

Now having dealt with the question of accident insofar as it affects the intention in relation to the murder, I must now turn to deal with the offence of manslaughter.

Section 232 of the Criminal Code prescribes that it's a criminal offence to commit manslaughter. Manslaughter is an offence that is less serious than the offence of murder. It is defined in Section 237 of the Criminal Code which reads, "Whoever causes the death of another person by any unlawful harm is guilty of manslaughter." It means that if you find that the accused did not intend to kill the deceased by unlawful harm, it is open to you to convict of the offence of manslaughter."

[49] Counsel's complaint is that the direction on accident was too favourable to the appellant! On counsel's view accident reduces murder to manslaughter. Therefore, counsel submitted, the judge should not have directed the jury that if they found

accident they should acquit. Hence counsel's submission: "That all or nothing misdirection could have struck the jury as awesome." Counsel in effect argued that the jury would have been unprepared to completely acquit the appellant and since that is what they would have been required to do on the judge's direction, if they found the shooting was an accident, the jury must have felt compelled to reject the defence of accident. The completion of that argument is that the appellant was denied the prospect of a conviction for manslaughter instead of murder by the judge's error in failing to direct the jury that if they found accident they could convict of manslaughter and would not have to let the men go free.

[50] An issue of terminology lies at the heart of this submission. "Accident" is a word that is used in a number of different senses. The judge used it to refer to a killing that was not intended and that was caused by harm that was not unlawful. As counsel wanted "accident" used in the direction to the jury that he thought should have been given, it was to refer to a killing that was not intended but that was caused by harm that was unlawful.

[51] In reality the direction that the judge gave to the jury on manslaughter comprehended the very factual situation that counsel terms an accident: the fact, according to Kenton Phillip, that somebody grabbed him and during the wrestling the gun went off. The jury would have clearly understood that it was this factual situation the judge was addressing – this accidental discharge of the gun - from the terms of the judge's directions on an unintended killing, which were connected to the preceding direction on accident by this bridge: "Now having dealt with the question of accident insofar as it affects the intention in relation to murder, I must now turn to deal with the offence of manslaughter." (Emphasis added).

[52] That statement was intended to establish in the minds of the jury that the judge was proposing thereafter to deal further with accident - insofar as it affected lack of intent in relation to manslaughter. There is no challenge to the directions the judge gave on manslaughter. In fact he gave the very directions on manslaughter that counsel thought he should have given. It made no difference that he did not use

the word "accident" in giving those directions; the effect was the same when he directed on a killing unaccompanied by an intention to kill. I would dismiss this ground and, as a result, Zoyd Clement's entire appeal against conviction.

Kenton Phillip's appeal

[53] The material relating to Kenton Phillip's first ground of appeal, that the judge misdirected on accident, has already been considered on a similar complaint by Zoyd Clement. The submission on behalf of Kenton Phillip is that the directions that the judge gave fell short of what was required. The directions that the judge gave have been reproduced above.

[54] Rather than falling short of what was required the judge's direction may have gone farther than was required on the facts of this case. On the facts it was not open to the jury to find that there was an unintended killing in the course of "a lawful act" because the very presence of the three men in the victim's home was an unlawful act and so was everything else they did there.

[55] As noted above, in considering Zoyd Clement's appeal in relation to accident, when the judge went on to direct the jury on an unintended killing in the course of an unlawful act he was directing the jury on accident, in the sense used by counsel. That direction put the case on proper beam and there was no complaint as to the terms of the direction the judge gave. I would reject this ground of appeal.

[56] Mr. Sylvester also argued on behalf of Kenton Phillip that the judge misdirected on intention and again the contention is that the direction given was inadequate. In particular, counsel argued that the judge failed to direct on the impact of Kenton Phillip's statement from the dock that he was told and he believed that the gun was empty. The judge, as would be expected, did highlight that aspect of the dock statement for the attention of the jury. It seems to me no particular direction was required by the judge in relation to this aspect. It was simply a question for the

jury to decide whether they believed it or not. To my mind it would have been gratuitous for the judge to tell the jury that if Kenton Phillip thought he had an empty gun he could not have intended to kill with that gun. Since that was Kenton Phillip's sole defence I am confident counsel would have belaboured the point. I would reject this ground of appeal.

[57] Kenton Phillip's final ground of appeal was that near the end of his summing up the judge pressured the jury to reach a verdict on murder and he did not direct them as to a verdict of manslaughter. The basis of this ground is that at the end the judge told the jury this was a case of murder and the law only permits a unanimous verdict. The judge urged the jury to use their best efforts to reach a unanimous verdict and told them that he was unable to accept a verdict that was less than unanimous.

[58] As the Director submitted, what the judge told the jury was correct in law as is seen from section 27 of the Jury Act Cap. 156, which states that on a capital charge the verdict must be unanimous. The standard exhortation by judges to juries to seek to reach a unanimous verdict does no more than impress on them that they must do their duty. It is a direction that the judge is bound to give, as a matter of law, and a failure to do so may, although it will not necessarily, render a conviction unsafe; see Georgiou.[9] The judge had earlier, at a number of points in his summing up, directed on manslaughter so the jury would have been clear that manslaughter was an available verdict.

[59] As a matter of law, when the jury began their deliberations they were required to deliberate on the charge of murder and reach a verdict on this charge. It was only if the jury decided the appellant was not guilty of murder or were unable to agree on a verdict in relation to murder that the jury could have proceeded to consider manslaughter. This is the clear implication of section 28 of the Jury Act, which allows the judge to receive a majority verdict on an offence less than murder after the expiration of two hours from the end of the summing up. The general principle,

[9] (1969) 53 Cr App R 428

therefore, which applies to this case, is that before the time has passed it is only a unanimous verdict on the murder charge that the jury can return. It follows that the jury has to first consider murder before they can consider manslaughter. The judge has no obligation, and fairness to the appellants does not require him, to direct on manslaughter before the minimum time has expired.[10] As the Director also rightly submitted, in this case the unanimous verdict on murder meant that manslaughter simply did not arise. I would also dismiss this last ground of appeal and, in consequence, I would dismiss Phillip's entire appeal against conviction.

Sentences

[60] All three appellants appealed against their sentences. The sentences which were imposed were as follows: Kenton Phillip was sentenced to life imprisonment, Elvon Barry was sentenced to serve 18 years in prison and Zoyd Clement, who was under 18 years at the time of the offence, was sentenced to detention at the pleasure of the court for a period not exceeding 15 years. The court ordered that Zoyd Clement's sentence was to be reviewed every five years.

[61] This was a conviction for murder that was committed in the course of an armed robbery in the victim's home. The Crown sought the imposition of the death penalty. It was therefore a case of that gravity.

[62] Counsel did not advance any basis in law or in principle upon which this court could properly interfere with the sentences that were imposed. It is well established that the discretion as to the proper sentence rests with the sentencing judge. It is not sufficient for counsel to appeal to the discretion of the appellate tribunal to see if that tribunal would be of a different sentencing disposition to the trial judge. It is not permissible for an appellate tribunal to substitute its own discretion for that of the trial judge except where the appellate court concludes that the trial judge exercised his sentencing discretion in an erroneous way, for instance by not considering the facts properly, or by proceeding on a wrong factual

[10] The conventional approach is for the judge to direct the jury to try to reach a majority verdict and that if the time should come when he can accept a verdict which is not the verdict of them all (which can only be for an offence less than murder), he will give then a further direction; see Thomas [1983] Crim LR 745

basis, or by erring in principle or in law, or in some other way. Counsel suggested none of these things. I find no basis for interfering with the sentences that were imposed. In my view, the appeal of all three men against their convictions and sentences should be dismissed and I would order accordingly.

Denys Barrow, SC
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal