EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

GRENADA

GDAHCRAP2016/0007

BETWEEN

SHELDON BAIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Cajeton Hood for the Appellant
Mr. Christopher Nelson, QC, the Director of Public Prosecutions,
and Ms. Crisan Greenidge, Crown Counsel for the Respondent

2018: October 17;
2019: November 1.
Re-issued: November 8.

Criminal Appeal – Appeal against conviction and sentence – Discretion to order separate trial – Whether learned judge erred in refusing to order separate trial of jointly indicted accused – No case submission – Whether learned judge erred in dismissing no case submission – Whether inconsistencies in evidence rendered prosecution case tenuous – Directions to jury on drawing inferences – Directions on defences not raised by evidence – Whether judge erred in failing to direct jury on defence of manslaughter – Joint enterprise – Whether miscarriage of justice occasioned by judge's failure to direct jury in accordance with R v Jogee and Ruddock v The Queen – Whether judge's summation favoured the prosecution – Whether judge erred in allowing opinion evidence based on pathologist's practical experience in ballistics – Whether sentence excessive – Time spent on remand – Whether period for which convict escaped from prison and was incarcerated in another jurisdiction should be counted as time spent on remand

The appellant, Sheldon Bain, along with Kenton Phillip ("Kenton"), Elvon Barry ("Elvon"), and Zoyd Clement ("Zoyd") was convicted on 7th April 2004 for the murder of Omelia Roberts. On 25th June 2004, Kenton was sentenced to life imprisonment, Elvon to 18 years imprisonment with hard labour, and Zoyd, who was 17 years old at the date of the offence, was sentenced to be detained at the court's pleasure for a period not exceeding 15 years, the said sentence to be reviewed at intervals of 5 years. The appellant was not sentenced at the same time with the others as he had escaped from Her Majesty's Prison on 8th April 2004, the day after he was convicted. He was arrested in Saint Vincent and the Grenadines, returned to Grenada in November 2015 and was sentenced to 80 years imprisonment on 11th March 2016 after a sentencing hearing.

At trial, the Crown's case was that the appellant, along with Kenton, Elvon and Zoyd, went to the home of Omelia Roberts in Belmont on the evening of 8th October 2002 to rob her of a certain sum of money. In the course of the robbery, Omelia Roberts was shot and killed by Kenton. The Crown relied on the evidence of their main witness Oliver Williams ("Oliver") who was familiar with all four men.

The appellant's defence was a complete denial of the Crown's case except so far as him being in the company of the co-accused men and Oliver on the evening of the murder.

The appellant appealed his conviction and sentence. The issues arising in this appeal can be broadly summarised as follows: (i) whether the learned judge erred in refusing to order separate trials and whether the manner of editing the statements of the co-accused men concealed his identity; (ii) whether the learned judge erred in refusing to uphold the no case submission; (iii) whether the learned judge erred in his direction to the jury on the mental element required for an accessory; (iv) whether the learned judge failed to give adequate directions on the alternative verdict of manslaughter; (v) whether the learned judge's summation was wholly inadequate and erroneous; (vi) whether the learned judge erred in admitting the expert evidence of a pathologist on a ballistic issue; and (vii) whether the sentence of eighty years was excessive in the circumstances.

Held: allowing the appeal in part; dismissing the appeal against conviction and affirming the conviction of the appellant for the offence of murder; allowing the appeal against sentence to the extent that the sentence of eighty years' imprisonment is varied to thirty-eight years, six months and nine days' imprisonment, that:

1. Section 126 of the Criminal Procedure Code provides the court with a discretion to order separate trials on the application of an accused or the Attorney-General. The appellant applied on the ground that the statements under caution of his co-accused contained evidence which was inadmissible and prejudicial to him. Though a critical factor to be taken into account, it must be weighed against the public interest that joint offenders should be tried jointly. In this case, the interest of justice and the fairness of the trial could be protected by editing the statements and giving explicit directions to the jury that the evidence in the statements is not evidence against the accused, which the learned judge did. Clear directions were also given to consider the evidence of each accused separately and that there were four separate cases. There were no exceptional circumstances in this case to justify separate trials. It follows then that there is

no basis for this Court's interference with the exercise of the learned judge's discretion as it did not exceed the generous ambit within which reasonable decision makers may disagree. Furthermore, any possibility of prejudice suffered by the appellant would have been neutralised by the detailed directions the learned judge gave the jury on the inadmissibility of the evidence of the co-accused against the appellant and of which there has been no complaint by the appellant.

Section 126 of the **Criminal Procedure Code**, Cap. 72B, Revised Laws of Grenada 2011 considered; Dufour and Others v Helenair Corporation Ltd and Others **(1996) 52 WIR 188** applied; **R v Lake** (1976) 64 Cr App Rep 172 applied; **R v Hayter** [2005] UKHL 6; **Lobban (Dennis) v R** (1995) 46 WIR 291 applied;

2. Where the prosecution's evidence is so tenuous that a jury properly directed could not properly convict on it, it is the duty of the judge, on a no case submission, to stop the case. The inconsistencies in Oliver's evidence, which formed the basis for the appellant's no case submission, related to peripheral issues which could not be said to undermine the prosecution's case. The prosecution's case was also not made tenuous by the fact that Oliver could be characterised as an accomplice or as a person with an interest to serve, as the learned judge gave adequate directions to the jury on evidence of an accomplice and emphasised that Oliver's evidence was uncorroborated. The appellant's argument that the judge ought to have upheld the no case submission, must fail.

   R v Galbraith [1981] 2 All ER 1060 applied.

3. There was no direct evidence from the Crown against the appellant that he had provided the gun. This was an inference which the Crown was asking the jury to draw having regard to their evidence. When the conduct of the appellant is considered as a whole, it was open to the jury to draw such an inference. It is true that the learned judge could have told the jury that there was no direct evidence that the appellant provided the gun. However, the jury having heard all of the evidence would have known that no one testified that the appellant provided the gun, and they were adequately directed on the drawing of inferences.

4. A judge is required to direct the jury on any possible defences that arise on the evidence led at the trial, whether or not the evidence on those defences come from the defendant's case or from the prosecution's case. The judge is required to do so even where the defendant for tactical reasons does not rely on a defence. On the evidence at the trial, the issue of manslaughter in relation to the appellant did not arise. There was therefore no duty on the judge to leave the issue of manslaughter to the jury.

   R v Hopper [1915] 2 KB 431 applied; **Von Starck (Alexander) v R** (2000) 56 WIR 424 considered.

5. The fact that the judge gave a **Chang Wing-Siu** direction, gives rise to the need to determine whether there was evidence that the appellant shared the common intention to kill or cause grievous bodily harm to the victim in accordance with **Jogee and Ruddock**. In all the circumstances of this case, it was appropriate to conclude that the appellant had the necessary conditional intent for the use of the gun to kill or cause grievous bodily harm if necessary in the course of the robbery. This was within the scope of the plan to rob to which the appellant agreed and gave his support to the very end. Accordingly, the judge's direction in relation to the mental element of joint enterprise did not occasion a miscarriage of justice.

   R v Jogee and Ruddock v The Queen [2016] UKSC 8; [2016] UKPC 7 applied.

6. It is settled law that a judge has a duty to present the case to the jury in an impartial manner. The judge must put the case for both sides fairly. It is impermissible for a judge to give a jury the impression that he favours the prosecution's case over the defendant's case or vice versa. Upon a review of the summation as a whole, the judge treated both the evidence of the prosecution and defence in an even-handed manner. It is evident that the judge gave a balanced summing up, and that the appellant was not deprived of the substance of a fair trial.

   R v Nelson [1997] Crim LR 234 applied; **Harewood (Vincent) v R** (1994) 48 WIR 32 considered; **Mears (Byfield) v R** (1993) 42 WIR 284 considered.

7. It has long been recognised that experience and knowledge in an area is sufficient to make opinion evidence admissible even where a witness has no formal qualification in the area. While Professor Vigoa was a pathologist, and not a ballistic expert, as a result of his experience of over 34 years in the field of pathology, the learned judge was entitled to admit the evidence. The jury hearing his evidence would have also taken both his formal qualification and experience into account when evaluating the weight of his evidence. In all the circumstances, the judge did not err in allowing Professor Vigoa's evidence.

   Furthermore, Professor Vigoa, having conducted the post-mortem examination, gave evidence which, in his expert opinion, was consistent with his finding that the deceased was in a lower position than the gun. This was within his purview as a pathologist. Accordingly, there is no merit in the contention that the evidence of Professor Vigoa was not within the limits of his expertise as a pathologist.

   R v Robb (Robert McCheyne) (1991) 93 Cr. App. R. 161 considered; **The State of Trinidad and Tobago v Boyce** [2006] UKPC 1 considered; **Myers v R** [2015] UKPC 40 considered; **R v Hodge** (2010) 77 WIR 247 considered.

8. There is no duty on a judge to give the jury special directions on circumstantial evidence. A judge is however required to make clear to the jury that they must

not convict unless they are satisfied of the accused's guilt beyond reasonable doubt. The judge did so on several occasions throughout the summation and therefore cannot be faulted in this regard.

McGreevy V Director of Public Prosecutions [1973] 1 All ER 503 applied.

9. The general principle is that credit must be given for the time spent on remand in determining the period of sentence to be served by a convicted person. The appellant having escaped from Her Majesty's Prison on 8th April 2004, fled to Saint Vincent and the Grenadines where he spent time in custody for an offence unrelated to his murder conviction. The appellant cannot rely on his unlawful act of escaping custody to evade justice, which subsequently led to his incarceration in Saint Vincent and the Grenadines to gain a benefit for time spent in custody there nor is he entitled to any credit for the period he spent in custody between the date of his return to Grenada and the date he was sentenced by the learned judge since during this period, he was serving his sentence for unlawfully escaping custody. He is however entitled to full credit for the time spent on remand in pre-trial custody which amounted to one year, five months and twenty-two days.

Callachand v R [2008] UKPC 49 considered; **Romeo Da Costa Hall v R** [2011] CCJ 6 (AJ) considered; **Gomes v The State of Trinidad and Tobago** [2015] UKPC 8 applied;

10. The sentence of eighty years was manifestly excessive. In all the circumstances, having been given full credit for the time spent by the appellant on remand before his trial, the appropriate sentence is thirty-eight years, six months and nine days.

JUDGMENT

Introduction

[1] **THOM JA:** The appellant, Sheldon Bain, along with Kenton Phillip ("Kenton"), Elvon Barry ("Elvon"), and Zoyd Clement ("Zoyd"), was convicted on 7th April 2004 for the murder of Omelia Roberts.

[2] On 25th June 2004, Kenton was sentenced to life imprisonment; Elvon was sentenced to 18 years imprisonment with hard labour, and Zoyd, who was 17 years old at the date of the offence, was sentenced to be detained at the court's pleasure for a period not exceeding 15 years, the said sentence to be reviewed

at intervals of five (5) years. Their appeals against conviction and sentence were dismissed by the Court of Appeal.

[3] The appellant was not sentenced at the same time with the others as he had escaped from Her Majesty's Prison on 8th April 2004, the day after he was convicted. He was subsequently arrested in Saint Vincent and the Grenadines and returned to Grenada in November 2015.

[4] On 11th March 2016, after a sentencing hearing, the appellant was sentenced to 80 years imprisonment by Gilford J, as Benjamin J, who had conducted the trial, had retired. The appellant appealed against his conviction and sentence on several grounds.

Background

[5] On the evening of 8th October 2002, Omelia Roberts who was self-employed as a huckster was at her home at Belmont with her children Garvin Roberts ("Garvin"), Damian Roberts ("Damian") and Giana Roberts ("Giana"). Garvin was sleeping on a chair in the living room while his brother Damian was sleeping on the floor. Omelia Roberts and her daughter Giana were sleeping in her bedroom. Garvin was awakened by the neighbour's dog barking. He saw a man, whose face was covered by a scarf, standing over him with a gun. The man put a gun to his neck and asked, 'where is the money?'. He was then told to open the door, and when he did so, two other men entered the house. The men also had masks on their face. After some discussion amongst the men, the man with the gun went to Omelia Roberts' bedroom. There was noise from the banging of the door on the partition wall, then a loud explosion was heard which sounded like a gunshot. The man with the gun ran out of the bedroom and ran towards the main road, the other two men following behind. Garvin then went to his mother's bedroom and found her on the floor bleeding. A report was made to the police. She was subsequently pronounced dead at her home by Dr. Friday. The appellant and three others were charged for the murder of Omelia Roberts.

The Crown's Case

[6] At the trial, the Crown's case was that of joint enterprise. The main witness for the Crown was Oliver Williams ("Oliver"), a bartender who also owns a black Ford custom van. He knew all four of the accused men. He testified that he agreed to hire his van to the appellant to go to Belmont to collect some things. The appellant was accompanied by two other men, Kenton and Devon. The appellant sat in the front with the driver while the other two men sat at the back. The appellant directed him to drive to Grand Anse Valley and told him to wait while he and Kenton left. They returned with two men, Elvon and Zoyd. The appellant went into the front seat of the van while the others went into the back of the van. The appellant told him to drive to Thelma's shop. The appellant spent about three minutes there and when he returned, he told him to drive to Belmont. The appellant directed him what route to take to Belmont. When they got to Belmont, the appellant told him to stop by a parlour. The appellant and the three men Kenton, Elvon and Zoyd got out of the vehicle. The appellant told him to drive around while he organised the things. Oliver drove the vehicle along the lagoon road and returned to the area of the parlour where he met the appellant, who told him to wait.

[7] Approximately 40-50 seconds later, Oliver saw the three men running towards the van from the direction where they went when they left the van. The men had things which looked like masks and Kenton had something that looked like a gun. The men jumped into the back of the van and laid down. Oliver asked the appellant what had happened and the appellant told him they had come out "on a little scene". Oliver made further enquiries of the appellant, but the appellant told him to drive the vehicle. Elvon, who was referred to as "Plank", leaned to the window of the van and told the appellant that they did not get the money and that Kenton had shot the woman and himself. Oliver sought to get details of what transpired and the appellant got upset with him and told Plank to pass the gun. Oliver was able to see through the rear view window when Kenton handed a gun to Plank who then passed the gun to the appellant. The

appellant cranked the gun and put it into his waist. He subsequently went over to the back of the vehicle where the others were seated. Oliver heard Plank telling the appellant that Kenton and the woman were wrestling. Oliver dropped off the men at the same place where he had picked them up. He then dropped off the appellant by Thelma's shop. The appellant and the other three men were subsequently arrested and charged for the murder of Omelia Roberts. Subsequently, a post mortem examination was performed by Professor Lazaro Vigoa ("Professor Vigoa") who opined that there were two causes of death. The first cause was hypovolemic shock due to extensive bleeding in the pericardium and very large loss of blood in the thoracic cavity as a result of the bullet perforating the left pulmonary vein. The second cause was a gunshot wound to the right upper breast. Professor Vigoa also testified that he observed powder mark to the dorsal side or the back of the right hand.

The Appellant's Case

[8] The case for the appellant was that on the evening of 7th October 2002, he was visiting his girlfriend at Thelma's house. At about 11:45pm he heard a horn blowing. He recognised the driver of the vehicle as Oliver. Oliver told him he was going up the highway to collect some things. He got into Oliver's van. Kenton was also in the van. Oliver drove to Grand Anse Valley and collected Plank and Zoyd. Oliver then drove to Belmont and stopped by a track. Oliver spoke to Kenton, Plank and Zoyd and they left and went down a track. The appellant left the van and went to speak to a friend at the parlour nearby. Sometime later Oliver and the other men returned and they began driving back to town. On the way back, the appellant asked Oliver where he and the others went, but Oliver did not give him any details. Oliver dropped Plank and Zoyd at Grand Anse and then dropped off the appellant by Thelma's shop. Kenton remained in the vehicle with Oliver.

[9] The following day, the appellant learnt from Alice, a woman in whose house he lived, that a lady was shot. He went to Grand Anse Valley accompanied by

Christopher Noel and he spoke to Oliver who told him not to speak to the police or anyone. Oliver also told him that Kenton had shot the woman accidentally. The appellant got scared and some days later he went to Criminal Investigation Department ("CID") with Alice. He was detained and questioned by Inspector Martin. He refused to sign a statement prepared by the police. He told Inspector Martin that he did not give anyone a gun nor did anyone give him a gun.

The Appeal

[10] In his notice of appeal, the appellant advanced several grounds, all of which he pursued at the hearing.

Ground A - Separate Trial and Editing of Caution Statement

[11] At the commencement of the trial, Mr. Clouden, on behalf of Elvon, made an application for a separate trial. The application was based on the fact that Kenton and Zoyd had made statements under caution to the police in which they made prejudicial statements against the other co-accused and this, he contended, would affect the fairness of his client's trial. He also submitted that if separate trials were ordered, then it was very likely that the trial period would be shortened. He further submitted that the learned judge should edit the statements to remove the names of the co-accused. Learned counsel Mr. Hood, who also represented the appellant at the trial, adopted and relied on those submissions.

[12] The learned judge refused the application for a separate trial but he agreed to edit the statements of the co-accused (the appellant did not give a statement to the police). The learned judge edited the statements by removing the names of the co-accused and substituting the letters A-D.

[13] Mr. Hood complains that the learned judge erred in refusing to order separate trials and it resulted in the appellant suffering grave prejudice since he was

implicated in the statements of the co-accused. Mr. Hood contends that the error was further exacerbated when the statements were wrongly incorporated into the prosecution's case against the appellant. Mr. Hood further complained that the manner of editing did not conceal the identity of the appellant but rather made it very clear that "D" referred to the appellant since he was the No. 4 accused and more so he was referred to as "Dutch" by witnesses at the trial.

Discussion

[14] The starting point is the **Criminal Procedure Code**[1] which governs the procedure for criminal trials. Section 126 reads as follows:

> "(1) Every person committed for trial shall be tried on an indictment in the court, and such trial shall be heard by and before a judge and a jury.
>
> (2) Any number of persons may be charged in one indictment and tried together for a crime which they are alleged to have jointly committed, or which they or any of them are alleged to have participated directly or indirectly, by abatement or otherwise.
>
> Provided that the court may on application either on behalf of any of the accused persons or of the Attorney-General at any time, order that any of such other persons shall be tried separately from all or any of the others."

[15] The above statutory provision provides for persons who are charged jointly to be tried jointly. It also gives the court a discretion to order separate trials on the application of an accused or the Attorney-General. The discretion of the judge although worded in wide terms must be exercised judiciously. An appellate court will however be slow to interfere with the exercise of the judge's discretion unless it is shown that the exercise of the discretion was wrong in principle, the judge misdirected himself in law, took into account irrelevant matters, failed to take into account relevant matters, or came to a decision so plainly wrong that it

[1] Cap. 72B, Revised Laws of Grenada 2011.

must be regarded as outside the generous ambit where reasonable decision makers may disagree.[2]

[16] The general principle in exercising the discretion whether to grant separate trials was outlined in the case of **R v Lake**[3] where Lord Widgery stated:

> "…it has been accepted for a very long time in English practice that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be tried as separate offences, all sorts of inconsistencies might arise. Accordingly, it is accepted practice, from which we certainly should not depart in this Court today, that a joint offence can properly be tried jointly **even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that**…" (Emphasis mine).

[17] The rationale for joint defendants to be tried jointly was emphasised by the House of Lords in **R v Hayter**.[4] The House reaffirmed that a judge is at liberty to exercise his discretion to order separate trials in the interests of justice as there are powerful public reasons why joint offences should be tried jointly. Lord Steyn stated the principle as follows:

> "While considerations of the avoidance of delay, costs and convenience, can be cited in favour of joint trials this is not the prime basis of the practice. Instead it is founded principally on the perception that a just outcome is more likely to be established in a joint trial than in separate trials. The topic is intimately connected with public confidence in jury trials. Subject to a judge's discretion to order otherwise, joint trials of those involved in a joint criminal case are in the public interest and are the norm…"

[18] In **Lobban (Dennis) v R**,[5] their Lordships acknowledged that there could be a real risk of prejudice to a defendant in a joint trial where evidence is admitted,

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[2] Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.
[3] (1976) 64 Cr App Rep 172.
[4] [2005] UKHL 6.
[5] (1995) 46 WIR 291.

and that evidence is admissible against one accused but not against the other co-accused, such as in the present appeal where the statement under caution of one co-accused is admissible in evidence against him but is not admissible against the appellant. In those circumstances their Lordships opined that the governing test is always the interest of justice in the particular circumstances of each case. If a separate trial is not ordered, the interest of the implicated co-defendant must be protected by the most explicit directions by the trial judge to the effect that the statement of one co-defendant is not evidence against the other.

[19] The following principles emerge from the authorities:

(i) A trial judge has a discretion whether or not to order separate trials.

(ii) The general principle is that persons who are charged jointly for an offence should be tried jointly.

(iii) Only in exceptional circumstances should separate trials be ordered.

(iv) Whether a separate trial should be granted would depend on the facts of the case.

(v) The complexity of a trial may necessitate a separate trial.

(vi) The fact that certain evidence which would not be admissible in the case of one co-defendant tried alone would be admissible in a joint trial is a critical factor to be taken into account by a judge in the exercise of his discretion; and

(vii) Where a separate trial is not granted, the judge must ensure that the fairness of the trial of an accused is not compromised.

[20] The appellant's application was grounded on the fact that the statements under caution of his co-accused contained evidence which was inadmissible and prejudicial to him. While this is indeed a critical factor to be taken into account, it must be weighed against the public interest that joint offenders should be tried jointly. This is a case where the interest of justice and the fairness of the trial could be protected by editing the statements and explicit directions to the jury that the evidence in the statements is not evidence against the accused. In this case, the learned judge did just that. The learned judge edited the statements of the co-accused to remove the appellant's name and the judge repeatedly and explicitly directed the jury that the evidence in the statements of the co-accused was not evidence against the appellant. The learned judge also gave the jury clear directions to consider the evidence of each accused separately and that indeed there were four separate cases.

[21] This was not a complex case. It was a straightforward case of an alleged robbery which resulted in the death of Omelia Roberts and where the prosecution's case was that the appellant was the mastermind of the offence. As the Privy Council recognized in **Lobban**, a trial of alleged robbery is a classic case for a joint trial.[6] There were no exceptional circumstances in this case. Whatever prejudice was suffered was cured by the very clear and detailed directions given to the jury in relation to the statement of the co-accused. In the words of Lord Steyn in **R v Hayter**, 'It was a paradigm case for a joint trial'.[7]

Editing of Statements

[22] The courts have long recognized that editing a co-accused's statement under caution to the police which incriminates another accused may be necessary to maintain the fairness of the trial. One well established manner of editing is substitution of letters in place of the names of co-accused as was done by the

[6] See n.4 at p. 299.
[7] See n. 3 at para 6.

judge in this case. Indeed this manner of editing was approved by the Privy Council in **Lobban**.

[23] While in my view the submission of learned counsel amounts to no more than speculation, any such possibility of prejudice as suggested by the appellant would have been neutralised by the detailed directions the learned judge gave the jury on the inadmissibility of the evidence of the co-accused against the appellant and of which there has been no complaint by the appellant. I am satisfied that the matters of unfairness alluded to by Mr. Hood were properly addressed by the judge. I find that the appellant has not met the threshold for appellate interference with the exercise of the discretion of the judge in conducting a joint trial. This ground of appeal fails.

Ground B - No Case to Answer

[24] At the close of the prosecution's case, Mr. Hood made a submission of no case to answer. The learned judge rejected the submission. Mr. Hood tried to persuade us that the learned judge erred in not upholding the no-case submission on the second limb in **R v Galbraith**.[8] He argued that the evidence of the prosecution was tenuous because of the several inconsistencies in the evidence of Oliver. Learned counsel also contended that Oliver was an accomplice or, at the very least, a person with an interest to serve whose evidence was not corroborated. Secondly, Mr. Hood urged us to dismiss the appeal since the learned judge gave no reason for dismissing the application.

Discussion

[25] While the record reads "Ruling delivered. Submissions Re: No. 4 Accused overruled", unfortunately, the contents of the ruling are not reflected in the record. Every accused person and indeed every litigant is entitled to know why his application or his entire case is dismissed. It is recognized that it is not in every case there is a need for lengthy written reasons for a judge's decision. On a no

[8] [1981] 2 All ER 1060.

case submission, it would quite often be appropriate for a judge to simply read his reasons for upholding or dismissing the application into the record. The mere absence of the reasons for refusing a no case submission cannot automatically lead to the quashing of a conviction. It does not equate to an irregularity at the trial or a misdirection in the summing up. It is not a basis for finding that the conviction is unsafe. It is clear from the evidence led by the prosecution and the submissions that were made to the trial judge on the no case submission that the appellant played a role in the commission of the crime – he hired the vehicle that was used to go to the scene of the crime, he gave direction to the driver, and he took charge of the firearm used to shoot the victim and left the area with the others. In these circumstances, I am not of the view that the appellant suffered any prejudice by the trial judge's failure to give reasons for dismissing the no case submission made by the appellant's counsel. I will therefore proceed to consider the main issue; that is, whether the learned judge erred in refusing to uphold the no case submission on the ground that the evidence of the main witness Oliver, was tenuous due to the several inconsistencies in his testimony and his evidence being uncorroborated.

[26] The principle in **Galbraith**, although formulated several years ago, is still the principle which guides the court when considering the issue of whether there is a case to answer. As stated in **Galbraith,** where the prosecution's evidence is so tenuous that a jury properly directed could not properly convict on it, then it is the duty of the judge to stop the case. This principle is not disputed. Having reviewed the evidence of the prosecution and in particular the evidence of Oliver, there were several inconsistencies as referred to by Mr. Hood and accepted by the learned Director of Public Prosecutions. However, the inconsistencies relied on by Mr. Hood in the evidence of Oliver related to peripheral issues such as where he resided, the number of his van, his relationship with the accused, he admitted that he lied in his first statement to the police about where he met the appellant, which of the other co-accused he picked up first the evening and when he called the police after the incident. These issues could not be said to have undermined the

prosecution's case. These were issues of credibility which was a matter for the jury to determine. Also the fact that Oliver could be characterised as an accomplice or a person with an interest to serve does not make his evidence tenuous. Further, the learned judge gave the jury adequate directions on evidence of an accomplice. In so doing, he emphasized that the evidence of Oliver was uncorroborated. This ground of appeal also fails.

Ground C - Misdirection on the Crown's Case Against the Appellant

[27] The learned judge in directing the jury on the Crown's case against the appellant stated that:

> "It is further the Crown's case that the No. 4 accused, Sheldon Bain counseled the three accused by providing the gun and pointing out the house which they were to enter and from which they were to steal. And you will have to determine on the basis of the evidence, what you make of the Crown's case."[9]

[28] The learned judge said:

> "I did say that the case for the Prosecution involves joint enterprise involving the Nos. 2 and 3 Accused persons. The case for the Prosecution is that the accused Kenton Phillip committed the offence together with the Nos 2 and 3 Accused Elvon Barry and Zoyd Clement under the direction of, or counseled by the No.4 Accused, Sheldon Bain, who is being referred to as 'Dutch' in the course of this trial."[10]

[29] Further, the learned judge continued:

> "Now I did say that the case of the Prosecution against the No. 4 Accused is that he was not present on the scene of the offence. That is to say that he was not in the deceased house. That is the case for the Crown. However, it is specifically alleged by the Crown that the No. 4 accused counseled the three accused to commit the offence of murder. The Crown is saying that the No. 4 accused is nevertheless guilty though not present. They are saying that he ordered, advised, encouraged or persuaded the other accused to commit the offence. Before you can convict the No. 4 Accused of murder through counselling you must be sure first of all that the offence was in fact committed. That is to say, in other words, that there was no accident. Secondly, that Dutch, the No. 4 accused, counseled the other accused by ordering, advising,

[9] See Record of Trial Proceedings, p.7 lines 15-17.
[10] See Record of Trial Proceedings, p.11, lines 23 to p.12 line 2.

encouraging or persuading them to do it. And thirdly, that the offence of murder was within the scope of what the No. 4 Accused counseled them to do, that is to enter the house and rob the deceased of ten grand."[11]

[30] The learned judge continued as follows:

> "Now let me turn to deal with the evidence of Sheldon Bain. As I said to you, (sic) Prosecution's case against Sheldon Bain is that he counselled the commission of the offence of murder. They are saying that he is the one who made all the arrangements and then encouraged and ordered the others to go ahead and commit the offence."[12]

[31] The appellant complained that in directing the jury in the above manner, the learned judge misdirected the jury on the case against him since there was no evidence in support of the direction given. Mr. Hood argued that Oliver, the Crown's main witness, did not testify that he saw a gun before the incident but rather, his evidence was that the appellant took the gun from one of the co-accused while they were in the van on the way back after the incident. Also, there was no evidence that the appellant counselled the other three accused to commit the offence of murder.

Discussion

[32] In my opinion, this ground has no merit. I agree that there was no direct evidence from the Crown against the appellant that he had provided the gun. This was an inference which the Crown was inviting the jury to draw having regard to their evidence. The Crown's case against the appellant was that he was the intellectual author of the crime. The Crown relied mainly on the evidence of the witnesses Oliver Williams and Garvin and Damien Roberts. The evidence of Oliver in relation to the appellant was that on the evening of the incident it was the appellant who hired him to go to Belmont. The appellant directed him to Grand Anse Valley where the appellant went and collected the other two accused Plank and Zoyd. It was the appellant who directed him on the route to drive to Belmont. The appellant also directed him

[11] See Record of Trial Proceedings, p. 13, lines 8 – 22.
[12] See Record of Trial Proceedings, p. 55: lines 13 – 17.

where to stop when they arrived at Belmont and gave him instruction to drive around while he waited for the appellant and the other men. When Oliver returned it was the appellant who instructed him to wait. When the other men returned, it was the appellant who instructed Oliver to drive the vehicle back to town. Oliver also testified that when the men returned Plank reported to the appellant what had occurred. The appellant requested the gun and it was given to him and he put the gun into his pocket. When the conduct of the appellant is considered as a whole it was open to the jury to draw such an inference. I agree that the learned judge could have told the jury that there was no direct evidence that the appellant provided the gun. However the jury heard all of the evidence and would have known that no one testified that the appellant provided the gun. They were directed on the drawing of inferences.

I will address Mr. Hood's submission that there was no evidence of counselling to murder when addressing Ground D.

Ground D – Mental Element of an Accessory

[33] Mr. Hood contends that the learned judge erred when he applied the principle in **Chan Wing-Siu v The Queen**[13] in relation to the mental element required for an accessory. He argued that there was no evidence against the appellant of an intention to commit the offence of murder and no evidence that he provided the gun to Kenton and therefore the learned judge should have left the issue of manslaughter to the jury. Mr. Hood also argued that had the jury been directed in accordance with the judgment in **R v Jogee and Ruddock v The Queen**[14] that if a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter, the verdict in the appellant's case may have been different.

[13] [1985] AC 168.
[14] [2016] UKSC 8; [2016] UKPC 7.

[34] I will deal first with Mr. Hood's argument that the learned judge erred in not giving the jury adequate directions on the alternative verdict of manslaughter since there was no evidence to ground intention to kill or to cause grievous bodily harm. Mr. Nelson, QC in response, submitted that the appellant at the trial did not rely on the alternative count of manslaughter since it would have undermined his defence that he took no part in the planning of robbery or the commission of any offence, therefore the issue of manslaughter did not arise. Further, there was evidence of intent to commit murder so there was no basis for manslaughter to be left to the jury.

Discussion

[35] It is settled law as illustrated from a long line of cases from **R v Hopper**[15] that a judge has a duty to direct a jury on any possible defence that arises on the evidence led at the trial. It does not matter if the evidence comes from the defendant's case or from the prosecution's case. The judge is required to do so even where the defendant for tactical reasons or not does not rely on an alternative verdict such as manslaughter. Failure to do so would amount to a material irregularity and save in exceptional circumstances would result in the conviction being quashed. Lord Clyde in delivering the judgment of the Board in **Von Starck (Alexander) v R**[16] stated the rationale of the principle as follows:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular, counsel for a defendant may choose to present his case to the jury in the way which he considers best serve the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the

[15] [1915] 2 KB 431.
[16] (2000) 56 WIR 424.

> possible conclusions which may be open to them on the evidence which has been presented in the trial, whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them…But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them." [17]

[36] The critical question is whether there was an evidential basis for the judge to leave the alternative offence of manslaughter to the jury.

[37] The appellant's evidence, based on his sworn testimony and that of his witness Christopher Noel, was a complete denial of involvement in the incident. He was not part of any plan to rob or commit any offence against the deceased nor was he aware of any such plan. In fact, he only became aware of the deceased's death the day after her death. The issue of manslaughter arose in the caution statement of Kenton to the police which was admitted into evidence as part of the Crown's case. This statement was obviously not evidence in relation to the appellant. In the statement he said: "As I was entering the room she jumped towards me and grab the gun, and we wrestle for two minutes. Afterwards the gun fire off and I hear her bawl O God then she fall." On this evidence, the learned judge directed the jury firstly on the defence of accident in that, if the defence of accident succeeded then all of the accused must be acquitted. On the above statement by Kenton, the learned judge also left the

[17] See p. 429E – 430B.

alternative verdict of manslaughter to the jury on the basis of lack of intent on the part of Kenton. He further directed the jury when dealing with the case against each of the other accused that they could not be convicted of a more serious offence than Kenton. In relation to the appellant, the learned judge directed the jury in the follow manner at page 61: "Here again, this is a case where he can be convicted for no higher offence than that for which you may well find the No. 1 Accused can be convicted."[18] In my view, the jury could have been left in no doubt that if they found that there was no intention or they were left in doubt as to whether Kenton intended to commit the offence of murder, then they could not convict the appellant of murder, but they could convict of manslaughter. This case was tried as the law stood then in accordance with the principle in **Chan Wing-Siu** where in those circumstances foresight was sufficient. If foresight was not proven, then the appellant would have had to be acquitted. He could not be convicted of manslaughter. I am of the view that based on the evidence at the trial, the issue of manslaughter did not arise as contended by Mr. Hood. There was no evidential basis on which the issue of manslaughter was raised and therefore there was no duty on the judge to leave the issue of manslaughter to the jury.

[38] I will now deal with Mr. Hood's submission in relation to the application in **R v Jogee and Ruddock v The Queen.**

[39] The offence of murder is a crime of specific intent to cause death or grievous bodily harm.

[40] The appellant was tried in 2004. The case for the Crown was based on joint enterprise. The law on joint enterprise as it stood then was the principle in **Chan Wing-Siu.** Under the **Chan Wing-Siu** principle, foresight was sufficient to establish mens rea. Thus, if there were a plan by two or more persons to commit the offence of robbery, and in the course of the robbery one of them

[18] See Record of Trial Proceedings, p. 61, lines 16 – 18.

kills the victim, the others are also guilty if they had foreseen the possibility that he might act in the way he did and continued in the joint enterprise. They would be guilty whether or not they intended that the victim should be killed.

[41] The law has since changed by the decision in **R v Jogee and Ruddock v The Queen**. In **Jogee and Ruddock** their Lordships re-examined the principle in **Chan Wing Siu** and concluded that the principle was wrong. They determined that foresight of an accessory was not sufficient to establish mens rea. It may be evidence of that intent but it was not automatically equivalent to intent. Instead, the Crown had to prove that the accessory encouraged or assisted the principal offender to commit the crime, and did so with the requisite mental element of the offence. Their Lordships provided very useful guidance on the applicability of the principle as follows:

> "92. In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.
>
> 93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.

> 94. if the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances."

[42] The Court, in delivering the decision in **Jogee and Ruddock**, was alive to the fact that several persons who were convicted at trials where the jury was directed in accordance with the principle in **Chan Wing-Sui** and **R v Powell and R v English**[19] were still serving their sentence. The issue of the effect of the decision in **Jogee and Ruddock** on prior convictions is discussed in their Lordships' judgment at paragraph 100 where Lord Hughes and Lord Toulson stated:

> "The effect of putting the law right is not to render invalid all convictions which were arrived at over many years by faithfully applying the law as laid down in *Chan Wing-Siu* and in *Powell and English.* The error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second, is important as a matter of legal principle, but it does not follow that it will have been important on the facts to the outcome of the trial or to the safety of the conviction."

[43] The issue that arises therefore, given the statements of the Privy Council/Supreme Court in **Jogee and Ruddock** cited above, is whether the conviction of the appellant was safe. It is necessary to consider whether there was evidence that the appellant shared the common intention to kill or cause grievous bodily harm to the victim. In so doing, regard must be had to the evidence that was before the jury, the direction given by the judge and further, the factual findings which the jury would have had to make to arrive at their verdict.

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[19] [1999] 1 AC 1.

[44] The Crown's case was that of joint enterprise with the appellant being the mastermind. The appellant did the organising and he gave the instructions. The appellant's case was a complete denial. In his sworn testimony he denied being a part of any plan to commit any offence and he had no knowledge of a gun. While he admitted going with Oliver and the other co-accused to Belmont on the evening of the incident, he testified that it was Oliver who had rounded up the co-accused and it was also Oliver who went down the track at Belmont with the others while he stayed by the parlour. In other words, generally, the acts which the Crown alleged the appellant did, he testified that they were done by Oliver. The jury heard all the evidence, and by their verdict of guilty of murder it can be concluded that they accepted the evidence of the Crown.

[45] The learned judge directed the jury on every ingredient of the offence of murder[20] and specifically directed the jury that the prosecution had to prove there was an intention to kill. He also directed them in accordance with the principle in **Chan Wing-Siu.** In relation to the appellant, the learned judge directed the jury that: (i) before they can convict him of murder through counselling they must first be sure first that the offence was in fact committed; in other words, that there was no accident; (ii) he counselled the other accused by ordering, advising, encouraging or persuading them to do it; and (iii) the offence of murder was within the scope of what he counselled them to do, that is to enter the house and rob the deceased of ten grand.[21]

[46] Based on the evidence and the direction given to the jury, by their verdict it can be concluded that the jury made the following factual findings: (i) the appellant was part of the plan to rob the deceased; (ii) the appellant provided the gun or at the very least he knew of the gun; (iii) the killing was not accidental; and (iv) the appellant must have foreseen that Kenton would use the gun to kill or cause grievous bodily harm if necessary during the course of the robbery; or in

[20] See Record of Trial Proceedings, p. 7, line 20 to p. 9, line 4.
[21] See Record of Trial Proceedings, p. 13, lines 15 – 22.

other words that it was within the scope of the plan which the appellant counselled and gave his assent and intentional support. It was a question of fact for the jury in all of the circumstances. These were findings which were open to the jury on the evidence of the role played by the appellant.

[47] Having regard to the circumstances of this case, in my view, this was an appropriate case where it can be concluded that the appellant had the necessary conditional intent as illustrated by their Lordships in paragraph 94 of **Jogee and Ruddock** for the use of the gun to kill or cause grievous harm if necessary in the course of the robbery. This was within the scope of the plan to rob to which the appellant agreed and gave his support to the very end. In these circumstances, I am of the view the judge's direction in relation to the mental element of joint enterprise did not occasion a miscarriage of justice.

Ground E – Unbalanced Summation

[48] It is settled law that a judge has a duty to present the case to the jury in an impartial manner. The judge must put the case for both sides fairly. It is impermissible for a judge to give a jury the impression that he favours the prosecution's case over the defendant's case or vice versa. Lord Justice Simon-Brown in **R v Nelson**[22] summarised the judge's duty in this respect in the following manner:

> "Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing-up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities…there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To play a case straight down the middle requires only that a judge gives full and fair weight to the evidence and arguments of each side. The judge is

[22] [1997] Crim LR 234.

not required to top up the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more and no less than that the judge shall fairly state and analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence…"

[49] With these principles in mind, I will consider the complaint of the appellant that the summing up was unbalanced. The appellant complains that the summation was unbalanced because during the summing up, the learned judge made comments which were prejudicial to the appellant's defence. He relied on the cases of **Harewood (Vincent) v R**[23] and **Mears (Byfield) v R**.[24] These cases state the same principle as in **R v Nelson**.

[50] In **Mears**, the Board stated at p. 289:

"…As Lloyd L J observed in *R v Gilbey* (1990) (unreported):

> 'A judge … is not entitled to comment in such a way as to make the summing-up as a whole unbalanced … It cannot be said too often or too strongly that a summing-up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'

Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views. Whether that is what has happened in any particular case is not likely to be an easy decision. Moreover, the board is reluctant to differ from the Court of Appeal in assessing the weight of any misdirections. Here their lordships have to take the summing-up as a whole... and then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at p 615 whether there was –

[23] (1994) 48 WIR 32.
[24] (1993) 42 WIR 284.

> 'Something which…deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.' "

[51] Mr. Hood identified the following as prejudicial comments which made the summing up unbalanced:

(i) The statement by the learned judge that "…there are aspects in those two statements that implicate all of the accused persons."[25] He contended that by so directing the jury, the learned judge led the jury to believe that the co-accused implicated the appellant, thus causing the jury to disbelieve the statements of the co-accused from the dock and the sworn testimony of Kenton which did not implicate the appellant. He posits that the learned judge should have said "there are aspects in these two statements that implicate certain persons". Mr. Nelson, QC, in response, submitted that the statement must be viewed in context. The words were preceded by the words "You may well find…" He argues that in so stating, the judge made the jury aware of the statement and its potential dangers and gave the jury a stern warning against making such a finding.

I agree with the submission of Mr. Nelson, QC. The summing up must be read as a whole. The learned judge, having made the statement, followed with a stern warning to the jury against using the statement of one accused as evidence against another accused. He continued by directing the jury in the following manner: "Now you will observe, or you may recall as the statement was being read, that there was no mention of certain names. Those names were substituted with letters. Object of that exercise was to protect those whose names were called. You must not speculate as to who those persons might be."[26] While Mr. Hood's formulation would have been

[25] See Record of Trial Proceedings, p. 35, lines 21 – 22.
[26] See Record of Trial Proceedings, p. 36, lines 14 – 17.

better, the warning which immediately followed would have removed any possible prejudice which the appellant would have suffered.

(ii) At pages 60 to 61 of the Record of Trial Proceedings, Mr. Hood contends that the learned judge made statements which amounted to "counselling the jury that they should not trust or believe the evidence of persons who have been in custody".

The judge made the statements complained of when dealing with the evidence of the appellant's witness Christopher Noel. When the passages are considered in the context of the summing up, the learned judge was simply directing the jury that when considering the evidence for the appellant, they ought to consider whether the evidence was concocted by the appellant and his witness while in prison. The witness had not given a statement to the police. In my view, this did not rise to the level of counselling a jury not to believe the testimony of persons in custody.

(iii) The learned judge failed to direct the jury as he did for the other accused that if they did not believe the appellant, they should go back to the case for the prosecution and determine whether or not they are satisfied of the appellant's guilt beyond a reasonable doubt.

There is no merit in this submission. While the learned judge did not give such an explicit direction to the jury, as submitted by Mr. Hood, as stated earlier, the summation must be read as a whole. On several occasions during the summation the learned judge directed the jury that it was for the prosecution to prove the guilt of the accused beyond reasonable doubt and further that the accused did not have to prove anything. The jury could not have been left in any doubt that they could only convict the appellant if they were satisfied of his guilt beyond reasonable doubt based on the case for the prosecution.

(iv) The learned judge failed to give the jury a warning of the danger of convicting on the uncorroborated evidence of an accomplice or a person with an interest to serve. Mr. Nelson, QC, in response, pointed out that the learned judge gave an accomplice warning and highlighted the evidence that was relevant to the issue at pages 24, line 24 to page 26, line 7. He also relied on the case of **Attorney General of Hong Kong v Wong Muk-ping**.[27]

As the learned Director of Public Prosecutions correctly pointed out, the learned judge gave the jury an accomplice warning, he directed the jury to evidence which they may consider to amount to corroboration but directed them that such evidence did not amount to corroboration and further he directed the jury that there was no evidence which corroborated the testimony of Oliver.

The learned judge highlighted the evidence of the appellant's lie to the police in another matter to the prejudice of the appellant[28] while the learned judge sought to minimize the lies of the prosecution witness Oliver rather than instruct the jury to disregard his evidence. The Director of Public Prosecutions, in response, submitted that since the credibility of the appellant was in issue, the learned judge was therefore correct to draw the jury's attention to the previous lie of the appellant. More so, it was only a passing comment which could not outweigh the detailed summation of the judge. When viewed in the round, the summation was balanced and it was tailored to suit the issues in the case and the arguments on both sides. He relied on the case of **R v Lawrence**.[29]

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[27] [1987] 2 All ER 488.
[28] See Record of Trial Proceedings, p. 59, lines 6 -13.
[29] [1982] AC 570.

> Quite rightly, Mr. Hood made no contention for a **Lucas**[30] direction. This is not a case where the prosecution was relying on lies by the appellant to support the evidence of guilt. Rather, they relied on the lie merely to reflect negatively on the appellant's credibility. The learned judge referred to it purely in that context. Contrary to the submission of Mr. Hood, the learned judge directed the jury that Oliver's credibility was paramount in the case and reminded them of the long pauses he gave before he answered questions under cross-examination, his evasive answers, the inconsistencies in his testimony and specifically the lie he told to the police.[31] The learned judge specifically reminded the jury to take the lie into account when considering the credibility of Oliver.[32]

[52] Having reviewed the summing up as a whole, I am of the view that the judge gave a balanced summing up. I can see no basis for the criticisms of learned counsel of the summing up. The appellant was not deprived of the substance of a fair trial. The judge reminded the jury of the salient features of the evidence for both sides in an even-handed way. This ground of appeal fails.

Ground F – Admissibility of Opinion of Expert Witness

[53] At the trial, the prosecution called Professor Lazaro Vigoa, a pathologist. He testified that he was qualified as a pathologist 34 years ago and has been employed with the government of Grenada as Chief Pathologist for 3 ½ years. He was deemed an expert without objection from the appellant or any of the other co-accused. During his examination-in-chief, he testified as follows: 'Also, I found a powder mark on the dorsal side of the hand. Powder marks means this anatomical area was close to the muzzle of the gun. When the gun shoots

[30] R v Lucas [1981] 2 All ER 1008.
[31] See Record of Trial Proceedings, p. 26.
[32] See Record of Trial Proceedings, p. 30.

there is an area, depending on the type of the gun, small fragments of the powder will escape'.[33]

[54] Professor Vigoa continued:

> "The second cause of death was the gunshot wound in the right upper breast region. The muzzle of the gun was from up to down and it was close to the hand with the powder mark, like the person tried to defend. There was no powder mark to the chest. The hand was closer to the mouth of the gun than the entrance. Always coming from up to down. The deceased was in a lower position than the gun."[34]

[55] Professor Vigoa was not cross-examined by Mr. Hood. He was cross-examined by Mr. Sylvester on behalf of the No. 1 accused. In answer to Mr. Sylvester, Professor Vigoa testified:

> "The powder mark was on the dorsal area of the right hand. I examined both hands. There was no powder on the left hand. The position of the hand was close to the muzzle of the gun. The powder is normally exhibited when a bullet was fired off. If muzzle held the powder would be in the palm but not at the top. The powder comes from around the muzzle."

[56] During the summation, the learned judge in dealing with the evidence of Professor Vigoa directed the jury as follows:

> "His second observation was a powder mark to the dorsal side or back of the right hand. Garvin said his mother was right handed. The Professor explained that the back of the hand would have been close to the muzzle of the gun as when the gun is fired, small fragments of powder escaped from the muzzle or the mouth of the gun. You'll recall that that corresponds to the evidence that was given by Cpl Merrit Jones who gave evidence on behalf of the No. 1 accused Kenton Phillip. It was further explained by Professor Vigoa that the powder mark on the hand was as if the deceased was trying to defend herself. You can take this into consideration in determining what transpired in that room. He said the right hand was not holding the barrel in the palm".

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[33] See Record of Trial Proceedings, p. 115, lines 10 -14.

[34] See Record of Trial Proceedings, p.116, lines 7 – 13.

[57] The appellant complains that the learned judge erred in admitting the opinion evidence since the opinion was on a matter which was outside of the witness' area of expertise. The evidence being inadmissible, the learned judge erred further when he directed the jury to take it into account. He also argued that the evidence was prejudicial to the appellant since it was in conflict with the principal accused defence of accident.

Discussion

[58] The general rule is that opinion evidence can only be given by a person who has the necessary qualification and experience to form and express a view on the particular issue in question. The English Court of Appeal, at page 166, explained the rationale for this principle in **R v Robb (Robert McCheyne)**[35] in the following manner:

> "...We are alive to the risk that if in a criminal case, the Crown are permitted to call an expert witness of some tenuous qualification the burden of proof may imperceptibly shift and a burden be cast on the defendant to rebut a case which should never have been before the jury at all. A defendant cannot fairly be asked to meet evidence of opinion given by a quack, a charlatan or an enthusiastic amateur…"

[59] While the court must always be alive to ensure that only experts in the field should be allowed to give an expert opinion on such matters, it has long been recognised that experience and knowledge in the area would be sufficient to make the evidence admissible even though the witness has no formal qualification in the area. In **The State of Trinidad and Tobago v Boyce**,[36] the Privy Council emphasised the need for the court to not only concentrate on whether the witness had formal qualification but also to consider whether by reason of his knowledge and experience he would be able to assist the jury on the issue. This principle is illustrated in **Myers v R**[37] where the Privy Council determined that a police officer who had studied the practices of gangs in

[35] (1991) 93 Cr. App. R. 161.
[36] [2006] UKPC 1.
[37] [2015] UKPC 40.

Bermuda and gang culture, and had received training on gang monitoring from the FBI, could give expert evidence on the practices of gangs in Bermuda.

[60] Applying the above principle, while Professor Vigoa was a pathologist and was not deemed a ballistic expert, as a result of his experience of over 34 years in the field of pathology, and there being no objection to the evidence of Professor Vigoa by the appellant, the learned judge was entitled to admit the evidence. Professor Vigoa cannot, in the words of Bingham LJ in **R v Robb (Robert McCheyne)**, be considered to be 'a quack, a charlatan or an enthusiastic amateur'. The jury had seen Professor Vigoa give evidence both in examination-in-chief and under cross-examination and they would have taken both his formal qualification and experience into account when evaluating the weight of his evidence. Additionally, the learned judge's direction to the jury on how to treat with the expert opinion of Professor Vigoa[38] is in keeping with the current legal position; that is, that as the arbiter of facts, the jury is not bound by an expert's opinion and is entitled to reject the expert's evidence and draw their own conclusions having regard to the totality of the circumstances.[39] It is clear, from the jury's verdict, that they accepted Professor Vigoa's evidence.

[61] Furthermore, Professor Vigoa, in his evidence, indicated that he conducted an external and internal examination on the body of Omelia Roberts. During his internal examination, he was able to trace the trajectory of the bullet throughout the body, which he stated entered the right side and went downwards to the left side through soft tissue. He stated that the angle was tangential-oblique and that the muzzle of the gun was from 'up to down'.[40] During his external examination, Professor Vigoa observed gunpowder only on the back of the right hand which he explained would happen as a result of the said hand being close to muzzle of the gun. Based on the foregoing, he stated that it appears as though the deceased tried to defend herself. This certainly does not lend any

[38] See Record of Trial Proceedings, p. 20, lines 11 – 24.
[39] See R v Hodge (2010) 77 WIR 247.
[40] See Record of Trial Proceedings, p. 116, line 9.

credence to the contention that this unfortunate ordeal was an accident. The appellant has argued that this evidence was outside the scope of the pathologist's expertise thus requiring a ballistic expert. However, in my view, Professor Vigoa, having conducted the post-mortem examination, gave evidence which, in his expert opinion, was consistent with his finding that 'the deceased was in a lower position than the gun'.[41] This was within his purview as a pathologist. Accordingly, there is no merit in the contention that the evidence of Professor Vigoa was not within the limits of his expertise as a pathologist. In view of the above, this ground also fails.

Ground G - Circumstantial Evidence

[62] Mr. Hood contends that the case against the appellant was entirely circumstantial and that the learned judge failed to adequately direct the jury on circumstantial evidence.

[63] There is no merit in this submission. As the learned Director of Public Prosecutions pointed out in his submissions, there was no duty on the learned judge to give the jury special directions on circumstantial evidence. This was made very clear by the House of Lords in **McGreevy v Director of Public Prosecutions**[42] where Lord Morris in delivering the opinion of the House stated at p. 510 that:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn."

[64] The learned judge did direct the jury on the drawing of inferences. At page 7 he stated:

> "Now you will be called upon to draw inferences from the evidence that you find to amount to facts. You must draw inferences from those facts

[41] See Record of Trial Proceedings, p. 116 line 13.
[42] [1973] 1 All ER 503.

> that you accept to be the truth. If from any given set of facts in the evidence which you accept you can with equal reason draw two or more inferences you must draw that inference that is favourable to the accused."[43]

Those directions were adequate in assisting the jury in drawing inferences.

[65] It was the duty of the learned judge to make clear to the jury that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. On several occasions throughout the summation, the learned judge directed the jury that the prosecution was required to prove the case beyond reasonable doubt. He outlined in detail the evidence on which the prosecution relied to prove its case against the appellant. This ground of appeal also fails.

Ground H - Sentence is Excessive

[66] Mr. Hood contends that in sentencing the appellant to 80 years' imprisonment, the learned judge erred in several respects being: (a) the sentence of eighty years was manifestly excessive as it was in effect a natural life sentence; (b) the sentence was based on an erroneous conclusion of fact and failed to take into account certain mitigating factors; and (c) the learned judge failed to give credit for the time the appellant spent on remand.

[67] At the very outset of his submissions, the learned Director of Public Prosecutions conceded that the sentence of 80 years was manifestly excessive. He submitted that having regard to the degree of culpability of the appellant, he being the mastermind of the offence, he should not receive a sentence less that the sentence received by Kenton who inflicted the fatal wound and who was sentenced to life imprisonment.

[68] In view of the concession of the learned Director of Public Prosecutions and rightly so in my opinion, since the learned judge erred in principle in sentencing

[43] See Record of Trial Proceedings, p. 7 lines 1 – 5.

the appellant, the arguments of Mr. Hood in relation to (a) and (b) fall away. This leaves the following issues to be determined: (i) whether the learned judge erred in failing to give credit for the time spent on remand and (ii) what would be an appropriate sentence.

Time spent on remand

[69] Mr. Hood complains that the learned judge erred in sentencing the appellant when she failed to take into account the time the appellant spent on remand and treated the period as punishment, the appellant having escaped lawful custody. In support of his contention, Mr. Hood referred the Court to the following passages in the judgment on sentencing at page 90, lines 15 – 18 of the Record of Proceedings:

> "There are authorities that provide that the length of his prison sentence should be reduced by the period spent on remand. I do not think this is applicable to the case at bar in the light of the circumstances of this case, the convict having absconded after being remanded at Her Majesty's Prisons."

Learned counsel also referred to page 92, line 16 where the learned judge states: "And to avoid any doubt, the sentence is to begin from today's date".

Discussion

[70] It cannot be disputed that the learned judge did not give the appellant credit for time spent on remand. The general principle is that credit must be given for the time spent on remand in determining the period of sentence to be served by a convicted person. This issue was considered by the Privy Council in **Callachand v R**[44] and by the Caribbean Court of Justice in **Romeo Da Costa Hall v R**.[45] In **Callachand v R,** Sir Paul Kennedy in delivering the decision of the Board stated the principle at paragraph 9 as follows:

> "In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent

[44] [2008] UKPC 49.
[45] [2011] CCJ 6 (AJ).

> in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing."

[71] In **Romeo Da Costa Hall,** the Court addressed the issue at paragraph 26 as follows:

> "…The judge should state with emphasis and clarity what he or she considers to be the appropriate sentence taking into account the gravity of the offence and all mitigating and aggravating factors, that being the sentence he would have passed but for the time spent by the prisoner on remand. The primary rule is that the judge should grant substantially full credit for time spent on remand in terms of years or months and must state his reasons for not granting a full deduction or no deduction at all…"

[72] In considering this issue, it is necessary to give a brief outline of the facts relevant to this issue since this is not a straight forward case of a convicted person spending time in custody prior to his conviction.

[73] The appellant was in custody following his arrest on 16th October 2002 until 8th April 2004, the day after he was convicted and when he escaped from custody. He was subsequently apprehended in Saint Vincent and the Grenadines in April 2004. He was charged with certain criminal offences alleged to have been committed in Saint Vincent and the Grenadines. He was convicted of said offences but his conviction was overturned on appeal and a nolle prosequi was subsequently entered. Following this, he was returned to Grenada in November 2015. During the entire period of April 2004 to November 2015 the appellant was in custody in Saint Vincent and the Grenadines until he was returned to Grenada.

[74] Mr. Hood submitted that there were three periods of remand for which credit should be given. Firstly, the period between the appellant's arrest and conviction, secondly the period between when a deportation order was made and when he was charged in Saint Vincent and The Grenadines, and thirdly

from the date he was charged to the date of his return to Grenada and was sentenced.

[75] In relation to the first period that is custody prior to conviction that is from 16th October 2002 to 7th April 2004, the learned Director of Public Prosecutions agreed that credit should be given for this period in keeping with the principle in **Callachand** and **Romeo Da Costa Hall**. What is in contention is the time spent in custody in Saint Vincent and the Grenadines. In my view, Mr. Hood's contention is wholly unmeritorious. The appellant fled the state of Grenada to evade justice. His time in custody in Saint Vincent and the Grenadines, while very lengthy, was unrelated to the offence of murder in Grenada for which he was convicted. The appellant cannot rely on his unlawful act of escaping custody which subsequently led to the events in Saint Vincent and the Grenadines to gain a benefit for time spent in custody there. A similar situation arose in the case of **Gomes v The State of Trinidad and Tobago**[46] where the appellant, while on bail, left the State of Trinidad and Tobago and his whereabouts were unknown for several years. He was eventually apprehended in the United Kingdom. He resisted being extradited and was held in custody during the extradition process. He was extradited, tried and convicted. In sentencing him, the learned judge refused to give credit for the time spent in custody in the UK pending his extradition. In upholding the judge's decision, the Board referred to the decision of the English Court of Appeal in **R v Noye (Kenneth James)**[47] where Lord Judge CJ stated:

> "As it seems to us, if this discretion may be exercised in such a way as to refuse to make any allowance for the time spent in custody abroad pending extradition -- and plainly the statutory language underlines that it can -- it would fall to be exercised where a defendant deliberately fled this country in a well-organized, sophisticated plan to evade justice here; successfully evaded justice for some time by staying abroad; when eventually brought before the courts abroad with a view to extradition, contested the extradition proceedings every inch of the way, and, what is more, put up a totally false story in order to evade

[46] [2015] UKPC 8.
[47] [2013] EWCA Crim 510.

extradition followed by as we have indicated, an unsuccessful appeal against the order."

[76] The appellant is also not entitled to any credit for the period he spent in custody between the date of his return to Grenada and the date he was sentenced by the learned judge being from November 2015 to 11th March 2016. The reason is that, on his return to Grenada, the appellant was convicted for escaping custody and sentenced to 15 months imprisonment. That period did not expire on 11th March 2016 when the appellant was sentenced. Mr. Hood quite rightly did not seek to persuade us in his oral submissions that the appellant should be given credit for this period.

Appropriate Sentence

[77] Having determined earlier that the sentence of 80 years was manifestly excessive, in view of the time that has elapsed since the appellant was convicted, I am of the opinion that it would not be appropriate to remit the matter to the High Court for sentence and this Court should impose an appropriate sentence

[78] The maximum period of sentence the appellant could receive is life imprisonment.

[79] In sentencing, a court should always seek to impose an appropriate sentence that meets the justice of the case. In determining what is an appropriate and just sentence, a court is required to embark on a multi-tier process. It is important that the stages are clearly identified to ensure that the relevant factors are taken into consideration at the appropriate stage of the process and to avoid double counting.

[80] The first stage of that process is to identify a starting point or what is often referred to 'as a notional sentence'. This is established by the court conducting an evaluation of the aggravating and mitigating factors of the offence.

[81] The aggravating factors of the offence are:

(i) there were multiple assailants involved in the commission of the offence. There was little chance of the deceased escaping;.

(ii) the underlying offence was an offence for gain, that being robbery;

(iii) there was the use of a weapon, being a gun;

(iv) the invasion of the home of the deceased during the night after she and her children had retired to bed;

(v) the killing took place in the presence of family members. Her daughter was in the same bed, while her sons were in the living room; and

(vi) this was a carefully planned and executed crime. The appellant and his co-accused travelled several miles from the capital to Belmont in the dead of night to commit the offence.

[82] There are no mitigating factors in relation to the offence.

[83] The aggravating factors in my view make the level of seriousness of this offence very grave. Mr. Hood submits that the starting point should be 15 years. In my view, that is far too low having regard to the number and nature of the aggravating factors and there being no mitigating factors. In my view, the appropriate starting point is thirty-five years.

[84] The next stage in the process is to consider the circumstances of the offender. A social inquiry report was submitted in relation to the appellant. It does not show anything unusual about the appellant upbringing. The appellant is a very intelligent gentleman. He was successful at the Common Entrance Examination

and gained a place at the prestigious Grenada Boys Secondary School. He continued his secondary education with his mother in Trinidad and Tobago where he was successful in six subjects at the Caribbean Examination Council. Additionally, he acquired training in technical drawing and construction. Members of his family testified that he was a very loving and caring person. Some members of the community gave an opposite view; that he was violent and feared by residents.

[85] The appellant has a previous conviction for the offence of grievous bodily harm. Furthermore, his level of involvement in the commission of the offence was very high. The appellant was the intellectual author of the crime. He planned the crime and supervised its execution; he gave the instructions and his co-accused, who were younger, followed.

[86] The report shows that the prison authorities in Saint Vincent and the Grenadines where the appellant spent approximately thirteen years have expressed the opinion that the appellant, while in custody, had become cooperative. He began attending church services and has shown improvement in his conduct. This, in my view, is an indication that there is prospect for rehabilitation of the appellant. However in view of the multiple aggravating factors, an upward adjustment in the period is warranted. I would therefore increase the starting point of thirty-five years by a further five years bringing the period to forty years.

[87] As stated earlier the appellant is entitled to full credit for the time spent on remand in pre-trial custody from 16th October 2002 to 7th April 2004 which amounted to one year, five months and twenty-two days. The period of sentence imposed is therefore thirty-eight years, six months and nine days.

Conclusion

[88] For the reasons stated above, the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that the sentence of eighty

years imprisonment imposed by the learned judge is set aside and in its place is substituted a sentence of thirty-eight years, six months and nine days. The sentence shall run from the date of sentence by the learned judge being 11th March, 2016.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur
Paul Webster
Justice of Appeal

By the Court

Chief Registrar