EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT VINCENT AND THE GRENADINES

SVGHCRAP2013/0016

BETWEEN:

ANJAY CHARLES

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mr. Mario F. Michel — Justice of Appeal
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]

Appearances:

Ms. Kay Bacchus-Browne for the Appellant
Mr. Carl Williams for the Respondent

2016: April 19;
2017 April 6.

Criminal appeal – Murder – Joint enterprise – Sole defendant – Eyewitness evidence – Mental element in joint enterprise – Trial judge's directions to the jury – Section 21 of the Criminal Code – Whether verdict unsafe and unsatisfactory on the evidence – Non-disclosure of witness statements by prosecution

The appellant, Anjay Charles, was the sole defendant tried on a nine count indictment containing three counts each of murder, unlawful use of firearm and possession of firearm with intent to commit an offence. The case against the appellant was that he and other persons went to Lowmans Hill armed with guns and murdered three men. The prosecution led evidence directly implicating the appellant including evidence that he was seen running with a gun in his hand from the area where gunshots were heard. The appellant presented an alibi defence stating that he was working at his cousin's garage in Chauncey on the day of the murders. He also gave sworn evidence at the trial to the same effect. The jury returned unanimous verdicts of guilty on all nine counts.

The appellant appealed his conviction and sentence alleging, inter alia, that the lone eyewitness evidence did not identify him as one of the persons who shot the men; that he cannot be convicted of acting in concert with two other named men because they were acquitted of the murders of the three men; that the learned Director of Public Prosecutions failed to disclose vital witness statements to the defence despite being asked several times thereby rendering the trial unfair and hampering the defence; and that the sentence imposed is excessive.

Held: dismissing the appeal and affirming the conviction and sentence, that:

1. When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each is deemed to have committed the offence. There need not be evidence as to how he or she participated in the unlawful activity. The case against the appellant was that he participated in the commission of the agreed unlawful purpose and he is therefore deemed to have committed the offence of murder. The Crown did not have to prove that he shot any of the three men. Proof that he was present at the scene of the crime with the requisite knowledge was sufficient to secure his conviction for murder. Further, the directions by the trial judge on the mens rea for murder combined with the direction on the actus reus for a person involved in the joint enterprise, would have been sufficient to alert the jurors that in order to find the appellant guilty of the offence of murder, they had to be sure that he participated in the shooting of three deceased men and that he did so with the intention that death or serious bodily harm would have been inflicted by those participating in the killings.

   Section 21 of the Criminal Code, Cap. 171, Revised Laws of Saint Vincent and the Grenadines 2009 applied; Teiko David Jamel Furbert et al v The Queen [2000] UKPC 12 applied.

2. The prosecution can proceed against one of several co-principals or an accessory without joining the principal. If two persons commit a crime as a part of a joint enterprise and the police apprehend only one of them, the prosecution can proceed against that person if they have evidence to show that he was involved in the joint enterprise with the person who remains at large. The essence of the case against the appellant was that he went to the scene of the crime with two other men, shots were fired and three men were killed and he was seen leaving the scene running with a gun in his hand, followed by another man who also had a gun in his hand. The Crown's case was not based on a theory that the appellant shot any of the men. He was charged and proceeded against as being involved in an unlawful joint enterprise with other persons that resulted in murder and it does not matter whether he participated as principal or as an accessory.

   Hui Chi Ming v The Queen [1992] 1 AC 34 applied.

3. The evidence of the acquittal of the two men of the murders of the same victims is irrelevant to whether the prosecution can proceed against the appellant. The verdict reached by a different jury (whether on the same or different evidence) in the earlier trial is irrelevant and amounts to no more than evidence of the opinion of that jury.

   Hui Chi Ming v The Queen [1992] 1 AC 34 applied.

4. The law as to the duty of disclosure requires the Crown to disclose to the defence any material of which it is aware that would tend either to materially weaken the Crown's case or materially strengthen the case for the defence. Non-disclosure by itself does not automatically lead to the conclusion that trial is unfair. The significance and consequences of the non-disclosure must be assessed. If the undisclosed statement is substantially the same as the evidence given by the witness in court it is unlikely that the fairness of the trial of the defendant would have been impacted. However, if the undisclosed statement is substantially at variance with the evidence given by the witness in the trial, the reviewing court may treat the non-disclosure as being unfair to the defendant and quash the conviction. In the instant appeal, counsel for the prosecution advised the Court that no statements were being withheld by the prosecution and that in any event there was no evidence withheld that was exculpatory. The prosecution was therefore not obliged to disclose any additional statements to the defence. Moreover, it was open to the defence, having requested statements before the trial, to apply to the judge for a disclosure order. Such an application was not made and this Court cannot speculate on the contents of the statements that are said to have been withheld. In the circumstances this ground of appeal fails.

   Maureen Peters v The Queen BVIHCRAP2009/0005 (delivered 1st October 2010, unreported) followed; McInnes v Her Majesty's Advocate (Rev 1) (Scotland) [2010] UKSC 7 applied; R v Foxford [1974] NI 181 applied; Berry (Linton) v R (1992) 41 WIR 244 applied; Young v The State [2008] UKPC 27 applied.

5. The appellant was convicted of the murder of three persons who were killed by firearms in what appears to be a premeditated and violent attack on the men. There is nothing in the record or in counsel's written and oral submissions to suggest that the learned trial judge erred in any way in imposing the various sentences for which the appellant was found guilty, or that the sentences were excessive or unreasonable. This ground of appeal therefore fails.

JUDGMENT

[1] WEBSTER JA [AG]: In June 2013 the appellant, Anjay Charles, was tried by a judge and jury on an indictment containing three counts of murder contrary to

section 159(1) of the Criminal Code,[1] three counts of unlawful use of a firearm contrary to section 185 of the Criminal Code, and three counts of possession of a firearm with intent to commit an offence contrary to section 19(1)(a) of the Firearms Act.[2] The jury returned unanimous verdicts of guilty on all nine counts. The appellant was sentenced to 25 years imprisonment on each count of murder, 10 years imprisonment on each count of unlawful use of a firearm, and 8 years imprisonment on each count of possession of a firearm with intent to commit an offence. The sentences were ordered to run concurrently. On 25th October 2013, the appellant was granted an extension of time to appeal against his conviction and sentence.

Factual Background

[2] On 9th August 2007 three men, Omoro Bowens, Reuben Small and Javon Antoine, were shot and killed at Lowmans Hill, Saint Vincent and the Grenadines. The case against the appellant was that he and other persons went to Lowmans Hill armed with guns and murdered the three men. The medical evidence is that Messrs. Bowens and Antoine were shot once each and Mr. Small was shot four times, three of the bullets entering the back of his head. The day after the killings the appellant was approached by the police but he ran away and was not found. It turned out that he had gone to Saint Lucia where, on his evidence, he was charged with illegal entry and spent time in prison. In the meantime two other men, Rodney Roberts and Jason Henry, were charged with the murders of the three men and were acquitted. The appellant returned to Saint Vincent and the Grenadines in or about October 2009 and in March 2010 he was arrested and charged with the murders of the three men. He gave the police a written statement in which he denied any involvement in the killing of the men and said that he was working at his cousin's garage in Chauncey on the day of the murders. He also gave sworn evidence at the trial to the same effect.

[1] Cap. 171, Revised Laws of Saint Vincent and the Grenadines 2009.
[2] Cap. 386, Revised Laws of Saint Vincent and the Grenadines 2009.

[3] I will set out the facts of the case in greater detail when I deal with the grounds of appeal.

Grounds of Appeal

[4] The appellant originally advanced three grounds of appeal. After the appeal was assigned to counsel, Ms. Kay Bacchus-Browne, she applied for and was granted leave to amend the notice of appeal to include additional grounds. The grounds of appeal in the amended notice are:

> (1) The verdict is unreasonable and cannot be supported by the evidence presented in court.
>
> (2) The learned Director of Public Prosecutions failed to disclose vital witness statements to the defence, despite being asked several times thereby rendering the trial unfair and hampering the defence.
>
> (3) The lone eyewitness evidence of Claudette Gordon is that she saw Rodney Roberts and Jason Henry shoot and kill Javon Antoine and Omoro Bowens. There is no credible evidence that the appellant shot them.
>
> (4) The learned trial judge ought to have withdrawn counts three, four, six, seven and nine from the jury.
>
> (5) The learned judge materially misrepresented the evidence when he told the jury there is no direct evidence that either the appellant or anybody else killed any of the three men.
>
> (6) The sentence is excessive.

Ground 1 – The verdict is unreasonable and cannot be supported by the evidence presented in court

[5] The Crown's case against the appellant rested heavily on the evidence of Shurlond Hooper ("Ms. Hooper") and Claudette Gordon ("Ms. Gordon"). Ms. Hooper testified that she knew the appellant for more than two years. On the day that the three men were killed, she was in Lowmans Hill at the home of a Mr. John Brady braiding the hair of her friend Althea. While braiding Althea's hair she saw a white car go up the hill and come back down in about 10 minutes. Some minutes later she heard three gunshots. She went to the front door which she could not unlock so she rushed to the kitchen door and went outside. In the process of going outside through the kitchen door of the house, she saw two men running towards her from the direction where she heard the gunshots. She recognised one of the men as the appellant who she knew as "Black" but she did not know his real name. She did not recognise the other man. The appellant was running in front of the other man and both of them had guns in their hands. When she saw the appellant he was about 15 to 20 feet away from her and there was nothing obstructing her view. She could see his whole body. She said that she saw his face when she came out of the kitchen and that "We see eye to eye."[3] She called out to him "Black" but he did not respond and "He went quickly and ran up in the alley beside the house I was in".[4]

[6] After the appellant ran down the alley next to the house, Ms. Hooper went to a bedroom in the house from where she had a clear view of the appellant. She said that she called his name again and "He stand up and look up to the direction of the house".[5] When pressed by counsel for the appellant as to why she called out to a man who was carrying a gun she said "To make him know I see him ... running with the gun".[6] She then went to the scene of the crime and saw the bodies of the three men.

[3] Record of Appeal, p. 29, lines 4 – 11.
[4] Record of Appeal, p. 27, lines 21 – 22.
[5] Record of Appeal, p. 31, lines 12 – 13.
[6] Record of Appeal, p. 77, line 15.

[7] Ms. Hooper's evidence was clear and consistent. She saw the appellant in broad daylight at about 2:30 in the afternoon. She had an unobstructed view of the appellant and she was close enough to look at him "eye to eye". She appears to have stood up very well to a long cross examination by defence counsel. What is significant about her cross-examination is that it was not suggested to her that the appellant was not one of the men that she saw, or that the appellant was not on the road on the fateful day. Her evidence on this vital issue was virtually unchallenged by the defence.

[8] The other person who gave evidence directly implicating the appellant is Ms. Gordon. Ms. Gordon is the mother of one of the deceased men, Ruben Small. She lives at Lowmans Hill. She said that she saw when the two of the deceased men, Amoro Bowens and Javon Antoine, were shot. The shooters were Rodney Roberts and Jason Henry. She did not see who shot her son Ruben Small and she did not see the appellant at the scene of the crime.

[9] The other significant part of her evidence is that she said that one morning the appellant came to the gate of her home in Lowmans Hill. She did not say when this happened, only that it was after the three men were buried.[7] Her evidence of the meeting with the appellant is at pages 123 to 124 of the record of appeal:

> "THE WITNESS: I -- after he said good morning I leave my porch and I went up a little way to the road where he was standing by my gate, and I turn to him and said "you is not the "Gangster Black" who kill my son.?
>
> THE COURT: You are asking him?
>
> THE WITNESS: Yeah I turn to him and tell him that. He say - -
>
> THE COURT: So -- you said to him "you are not the "Gangster Black" that kill my son"?
>
> THE WITNESS: Yeah.
>
> THE COURT: Mhmm.

[7] Record of Appeal, p. 122, lines 7-8.

THE WITNESS: He turn to me and tell me is P2 and 2B who bring him up here and why he ha to get in it and can I give me (sic) some water please.

THE COURT: Who and who bring him up there?

THE WITNESS: P2 and 2B that is the name of the two person.

BY MR CARL WILLIAMS:
Q. P2 and 2 is the other two men who you see kill the other two men?
A. Yes please My Worship.
Q: What else did he say to you?
Q. I give him the water and he turn his back and went down to the alley.

THE COURT: Yes.

BY MR. CARL WILLIAMS:
Q: How old was your son at the time of his death?
A: He was going to 23 - - between 22 and 23.
Q: So all "Gangster Black" tell you is that p2 and 2B bring him up there?
A: He say morning first, and when I go out on the porch I saw him I say "you not the "Gangster Black" that they say kill my son" and he say is "P2 and 2B that make me come up Lowmans in (sic) do it".
Q: Do it?
A: Yes please.

MR. SYLVESTER RAYMOND CADETTE: My Lord, umm I don't think I'll ask questions.

THE COURT: No questions?"

[10] This was damaging evidence against the appellant especially on the issue of joint enterprise which I will deal with later. The question by the prosecutor "P2 and 2B is the other two men who you see kill the other?" is a leading question on an important issue, but the prejudice, if any, to the appellant is mitigated by the fact that Ms. Gordon had already given evidence of the identities of the two men who she saw shooting two of the deceased men. More importantly, the identities of the two men that the appellant was speaking about was not crucial to the prosecution's case. The importance of evidence is that in response to Ms. Gordon's suggestion that the appellant had killed her son she said that the appellant said that he came to Lowmans Hill with two men called the P2 and 2B "in (sic) do it". For the purposes of the Crown's case the identification of the two

men is not material. Their case is that the appellant, acting with other persons, participated in the killing of three men. It was eminently reasonable for the jury to treat the witness' account of the appellant's reference to coming up to Lowmans with two other men "in (sic) do it" as a reference to a plan to kill the three men. This is a virtual confession by the appellant that he was involved in the killing and yet there was no cross examination of the witness on this or any other point. Her evidence remained unchallenged. The jury was entitled to rely on it in coming to their verdict.

[11] There are two other items of evidence to which I will refer under ground 1. Firstly, the appellant called his cousin, Reuben Laborde ("Mr. Laborde"), as a witness in support of his alibi defence that he was working at his cousin's workshop on the day of the murders. According to the evidence of Mr. Laborde, the appellant never left the workshop that day and yet when the news of the killings was broadcast on the radio at about 3 pm the appellant told his cousin "Bet yuh they going call up my name and say I involve in these things here."[8] Under cross examination the appellant did not deny saying this to his cousin, only that he could not remember saying it.[9] Why was the appellant concerned about being accused of involvement in the killings if he was with his cousin at the garage at the material time?

[12] Secondly, the appellant denied that on the day following the shooting police came to the garage at Chauncey looking for him and that he ran away from the police. However, Mr. Laborde said in his evidence that the police came to the garage that day and the appellant saw them and ran.[10]

[13] There was cogent evidence from Ms. Hooper that the appellant was seen running from the scene of the murders with a gun in his hand followed by another man who also had a gun, and that he told the mother of one of the deceased men that P2 and 2B made him come up to Lowman's to "do it". The evidence was strong and

[8] Record of Appeal, p. 360, lines 10 – 11.
[9] Record of Appeal, p. 324, lines 10 – 11.
[10] Record of Appeal, p. 373, lines 20 – 21.

compelling and remained virtually unchallenged on vitally important issues. By the jury's verdict they obviously rejected the alibi defence. The verdict was reasonable and is supported by the evidence. In the circumstances ground 1 of the grounds of appeal fails.

Ground 3 – The lone eyewitness evidence of Claudette Gordon is that she saw Rodney Roberts and Jason Henry shoot and kill Javon Antoine and Omoro Bowens. There is no credible evidence that the appellant shot them

[14] The thrust of this ground of appeal is that because Ms. Gordon said she saw two other persons shoot two of the deceased men, and that there is no credible evidence that the appellant shot any of them, the appellant cannot be convicted of the murders. However, the Crown's case is not based on a theory that the appellant shot any of the men. The essence of the case against the appellant is that he went to the scene of the crime with two other men, shots were fired and three men were killed, and he was seen leaving the scene running with a gun in his hand followed by another man who also had a gun in his hand. Therefore, he was present and participated in the killing of the three men and it does not matter whether he fired any of the fatal bullets. The analysis above in relation to ground 1 shows that there was credible evidence to support the appellant's participation in the crime. That is sufficient to dispose of ground 2 as drafted but both parties dealt with the issue of unlawful joint enterprise under this ground.

Joint Enterprise – Proceeding against the appellant after the acquittal of other persons

[15] The appellant's first submission under the general heading common design or joint enterprise is that he cannot be convicted of acting in concert with 2B and P2 because they were acquitted of the murders of the three men. My first comment on this statement is that it is factually incorrect. The appellant was not charged with or convicted of acting in concert with 2B and P2. He was charged with acting in concert with unnamed persons.

[16] It is trite law that the prosecution can proceed against one of several co-principals or an accessory without joining the principal. If two persons commit a crime as a part of a joint enterprise and the police apprehend only one of them, the prosecution can proceed against that person if they have evidence to show that he was involved in the joint enterprise with the person who remains at large. The position regarding an accessory is dealt with in Blackstone's Criminal Practice 2016[11] at paragraph A4.23 under the heading "Liability of Accessory where there is no Principal" that, "A person can be liable as an accessory even though the principal offender cannot be identified or has been acquitted in a previous trial". The learned editors refer to the Privy Council decision from Hong Kong of Hui Chi Ming v The Queen[12] in support of this point. In Hui Chi Ming v The Queen, the principal offender and others were charged with the stabbing death of the victim. At his trial for murder, the jury acquitted the principal offender of murder and found him guilty of manslaughter. The appellant was subsequently arrested and charged for murder; in that he had participated in a joint enterprise in which the principal had murdered the victim. At trial of the appellant for murder he sought to introduce evidence of the conviction of the principal offender of the lesser offence of manslaughter. The trial judge disallowed the evidence and on appeal to the Privy Council their Lordships confirmed that the evidence was properly excluded "… because the verdict reached by a different jury (whether on the same or different evidence) in the earlier trial was irrelevant and amounted to no more than evidence of the opinion of that jury."[13]

[17] In the instant case, the evidence of the acquittal of Rodney Roberts and Jason Henry should not have been admitted, but there was no objection and in any event the evidence was in favour of the appellant. However, the evidence of the acquittal of these two men is irrelevant to whether the prosecution can proceed against the appellant. As stated above, he was charged and proceeded against as being involved in an unlawful joint enterprise with other persons that resulted in

[11] Oxford University Press, p. 80.
[12] [1992] 1 AC 34.
[13] At pp. 42 – 43.

murder and it does not matter whether he participated as principal or as an accessory. It is irrelevant that other persons have been acquitted of the murders of the same victims.

[18] The decision in Hui Chi Ming v The Queen was disapproved in the joint decision of the Supreme Court and the Privy Council in R v Jogee and Ruddock v The Queen[14] on the issue of the mental element required to secure a conviction of murder against an accomplice. But Hui Chi Ming v The Queen was not overruled and continues to be good law on the relevance of a prior verdict in another trial.

Joint Enterprise – Evidence, intention and directions to the jury

[19] This takes me to a consideration of the appellant's further submission that there is no evidence of a joint enterprise in this case. In dealing with this submission, I note that the grounds of appeal do not make specific reference to joint enterprise or common design and that there is no criticism of the learned judge's summing up on this issue. Ground 3 comes closest but it only goes as far as saying that Ms. Gordon saw two named persons shoot two of the deceased men and there is no evidence that the appellant shot anybody. This ground is more consistent with the appellant's defence that he was not present and did not participate in the commission of the crime. The importance of joint enterprise is borne out by the fact that both parties referred to it in their written and oral submissions. It is an important issue in this case and this Court is duty bound to consider it. In Lester Pitman v The State,[15] an appeal to the Privy Council from the Court of Appeal of Trinidad and Tobago which coincidentally dealt with joint enterprise, Lord Carswell said:

> "It is the duty of the court in a criminal appeal to take account of all the grounds which could reasonably be advanced on behalf of an appellant, whether or not they had been sufficiently argued..."[16]

[14] [2016] UKSC 8; [2016] UKPC 7.
[15] [2008] UKPC 16.
[16] At para. 24.

Following Lord Carswell's guidance I will deal with joint enterprise and the directions given by the trial judge to the jury on this issue.

[20] The Crown relied on the doctrine of joint enterprise in its simplest form, that is, where two or more persons with a common purpose decide to commit an unlawful act and then commit an act that is within the scope of the common purpose each is responsible for the actions of the others in carrying out the unlawful act. This has been a part of the common law since at least 1864 in the case of Regina v John Swindall and James Osborne[17] which was cited and relied on by the respondent. The case involved two cart drivers engaged in a race, driving their respective carts at a dangerous and furious pace. One of them ran down and killed a pedestrian. Both were charged for manslaughter. It was not known who drove the fatal cart, but since they were encouraging each other in the race, it was irrelevant which of them had actually struck the pedestrian and both were found guilty of manslaughter.

[21] The Privy Council repeated this principle in R v Jogee and Ruddock v The Queen in the first paragraph of the opinion of the Board when Lord Toulson stated, albeit obiter:

> "Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial."

[22] The position in Saint Vincent and the Grenadines regarding this form of joint enterprise is now governed by section 21 of the Criminal Code, which reads:

> "When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each is deemed to have committed the offence."

[17] (1864) 2 Car & K 230.

Section 21 is self-explanatory and codifies the common law position in cases such as Regina v John Swindall and James Osborne. The deeming provision at the end of the section confirms that each participant in the unlawful activity can be found guilty without evidence as to how he or she participated in the unlawful activity. Under the section he or she is deemed to have committed the offence.

[23] Section 21 is in exactly the same terms as section 28 of the Criminal Code of Bermuda which was considered by the Privy Council in Teiko David Jamel Furbert et al v The Queen[18] on appeal from the Court of Appeal of Bermuda. The relevant facts of the case are that the victim was sitting in a room with other persons when he was fatally wounded by a single bullet discharged from outside the house. Both appellants were in the vicinity of the house when the shot was fired. The evidence of who discharged the firearm was not decisive and both appellants denied firing the shot. The jury found them guilty and their appeals to the Court of Appeal of Bermuda and to the Privy Council were dismissed. In delivering the opinion of the Board Lord Hutton stated:

> "The appellants submitted that in accordance with the principles of the common law the judge should have directed the jury that before they could convict the person who fired the gun they must be satisfied that he intended to kill or cause grievous bodily harm. They further submitted that in accordance with the principles of the common law established in *Chan Wing-Siu v. The Queen* [1985] AC 168 and *Reg. v. Powell (Anthony)* [1999] 1 AC 1 the judge should have directed the jury that before they could convict the accomplice they must be sure that he foresaw that the person who fired the gun intended to kill or cause grievous bodily harm. Their Lordships are unable to accept these submissions because it is clear that in Bermuda the liability for murder and the liability of a party to a joint enterprise are governed by the provisions of the Criminal Code and not by the rules of the common law, and it is also clear that section 287(1)(c) provides for an offence which can be termed "constructive murder"."[19] Emphasis added.

The reference in the final sentence in the passage to the fact that the liability of a party to a joint enterprise is now governed by the Criminal Code in Bermuda is a reference to the sections 27 and 28 of the Criminal Code dealing with joint

[18] [2000] UKPC 12.

enterprise which their Lordships had considered in the preceding paragraphs. Section 287(1)(c), which is substantially the same as section 159 of the Saint Vincent and the Grenadines Criminal Code, deals with the definition of murder.

[24] Following the guidance from their Lordships, I have no hesitation in finding that the case against the appellant is governed by section 21 of the Criminal Code and not by the common law. The case against him was that he participated in the commission of the agreed unlawful purpose and is therefore deemed to have committed the offence of murder. The Crown did not have to prove that he shot any of the three men. Proof that he was present at the scene of the crime with the requisite knowledge was sufficient to secure his conviction for murder.

[25] It is apparent from the analysis of the evidence under ground 1 that the Crown has discharged the burden of proving the actus reus of murder in the context of a joint enterprise to kill or cause grievous bodily harm to the victims of the shootings at Lowmans Hill. Ms. Gordon said that in response to a suggestion to the appellant that he had killed her son he replied that he came to Lowmans Hill with P2 and 2B "in (sic) do it", and the evidence of Ms. Hooper was that the appellant was seen running from the scene of the crime with a gun in his hand immediately after the sound of gun shots were heard coming from the area from which he was running. There is no evidence to suggest that the killing of the men was outside the scope of joint enterprise. The judge's direction to the jury on this issue was adequate. He told the jury:

> "Then the prosecution, Mr. Foreman and members of the jury is also relying on a principle known as joint enterprise. It's called by other names like common design acting together and other things. Well the principle is that where two or more, it must – can't be less than two you know, can't be less than two; embark on a joint mission, two persons or three or four decide to go an (sic) do something, each, if is two of them A is responsible for B's action and B is responsible for A's action and is (sic) its three ah (sic) them A is responsible for B and C and B responsible for A and C and so on and so forth. So where two or more persons embark on a joint mission or enterprise, each one is liable for the actions of the other in

[19] At para. 27.

> pursuance of that joint enterprise. Now they don't have to be at the same place you know nor doing the same thing … alright let's say three men decide to rob a bank, one ah (sic) them is outside in a car with the engine running, him round the corner you know, another one is right at the corner of the bank watching to see if any police or other coming and is only one ah (sic) them enter the bank you know, mask and with gun and throw the bag and say fill it up – fill it up – fill it up now and then he escape, all three ah them guilty ah the robbery you know because they were each assisting the other. So when the prosecution indict this man and said Anjay Charles and others, they not certain who are the others but what they are saying it wasn't him alone at least one other person was there. So the principle would come into play of joint enterprise."[20]

The judge repeated the substance of this direction towards the end of his summing up when he said:

> "…remember I told you know why the prosecution has indicted like that; they are relying on what is called joint enterprise for that. And I told you that where two or more persons embark on a joint enterprise each is responsible for the act done by the other in pursuance of the joint enterprise."[21]

[26] These directions are substantially the same as the direction given by the trial judge to the jury in the Teiko David Jamel Furbert et al v The Queen case that was expressly approved by Lord Hutton at paragraph 26 of the Board's opinion:

> "In the present case their Lordships are of opinion that section 287(1)(c) applied to the person who fired the gun and section 28 applied to the person who was acting with the gunman in the prosecution of an unlawful purpose. Their Lordships further consider that there is ample authority (see the cases discussed in *Reg. v. Giannetto* [1997] 1 Cr.App.R. 1) that the judge was correct in directing the jury at page 241 that:-
>
> > "It follows that you do not, in fact, have to be sure which defendant in fact pulled the trigger, provided that you are sure that both were there pursuant to a joint enterprise to kill or cause grievous bodily harm to James Caines, or at least to use the gun to fire into the room. If that is the case, provided that what occurred was within the ambit of the joint enterprise and the other elements of the offence are made out, then both are guilty although only one fired the shot."

[20] Record of Appeal, pp. 483 - 484.. lines 5 - 22 on p. 483, lines 1 - 4 on p. 484.
[21] Record of appeal, p. 492, lines 14 – 17.

[27] In my opinion, the judge's summing up on what was essentially the actus reus of the joint enterprise was adequate. What is missing from this part of the summing up is a direction on the mental state of the appellant at the relevant time. Murder is a crime of specific intention and the judge should have directed the jury when he was addressing them on joint enterprise that they must be satisfied and feel sure that the appellant participated in the commission of the crime with the intention that death or serious bodily harm would have been inflicted upon any of the three deceased men. However, earlier in his summing up he referred to the mental element required for murder. At page 475 of the record of appeal, after telling the jury that the case against the appellant was based on joint enterprise, he directed them as follows:

> "…murder…is where a person and they use ah (sic) old-time phrase malice aforethought, that - - but that is how it is done here, with malice aforethought causes the death of another person by an unlawful act or omission. Now malice aforethought is described as either an intention, listen carefully, an intention to cause the death or to do some grievous bodily harm to the victim. And second part of it, remember you know the intention to cause and you must have knowledge that they (sic) act or omission causing death will probably cause the death or some grievous bodily harm."

[28] The learned judge then gave the jury a hypothetical example of a person aiming a gun at another person and pulling the trigger. He said that the natural thought must be that he intends to kill the person because a firearm is a lethal barrel weapon. The judge continued:

> "That where a person with malice aforethought by an unlawful act causes another person to lose his life, and he either have intention to cause it or he had knowledge by his act or omission it would have that result. So that is how we deal with murder."[22]

[29] These directions by the trial judge, combined with the later direction on the actus reus for a person involved in the joint enterprise,[23] would have been sufficient to alert the jurors that in order to find the appellant guilty of the offence of murder they had to be sure that he participated in the shooting of three deceased men

[22] Record of Appeal, p. 476, lines 10 – 13.
[23] See para. 25 above.

and that he did so with the intention that death or serious bodily harm would have been inflicted by those participating in the killings. By their verdict the jury must have been satisfied that the evidence was sufficient to draw the necessary inferences that the appellant participated in the shooting of the victims and that he did so with the intention of causing them death or serious bodily injury.

[30] The learned judge gave adequate directions on the mens rea and actus reus, albeit at different times in the summing up. It would have been better if he had repeated the direction on mens rea immediately after he dealt with the direction on joint enterprise set out above but the net effect of his summing up is that the jury were told in sufficiently clear terms that in order to convict the appellant, they had to be satisfied that he participated in the commission of the crime with the intention that death or serious injury would have been caused to the deceased men.

[31] If I am wrong and the judge's summing up on the issue of the appellant's mens rea was deficient in the sense that the direction on intention was not repeated as a part of the directions in respect of joint enterprise, there was ample evidence before the jury from which they could have inferred the appellant's intention at the material time. Had they been properly directed they would inevitably have come to the conclusion that the appellant participated in the commission of the crime intending to cause death or grievous bodily harm to the three men and they would have come to the same verdict.

[32] I would dismiss this ground of appeal.

Ground 2 – The learned Director of Public Prosecutions failed to disclose vital witness statements to the defence, despite being asked several times thereby rendering the trial unfair and hampering the defence

[33] The appellant complained that despite requests made to the Director of Public Prosecutions by his attorney for vital witness statements the requested statements were not provided. It is not clear from the record of appeal which statements the appellant was complaining about as the issue was not raised during the trial. The

requests were in writing but the writings were not included in the record of appeal or otherwise provided to the Court. It appears from paragraphs 2 and 3 of the appellant's written submissions that the missing statements are those of Ms. Hooper and Kensley Jackson made in connection with this case, and a statement by Ms. Gordon made in connection with the case against Rodney Roberts and Jason Henry. At the hearing of the appeal, Mr. Carl Williams who appeared for the respondent, informed the Court that his office had received the file for this case from the police with the witness statements and the entire file was handed over to the defence. No statements were withheld. There is no evidence that efforts were made by the respondent to see if the police had withheld any of the additional statements requested by the defence. The respondent also stated in paragraph 6.1 of their written submissions filed on 21st March 2016 that:

> "…the statements alleged to have been withheld have never been proved to be exculpatory. The Appellant was not deprived of his due process rights because there was no withholding of any evidence that was material and exculpatory and there was no presentation of facts or misleading evidence at the Appellant's trial."

It is not clear from this statement whether the prosecution is saying that they did not have the statements or that in any event they are not exculpatory.

[34] There is no suggestion by the defence that the statements that were not provided were in any way at substantial variance with the evidence given by the witnesses at the trial or at the preliminary inquiry. It appears from the wording of the ground of appeal that the appellant's complaint is that not having the statements hampered the defence and rendered the trial unfair. The issue for this Court is whether the alleged non-disclosure of the witness statements without more made the trial of the appellant unfair.

[35] The issue of non-disclosure of evidence by the prosecution was considered by this Court in 2010 in the case of Maureen Peters v The Queen[24] where Baptiste JA said:

[24] BVIHCRAP2009/0005 (delivered 1st October 2010, unreported).

"[35] The law as to the duty of disclosure is now reasonably well settled. The law requires the crown to disclose to the defence any material of which it is aware which would tend either to materially weaken the crown's case or materially strengthen the case for the defence. Non-disclosure by itself does not automatically lead to the conclusion that trial is unfair. As was stated by the Supreme Court of the United Kingdom in McInnes v Her Majesty's Advocate (Rev 1) (Scotland) [14] (*[2010] UKSC 7*) [at paragraph 20]:

> "The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether given that there was a failure to disclose and having regard to what actually happened at the trial, the trial was nonetheless fair … as a consequence there was no miscarriage of justice ... The test that should be applied 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."

[36] After taking full account of all the circumstances of the trial including the undisclosed cheques the question is, should the jury's verdict be allowed to stand? As stated in McInness at paragraph 24, that question will be answered negatively if there was a real possibility of a different outcome.

[37] I am of the view that the undisclosed material would have made no difference to the outcome of the trial."

[36] I agree with Baptiste JA's summary of the law as it relates to the general duty of disclosure by the prosecution. The prosecution is required to disclose all relevant evidence but the non-disclosure of relevant evidence does not automatically lead to the conclusion that the trial was unfair. In the Maureen Peters case, the undisclosed evidence was in the form of cheques that were available when the Court of Appeal heard the appeal. The Court of Appeal concluded that in all the circumstances of the case, the non-disclosure of the cheques did not make a difference to the outcome of the trial.

[37] The principle of law regarding the general duty of the prosecution to disclose relevant evidence as stated by Baptiste JA in the Maureen Peters case is not in dispute. This appeal concerns the law and practice relating to the more specific

duty to disclose witness statements. Prior to the trial of the appellant in the lower court, the prosecution delivered all the witness statements in their possession to counsel for the appellant. The issue in this appeal is what is the consequence when the prosecution does not disclose the witness statement of an important witness. The authorities establish that if the undisclosed statement is substantially the same as the evidence given by the witness in court, it is unlikely that the fairness of the trial of the defendant would have been impacted. However, if the undisclosed statement is substantially at variance with the evidence given by the witness in the trial, the reviewing court may treat the non-disclosure as being unfair to the defendant and quash the conviction. A good statement of this principle is in the case of R v Foxford,[25] a decision of the Court of Criminal Appeal in Northern Ireland:

> "The Crown ought of course to offer the statement to the defence if the statement is materially at variance with the maker's evidence in court, but in this regard the trial judge has to rely on the Crown's discretion and propriety. In certain circumstances the trial judge might feel that the facts relating to the making of statements such as those made in this case to Mr. O'Hanlon were so unusual as to justify him in directing the prosecution to furnish them to the defence, but this must be a matter within the discretion of the trial judge."

This passage was quoted with approval by Lord Lowry in the Privy Council decision of Berry (Linton) v R[26] which concerned the non-disclosure of witness statements in Jamaica. In dealing with the law and practice in Jamaica, Lord Lowry referred to three decisions of the Jamaican Court of Appeal and continued:[27]

> "In *Purvis*,[28] which involved the identification of the driver of a car, counsel submitted that the trial judge should have granted his application to see the statement of the Crown witness who had given the police a description of the driver. That argument was rejected because there was no suggestion that there was any discrepancy or inconsistency between the evidence of the witnesses and their earlier police statements. Waddington acting P, giving the judgment of the Court of Appeal … continued (at page 512):

[25] [1974] NI 181 at p. 200.
[26] (1992) 41 WIR 244.
[27] At p. 250.
[28] R v Purvis and Hughes (1970) 16 WIR 267.

> 'It is to be noted in the instant case that no suggestion was made by defence counsel that there was any discrepancy or inconsistency between the evidence which the witnesses had given in court and the statements given to the police. If there was in fact any such material discrepancy or inconsistency it would have been the duty of counsel for the Crown to inform the defence of the fact, and indeed the trial judge expressly referred to Crown counsel's duty in this respect. Crown counsel did not make any offer of the statements and in the circumstances the trial judge was entitled to assume that there were no discrepancies or inconsistencies therein and to refuse to order production of the statements. We had no doubt that if there was the slightest suggestion that the statements differed materially from the evidence given by the witnesses the trial judge would have called for these statements and examined them himself and if necessary would have made them available to the defence. We did not think therefore that there was any merit in this ground of appeal.'"

[38] Berry (Linton) v R is also a good example of how withholding witness statements that are inconsistent with the witness' evidence in court can result in unfairness to the defendant and the quashing of his or her conviction. The relevant facts were that the prosecution withheld witness statements of two vital witnesses that were inconsistent with evidence that the witnesses gave in court. This only became known to the defence when the appellant applied for leave to appeal to the Privy Council. The inconsistent statements were handed over by new counsel for the prosecution. The Board allowed the appeal finding that although there was a strong case against the appellant, it was not inevitable that the jury would have convicted him had the defence been furnished with the two statements that were not disclosed in advance of the trial. The Board also found that the trial judge's directions on the defendant's good character were inadequate. The appeal was allowed and the case remitted to the Court of Appeal with a direction that that court should quash the conviction and either enter a verdict of acquittal or order a new trial, whichever course it considered proper in the interests of justice.

[39] The relevant principles that I extract from Berry (Linton) v R are:

(i) Prosecuting counsel, as an officer of the court, is expected to bring to the attention of the defence and provide them with any statement that is materially different from the evidence given or to be given by the witness in court.

(ii) Failure to provide an inconsistent statement can result in unfairness to the defendant and the quashing of his conviction.

[40] We have not been referred to any case, principle of law or practice in the Eastern Caribbean that differs from the practice in Jamaica as set out in Berry (Linton) v R. Following Berry the non-disclosure of one or more statements will only result in unfairness to the defence if the undisclosed statement is substantially at variance with the evidence that the prosecution knows that the witness will give or has given. In this situation, the prosecution is bound to disclose the prior witness statement and a failure to do so could result in unfairness to the defence and the quashing of the conviction.

[41] The question then arises what should defence counsel do if he or she is satisfied that statements are being withheld but he or she is unsure about the contents of the statements. The answer is simple. Firstly, as was done in this case, counsel should write to the prosecution requesting copies of the disputed statements. In the event that the statements are not produced by the prosecution within a reasonable time, the defence should apply to the court for a disclosure order. Failure to do so can result in the situation that confronts the appellant in this case, namely, there are allegations of undisclosed statements but this Court is not in a position to assess whether the withholding of those statements is unfair to the appellant. This is the situation that confronted counsel for the appellant in Young v The State,[29] a decision of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago. The opinion of the Board was delivered by Lord Carswell at paragraph 13:

> "Miss Deal [counsel for the appellant] also made submissions about several matters, including the lack of disclosure of witnesses' statements

[29] [2008] UKPC 27.

> to the police and the balance of the judge's summing up, which their Lordships will consider briefly before returning to the identification issue. She argued that it appears from the evidence that Mr and Mrs Offord made statements to the police, which should have been disclosed to the defence in order to allow them to bring out any discrepancies between their contents and the evidence subsequently given by the witnesses. Their Lordships have not seen these statements, which were not available at the hearing before the Board, and decline to speculate whether they might have been inconsistent in any respect with the evidence given. It was open to the defence to request copies before trial or apply to the judge, but this does not appear to have been done. Their Lordships do not consider that there is any weight in this argument."

[42] In the instant appeal, counsel for the prosecution has advised the Court that no statements are being withheld by the prosecution and that in any event there was no evidence withheld that was exculpatory. Implicit in this statement is that the prosecution was not in possession of any statements that were inconsistent in a material way with the evidence given by the witnesses in court. Therefore, the prosecution was not obliged to disclose any additional statements to the defence. If the appellant was satisfied that there were statements to which the defence was entitled, the proper course was to have applied to the trial judge for a disclosure order. This would have forced the prosecution to go in search of any statements that the police may have had but had not delivered to the prosecution. In saying this I am not suggesting that the prosecution did not make diligent attempts to locate any missing statements. What is important is that a formal application would have flushed out all the relevant facts and issues. The application was not made and this Court cannot speculate on the contents of the statements that are said to have been withheld. In the circumstances this ground of appeal should also fail.

Ground 4 – The learned trial judge ought to have withdrawn counts three, four, six, seven and nine from the jury

[43] The appellant complains in this ground of appeal that counts 3, 4, 6, 7 and 9 of the indictment should have been withdrawn from the jury by the trial judge. The appellant's written and oral submissions did not give any reasons why these counts

should have been withdrawn from the jury. In fact it is not clear that the appellant was still pursuing this ground. But it was not withdrawn. In any case I find that each of the counts charges a separate offence and they are not duplicitous. They are consistent with the Crown's case that the appellant participated in joint enterprise resulting in the death of three persons by gunshot wounds.

[44] In the absence of reasons why the challenged counts of the indictment should have been withdrawn from the jury, this ground of appeal should also fail.

Ground 5 – The learned judge materially misrepresented the evidence when he told the jury there is no direct evidence that either the appellant or anybody else killed any of the three men

[45] It is correct that the trial judge directed the jury early in his summing up that there was no direct evidence to show that the appellant or anybody else killed any of the three men.[30] There is evidence that Ms. Gordon saw two men shoot two of the victims. However, at the request of counsel for the appellant the judge corrected this error towards the end of the summing up and enquired of counsel for the appellant if he was satisfied to which he responded "Yes my Lord that's important."[31] There was no prejudice to the appellant and this ground of appeal should also be dismissed.

Ground 6 – The sentence is excessive

[46] The appellant was convicted of the murder of three persons who were killed by firearms in what appears to be a premeditated and violent attack on the men. There is nothing in the record or in counsel's written and oral submissions to suggest that the learned trial judge erred in any way in imposing the various sentences for which the appellant was found guilty or that the sentences were excessive or unreasonable. This ground of appeal also fails.

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[30] Record of Appeal, p. 478, lines 4 – 5.
[31] Record of Appeal, p. 506.

Disposition

[47] Given the cogent evidence presented by the prosecution and having reviewed the grounds of appeal and the submissions of counsel, I am satisfied that the verdict of the jury is not unsafe or unreasonable and the sentence of the judge was not excessive. Accordingly, I would dismiss the appeal and affirm the conviction and sentence.

[48] I wish to place on record this Court's gratitude to Ms. Bacchus-Browne for taking this appeal on assignment and to all counsel for assisting the Court.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario F. Michel
Justice of Appeal

By the Court

Chief Registrar