

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCRAP 2008/002

HCRAP 2008/003

BETWEEN:

**CARLTON BEDMINSTER
CAREEM BEDMINSTER**

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Hugh A. Rawlins
The Hon. Davidson K. Baptiste
The Hon. Errol Thomas [Ag.]

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Hugh Marshall Jr. for Carlton Bedminster
Mr. Steadroy Benjamin for Careem Bedminster
Mr. Anthony Armstrong, Director of Public Prosecutions for the Respondent

2010: June 30
December 15.

Criminal Law-Attempted Murder-appeal against conviction-whether unsafe-whether the judge erred in law when directing the jury on the meaning of attempted murder-Joint enterprise-whether the judge erred in law when directing the jury on joint enterprise-Identification evidence-whether the judge should have withdrawn the case from the jury as the identification evidence was poor-recognition cases-whether the judge misdirected the jury in his summation on identification evidence-whether fatal to conviction-whether the judge misstated the facts and misdirected the jury on the facts-what is the effect of inconsistencies on the reliability of evidence of the virtual complainant-Alibi defence-

whether the judge gave no directions to the jury on the unsworn statement which contained the defence of alibi of the appellant-what is the requisite intent for attempted murder-whether a special warning on intent was needed-

The 1st and 2nd appellants were convicted of attempted murder and were sentenced to five and seven years respectively. The case against the appellants proceeded on the basis of a joint enterprise. The prosecution's case was that the appellants were the sole occupants of the car which was deliberately driven at the virtual complainant while he was sitting on a culvert. The car struck him in the stomach and flung him a few feet backwards into a fence. The virtual complainant stated that the appellants emerged from the car both armed with cutlasses while two other prosecution witnesses stated one had a cutlass and the other a piece of wood. The 2nd appellant rushed the virtual complainant with the cutlass and flung a chop towards his head. In shielding himself with his hand the virtual complainant sustained a chopped thumb. The appellants fled the scene leaving behind the car. The 1st appellant appealed against his conviction on the ground that it was unsafe and unsatisfactory having regard to the fact that the learned judge erred in law in directing the jury on joint enterprise as well as to the meaning of attempted murder. He further contended that the judge erred in law by not withdrawing the case from the jury on the basis that the quality of the identification evidence was poor and in misdirecting the jury in his summation on identification evidence. Other grounds alleged were that the judge misstated the evidence, misdirected the jury on the facts and gave no directions to the jury upon the unsworn statement of the 1st appellant. The 2nd appellant appealed against his conviction on the ground that the judge failed to direct the jury adequately on what are the legal requirements of attempted murder. The virtual complainant did give evidence that he had known the appellants for about one year before the incident. The 1st appellant made an unsworn statement raising an alibi defence while the 2nd appellant in his unsworn statement denied driving the car that was involved in the incident on the day and also denying that he tried to chop the virtual complainant.

Held: allowing the appeal and quashing the conviction of both appellants and setting aside their sentence and ordering that both appellants be retried.

1. That the learned judge adequately summed up to the jury the evidence from which a joint enterprise could be inferred; the fact that it could be formed on the spur of a moment; nothing needed to be said and it may be inferred from the behaviour of the parties. He made it very clear that mere presence at the scene of a crime was insufficient to prove guilt. But if the jury found that the appellants were at the scene of the crime and did by their presence encourage the other in the offence, they both would be guilty. On the evidence presented by the prosecution, the jury could conclude that the two appellants were not merely present but by their actions encouraged each other in the commission of the crime. The appellants were the only occupants in the car which drove at and struck the virtual complainant and when the car stopped, they both emerged from it armed and chased the virtual complainant. The second appellant flung a chop towards the head of the complainant.

2. Having regard to the principle that a summation has to be looked at as a whole the learned judge gave a proper direction on the issue of presence at the scene of the crime in the context of joint enterprise liability and having done so turned to define attempt. Given the facts and circumstances of this case and the issues involved and having regard to the judge's direction on the aspect of presence at the scene of the crime in joint enterprise liability, there is no confusion or error of law in the directions given by the learned judge.
3. That this was clearly a recognition case as the appellants and the virtual complainant were no strangers to one another. The fact that only one witness had identified the appellants as being present does not make the quality of the identification evidence poor; it was not based on a fleeting glance encounter. The quality of the evidence presented was such that the jury could safely be left to assess its value even though there was no supporting evidence of identification.

R v Turnbull (1976) 63 Cr. App. R 132, **R v Breslin** 80 Cr. App. R 226 and **R v Levy** [2006] EWCA Crim. 3063 cited.

4. That the learned trial judge brought to the jury's attention the fundamental requirement of the special need for caution before convicting on the identification evidence, he instructed the jury as to the reason for such a need and instructed the jury that an apparently convincing witness can be mistaken.
5. That it was incumbent upon the learned judge to tailor his summing-up so that the jury could clearly appreciate and weigh the strengths and weaknesses of the identification evidence in reaching their verdict. In this case it became even greater as the virtual complainant was the only person to recognize or identify the appellants. The cumulative effect of the inconsistencies in the evidence and the inadequate assistance given by the learned judge to the jury in relation to the identification would render the conviction unsafe.

Langford & Anor v The State (Dominica) 2009 UKPC 20 and **Fuller v The State** (1995) 52 WIR 42 at 433 applied.

6. That there was no infringement of the hearsay rule neither did the appellant suffer any prejudice when the learned judge directed that the virtual complainant said that "he had seen these persons from time to time around. In fact he had some friends who knew them"
7. In giving a character direction to the jury the learned judge tied in the unsworn statement which raised the defence of alibi and **essentially told the jury** that they should consider what weight should be given to it bearing in mind the good character of the accused. Consequently the 1st appellant suffered no injustice by the judge not directing the jury that if they believe the unsworn statement or had doubts about it they should acquit. It would not have been possible for the jury to reject the alibi and either believe or have doubt about the unsworn statement.

8. That nothing has been presented to persuade this court that this is one of the rare cases in which the simple direction on intent would be insufficient. It seems unlikely that the jury would have lost sight of the evidence that the car was driven at the virtual complainant and of both appellants emerging from the car armed after it came to a stop and chasing the virtual complainant. These circumstances do not fall into an exceptional category requiring a special direction on intent.

R v Nedrick 83 C.A.R. 267 at 270 applied.

JUDGMENT

- [1] **Baptiste J.A:** This is an appeal by brothers Carlton and Careem Bedminster against their conviction and sentence for the offence of attempting to murder Kevin Norde on the 10th October 2005. They were convicted on 6th March 2008 and sentenced to five and seven years imprisonment respectively on 19th March 2008. The case against the Bedminsters proceeded on the basis of a joint enterprise. The prosecution's case was that they were the sole occupants of a motor car which was deliberately driven at Norde sometime after 4 pm on Monday 10th October 2005 while he was sitting on a culvert. The motor car rushed over the speed bump which was a little distance from the culvert, struck him in the stomach and flung him a couple feet backwards into a wire fence. The Bedminsters emerged from the vehicle which had gotten stuck in the culvert. They were both armed. Norde's evidence is that they were both armed with cutlasses while two other prosecution witnesses stated that one of the persons they saw had a cutlass and the other, a piece of wood. Careem rushed Norde with the cutlass and flung a chop towards his head causing him to duck and put up his left hand. He sustained a chop on his thumb. The Bedminsters eventually fled the scene leaving the car behind. Norde was the only witness who identified the Bedminsters. He stated that he knew them for about a year before the incident.
- [2] Carlton made an unsworn statement in which he raised an alibi defence. He stated that on the day in question he was at work at Royal Bank. He left work and went to his residence at Clarke's Hill. From there he went to Herbert's Estate where he also resided and stayed there until the following morning. He also called

an alibi witness. Careem also made an unsworn statement denying that he was driving the car that was involved in the incident on the day in question, that is, the 10th October 2005 and also denying that he tried to chop Norde on that day.

- [3] Prior to the incident Norde and Carlton Bedminster were involved in instances of hostile verbal and physical confrontation. Norde testified that in September 2005 while crossing a street a vehicle swung around the corner at high speed causing him to jump across on the other side. Carlton and another person were in the vehicle. When the vehicle stopped he asked them whether they wanted to be in something with him. Carlton came out of the right hand side of the vehicle and told him his time is coming soon. Four days after that incident Carlton and another individual threatened to chop him and while walking towards his workplace, Carlton repeatedly cuffed him in the back of his head. On the 10th October 2005 Norde saw Carlton walking on High Street and went across to him and pushed him in retaliation for repeatedly cuffing him in his head. Carlton grabbed two stones and came back at him. About 2004 Careem and Norde were involved in an argument at Heritage Quay and were also involved in a bottle throwing incident.
- [4] Multifarious grounds of appeal were filed by Carlton Bedminster. These grounds allege that the learned judge erred in law in directing the jury on joint enterprise as well as to the meaning of attempted murder. Other grounds allege that the learned judge erred in law in not withdrawing the case from the jury on the basis that the quality of the identification evidence was poor and in misdirecting the jury in his summation on identification evidence. Further, the learned judge misstated the evidence, misdirected the jury on the facts and gave no directions to the jury upon the unsworn statement of the appellant.

Joint Enterprise

- [5] This ground of appeal alleges that the learned trial judge erred in law when he directed the jury on joint enterprise and upon the guilt of the appellant by stating

that their presence at the scene alone encouraging the other was sufficient to ground the offence of attempted murder.

- [6] This ground calls for an examination of the learned judge's charge to the jury. The learned judge gave the jury the conventional direction on joint enterprise. He stated that the prosecution's case was that the two accused committed the offence. The learned judge directed the jury 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....Those planned agreement in the joint enterprise 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 needs to be said at all. It can be made with a nod, or a wink, or a knowing look. An agreement can also be inferred from the behaviour of the parties... what had transpired before between these two individuals, and the fact of the car running into him, and they together leaving the car and running behind him, he said all those things-before, during, and after, suggest to you that this was a joint enterprise. It could have been formed right there on the spot. It could have been formed right there just before the bump, the speed bump.

The essence of joint responsibility for a criminal offence is that each defendant share (sic) shares the common intention to commit the offence and took some part in it however great or small to achieve that aim....Your approach in this case should therefore be as follows: If looking at the case of Carlton Bedminster and Careem Bedminster treating them separately, you are sure that with the intention I've mentioned they each or both of them committed the offence on his own on their own or took some part in it, in committing it with the other, then he is guilty.

Now, mere presence at the scene of the crime is not enough to prove guilt, but even if you find that the two accused were on the scene and intended each, and did by their presence alone encourage the other in the offence, then he will be guilty."

- [7] The judge went on to explain to the jury that if they were to find, in fact if they were to accept the evidence of Norde that the two appellants ran out behind him and the one with the cutlass flung it and tried to chop him; it was open to them to find that the presence of the other person who ran out with the piece of wood in his

hand, in the manner in which he was present, was sufficient to encourage the other in the offence and therefore he would be guilty, they both would be guilty.

- [8] I discern no error of law or deficiency on the part of the learned judge in directing the jury on joint enterprise and upon the guilt of the appellant. The learned judge adequately summed up to the jury the evidence from which a joint enterprise could be inferred; the fact that it could be formed on the spur of a moment; nothing needed to be said and it may be inferred from the behaviour of the parties. The learned judge was very clear that mere presence at the scene of a crime was insufficient to prove guilt. If however the jury found that the appellants were at the scene of the crime and did by their presence encourage the other in the offence, they both would be guilty. On the evidence presented by the prosecution, the jury could conclude that the two appellants were not merely present but by their actions encouraged each other in the commission of the crime. The appellants were the only occupants in the car which drove at Norde. When the car stopped they both emerged from it and were both armed. They both chased Norde. One of the appellants flung a cutlass at Norde and tried to chop him. In the circumstances there is no merit in this ground of appeal.

Attempted Murder

- [9] The ground here is that the trial judge erred in law when he directed the jury as to the meaning of attempted murder. The complaint is that the trial judge directed the jury that "Attempting to commit a crime means trying to commit a crime as distinct from merely intending to commit it or merely getting ready to commit it." Yet at the same time directed the jury that "it would be open to you that his presence there in the manner in which he was present was sufficient to encourage the other in the offence and therefore he'd be guilty, they'll both be guilty." Mr. Marshall submits that this direction was both erroneous and confusing.
- [10] In this ground learned counsel has embarked on an exercise of cutting and pasting what the learned judge said, the effect of which is to give an erroneous picture of

the judge's charge to the jury. In directing the jury on joint enterprise the learned judge stated:

"Now, mere presence at the scene of a crime is not enough to prove guilt, but even if you find that the two accused were on the scene and intended each, and did by their presence alone encourage the other in the offence, then he will be guilty."

- [11] Having so directed the jury, the learned judge immediately referred to the evidence of Norde. The judge instructed the jury that if they were to accept Norde's evidence that the two appellants ran out behind him and the one with the cutlass flung it and tried to chop him then:

"The other person who ran out with him with a piece of wood in his hand, it would be open to you that his presence there in the manner in which he was present was sufficient to encourage the other in the offence and therefore he'd be guilty, they'll both be guilty. But that finding is for you. You alone can make that determination."

- [12] The learned judge gave a proper direction on the issue of presence at the scene of the crime in the context of joint enterprise liability having regard to the facts of this case. Having done that the learned judge turned to the issue of "attempt". The judge stated:

"Attempting to commit a crime means trying to commit a crime as distinct from merely intending to commit it or merely getting ready to commit. I must stress that merely intending to commit a crime is not enough... Some act must be done in order to carry out that intention, and that act must be done immediately and not remotely connected to the intended crime."

- [13] I pay regard to the principle that a summation has to be looked at as a whole. Given the facts and circumstances of this case and the issues involved and having regard to the judge's direction on the aspect of presence at the scene of the crime in joint enterprise liability, I discern no confusion or error of law in the directions given by the learned judge. Accordingly, this ground of appeal fails.

Identification

- [14] Under the ground of identification it is stated that the learned trial judge erred in law in not withdrawing the case from the jury on the basis that the quality of the identification evidence was poor, as only one witness had identified the appellant as being present. This evidence was not corroborated by any other evidence whatsoever and the appellant maintained a defence of alibi.
- [15] The Turnbull principle **R v Turnbull**¹ requires a judge to withdraw the case from the jury and direct an acquittal when the quality of the identifying evidence is poor, unless there is other evidence which goes to support the correctness of the identification. Recognition cases are not excluded from that principle. The identification evidence can be poor even though given by a number of witnesses. They may all have had only the opportunity of a fleeting glance or a longer observation made in difficult conditions. What matters is the quality of the identification evidence rather than its volume.² If the quality of the identification evidence is good and remains good at the close of the case, the danger of a mistaken identification is lessened, but the poorer the quality the greater the danger.
- [16] In **R v Ley (Kerry)**³ Scott Baker LJ pointed out that there are two distinct exercises for the judge in a case depending on identification evidence alone. First he must decide whether the evidence of identification crosses the quality threshold so that the case can safely be left for the jury to determine. Secondly, when summing up the case, he has to give the jury an appropriate **Turnbull** direction tailored to the facts of the case.
- [17] Did the identification evidence in this case cross the quality threshold to have allowed the trial judge to safely leave the case for the jury to decide? The sole identification evidence came from Norde who stated that he knew both appellants

¹ (1976) 63 Cr. App. R 132

² **R v Breslin** (1985) 80 Cr. App. R 226

³ [2006] EWCA Crim. 3063 at paragraph 27

for about a year before the incident of 10th October 2005. Norde also said that he and Careem Bedminster were involved in a scuffle a couple years before the incident. They were also involved in an argument in 2004. It is also clear from Norde's evidence that he and Carlton Bedminster had instances of hostile verbal and physical confrontation from late September 2005 leading up to the incident of 10th October 2005.

- [18] With respect to the incident of Monday 10th October 2005, Norde testified that he left home and went down an alley to await someone. He was sitting on a culvert. It was about 4 p.m. in the afternoon. His head was bent down. A car drove down the road. All of a sudden he heard a sound of a vehicle engine rushing over the speed bump; when he looked up the car was already on him. He hopped to his feet. The car struck him in the stomach and flung him a couple of feet backwards in a wire fence. Norde stated that his right foot got caught up under the vehicle when it hit him. It got ripped and punctured. He stood looking at his foot. Then the front door of the car opened and the two brothers came out with cutlasses each in their hands. Careem came from the driver's side and Carlton came from the left. No one else was in the vehicle. Careem rushed him with a cutlass and flung a chop with it towards his head. He ducked and put up his left hand towards his head and the cutlass chopped his thumb. He ran backwards. Careem and Carlton ran after him asking him what he was running for. He went into a neighbour's yard. Norde further stated that the car became stuck on the culvert. Careem and Carlton tried to start the car but they could not move it. They jumped out and ran up the road with the cutlasses in their hands into some bushes.
- [19] This was clearly a recognition case. The appellants and Norde were no strangers to one another. They had unfriendly and hostile interactions before the incident of 10th October 2005. In fact the very morning of the incident Norde and Carlton were involved in a physical confrontation when Norde went across to Carlton and pushed him in retaliation for Carlton cuffing him repeatedly in the back of the head the day before. I do not consider the quality of the identification evidence to be

poor. It was not based on a fleeting glance encounter. The fact that only one witness had identified the appellants as being present does not make the quality of the evidence poor. In my judgment the quality of the evidence presented was such that the jury could safely be left to assess its value even though there was no other supporting evidence of identification. It would then be incumbent on the learned judge to give the jury appropriate directions and assistance in treating the evidence. This ground of appeal accordingly fails.

- [20] Another ground of appeal was that the learned trial judge erred in law and misdirected the jury in his summation by not directing the jury that this was a case against an accused which depended wholly or substantially on the correctness of identification of the accused by one prosecution witness which the defence alleged to be mistaken or untruthful. The trial judge failed to warn the jury of the special need for caution before convicting the accused in reliance on the correctness of identification.
- [21] In my view this ground of appeal is unfounded. The learned trial judge brought to the jury's attention the fundamental requirement of the special need for caution before convicting on the identification evidence, he instructed the jury as to the reason for such a need and instructed the jury that an apparently convincing witness can be mistaken.
- [22] In his summation the learned judge directed the jury that:

"This is a trial where the case against the accused in the defense of the accused depends on the correctness of the identification of them. Where the defence alleges ... that the prosecution is mistaken. ... I must warn you of the special need for caution before convicting an accused or any accused in reliance of evidence of identification. The law requires me to put this to you, to explain and caution you that there have been wrongful convictions in the past as a result of such mistakes. An apparently convincing witness can be mistaken, so can a number of apparently convincing witnesses, a number of them. I need to remind you that mistakes are made in recognition even of close friends and relatives sometimes. You should therefore examine carefully the circumstances in which the identification by each witness or by the - - Kevin Norde,

because he's the only one who claims to have identified these persons, the circumstances under which the ID-the identification was made, under what circumstances, distance, whether he knew them from before, whether he had any special reasons for remembering them. And on this point you are directed-I direct you to the virtual complainant's evidence, that is, Kevin Norde's evidence of his several prior encounters with the accused. Remember that Kevin Norde is the only person that can identify the accused as the perpetrators of this offence. It is his evidence primarily that you must feel sure of with respect to the identification."

There was no error in law or misdirection by the learned judge in his summing-up. The learned judge dealt adequately with all the points raised by this ground of appeal.

- [23] It is also alleged that the learned judge [1] misdirected the jury by failing to instruct them as to the need for a special warning in cases that depend on the uncorroborated identification of one witness and [2] failed to advise the jury that a mistaken witness can be a convincing one. Again I find no merit in this ground which is in essence a slight variation of the previous ground of appeal. The judge expressly charged the jury that "an apparently convincing witness can be mistaken." This ground also fails.
- [24] Another ground was that the learned judge failed to give the jury directions to examine the circumstances of identification, in relation to what the witness was doing at the time and the length of time he had to make the identification/recognition. Further, the learned judge gave no sufficient warning to the jury that mistakes in recognition of close relatives and friends are sometimes made. The latter part of this ground is bereft of substance as the learned judge expressly warned the jury that: "I need to remind you that mistakes are sometimes made in recognition even of close friends and relatives sometimes." Although the learned judge directed the jury to examine carefully the circumstances under which Norde identified the appellants I entertain real concerns as to whether the learned judge gave the jury adequate assistance on this issue.

- [25] In his skeleton arguments Mr. Marshall contended that the learned judge ought to have given a warning on the circumstances under which the identification took place. Firstly, that Norde was not looking at the person being identified and was in fact running away, that no one else present made an identification and that the identification was largely a result of what he was told by third parties.
- [26] The brunt of the argument here is that the learned judge dealt inadequately with the weaknesses in Norde's evidence. The summing-up in identification cases must not only contain a warning about the special need for caution but must also expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case. The judge should not only identify the evidence capable of supporting the identification but should relate each of the factors material to the particular case to the evidence given at the trial⁴.
- [27] In **Langford** the Board commended to judges the sound advice given by Ibrahim JA in **Fuller v The State**⁵. In **Fuller** the Court of Appeal of Trinidad and Tobago was concerned about the repeated failures of trial judges to instruct juries properly on the *Turnbull* principles when they dealt with the issue of identification. Ibrahim JA stated:
- "Great care should be taken in identifying to the jury all the relevant criteria. Each factor or question should be separately identified and when a factor is identified all the evidence in relation thereto should be drawn to the jury's attention to enable them not only to understand the evidence properly but also to make a true and proper determination of the issues in question. This must be done before the trial judge goes on to deal with another factor. It is not sufficient merely to read to them the factors set out in Turnbull's case and at a later time to read to them the evidence of the witnesses. This is not a proper summing-up. The jury has heard all the evidence in the case when the witness testified. It will not assist them if the evidence is merely repeated to them. What they require from the judge in the final round is his assistance in identifying, applying and assessing the evidence in relation to each direction of law which the trial

⁴ See *Langford & Anor v The State (Dominica)* [2009] UKPC 20, paragraph 23

⁵ (1995) 52 WIR 42 at 433

judge is required to give to them and also in relation to the issues that arise for their determination."

- [28] Although the learned judge referred to the factor of the circumstances under which the recognition was made, he did not alert the jury to the potential weakness of that evidence. For instance in dealing with that issue the learned judge should have reminded the jury of Norde's evidence that he was sitting on the culvert with his head bent down and of the suddenness with which the car rushed over the speed bump and struck him in the stomach flinging him a couple feet backward, causing an injury to his foot. The trial judge should have invited the jury to consider whether the quickness with which the events unfolded and the nature of the events had any effect on the reliability of Norde's evidence. This assumes more moment when one considers the conflict between Norde's evidence and that of two other prosecution witnesses. Norde testified that both appellants came out of the car each armed with a cutlass. Two other witnesses for the prosecution, Shawn Henry and Rollette Joseph, though not identifying the appellants, stated that one of the individuals had a cutlass and the other had a piece of wood. If the jury found that there was a discrepancy in the evidence they should have been invited by the judge to consider the possible effect of that discrepancy on the reliability of the identification evidence of Norde.
- [29] Norde also gave evidence that Careem came out of the driver's side, the right side and was the one who rushed him with the cutlass, flinging a chop towards his head while Carlton came from the left side and was the one who was properly dressed. Shawn Henry testified that after the car struck Norde two young fellows jumped out of it. The one who was driving the car had on his working clothes, he was properly dressed. The other was dressed normal, like home clothes. The one who was driving had the cutlass. Again the jury was not given assistance on the possible effect of these inconsistencies on the reliability of the evidence of Norde.

[30] The learned judge gave the jury a general direction that inconsistencies go to the credibility and reliability of a witness, and brought the inconsistencies mentioned above to their attention. That however was not done in the context of the learned judge's specific directions on identification evidence and the potential impact of such inconsistencies on the reliability of the identification evidence of Norde. The necessary nexus was not created by the learned judge. It was incumbent upon the learned judge to tailor his summing-up so that the jury could clearly appreciate and weigh the strengths and weaknesses of the identification evidence in reaching their verdict. This became even greater as Norde was the only person to recognize or identify the appellants. The question now becomes, what is the effect of these failures on the safety of the conviction? In the context of this case, I am of the view that their cumulative effect would render the conviction unsafe.

[31] Norde made a dock identification of the accused. Before making the dock identification he did not identify the appellants to the police. No identification parade was held. In my view there was no need to hold an identification parade in the circumstances of this case as it would have served no useful purpose. Norde and the appellants knew one another. At an identification parade Norde would naturally pick out the appellants as the persons whom he believes to be the occupants of the car that drove at him on the 10th October 2005, striking him in the stomach and flinging him backwards into a fence, and ran after him while being armed. As Lord Hoffman pointed out in **Goldson & Mc Glashan v R**⁶:

"The evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification whereas all that it would confirm was the undisputed fact that the witness knew the accused.

It would not in any way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime."

In the circumstances of this case the dock identification occasioned no miscarriage of justice.

⁶ (2000) 56 WIR 444

- [32] A further ground of appeal was that the learned judge misdirected the jury when he directed that the virtual complainant "says that he had seen these persons from time to time around. In fact he had some friends who knew them" which such direction was reference to evidence contrary to the hearsay rule and was not evidence of identification at all and amounted to prejudice to the appellant without any probative value whatsoever. I do not discern any infringement of the hearsay rule here, or the prejudice allegedly suffered by the appellants.
- [33] Another ground advanced on behalf of Carlton Bedminster was that the learned judge gave no directions upon his unsworn statement. The complaint here is that the jury during their deliberation was not aware that if they believed the unsworn statement of Carlton Bedminster they must acquit or if they were in doubt to resolve the doubt in his favour.
- [34] In his short unsworn statement Carlton Bedminster raised the defence of alibi. In directing the jury on the unsworn statement the learned judge said:
- "In the first place, as you know, he did give - make an unsworn statement from the dock in his defense-in their defense. And in considering that statement and weight you give to it, you should bear in mind that it was made by a person of good character in the way I described to you, that a person who has no criminal record, a criminal record to be put before the Court. And that-and taking that into account when deciding whether or not you want to believe the statements they gave."
- [35] In **Director of Public Prosecutions v Walker**⁷ Lord Salmon gave guidance with respect to a judge's direction to the jury as it pertains to the unsworn statement of an accused. In delivering the advice of the Board Lord Salmon said this:
- "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it, that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

⁷ [1974] 1 WLR 1090

The learned judge did not give the above direction to the jury. However, in giving a character direction to the jury the trial judge tied in the unsworn statement and essentially told the jury that they should consider what weight should be given to it bearing in mind the good character of the accused.

- [36] Carlton Bedminster called one witness, Mr. Moore, in support of his alibi defence. Mr. Moore's evidence was that he recalled the 10th October 2005 at about 4:30pm, it was a Wednesday and he was taking his wife home from school. He knew it was a Wednesday because his wife gives lessons at school and this was her last day of giving lessons for the week. That Wednesday he was driving in the vicinity of Carlton Bedminster's home and he saw Carlton. After dropping his wife, he picked up Carlton and dropped him to Potters. It must be remembered that the prosecution's case is that the incident occurred on Monday the 10th of October 2005. Mr. Moore was however sure that he picked up Carlton on a Wednesday. The learned judge reminded the jury that Carlton Bedminster is saying that he was not on the scene of the crime when it was committed and directed the jury that the prosecution has to prove his guilt so that they are sure of it. The learned judge also directed the jury that Carlton Bedminster did not have to prove that he was elsewhere at the time. The prosecution must disprove his alibi. The judge further directed the jury that even if they conclude that the alibi was false that does not of itself entitle them to convict and reminded the jury to: "bear in mind that an alibi is sometimes prevent you [invented] to bolster a genuine defense".
- [37] The learned judge told the jury: "So you may want to find that that witness [Moore] doesn't necessarily assist the accused. That's a matter for you. It's open to you to find, well, no maybe he really meant the 10th and he got the day of the week wrong although he said he remember the day by the day of the week; but it's a matter for you; it's open for you."
- [38] It may very well be that the jury rejected the alibi evidence based on the day (Wednesday) Moore said he gave a lift to Carlton Bedminster and the day

(Monday) the incident occurred. In the circumstances the jury would have had a proper basis for rejecting the alibi. Rejecting the alibi evidence of Moore necessarily entailed rejecting the alibi put forth by Carlton Bedminster which in itself meant rejecting his unsworn statement. Therefore Carlton Bedminster suffered no injustice by the judge not directing the jury that if they believe the unsworn statement or were unsure about it they should acquit. It would not have been possible for the jury to reject the alibi and either believe or have doubt about the unsworn state.

- [39] A further ground of appeal was that the learned judge misdirected the jury on the facts in misstating the evidence when he said that the virtual complainant said that one of the accused had a cutlass and one had a piece of wood when in fact the learned judge ought to have pointed out to the jury that there existed an inconsistency between the witnesses of the prosecution in that the virtual complainant spoke of two persons with a cutlass whereas two other witnesses for the prosecution spoke of one person with a cutlass and the other with a piece of wood. I agree that the learned judge misstated the evidence on that issue. However in directing on inconsistency he brought out that point to the jury. The learned judge also misdirected the jury on the facts in misstating the evidence when he stated that the virtual complainant said that Carlton came from the driver's side of the vehicle. Norde testified that Careem Bedminster came from the right hand side of the vehicle and Carlton came from the left side.

Appeal of Careem Bedminster

- [40] With respect to Careem Bedminster, the first ground of appeal alleges that the learned trial judge failed to direct the jury adequately on what are the legal requirements of attempted murder.
- [41] Mr. Benjamin stated that whilst it is admitted that a direction by the learned judge on an intention to kill would be sufficient direction on a charge of attempted murder, in the instant case, an extended direction was required. Mr. Benjamin

submitted that the learned trial judge ought to have given to the jury a direction on "probability" as encapsulated in the guidelines set out in **R v Nedrick (Ransford Delroy)**⁸ where the Lord Chief Justice, Lord Lane said:

"When determining whether a defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions: (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence? If he did not appreciate that death or serious harm was likely to result from his act, he cannot have intended to bring it about. If he did but thought that the risk to which he was exposing the person killed was only slight, then it may be easy for the jury to conclude that he did not intend to bring about that result. On the other hand, if the jury are satisfied that at the material time the defendant recognized that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result."

- [42] **Nedrick** was reviewed by the House of Lords in **R v Woollin (Stephen Leslie)**⁹ where their Lordships opined that it is unlikely, if ever, to be helpful to direct the jury in terms of the two questions set out by Lord Lane. Lord Hope regarded these two questions as detracting from the clarity of the critical direction Lord Hope stated: "I would prefer to say therefore that it is unlikely, if ever, to be helpful to tell the jury that they should ask themselves these questions. I think that it would be better to give them the critical direction, and then to tell them that the decision was theirs upon a consideration of all the evidence."

- [43] The critical direction referred to by Lord Hope is part of the model direction given by Lord Lane in **Nedrick** which states that:

"Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."

⁸ (1986) 83 Cr. App. 267 at 270

⁹ [1999] A.C. 82

In the interests of clarity, the House of Lords amended the above direction by substituting the words "to find" for the words "to infer".

- [44] Attempted murder, unlike murder, always requires an intent to kill. The issue for the jury in a case of attempted murder is the narrow one of whether the defendant intended to kill. To return a guilty verdict an intent to kill must be proved¹⁰. Although **Nedrick** concerned murder and not attempted murder, in so far as the mental element in attempted murder is the intent to kill, the principle enunciated in **Nedrick** would apply to attempted murder with the requisite modification.
- [45] The direction on probability suggested by Mr. Benjamin is inharmonious with the opinion expressed by the House of Lords in **Woollin** that it is unlikely, if ever, to be helpful to tell the jury that they should ask themselves: how probable was the consequence which resulted from the defendant's voluntary act? Did he foresee that consequence? From a reading of **Nedrick** it is clear that it would be in rare cases that the simple direction would be inadequate.
- [46] Nothing has been presented to persuade this court that this is one of the rare cases in which the simple direction on intent would be insufficient. In **Woollin** Lord Steyn stated that it may be appropriate to give a direction in accordance with **Nedrick** in any case in which the defendant may not have desired the result of his act. In the circumstances of this case I do not accept that a special direction of the kind Mr. Benjamin contends for ought to have been given. It seems unlikely that the jury would have lost sight of the evidence that the car was driven at the virtual complainant and of both appellants emerging from the car armed after it came to a stop and chasing the virtual complainant. In my judgment these circumstances do not fall into an exceptional category requiring a special direction on intent.
- [47] Mr. Benjamin submitted that "the learned judge ought to have directed the jury that the prosecution must make them feel sure that the crime the two accused intended

¹⁰ R v York (Lee) [2007] EWCA Crim. 1743

was murder, and the murder in this case was to be killing, an intention to kill. Further, the learned judge erred and failed to direct the jury that if on the other hand they felt that the act the accused intended to do was to cause injury or fear then that would not be attempted murder." Mr. Benjamin further submitted that had the jury been given that direction there was the distinct possibility that the appellant would have been found not guilty of attempted murder, therefore the conviction is unsafe and ought to be quashed.

- [48] These submissions by Mr. Benjamin call for an examination of the learned judge's charge to the jury. The learned judge directed the jury that "the offence of murder is committed where a person unlawfully kills another with intent at the time of the killing to kill or cause grievous bodily harm. In the offence of attempted murder, the person must, however, have the intention to kill, nothing less than that intention to kill will suffice. So the question is here you have to consider, you have to consider whether the persons who attempted to murder the VC, if that is what you found happened intended to do it, did it with intention to kill him, nothing else." The learned judge further directed the jury that whether an act is sufficiently proximate to the complete offence of murder to amount to attempted murder is a question of fact for them and whether or not that driving the vehicle into the virtual complainant could have had that effect was a matter for them. The learned judge went on to state that "if the car had slammed brakes just before hitting the culvert, you may say that that is in fact not sufficient, it stopped short of the completed act." The learned judge also directed the jury that:

"The second ingredient which must be established by the prosecution so that you feel sure, is an intention on the part of the accused to commit that completed offence of murder, that is, to kill. The prosecution must prove an intention to kill on the part of the two accused."

The learned judge further directed the jury that:

"And in considering, of course, an intention, and the prosecution's case is that the car is what was used and what else could they have intended. Remember the defense is saying that the car clearly, based on the evidence, could not have been travelling particularly fast, and that, they saying, is sufficient evidence to show that whoever was driving that car

didn't intend to, in fact, even to commit grievous bodily harm or to murder. But that's a matter for you."

- [49] Looking at the summation in the round the jury would have been left in no doubt that the prosecution had to make them sure that the accused intended to commit the completed offence of murder, that is to kill. Further that the requisite intent for the offence of attempted murder was the intent to kill and nothing less than an intention to kill would suffice. The learned trial judge gave adequate directions to the jury on the issue of intent.
- [50] In the circumstances of this case my conclusion that the deficiencies in the learned judge's treatment of the identification evidence rendered the conviction unsafe, when I dealt with Carlton Bedminster's appeal, would also apply to Careem Bedminster. Accordingly, I would quash the conviction of both appellants and set aside their sentence. I would further order that both appellants be retried.

Davidson K. Baptiste
Justice of Appeal

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Errol Thomas
Justice of Appeal [Ag.]