EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCRAP 2008/010; 2008/011; 2008/012; 2008/014

BETWEEN:

[1] CRAIG SMITH
[2] CLAYTON FRANCIS
[3] NOEL MELVIN
[4] MARLON PHOENIX

Appellants

and

THE QUEEN

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell	Justice of Appeal [Ag.]

Appearances:

Mr. Cosbert Cumberbatch for Craig Smith, Clayton Francis and Noel Melvin
Mr. Ralph Francis for Marlon Phoenix
Mr. Anthony Armstrong, Director of Public Prosecutions, for the Respondent

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2011: September 22;
2012: June 25.

Criminal appeal against conviction – Attempted murder - Joint enterprise – ID parade – Withdrawal from joint enterprise – Primary party departing from common design by unforeseen action – Conviction of offence of shooting with intent to cause grievous bodily harm where secondary party is unaware of the intent of primary party – Whether secondary party's realization of primary party's intent sufficient to found conviction – Non-disclosure

In an attempt to retrieve a car belonging to Noel Melvin from Jason Hope, the appellants drove to Gavin Paredes' home at Tyrells where Paredes was shot at by Marlon Phoenix, stabbed under his right arm by Craig Smith and hit on his head with an object by Melvin.

Clayton Francis was in the car when Paredes sustained his injuries. Following this, they drove to Marlon Charles' home at Ramon Hill where Phoenix, Smith and Melvin confronted both Charles and Hope. Francis again remained in the car. Phoenix produced the gun and discharged two shots which resulted in Charles being shot in the chest.

The prosecution's case was that the appellants acted as part of a joint enterprise. Smith, Francis and Melvin knew that Phoenix had a gun, foresaw his intention to kill at both Tyrells and Ramon Hill and continued to participate in the joint enterprise with the knowledge of his intention and on this basis, they are all fully liable for the offences of shooting with intent and attempted murder.

Smith, Francis and Melvin denied that they were a part of any joint enterprise with Phoenix. They denied the prosecution's allegations that they had knowledge that Phoenix had a gun and that they were aware of his intention to kill. They claimed that Phoenix acted entirely on his own; Francis claimed that he was merely a bystander. Phoenix's defence was one of alibi. A jury found the appellants guilty of the offence of shooting at Paredes with intent to do him grievous bodily harm and the attempted murder of Charles on the basis of a joint enterprise.

The appellants appealed against their convictions on various grounds which included that the learned trial judge failed to point out adequately to the jury that attempted murder requires an intention to kill and nothing short of that intention to kill would suffice and that the learned judge misdirected the jury or failed to direct the jury adequately on the law relating to unlawful joint enterprise. Phoenix, in particular, allege that the learned trial judge failed to direct the jury about the need for special care when considering the evidence of a co-accused; he challenges the integrity and credibility of the identification parade and complains of a material irregularity regarding the alleged failure of the prosecution to disclose Francis's first statement which appeared not to have implicated him.

Held: allowing the appeal of Craig Smith, Clayton Francis, and Noel Melvin against their conviction for shooting with intent and quashing the conviction; dismissing Marlon Phoenix's appeal against his conviction for shooting with intent and upholding his conviction; dismissing the appeal of Craig Smith, Clayton Francis, Noel Melvin and Marlon Phoenix against their conviction for attempted murder and upholding their conviction, that:

1. In a joint enterprise, if a secondary party realizes (without agreeing to such conduct being used) that the primary party may kill or intentionally inflict serious injury, but nevertheless continues to participate with the primary party in the venture, that will amount to a sufficient mental element for the secondary party to be guilty of murder if the primary party, with the requisite intent, kills in the course of the venture unless (i) the primary party suddenly produces and uses a weapon of which the secondary party knows nothing and which is more lethal than any weapon which the secondary party contemplates that the primary party or any other participant may be carrying and (ii) for that reason the primary's party act is

to be regarded as fundamentally different from anything foreseen by the secondary party. Applying this principle to the present case, there was no evidence presented at trial which showed that Smith, Melvin and Francis had knowledge of the gun in Phoenix's possession before he shot at Paredes. Moreover, no evidence was produced which showed that Smith, Melvin or Francis came to the realization that Phoenix may shoot at Paredes with intent to do him grievous bodily harm but they nonetheless continued to participate with him in the venture. Phoenix's action went outside the scope of the joint enterprise. In the circumstances, the conviction of Smith, Melvin and Francis for the offence of shooting with intent is unsafe and cannot be upheld.

R v Powell and Daniels and R v English [1999] 1 AC 1 applied; R v Hyde [1991] 1 QB 134 applied; R v Rahman and others [2008] UKHL 45 applied.

2. Smith, Melvin and Francis, armed with the knowledge of Phoenix's intent to recover the car by violence and knowing that Phoenix had shot at Paredes at Tyrells, nonetheless journeyed to Ramon Hill with him. There was a conversation in the car on the way to Ramon Hill about the gun. As such, they had the sufficient mental element to be liable and guilty for the actions of Phoenix. Smith, Melvin and Francis lent themselves to the enterprise and by doing so gave assistance and encouragement to Phoenix in carrying out the enterprise which then involved the intent to kill. Additionally, the learned trial judge gave proper and adequate directions to the jury concerning the intent for attempted murder. Accordingly, their conviction of attempted murder of Charles must be upheld.

   R v Powell and Daniels and R v English [1999] 1 AC 1 applied; R v Hyde [1991] 1 QB 134 applied; R v Rahman and others [2008] UKHL 45 applied.

3. An accused who effectively withdraws before an injury is inflicted would not be guilty because he was not a party to and did not participate in any unlawful violence which caused the injury. This distinction was specifically put to the jury by the learned trial judge in reference to Francis' defence. In scrutinizing the evidence, Francis, at all material times, continued with the joint venture with the other appellants. After the shooting at Tyrells, he was aware that Phoenix possessed a gun and was prepared to use violence to recover the car from Hope. He was the one who identified the car in which Hope and Charles were in and who drove away the car in which two of the other appellants fled the scene with him after the Ramon Hill shooting. He never, at any point, abandoned the appellants and therefore it cannot be said that he effectively disengaged or withdrew from the enterprise.

   R v O'Flaherty et al [2004] EWCA Crim 526 applied.

4. The test for non-disclosure is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different

verdict. The statement allegedly made by Francis to the police about Phoenix's non-involvement in the incidents was never recorded. Consequently, there was no such evidence to be disclosed to the defence for the evidence to be placed before the jury. Even if such a statement was placed before the jury, the jury had the evidence of Smith and Hope identifying Phoenix as the shooter. In the circumstances, there was not a real possibility that the jury would have arrived at a different verdict.

Mc Innes v Her Majesty's Advocate (Rev 1) (Scotland) [2010] UKSC 7 applied; Maureen Peters v The Queen Territory of the Virgin Islands HCRAP 2009/005 (delivered 1st October 2010) applied.

5. An identification parade ought to be fair to the appellant. In this case the parade was not patently or materially defective and was conducted fairly. Furthermore, there was other cogent evidence pointing to Phoenix as the shooter.

Mark Peters v The Queen Saint Vincent and the Grenadines Criminal Appeal No. 8 of 2000 (delivered 17th September 2001) applied.

6. The trial judge clearly and properly directed the jury on the applicable legal principles pertaining to Smith's evidence in regard to Phoenix. In the circumstances there is no merit in the complaint regarding the directions of the learned judge.

JUDGMENT

[1] BAPTISTE JA: This is an appeal against conviction. On 9th June 2008, following a trial before a judge and jury, the appellants, Craig Smith, Clayton Francis, Noel Melvin and Marlon Phoenix, were convicted of the offences of shooting at Gavin Paredes with intent to do him grievous bodily harm and the attempted murder of Mario Charles. The incidents, which were related, occurred on 13th October 2006 at Tyrells and Ramon Hill respectively and, on the Crown's case, constituted a joint enterprise on the appellants' part to retrieve a car belonging to Melvin which one Jason Hope had taken from Francis.

Background

[2] The events leading to the appellants' conviction were triggered by a dispute between Hope and Melvin concerning an amplifier and a speaker belonging to

Hope which Melvin had in his possession. This resulted in Hope seizing Melvin's car, which was at the time being driven by Francis, and driving away with it. At the time of the seizure, Hope was in the company of Paredes and was driving Paredes' car. After the seizure, Paredes drove home to Tyrells and parked his car in front of his house.

[3] Francis arrived at Smith's home and told him what had transpired. Soon after, Melvin arrived in a car. Francis and Smith entered the car and Melvin drove to Sea View Lawn and collected Phoenix. Melvin told Phoenix that someone took the car from Francis. They all set forth to retrieve the car that Hope took and drove together to Paredes' home at Tyrells. Melvin pulled up close to Paredes' house. Paredes was at the time repairing his vehicle. The four appellants came out of the car, surrounded Paredes, and then Francis went back to the car. Melvin asked Paredes for his (Melvin's) car. Paredes told him to check Hope. Phoenix had a gun in his hand which he pointed at Paredes head and said "you dead now, you dead now" and fired a shot at his head. Paredes dodged and managed to escape. Melvin ran after Paredes and hit him on the back of his head with an object. Smith stabbed Paredes under the right side of the arm, with an ice pick. All the appellants left in the car in which they came. The events at Tyrells led to counts of attempted murder and shooting with intent being preferred against the appellants. They were acquitted of the count of attempted murder but convicted of shooting with intent.

[4] From Tyrells, events moved to Roman Hill. Hope and Mario Charles were driving away from Charles' house when they were pulled over by the car in which the appellants were in. The appellant Francis identified the car to the other appellants. Melvin, Smith and Phoenix came out of the car while Francis remained in it. Charles and Hope left the car they were in. Phoenix pointed a gun at Charles and Hope and told them to back up. They began to back up from the car. Phoenix discharged a shot. Hope told Noel "I can't believe you a deal wid me so. You thief me subben and them and bring man fu fire shot at after me." Then Phoenix fired a

second shot. Charles ran into his home followed by Hope. Charles got shot in the chest and his diaphragm was punctured.

The prosecution's case

[5] The case against the appellants was one of joint enterprise. The prosecution contended that Smith, Francis, Melvin and Phoenix planned to retrieve Melvin's car by force. Pursuant to the joint enterprise, they travelled to Paredes' home at Tyrells where Phoenix shot at Paredes. From Tyrells, they all travelled to Roman Hill where the car was recovered. Phoenix had a gun. Smith, Francis and Melvin knew that Phoenix had a gun, foresaw his intention to kill and continued to participate in the joint enterprise with the knowledge of his intention and on this basis, they are all fully liable. Smith, Melvin and Francis knew that Phoenix had a gun because he had used the gun at Tyrells and there was a conversation in the car about the gun after the shooting at Tyrells. Armed with that knowledge and with the foresight that Phoenix intended to kill, they continued to participate in the joint enterprise which culminated in Phoenix shooting Charles, therefore they are equally liable and guilty of attempted murder of Charles.

The appellant's case

[6] All the appellants gave evidence on oath. For their part, Smith, Francis and Melvin denied that they were part of any joint enterprise with Phoenix and asserted that they did not know that Phoenix had a gun or that he was going to shoot at Paredes. They contended that Phoenix acted exclusively on his own and they did not know that he intended to kill. In particular, Francis contended that he (Francis) was merely in the car and took no part in the incidents. Phoenix claimed that he was neither at Tyrell's nor at Roman Hill at the time of the incidents but was at Sea View Lawn all of the time. Phoenix also assailed the integrity and reliability of the identification parade, claiming that it was not conducted fairly.

Grounds of appeal

[7] Smith, Francis and Melvin allege that (1) the learned judge failed to point out adequately to the jury that attempted murder requires an intention to kill and nothing short of that intention to kill would suffice; (2) The learned judge misdirected the jury or failed to direct the jury adequately on the law relating to unlawful joint enterprise; (3) No reasonable jury properly directed could have convicted based on the evidence; (4) The verdict of the jury was unsafe and unsatisfactory. Francis also complains that the learned judge failed to adequately put his defence by failing to point out that he remained in the vehicle at all times and took no part in the incidents at Tyrells or Roman Hill, except that he drove the car in which two of the appellants left the scene of the shooting. Francis stated the circumstances in which he left the scene of the shooting.

[8] Phoenix complains of a material irregularity regarding the alleged failure of the prosecution to disclose Francis's first statement which appeared not to have implicated him (Phoenix). Phoenix also complains that the learned judge failed with respect to the need for special care when considering the evidence of a co-accused. Phoenix also challenges the integrity and credibility of the identification parade. Phoenix also complains that the verdict is unsafe and unsatisfactory.

Intent in attempted murder

[9] The requisite intent on a charge of attempted murder is the intention to kill, nothing less than that will suffice.[1] Mr. Cumberbatch submits, quite correctly, that the charge of attempted murder is not satisfied by an intention to do grievous bodily harm and if there is no clear intention to kill, there cannot be a conviction for attempted murder. Mr. Cumberbatch contends that the learned judge failed to make that distinction sufficiently clear to the jury. Mr. Cumberbatch further contends that the learned judge ought to have gone on and state to the jury that nothing short of an intention to kill will satisfy the requirements of the law. Mr.

[1] Benny v The State (1981) 34 WIR 236.

Cumberbatch argues that the learned judge's directions on intent were such that the jury could have been left with the impression that a charge of attempted murder could be satisfied by evidence showing that the accused intended to inflict grievous bodily harm.

[10] An examination of the learned judge's summation of shows that Mr. Cumberbatch's complains are not well-founded. On several occasions the learned judge made it very clear to the jury that the requisite intent on a charge of attempted murder is the intention to kill. In sync with that intent, the learned judge, in dealing with the law on attempted murder, directed the jury that:

> "Where an accused person or accused persons are charged with the offense of attempted murder, the intention the Prosecution have to prove is the intention to kill only."[2]

The learned judge also directed that:

> "If the jury were to conclude that the defendant did not intend to kill but only intended to cause grievous bodily harm, you will have to acquit them of attempted murder."[3]

The learned judge also told the jury:

> "For attempted murder the intention is the intention to kill. If the Prosecution have not made you sure or if you have reasonable doubt as to whether that was the intention, you will have to consider the alternative Count because you will have to find not guilty on attempted murder and go on to consider the alternative count of wounding with intent."[4]

The learned judge further directed:

> "If, however, having reviewed the evidence led by the Prosecution you're unsure or you have reasonable doubt as to whether he [Marlon Phoenix] intended to kill, you will have to acquit him of the offense of attempted murder … because for attempted murder the intention must be to (sic) intention to kill."[5]

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[2] See Transcript of Trial Proceedings Volume IV at p. 55, lines 21 to 24.
[3] See Transcript of Trial Proceedings Volume IV p. 57, lines 17 to 20.
[4] See Transcript of Trial Proceedings Volume IV p. 73, lines 9 to 15.
[5] See Transcript of Trial Proceedings Volume IV p. 58, line 22 and p. 59, lines 1 to 3.

In the same vein, in dealing specifically with the count of attempted murder in respect of Charles pertaining to the incident at Roman Hill, the learned judge said, "What is required from the Prosecution is to prove so as to make you feel sure the intention to kill".[6] Following from that, the learned judge also reminded the jury that, "the Prosecution has to prove each element of the offence to make you feel sure, nothing less will suffice".[7]

[11] The learned judge, in her summation,[8] reminded the jury that the prosecution's case was one of joint enterprise in which Phoenix was the principal actor. Phoenix intended to kill. Smith, Melvin and Francis knew or foresaw that Phoenix intended to kill and with that knowledge of Phoenix's intention they continued to participate in the joint enterprise; therefore they would be liable for attempted murder. The learned judge proceeded to consider the counts of shooting with intent to cause grievous bodily harm and wounding with intent to cause grievous bodily harm. The learned judge reminded the jury that, on the prosecution's case, Phoenix was the principal who had the intent to cause grievous bodily harm when he shot and the same would hold for wounding with intent. Smith, Melvin and Francis, the other participants in the joint enterprise, knew that Phoenix had a gun and continued to participate in the joint enterprise knowing that Phoenix intended to cause grievous bodily harm therefore they all would be guilty once the prosecution made them sure of the alternative counts. Mr. Armstrong submitted, that the learned judge clearly made the distinction between the intent required for attempted murder, shooting with intent and wounding with intent. I agree.

[12] In her directions, the learned judge adequately and properly directed the jury that the requisite intent on a charge of attempted murder was the intent to kill and that nothing less than that would suffice. The jury would have been left in no doubt as to the intent required on a count of attempted murder. Further, the learned trial

[6] See Transcript of Trial Proceedings Volume IV p. 67, lines 14 to 16.
[7] See Transcript of Trial Proceedings Volume IV p. 67, lines 17 to 19.
[8] See Transcript of Trial Proceedings Volume IV p. 107.

judge clearly demonstrated to the jury the distinction between the intent required for attempted murder, shooting with intent and wounding with intent. The verdict of the jury shows that there was no confusion in their minds in applying the directions given on intent. They found the appellants not guilty of the first count of attempted murder but guilty of the alternative count of shooting with intent. The jury also found the appellants guilty of the second count of attempted murder. This ground of appeal accordingly fails.

Directions on joint enterprise

[13] The appellants complain that the learned trial judge misdirected or failed to direct the jury adequately on the law relating to unlawful joint enterprise. The skeleton submission does not indicate the nature of the misdirection or the inadequacy of the direction on the law of joint enterprise. The learned judge gave the standard direction on joint enterprise by stating:

> "Where in a criminal trial the offense 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 the offence, they are each guilty … the words "plan and agreement" do not mean that there has to be any formality about it. An agreement to commit an offense may arise at the spur of the moment. Nothing needs to be said at all. It can be made with a wink and a nod, or a knowing look. An agreement can also be inferred from the behavior of the parties. The essence of joint responsibility for a criminal offense is that each defendant share the intention to commit the offense and took some part in it so as to achieve that aim."[9]

The learned judge also instructed the jury that:

> "Insofar as the joint enterprise or joint responsibility is concerned, the Prosecution say to you that each of the four accused together had a joint plan to retrieve the car by the use of force. And they say that Marlon Phoenix intended to kill … and that Nos. 1, 2 and 3 accused knew or foresaw his intention to kill and yet they continue to participate in the joint enterprise with the knowledge of his intention, and on this basis, they are all four culpable."[10]

[9] See Transcript of Trial Proceedings Volume IV p. 23, lines 11 to 25.
[10] See Transcript of Trial Proceedings Volume IV p. 25, lines 11 to 20.

Later in the summation, the learned judge correctly directed the jury on the issues of withdrawal and mere presence at the scene of a crime.

Liability of secondary parties

[14] In R v Hyde,[11] Lord Lane CJ stated the basic principle governing the liability of secondary parties for murder:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nonetheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture. As Professor Smith points out, B has in those circumstances lent himself to the enterprise and by so doing he has given assistance and encouragement to A in carrying out an enterprise which B realises may involve murder."

[15] In R v Powell and Daniels and R v English,[12] the House of Lords dealt with the liability for the acts of another committed pursuant to a joint enterprise. The House was concerned with the state of mind of the secondary party necessary to support a conviction for murder. In Powell and Daniels, the two appellants together with a third man went to purchase drugs from a drug dealer. One of the three, to the knowledge of the other two, was carrying a gun and on arrival at the dealer's house, shot him as he opened the door as a result of which he died. In English, the two defendants attacked a man with wooden posts. One of them, unbeknown to the other, was carrying a knife which he drew and stabbed the victim, causing death.

[16] In the case of Powell and Daniels, the question to be considered was whether it was sufficient for a secondary party to a killing to realize that the primary party might kill with intent to do so or to cause really serious harm, or whether it was necessary to hold that intention himself. The House of Lords held that it was sufficient to found a conviction for murder for a secondary party to realize that in

[11] [1991] 1 QB 134 at 139.
[12] [1999] 1 AC 1.

the course of a joint enterprise, the primary party might kill with intent to do so or with intent to cause grievous bodily harm.[13] In the case of English, the House considered the question whether it was sufficient to support a conviction for murder that the secondary party intends or foresees that the primary party will or may act with intent to cause grievous bodily harm if the lethal act carried out by the primary party is fundamentally different from the acts intended or foreseen by the secondary party. The House held that if the act of the primary party causing death was not something which the secondary party had foreseen as a possibility, it took the killing outside the scope of the joint enterprise and the secondary party would not be guilty of any offence.[14]

[17] In light of English, the basic Hyde principle was restated by Lord Brown in R v Rahman and others[15] thus:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."*

[18] Applying the principles relating to the liability of secondary parties in the context of shooting with intent, if Smith, Francis and Melvin realized (without agreeing to such conduct being used) that Phoenix may shoot at Paredes with intent to do him grievous bodily harm but nonetheless continued to participate with him in the venture, that would amount to a sufficient mental element for them to be guilty of shooting with intent. The difficulty here is the absence of evidence that Smith, Noel or Francis knew that Phoenix had a gun in his possession before he shot at Paredes in Tyrells.

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[13] Per Lord Hutton at p. 27.
[14] Per Lord Hutton at p. 30.
[15] [2008] UKHL 45, para. 68.

Could a reasonable jury convict based on the evidence? Was the verdict unsafe and unsatisfactory?

[19] The captioned grounds of appeal will be dealt with together. All the appellants journeyed by car to Tyrells to retrieve Melvin's car. They pulled up close to Paredes' house. They met Paredes on the road repairing his engine. All the appellants alighted from the car and three of them, Melvin, Smith and Phoenix surrounded him. Francis returned to the car and sat down in it with the door open. Melvin inquired of Paredes as to the whereabouts of his car. Paredes replied that Hope had it. After Melvin inquired about the car, Phoenix, pointed a gun at Paredes' head and said, "you dead now, you dead now". In the process of firing a shot at Paredes' head, Paredes dodged and managed to escape. Smith stabbed him with an ice pick under the right side of his arm and Melvin hit him with an object on his head. Smith stated that he heard an explosion and saw Phoenix push his hand in his waist but did not see him with a gun. Melvin, Smith and Phoenix returned to the car. Francis also stated that he heard an explosion and everyone ran back to the car.

[20] There is no evidence that as Phoenix journeyed to Tyrells with the other appellants they knew that he had a gun. Neither is there evidence that when Phoenix left the car with the other appellants when they arrived at Tyrells, they knew that he had a gun. Smith testified that he was unaware that anyone had a weapon. Melvin stated that he asked Phoenix "how he ha gun in the car and nobody know". The three other appellants could not therefore have foreseen the use of a gun by Phoenix at Tyrells. It appears to me that the use of the gun by Phoenix at Tyrells was not something which the other appellants had foreseen as a possibility. It was something outside the scope of the joint venture and the other appellants would not be guilty of the offence of shooting at Paredes with intent to do him grievous bodily. In the circumstances, the conviction of Smith, Melvin and Francis for shooting at Paredes with intent to do grievous bodily harm is unsafe. That however, would not be the same for Phoenix.

[21] Whatever may have been the situation before the shooting at Tyrells with respect to knowledge and foresight, different considerations were in play after the shooting. Smith, Melvin and Phoenix returned to the car after the shooting. The shooting was discussed in the car. Referring to the explosion, Melvin asked, "wha that" a who do that?" Phoenix replied, "just cool, drive". Melvin stated that Phoenix admitted that he fired one shot. Melvin inquired of Phoenix how "he ha gun in the car and nobody know". Francis said after the explosion the appellants ran back to the car and Melvin asked "a who do that?" Phoenix admitted responsibility. After the shooting at Tyrells, Melvin, Smith and Francis knew that Phoenix had a gun, had used the gun at Tyrells and was prepared to use violence to recover the car. Armed with that knowledge they all drove with him to Roman Hill in search of the car.

[22] In respect of the count of attempted murder, if Smith, Francis and Melvin realized (without agreeing to such conduct being used) that Phoenix may attempt to kill in recovering the car, but nonetheless continued to participate with him in the venture, that would amount to a sufficient mental element for them to be guilty of attempted murder if Phoenix with the intent to kill, attempts to murder Charles. Whatever may have been the state of knowledge of Noel, Smith or Francis as to Phoenix's possession of a gun before he shot at Paredes, there can be doubt that flowing from the events at Tyrells, they knew Phoenix had a gun, foresaw that he might act with intent to kill in retrieving the car and armed with that knowledge and foresight they did not disengage themselves from the enterprise but continued with Phoenix to Roman Hill where he shot Charles. The evidence shows that they were certainly not mere bystanders. In the prevailing circumstances they lent themselves to the enterprise, thus gave assistance and encouragement to Phoenix in carrying out an enterprise which they realized may involve attempted murder. The jury's verdict shows that they were satisfied that Smith, Francis and Melvin knew that Phoenix had a gun, and they foresaw that he might use the gun with the intent to kill as they sought to retrieve the car and they continued to participate in the enterprise. There was sufficient evidence from which a jury

properly directed could find all the defendants guilty of attempted murder and that verdict was properly open to them. The verdict on the count of attempted murder is not unsafe or unsatisfactory. This ground of appeal accordingly fails.

Did the judge fail to put Francis' defence adequately to the jury?

[23] Part of Francis' defence was that he remained in the vehicle at all times and took no part in the incidents at Tyrells or Roman Hill, except that he drove the car in which two of the appellants left the scene at Roman Hill after the shooting. Francis complains that the trial judge failed to adequately point that out to the jury. In addressing Francis' defence, the trial judge told the jury that they may wish to pay attention to the case as it relates to Francis because his position is that he wasn't part of any joint enterprise. The learned judge reminded the jury that the position of the defence is that Francis remained in the car both at Tyrell and at Roman Hill. The learned judge interspersed this with a reminder of Paredes' evidence that all four defendants rushed him, and then Francis went back in the car. The trial judge then directed the jury to examine the evidence as to what happened at Tyrells and Roman Hill to determine whether the prosecution has made them feel sure that Smith, Melvin or Francis withdrew from the incidents.

[24] I am not of the view that the complaint against the learned judge is meritorious. The learned judge dealt with the issue of presence at the scene of a crime and informed the jury that this had particular significance for Francis who claimed that he was merely there in the car. In that regard, the learned judge directed the jury that:

> "…mere presence at the scene of a crime is not enough to prove guilt. But if you find that a particular defendant was on the scene and did by his presence encourage or assist the other in the offense then he is guilty."[16]

[16] See Transcript of Trial Proceedings Volume IV p. 24, lines 8 to 12.

The learned judge also dealt with the issue of withdrawal and directed the jury that a defendant cannot be jointly responsible if he had clearly disengaged and withdrawn.

[25] The law recognizes that a party to a joint enterprise may withdraw from the adventure so as not to be responsible for any resulting crime provided that the withdrawal is real and effective. In R v O'Flaherty et al,[17] in addressing the issue of withdrawal, Mantell LJ stated that a defendant who effectively disengages or withdraws before an injury is inflicted would not be guilty because he was not a party to and did not participate in any unlawful violence which caused the injury. Francis knew that the other appellants were on a course to retrieve the car and they all drove to Parades' house at Tyrells. All the appellants got out of the car and surrounded Paredes. Francis then returned to the car. Francis stated that he heard an explosion while still seated in the car but never left the car. After the explosion, the other three defendants got back into the car and Noel asked "a who do that" and Phoenix claimed responsibility. After the shots were fired at Tyrells, Francis did not abandon the appellants. He did not indicate that he wanted nothing more to do with the enterprise, involving as it did, the use of violence, but continued with the other appellants to Roman Hill. At Roman Hill, Francis did not remain a mere spectator. It was he who pointed out to the other appellants, the car in which Hope and Charles were in, resulting in the car being stopped and Charles being shot by Phoenix. Francis was the one who drove away the car in which two of the other appellants fled the scene with him after the Roman Hill shooting. On the evidence, the jury was evidently entitled to reject Francis' defence that he was merely at both scenes and played no active part. The jury could properly find that there was a joint enterprise in which Francis played an active role and encouraged and assisted the others by his presence. Francis did not effectively disengage or withdraw from the enterprise.

[17] [2004] EWCA Crim 526.

Phoenix's appeal
(Non-disclosure)

[26] Mr. Francis, counsel for Phoenix, complains that there was a material irregularity in that the prosecution failed to disclose an earlier statement made by Francis which did not implicate Phoenix. Mr. Armstrong contends that that statement was at no time in the possession of the police or the Director of Public Prosecutions. Mr. Armstrong concedes that if such a statement were made it would have been a failure on the part of the police not to record it.

[27] The prosecution is under a duty to disclose to the defence any material of which it is aware which would tend either to materially weaken the prosecution's case or materially strengthen the case for the defence. Non–disclosure by itself does not automatically lead to the conclusion that the trial is unfair. The court is under a duty to assess the significance and consequences of the non-disclosure. The applicable test is whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict.[18]

[28] As Mr. Armstrong points out, Smith identified Phoenix as the shooter and Phoenix was also identified by Hope at an identification parade. I agree with Mr. Armstrong's submission that in view of the strong evidence against Phoenix, even if that statement were put before the jury (if it existed) it would only cast doubt on Francis' credibility. The jury would still have the evidence of Hope and other witnesses as to the role played by Phoenix. In the circumstances, there was not a real possibility that the jury would have arrived at a different verdict.

Evidence of co-accused

[29] A statement made in the absence of an accused by a co-accused cannot be evidence against the accused unless the co-accused goes into the witness box and gives evidence in the course of a joint trial. In such a case his sworn evidence

[18] Mc Innes v Her Majesty's Advocate (Rev 1) (Scotland) [2010] UKSC 7, para. 20; Maureen Peters v The Queen Territory of the Virgin Islands HCRAP 2009/005 (delivered 1st October 2010), para. 35.

becomes evidence for all purposes in the case, including that of being evidence against the accused.[19] The trial judge would be obliged to warn the jury to be careful with the evidence of a co–accused as there may be a danger of him having an interest of his own to serve. In her summation, the learned judge clearly and properly directed the jury on the applicable legal principles. In the circumstances there is no merit in the complaint regarding the directions of the learned judge.

Identification Parade

[30] An identification parade was held at which Hope picked out Phoenix. Mr. Francis complains that the identification parade was materially and patently defective and the evidence of Hope was seriously flawed, thus the conviction was unsafe and unsatisfactory. He referred to the photographs of the lineup and contended that they were basically the same and that Phoenix was the only one in the lineup with a beard. Mr. Francis contended that if the evidence of the identification parade were weak then Phoenix ought not to have had a case to answer. Mr. Francis was however cognizant of the evidence of the co-accused who implicated Phoenix as the man with the gun.

[31] Mr. Armstrong, the Director of Public Prosecutions, contended that it is almost impossible that the police will be able to find nine persons who are identical to be placed on an identification parade. The most that they can do is to try to find persons with similar features to those given by a witness. Nevertheless, there are some cases where an identification parade will be unfair where there is something distinctive about only one person on that parade and that person is the accused. In The State v Vibert Hodge,[20] Massiah JA had this to say:

> "In this matter, therefore, where the appellant alleged that he was identified merely by his teeth at an identification parade held *five weeks* after the offence was committed, where the appellant alleged further that he was the only person on the parade with gold teeth and the victim herself admitted that she had asked the appellant to open his mouth, it is

[19] Leonard Rudd (1948) 32 Cr App R 138.
[20] (1976) 22 WIR 303 at p. 306.

patent that careful and adequate directions to the jury were a matter of the highest importance."

As a result, it was held that the jury should have been directed that if they believed the accused that he was the only person on the parade with a gold teeth, the parade would have been unfairly conducted and they should attach little weight to it. Similarly in The State v Ken Barrow,[21] it was held that the identification parade with the accused as the only man on the parade with a scar on the left side of his face was a farce and it was no parade at all since the witness would have picked out no other person than the accused.

[32] Hope, the witness who picked out Phoenix, described the gunman as about five feet or so, in height, round face and had a beard. Hope admitted that all the men in the lineup were not bearded and that not all of them were five feet tall. The police officer conducting the parade said he gathered a number of men fitting as far as practicable the height, description and built to that of Marlon Phoenix. He went to say that the persons he gathered fitted the description of the person described by the witnesses. Photographs were taken at the identification parade including the photographs of Jason Hope pointing to the person who fired the shots, this being Phoenix. In the case of The State v Vibert Hodge reference was made to the Delvin Committee, set in the United Kingdom and headed by Lord Delvin, to examine issues related to visual identification. One of the proposals was that photographs should be taken of the persons on the parades so that their faces and physical appearance generally could be seen by the jury who could judge for themselves whether persons similar in appearance to the accused were indeed chosen for the parades as police witnesses invariably assert.

[33] In this case the jury was able to look at the photographs and would have been able to make a determination as to whether the parade was fair to the appellant. Learned counsel for the appellant in his address to the jury told them the other

[21] (1976) 22 WIR 267.

men in the lineup were dissimilar to his client. The learned judge in her summation reminded them of this and went on to say that at the end of the day, they have the photographs and will be able to make a determination for themselves. The judge told the jury that:

> "Defence counsel for Marlon Phoenix has taken issue with the identification parade, and he said to you that the witnesses were so dissimilar from the alleged perpetrator, Marlon Phoenix. And he said some of them didn't have beard, and some of them were stocky. At the end of the day you will have the exhibits which weren't tendered in this matter, the photographs, and you will look at those exhibits and determine for yourselves whether you feel having looked at those exhibits whether you could accept what defence counsel is saying."[22]

> "Defence counsel say to you, no, you can't be sure. You must have reasonable doubt and in any event, the ID parade wasn't fairly and properly carried out because in all the men didn't look dark, all the men didn't have on beard. You must determine, having looked at the photographs, … you can come to the conclusion that the Prosecution has made you feel sure that the ID parade was fairly carried out."[23]

> "Corporal Bascombe has provided you with the photographs of the persons who were on the ID parade and you must look to see whether you find those persons were so distinctly different. Defense counsel say that were distinctly different. You would look at the photographs and determine for yourselves whether those men on the parade were so distinctly different from Marlon Phoenix so that attention was drawn to him alone."[24]

[34] Nevertheless, even assuming that the evidence was such that the identification parade was 'patently and materially defective' and accordingly no weight is attached to it that does not necessarily put an end to the matter. In Mark Peters v The Queen,[25] the appellant complained that:

> "…that the identification parade was conducted unfairly and therefore was prejudicial to a fair hearing of the appellant. Learned counsel for the appellant, for example, drew attention to the evidence that the persons taking part in the parade were so totally different from the appellant, for

[22] See Transcript of Trial Proceedings, Volume IV, p. 30, lines 13 to 22.
[23] See Transcript of Trial Proceedings, Volume IV, p. 31, lines 22 to
[24] See Transcript of Trial Proceedings, Volume IV, p. 33, lines 11 to 18.
[25] Saint Vincent and the Grenadines Criminal Appeal No. 8 of 2000 (delivered 17th September 2001).

> example, he drew attention to the fact that one person was blind. He also drew attention to the fact that the identifying witness told the police that the man who did the stabbing wore earrings. On the parade the defence contended that the appellant was the only person wearing earrings. Having regard to the evidence that was led at the trial it is not clear whether or not the appellant was wearing earrings at the identification parade."[26]

At that trial the learned judge directed the jury in the following manner:[27]

> "Now, whilst the identification parade plays an important part in the whole process, even though you may think it does not carry the value, this parade didn't carry the value in evidence that it should, you are quite free to convict the accused if you are sure about what the man, Fraser is saying on the night in question. I must remind you about that, if you think that the identification parade was not a fair one, then that may, it is a matter for you, reduce the weight of the evidence that you attach to young Austin Fraser. It is a matter for you."

[35] In delivering the judgment of the Court of Appeal, Redhead JA said:[28]

> "However, notwithstanding, the complaint about the identification parade, I am of the view that there was other cogent evidence if the jury accepted could have and was entitled to find that the appellant was the person who was involved in the stabbing of the deceased."

[36] Mr. Armstrong submitted that even if the identification parade is found to be unfairly conducted there was other cogent evidence such as the evidence of co-accused implicating and pointing to Phoenix as the shooter. On the evidence presented I am not of the view that the identification parade was patently or materially defective or was conducted unfairly. In my view Hope properly identified Phoenix at the parade. In any event there was other cogent evidence pointing to Phoenix as the shooter.

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[26] Ibid, para. 20.
[27] Para. 31.
[28] Ibid, para. 29.

Is verdict unsafe and unsatisfactory?

[37] Given the cogent evidence presented by the prosecution and accepted by the jury, there is no merit in the complaint that the verdict of the jury is unsafe and unsatisfactory. This ground of appeal accordingly fails.

Disposition

[38] The appeal of Craig Smith, Clayton Francis, and Noel Melvin against their conviction for shooting with intent is allowed and the conviction quashed. Marlon Phoenix's appeal against his conviction for shooting with intent is dismissed and conviction is affirmed. The appeal of Craig Smith, Clayton Francis, Noel Melvin and Marlon Phoenix against their conviction for attempted murder is dismissed and conviction is affirmed.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Don Mitchell
Justice of Appeal [Ag.]