

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCRA2016/0008

BETWEEN:

OMARI PHILLIP

Appellant

and

THE KING

Respondent

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mr. Trevor M. Ward
The Hon. Mde. Esco L. Henry

Justice of Appeal
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Lawrence Daniels for the Appellant.
Ms. Rilys Adams for the Respondent.

2024: September 30;
November 13.

Criminal Appeal – Appeal against conviction and sentence – Murder – Trial – Adverse publicity during the course of a trial – The impact of adverse media coverage on the fairness of a trial – Whether the conviction is unsafe or unsatisfactory due to the alleged failure on the part of the judge to declare a mistrial – Judge’s summing-up - Directions to the jury – Directions on the defence of alibi – Whether the judge failed to adequately put the defence of alibi to the jury – Joint enterprise – Secondary party or accessory to a joint enterprise – Liability of a secondary party to a joint enterprise – R v Jogee and Ruddock v R – Directions on the mens rea required by a secondary party – Whether the judge directed the jury to consider the scope of the common purpose and specifically whether a common intention extended to the use of lethal force if the circumstances arose, with intention to kill or cause grievous bodily harm – Directions to the jury on identification evidence - Whether identification was a live issue and the judge ought to have directed the jury on the failure of authorities to conduct an identification parade – Directions on the alternative verdict to the lesser offence of manslaughter – Whether the judge’s directions on manslaughter were adequate and capable of negating the requisite intention for murder - Sentencing – Manslaughter – Section 5 of the Offences Against

the Person Act Cap 300 – Time spent on remand – The judge’s sentencing power to give credit for time spent on remand by way of arithmetical deduction

On 20th May 2016, Omari Phillips (the “appellant”) and his co-defendant, Timorie Elliott (“Elliott”) were unanimously convicted for the murder of Dorothy Prince. The case for the prosecution was that four men, two of whom were armed with guns, robbed Dee’s Service Station (“the service station”) on Old Parham Road, Saint John’s, Antigua. During the robbery, Dorothy Prince, an attendant at the service station, was shot and killed. The sole evidence identifying the appellant as one of the robbers came from Gideon Jackson (“Jackson”), an accomplice who drove the car which the robbers used in the execution of the robbery.

Jackson testified that he saw Dion Thomas (“Thomas”) on 17th February around 3:00 pm who told him about a robbery planned later in the evening. Jackson subsequently rented a Nissan Almera, then picked up the appellant and Thomas at Wireless Road. Shortly after 9:00 pm, Jackson, being directed by the appellant, reversed into an alley north of Wheels Supermarket. There, Thomas, the appellant and Elliott entered the vehicle. Jackson followed the appellant’s directions to reach the service station and as they drew near to that location, Thomas, the appellant and Elliott covered their faces; the appellant in particular, covered his face with a make-shift mask. Upon reaching the service station, the appellant and Thomas each drew a firearm from the knapsacks they were carrying. Thomas, Dion and Elliott then exited the vehicle. The appellant and Thomas in particular, accosted Dorothy Prince and Teress King, pointing their firearms at them. Jackson said that he heard an explosion which he believed to be a gunshot. It was common ground at the trial that Thomas was the person who shot Dorothy Prince. Thereafter, the appellant retrieved two pouches containing cash and returned to the vehicle followed by Thomas. Elliott was already seated in the vehicle by then. The appellant started to argue with Thomas, using expletives and questioned why Thomas had shot Ms. Prince. Jackson then drove to the appellant’s house where the loot was counted and divided among them.

The appellant’s case on the other hand was that he did not know his co-defendants and was not present at the robbery since he was at home all day and had slept through the night. His brother was called in support of his alibi.

It is significant to note that during the course of the trial, an article was published in the Observer Newspaper under a headline which read: “Officer testifies finding clothes worn by one defendant during the killing” (“the Observer article”). Counsel for the appellant first raised the publication of the Observer article, in the absence of the jury. Counsel’s complaint was that the article was most prejudicial, unfair and patently false and he called on the judge to declare a mistrial. However, the judge did not accede to his request and the trial proceeded.

The jury returned guilty verdicts for the offence of murder in respect of Elliot and the appellant. The appellant was sentenced to a term of 25 years imprisonment, with a review after 18 years. The appellant, dissatisfied with his conviction and sentence, appealed to this Court advancing 6 grounds of appeal from which the following issues could be culled: (i) whether the conviction is unsafe or unsatisfactory on account of the alleged failure on the part of the learned judge: (a) to declare a mistrial; (b) to put the appellant’s case adequately and fairly; (c) to properly direct the jury on the *mens rea* of an accessory; and (d) to give directions or adequate directions on the alternative verdict of manslaughter; and (ii) whether the trial was generally unfair.

Held: substituting the verdict of manslaughter for the verdict of guilty of murder, setting aside the sentence of 25 years and substituting a sentence of six years, five months and 23 days, that:

1. Oftentimes during the course of a criminal trial, prejudicial information is revealed to the jury. One such example is where there is adverse publicity in relation to a defendant during the trial. When this occurs, the trial judge must decide whether the defendant can nonetheless have a fair trial. If, however, the impact of adverse media coverage on the fairness of the trial cannot be cured even by robust directions, the judge must declare a mistrial. If he does not do so, any guilty verdict returned by the jury may be rendered unsafe. In relation to the judge's refusal to declare a mistrial on account of the publication of the Observer article, this Court was of the view that the Observer article did not begin to approximate the extent and degree of adverse publicity that would warrant the discharge of the jury. The Observer article was a one-off article which contained an inaccurate report which did not align with the evidence of the police constable at trial, who spoke to the items retrieved from the appellant's home. Additionally, and imperatively, the judge accurately and adequately directed the jury on what the actual evidence in the case was as it related to finding clothes at the appellant's home. Also, the judge adequately directed the jury to disregard anything they may have heard on the outside about the case including the Observer article, and to decide the case only on the evidence presented in the courtroom. These directions were sufficiently robust to have cured any potential risk of prejudice. Accordingly, there was no basis for faulting the judge's exercise of discretion to proceed with the trial.

Bennet v R [2018] CCJ 29 (AJ) followed; **Hyles v Director of Public Prosecutions**; **Williams v Director of Public Prosecutions** [2018] CCJ 12 (AJ) followed; **R v McCann (John Paul)** (1991) 92 Cr. App. R. 239 followed; **R v Taylor and another** (1994) 98 Cr. App. R 361 followed; **Boodram v The State** (1997) 53 WIR 352 followed; **Director of Public Prosecutions v Jaikaran Tokai** (1996) 48 WIR 376 followed.

2. The contention that the judge failed to adequately put the appellant's defence of alibi is completely untenable. The judge's directions adequately conveyed to the jury that: the appellant's defence was alibi; the appellant did not have to prove the alibi; it was for the prosecution to disprove it; and that even if they thought that the alibi was untrue, they could only convict if the prosecution satisfied them of the appellant's guilt beyond a reasonable doubt. Thereafter, the judge carefully rehearsed the evidence of the appellant's brother in support of his (the appellant's) defence of alibi, and the judge also read out the contents of the appellant's unsworn statement. In relation to counsel for the appellant's reference to a statement made by the DPP in the absence of the jury which in counsel's view suggested that the prosecution was not relying on the evidence of Jackson to place the appellant on the scene of the crime, the Court found that whatever the DPP said to the judge formed no part of the judge's directions on alibi and cannot be used to assess whether the judge put the defence of alibi properly. Furthermore, counsel for the appellant's interpretation of the DPP's statement was plainly flawed, as it was not viewed in the full context of the matter under discussion when it was made.

3. **R v Jogee** and **Ruddock v R** set the law right on the principles governing the liability of a secondary party to a joint enterprise. There are two critical questions to be answered: first, whether the defendant was in fact a participant, that is, whether the defendant assisted or encouraged the commission of the crime; and second, if the crime requires a particular intent, the secondary party must intend to assist his co-defendant to act with such intent. Accordingly, in the present case, the relevant questions for the jury to determine in relation to the appellant's role in the joint enterprise, were whether the appellant was in fact a participant in the commission of the crime and more critically, whether he shared a common intention to rob the service station as well as the intention to kill if necessary to facilitate the robbery as part of the joint enterprise, or to assist or encourage Thomas to act with such intention. It was therefore incumbent upon the judge to direct the jury to consider the scope of the common purpose and specifically whether a common intention extended to the use of lethal force if the circumstances arose, with intention to kill or cause grievous bodily harm. However, in the present case, taking the judge's directions to the jury at its most expansive, the judge directed that "the mental element of the secondary party is the intention to assist or encourage a person who murdered Dorothy Prince to carry out the killing." The six subsequent directions given by the judge with respect to the issue of "assisting or encouraging" did not mention that the intention must be to assist or encourage the principal to act with the intention to kill or cause grievous bodily harm.

R v Jogee [2016] UKSC 8 followed; **Ruddock v R** [2016] UKPC 7 followed; **Bastian v The King** [2024] UKPC 14 followed; **R v Smith (Wesley)** [1963] 1 WLR 1200 followed.

4. More so, the aforesaid six directions carry the danger of leaving the jury with the erroneous impression that the mere presence of the appellant might be taken as evidence of him intentionally assisting or encouraging Thomas in the murder of Dorothy Prince, or that once they were satisfied that the appellant was assisting or encouraging Thomas in the commission of the robbery then that would suffice to find him guilty of murder. Importantly, the judge's failure to direct the jury properly on this issue, assumes greater significance when considering Jackson's evidence of the heated words the appellant directed at Thomas after they returned to the vehicle. This evidence was relevant to the issue of the appellant's intention. Viewing the summing up as a whole, the Court concludes that the judge's directions on the *mens rea* required by a secondary party were defective and rendered the murder conviction unsafe.
5. The appellant's assertion that identification was a live issue such that the judge ought to have directed the jury on the failure of the relevant authorities to conduct an identification parade, is misconceived. The evidence implicating the appellant in the commission of the offence came from Jackson; none of the persons present at the service station could have identified any of the perpetrators, which was not surprising as the evidence showed that they had taken steps to conceal their identities. No useful purpose would have been served by asking Jackson to attend an identification parade to identify the appellant whom he said he knew for two to three years prior to the incident and

whom he said was part of the planning and execution of the robbery. Jackson would have naturally picked out the appellant on the ID parade. For avoidance of doubt, the appellant's case was not one of mistaken identity; rather the contention was that Jackson was deliberately and falsely implicating the appellant in the commission of the offence. It follows that, the issue before the court was one of credibility and this Court was of the view that the jury were adequately directed in relation to the matters that they should consider when assessing Jackson's credibility. Therefore, the summation on this point was proper and fair and the judge did not err in failing to direct on the failure to hold an identification parade.

Goldson & McGlashan v The Queen [2000] UKPC 9 applied.

6. A trial judge has to be alive as to whether, on the evidence, it is necessary to leave to the jury the option of returning an alternative verdict to a lesser offence. This Court did not agree with counsel for the appellant that the judge failed to leave the alternative verdict of manslaughter to the jury. In fact, the direction as formulated was sufficient to convey to the jury that for the appellant to be guilty of manslaughter they had to be sure that the appellant lacked the *mens rea* for murder, or be in doubt as to whether he did, and that the appellant intentionally participated in the robbery in the course of which Ms. Prince's death was caused and a reasonable person would have realised that, in the course of the robbery, some physical harm might be caused to some person. Notwithstanding the foregoing, the Court agreed with counsel for the appellant that the judge failed to relate the aforesaid direction to the evidence on which the issue of manslaughter arose. **R v Coutts** [2006] UKHL 39 followed.
7. Nonetheless, on the facts which they must have accepted, there was cogent evidence for a reasonable jury to have found that a reasonable person would have realised that the appellant intentionally participated in the robbery and in the course of that robbery, some physical harm might be caused to some person, given the presence of loaded firearms carried to the scene of the robbery. Therefore, the evidence properly supports a conviction for manslaughter which this Court is empowered to impose in substitution for the conviction of murder.

Section 40(2) of the **Eastern Caribbean Supreme Court Act** Cap 143 of the Revised Laws of Antigua and Barbuda applied.

8. The Court finally addressed the question of the appropriate sentence to be applied for the substituted verdict of manslaughter. First, the Court considered the legislative regime, which prescribes a maximum sentence of 35 years imprisonment for manslaughter. The Court determined that 18 years imprisonment was an appropriate starting point having regard to the following factors in relation to the offence: (1) the death of Ms. Prince was caused in the course of committing a pre-meditated and unlawful offence of robbery; (2) the appellant and one of his accomplices carried firearms during the commission of the robbery; (3) there were other persons present at the service station who were put at risk of being seriously harmed; and (4) the appellant played a leading role in the venture, as he was intricately involved in the planning of the robbery

and consequently, he must shoulder a high degree of culpability. The Court then turned to whether there were any aggravating or mitigating factors in relation to the appellant himself. While the Court did not identify any mitigating factors in the appellant's favour, the Court noted that the appellant had a previous conviction for wounding, which in the court's view was an aggravating factor warranting an increase in the sentence to 19 years imprisonment.

Section 5 of the **Offences Against the Person Act** Cap 300 of the Revised Laws of Antigua and Barbuda considered.

9. Lastly, and consistent with the jurisprudence of the Eastern Caribbean Supreme Court, any time the defendant spent 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. The Court noted the Criminal Procedure Act which empowers the Superintendent of Prisons to credit the time spent on remand as part of the sentence imposed by a Court. However, this power did not absolve the judge of his or her own responsibility to transparently explain during the sentencing exercise how they have treated with time in custody. Based on the information furnished to this Court, as at today's date the appellant spent an initial period of 297 days on remand from 28th February 2012 to 21st December 2012. He was further remanded to prison on 5th April 2013 where he has remained to date. The prison authorities have already deducted the 297 days he had been initially remanded. This means that he has spent four thousand, six hundred and four days (4604) or twelve years, seven months and seven days in custody from 5th April 2013 to the present. The appellant must be credited for this period.
10. Accordingly, it should be clearly understood that the appropriate sentence the Court would have imposed on the appellant for manslaughter would have been 19 years imprisonment, but as he has already served four thousand, six hundred and four days (4604) or twelve years, seven months and seven days in custody that period is deducted, so that the sentence passed is six years, five months and 23 days.

Offences Against the Person Act Cap 300 of the Revised Laws of Antigua and Barbuda considered; **Shonovia Thomas v The Queen** HCRAP2010/006 (delivered 27th August 2011, unreported) followed; **Callachand & Anor v State of Mauritius** [2008] UKPC 49 followed; **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) followed.

JUDGMENT

- [1] **WARD JA:** On 20th May 2016, a jury unanimously convicted Omari Phillip ("the appellant") and his co-defendant, Timorie Elliott, ("Elliott") for the murder of Dorothy Prince. Dion Thomas, ("Thomas") who had also been charged with the

murder, died before the trial. On 2nd December 2016, he was sentenced to a term of 25 years imprisonment, with a review after 18 years.

- [2] The prosecution's case was that sometime after 9:00 p.m. on 17th February 2012, four men, two of whom were armed with guns, robbed Dee's Service Station ("the service station") on Old Parham Road, Saint John's, Antigua. During the robbery Dorothy Prince, an attendant, was shot and killed. It is not in dispute that Thomas was the person who shot her. The sole evidence identifying the appellant as one of the robbers came from Gideon Jackson, ("Jackson") an accomplice and serving police officer at the time. He drove the car which the robbers used in the execution of the robbery.
- [3] According to Jackson's evidence, at about 3:00 p.m. that afternoon he saw Dion Thomas walking along a road in the Piggotts area. Thomas signalled him to stop and told him about a "move" that was being planned for later that evening. That "move" was the robbery. Jackson called a friend and made arrangements to rent a Nissa Almera vehicle ("the Almera" or "the vehicle"). He later met up with Thomas and the appellant at Wirelesss Road. The appellant told him that they should proceed to his house to collect a roll of tint for the vehicle. After the appellant retrieved the tint, Thomas instructed him to drive to Pares where Thomas' friend would tint the vehicle. The tinting of the vehicle was completed at about 8:00 p.m. Jackson dropped off Thomas and the appellant at Wireless Road and proceeded to his home.
- [4] Shortly after 9:00 p.m. Jackson drove the Almera to Wireless Road, from where he placed a call to Thomas. The appellant answered the call and instructed him to reverse into an alley north of Wheels Supermarket. He did as directed. The appellant, Thomas and Elliott then entered the vehicle. The appellant sat in the front left passenger seat, with Thomas and Elliott in the rear seat. The appellant then directed Jackson on the route he should take to get to the service station. En route to the gas station, they made a stop along a road where they removed the vehicle's number plates before continuing to the service station.

- [5] As they drew near to the service station, the appellant and Thomas covered their faces with make-shift masks; Elliot wore a hooded jacket. On Thomas' instructions, Jackson pulled up between the pumps at the service station. Just then, the appellant and Thomas each drew a firearm from knapsacks they were carrying. Without anything being said, the appellant, Thomas and Elliott exited the vehicle and confronted the service station attendants on duty. Elliott approached Kerian Gunthropes from behind, tugging at a pouch slung over her shoulders which contained cash from sales. She looked around and realised that the person tugging at her pouch was masked. On the prosecution's case, this person was Elliott. In a panic, she threw the pouch at him and fled the compound.
- [6] Meanwhile, the appellant and Thomas accosted Teress King and Dorothy Prince, who were at the other pumps. Jackson testified that he observed Thomas and the appellant pointing their weapons at the gas attendants and then he heard an explosion which he believed to be a gunshot. Garfield Brown, a customer who was returning to the pump to pay for his gas, testified that as he did so, he saw Teress and Dorothy Prince "scrambling" when a tall individual with his face fully covered raised his arm, in which he held a shiny object, pointed it in the direction of the pump attendants and discharged a shot. The appellant retrieved two pouches containing cash which they had relieved the attendants of and returned to the vehicle followed by Thomas. Elliott was already seated in the vehicle by then.
- [7] Jackson further testified that after they drove off, the appellant started to argue with Dion saying, "what the fuck you do that for?" Dion [Thomas] didn't reply."¹ Under cross-examination, Jackson had testified that in his conversations with the appellant and Thomas he did not get the impression that anyone would be hurt. They proceed to the appellant's house where the loot was counted and divided among them.

¹ Record of Appeal Volume II, p. 467, lines 3 – 5.

- [8] The prosecution's case against the appellant was put on the footing, and the judge directed the jury, that he was liable as a secondary party to a joint enterprise. Since none of the attendants or other persons present at the service station was able to identify any of the perpetrators of the robbery, the prosecution's case against the appellant rested on the evidence of the accomplice, Jackson.
- [9] The appellant made an unsworn statement, in essence saying that he did not know his co-defendants and was not present at the robbery since he was at home all day doing household chores and had slept through the night. He called his brother in support of his alibi.
- [10] The appellant appeals his conviction and sentence on the following grounds:
- (i) The appellant's sentence is harsh and excessive.
 - (ii) The conviction is unsafe and unsatisfactory (where the learned trial judge refused to declare a mistrial after the press falsely reported in a national newspaper that "the clothes worn during the robbery was found at the defendant's house" and no such evidence was given in trial.
 - (iii) The case for the appellant was not properly put to the jury.
 - (iv) The summation by the learned trial judge was unfair to the appellant.
 - (v) The learned trial judge took into account irrelevant factors including that the appellant showed no remorse; and
 - (vi) The trial was unfair having regard to all the circumstances.
- [11] Distilling these grounds of appeal, as developed in the appellant's submissions, in substance grounds (i) and (v) challenge the sentence imposed. Grounds (ii) (iii) and (iv) contend that the conviction was unsafe because: (a) the judge failed to declare a mistrial on account of an erroneous press report concerning the

evidence; (b) failed to properly put the appellant's case to the jury; (c) misdirected the jury on the *mens rea* of an accessory; and (d) failed to leave the alternative verdict of manslaughter. Ground (vi) asserts that the trial was generally unfair having regard to all the circumstances.

[12] The issues thus arising as it relates to the appeal against conviction are: (i) whether the conviction is unsafe or unsatisfactory on account of the alleged failure on the part of the learned judge: (a) to declare a mistrial; (b) to put the appellant's case adequately and fairly; (c) to properly direct the direct the jury on the *mens rea* of an accessory/secondary party; and (d) to give directions or adequate directions on the alternative verdict of manslaughter; and (ii) whether the trial was generally unfair.

[13] I will deal with the grounds of appeal in the order in which the appellant argued them at the oral hearing. Ms. Daniels dealt with grounds (ii) (iii) and (iv) together.

Ground (ii) – Whether the conviction is unsafe

(a) The judge's failure to declare a mistrial

[14] During the course of the trial, an article was published in the Observer Newspaper under a headline which read: "Officer testifies finding clothes worn by one defendant during the killing." Counsel for the appellant first raised the publication of the offending article, quite properly so, in the absence of the jury. He complained that the article was "most prejudicial... unfair and ..patently false" since no one in the case had given such evidence. He called on the judge to declare a mistrial in the interest of justice.

[15] The appellant contended that the judge erred in not acceding to trial counsel's request to declare a mistrial.

Discussion

[16] It often happens that during the course of a criminal trial, prejudicial information is revealed to the jury. This may occur when a witness, in the course of giving evidence, discloses inadmissible evidence which is highly prejudicial to the defendant. In other cases, the prejudice may be occasioned by adverse pre-trial

publicity, or adverse publicity occurring during the trial itself. Where this occurs, the essential question for the trial judge is whether the defendant can nonetheless have a fair trial. Whether to discharge the jury is a matter within the judge's discretion. If the impact of adverse media coverage on the fairness of the trial cannot be cured even by robust directions, the judge would be obliged to declare a mistrial. In appropriate cases, a judge's failure to declare a mistrial in the face of adverse and highly prejudicial media publicity can lead to the quashing of a conviction.²

[17] However, as the authorities show, the type of media publicity that attracts such a course is usually coverage that is extensive, persistent, and highly prejudicial. **R v McCann (John Paul)**³ is illustrative of this point. In that case, the defendants, who were alleged to be members of a terrorist organization, were charged with conspiracy to murder the Secretary of State, and persons unknown. At trial, they exercised their option not to give evidence. During closing speeches, the Home Secretary announced the Government's intention to effect legislative changes to the right to silence. The statement received extensive publicity in the print and electronic media and attracted widespread commentary from, among others, the Secretary of State for Northern Ireland and Lord Denning, a former Master of the Rolls.

[18] The judge did not accede to an application to discharge the jury. In his summation, he directed them to disregard any broadcasts on the right to silence. The appellants were convicted. On appeal, it was contended that the impact of the media coverage and press comments at a critical stage of the trial made it impossible to say that the jury had not been influenced by what they must have seen and heard. The Court of Appeal agreed, holding that it was "left with the definite impression that the impact which the statements in the television interviews may well have had on the fairness of the trial could not be overcome by any direction to the jury, and that the only way in which justice could be done and be obviously seen to be done was by discharging the jury and ordering a

² See: *Bennet v R* [2018] CCJ 29 (AJ) and *Hyles v Director of Public Prosecutions; Williams v Director of Public Prosecutions* [2018] CCJ 12 (AJ).

³ (1991) 92 Cr. App. R. 239.

retrial.” The Court held that that is what the trial judge should have done. His failure to do so meant that verdict of the jury was unsafe. The Court of Appeal allowed the appeal and quashed the convictions.

[19] Another example is furnished by the case of **R v Taylor and another**,⁴ cited by the respondent. In that case the media coverage was characterised as “unremitting, extensive, sensational, inaccurate and misleading,” resulting in the quashing of the conviction.

[20] It is fair to say, however, that in practice, such an outcome is more the exception than the norm. In **Boodram v The State**⁵ the Court of Appeal of Trinidad and Tobago endorsed the proposition expressed by the Privy Council in **Director of Public Prosecutions v Jaikaran Tokai**⁶ that the question in cases of adverse publicity is “whether the circumstances are such that the procedures available to the trial judge are obviously and inevitably going to be insufficient to secure that the trial will be a fair one.”

[21] The options open to a trial judge include giving strong warnings or direction, discharging the jury or granting a temporary or permanent stay depending on the extent and degree of adverse publicity. However, as de la Bastide CJ cautioned in **Boodram** at p. 367:

“If a court abandons prematurely its efforts to secure a fair trial, it will be derelict in its duty to be fair to the prosecution and to pay due regard to the interests to the victim, his family and society at large in having those who have committed crimes convicted and dealt with according to law.”

[22] Applying these principles to the facts of this case, it is worth noting that the impugned “article” was a one-off headline occurring in the Observer Newspaper, which inaccurately reported: “Officer testifies finding clothes worn by one defendant during the killing.” The actual evidence relating to the finding of clothes at the appellant’s home was given by Police Constable who testified that upon executing a search warrant one female purple T-shirt, one pair of dark

⁴ (1994) 98 Cr. App. R 361.

⁵ (1997) 53 WIR 352.

⁶ (1996) 48 WIR 376 at 423.

jeans pants and a pair of grey polar Ralph Lauren tennis shoes were retrieved from his bedroom. Jackson had testified that at the time of the commission of the offence, the appellant was wearing a “long-sleeve, orangish-reddish plaid shirt, and blue jeans.”

[23] Having received submissions on the application to declare a mistrial in the absence of the jury, the judge ruled that the court was “very much equipped and has always given the jury proper directions when it comes to matters which they may have heard or read about, as we would say, on the outside, ...I do not find it [the article] prejudicial. And it is a matter which can be, with proper directions, be sent to the jury for their consideration on all the proceedings in the matter.”

[24] Consistent with his ruling, during the summation, the judge directed the jury in the following terms:

“You must decide this case, members of the jury, only on the evidence you have heard in this courtroom. You must therefore dispel from your mind anything that you may have heard on the outside, anything that you have seen or read about this case on the outside. And on that note, I must mention an article which appeared in the Observer Newspapers which had (inaudible) which did give true [sic] facts or bear any relation to what had occurred in court.

And so it goes by (inaudible) only to consider what is said in court. Again I repeat, you must decide this case (inaudible) only on the evidence you heard in this courtroom. You must therefore cast out of your minds anything that you have heard on the outside (inaudible) anything you may have seen or read about this case on the outside.”

[25] On analysis, the headline complained of was a one-off one and does not begin to approximate the extent and degree of adverse publicity that would warrant the discharge of the jury. The judge accurately directed the jury on what the actual evidence in the case was as it related to finding clothes at the appellant’s home. The judge’s direction to the jury to disregard anything they may have heard on the outside, or seen or read about the case, including the Observer article, and to decide the case only on the evidence presented in the courtroom was sufficiently robust to have cured any potential risk of prejudice in the circumstances of this case. One is entitled to think that the jury would be faithful to directions given by the judge. As Lord Taylor of Gosforth CJ stated in **R v**

West:⁷ “providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise.”

[26] In my view, this was not a case where it could be said that the circumstances relating to the publication of the article were such that the procedures available to the trial judge were obviously and inevitably going to be insufficient to secure that the trial would be a fair one. I can discern no basis for faulting the judge’s exercise of discretion to proceed with the trial.

(b) Judge’s failure to put the defence adequately

[27] This ground of appeal was not developed at all in the appellant’s written submissions. However, during the course of oral submissions, Ms. Daniels submitted that the judge did not properly put the defence of alibi to the jury. In this regard, Ms. Daniels specifically targeted the following directions:

“The accused Omari Phillip is putting up a defence of alibi. In other words, he was not there. (inaudible), he proved that he was elsewhere. But it’s for the Prosecution to disprove the alibi. That’s the Prosecution (inaudible). That’s the question you will have to resolve for yourself. In that regard you have to consider the evidence of Gideon Jackson (inaudible) and who does he have in the passenger seat next to him—in the front left passenger at the front”⁸

[28] Ms. Daniels then contrasted this direction with the following statement made by the learned Director of Public Prosecutions (“DPP”) to the court in the absence of the jury:

“It is quite clear if not manifestly clear, that the prosecution can’t rely on the testimony of Gideon Jackson to place Omari Phillip at the scene of the offence, and also as being one of the primary actors.”⁹

[29] The thrust of Ms. Daniels’ submission was that the judge undermined the direction on alibi by suggesting that the evidence of Jackson was capable of disproving the alibi when the prosecution was not relying on the evidence of Jackson to place the appellant on the scene of the crime.

⁷ [1996] 2 Cr. App. R. 374, at 385-386.

⁸ ROA, Vol iii, p. 1061, lines 5 – 10.

⁹ ROA Vol ii, p. 667, lines 21 -25.

[30] Two points may be made in answer. First, whatever the DPP said to the judge forms no part of the judge's directions on alibi and cannot be used to assess whether the judge put the defence of alibi properly. Secondly, the DPP's statement must be viewed in the full context of the matter under discussion when it was made. The issue under discussion was how to treat with the press report in relation to the clothing said to have been found at the appellant's residence. The full context in which the DPP's utterance was made is set out below:

"Secondly, my Lord, while I do agree with my learned friend that the article referenced in that newspaper article is factually wrong, it is not the type of evidence which the prosecution relies on that places the defendant, and by extension, my learned friend's client, Omari Phillip, at the gas station on the night of the 17th February, 2012.

It is quite clear if not manifestly clear, that the prosecution can't rely on the testimony of Gideon Jackson to place Omari Phillip at the scene of the offence, and also as being one of the primary actors. Therefore, the reliance that is seemingly placed by my learned friend that it is the red shirt – the purple shirt, beg your pardon, on which hangs the placement of his client at the service station is holding its place is misconceived. ...part of the prosecution case relied on which supports the testimony of Gideon Jackson is that of the video footage. That bit of evidence, my Lord, is far more important to the prosecution case in leaving – lending credibility to Jackson's evidence that Accused – Accused Omari Phillip was present on the night of the 17th February 2012, and his description as dressed, the Court, My Lord, cannot – can be found from that video footage."

[31] Placed in context, it is plain that the DPP was not suggesting that the prosecution was not relying on Jackson to place the appellant at the scene of the crime; far from it. The point being made by the DPP was that the prosecution was not relying on the finding of any clothes at the appellant's home to place the appellant at the crime scene but on the evidence of Jackson, supported by the video footage of the robbery which captured the robbery and lent support to Jackson's description of the clothing worn by one of the men, which the prosecution say was the appellant.

[32] As Ms. Adams, for the respondent correctly pointed out, trial counsel for the appellant was under no misapprehension that the prosecution was not relying on the evidence of Jackson to place the appellant at the crime scene. Mr. Bowen, in replying immediately to the DPP's submission told the judge, "The DPP urge upon you, My Lord, that the Crown's case relies on the testimony of

Constable Jackson.” The judge added “and video footage.” All parties in the trial clearly understood what the DPP’s position was. Ms. Daniels’ understanding of the prosecution’s attitude to the evidence of Jackson in placing the appellant at the scene of the crime is plainly flawed.

- [33] Returning to the actual directions on alibi, the passage of the summation first quoted above does not represent the full extent of the judge’s directions on the appellant’s alibi. Even before this passage the judge had directed the jury as follows:¹⁰

“There are a number of other matters that arise in this case. Let’s take for instance Omari Phillip. His defence was that he was not there. He was at home. He never left his home. His defence is one of alibi. Mr. Phillip says he was not at the scene of the crime when it was committed. In his unsworn statement he says that he was home always into the night, that he never left his home. And the prosecution has to prove the case beyond a reasonable doubt he does not have to prove that he was elsewhere at the time of the crime.

The Prosecution must prove, disprove the alibi, and if you conclude that the alibi is (inaudible) sought, that does not put itself entitled to the convictions again [sic]. The Prosecution must still satisfy you beyond a reasonable doubt of his guilt. You see sometimes an alibi is sometimes a defendant (inaudible). Let me go back to (inaudible) for you.

The defendant Omari Phillip says he was not at the scene of the crime when it was committed. In his unsworn statement he says that he was at home all day into the night, that he never left his home. As the Prosecution have to prove his guilt beyond reasonable doubt, he doesn’t have to prove that (inaudible) at the time.

On the contrary, the Prosecution must disprove the alibi. And if he conclude that an alibi was (inaudible) that does not itself (inaudible) convict the defendant (inaudible) the prosecution’s case. The Prosecution must still satisfy you beyond reasonable doubt of his guilt.”

- [34] In various parts of the transcript, the quality of this transcription is, frankly, poor. However, the substance of the judge’s directions in the passage above can be gleaned and where there are gaps, the context suffices to fill the void. In my view, the judge’s directions conveyed to the jury that the appellant’s defence was alibi; that the appellant did not have to prove the alibi; that it was for the prosecution to disprove it; and that even if they thought the alibi was untrue, they

¹⁰ Record of Appeal, Vol III, p. 1002, line 24 - p. 1004, line 3.

could only convict if the Prosecution satisfied them of the appellant's guilt beyond a reasonable doubt.

[35] The judge later went on to carefully rehearse the evidence of the appellant's brother, Selvin Phillip, in support of the alibi and to read out the contents of the appellant's unsworn statement.

[36] Furthermore, another facet of the appellant's case strategy was to impugn the credibility of the accomplice by suggesting that he was implicating the appellant to shield the role that Jackson's brother had played in the robbery. This too, the judge highlighted when he told the jury:

“In cross-examination on that, the defence was seeking to establish that the other man was Mr. Jackson's brother. That was what Mr. Bowen was seeking to establish in cross-examination.”

[37] The judge also highlighted to the jury those matters on which the appellant had been shown to have lied to the police previously, as explored by the appellant's counsel during his cross-examination of Jackson.

[38] Based on all the foregoing, the contention that the judge failed to put the appellant's defence adequately is completely untenable.

(c) Judge's failure to properly direct on the *mens rea* of secondary party

[39] Ms. Daniel's submission under this ground was that the judge failed to give proper directions on the liability of a secondary party to a joint enterprise, consistent with the learning in **R v Jogee**¹¹ and **Ruddock v R**.¹² It is further said that the judge was required, but failed, to relate the directions to the evidence in the case.

Joint enterprise

[40] The judge first directed the jury on the elements of murder. He correctly directed the jury on the *mens rea* for murder, directing them that the accused must have

¹¹ [2016] UKSC 8

¹² [2016] UKPC 7.

an intention to kill or cause grievous bodily harm.¹³ The judge then directed the jury on the *mens rea* required in the case of the appellant and Elliott in the following terms:

“Omari Phillip and Timorie Elliott are charged jointly. As the DPP said, they were involved in a joint enterprise. This is a case of armed robbery resulting with the murder of Dorothy Prince. The principle [sic] figure, the one who actually fired the shot is Dion Thomas, who is now deceased.

Timorie Elliot and Omari Phillip are the law call [sic] secondary accomplice. They did not pull the trigger. The mental element of the one pulling the trigger despite(inaudible) from the secondary party. The mental element requires the (inaudible) necessary to kill or cause grievous bodily harm. The mental element of the secondary parties which are Omari Phillip and Timorie Elliot is in the intention to assist or encourage a person who murdered Dorothy Prince and (inaudible) kill So (inaudible).

Mental element for the secondary party is the intention to assist or encourage a person who murdered Dorothy Prince to carry out the killing.”

[41] At other points throughout his review of the evidence, the judge directed the jury with respect to the issue of “assisting or encouraging” as follows:

- (i) “Now in this case, there are two accused Omari Phillip and Timorie Elliot. You will have to consider the evidence against them separately. Examine the acts or (inaudible) separately. Then ask yourself whether they by their presence were assisting or encouraging the fatal shooting of Dorothy Prince by [Dion Thomas]”¹⁴
- (ii) “Remember the Prosecution will have to establish whether Mr. Elliott and Mr. Phillip (inaudible). They will have to look at the (inaudible) to see whether they were assisting Mr. Thomas because that is what the law says (inaudible) were assisting or encouraging. Here the evidence is that they were harassing the attendant. They have a gun in their hands harassing Teresa and Dorothy...”¹⁵
- (iii) “...the prosecution has to establish that Mr. Phillip and Mr. Elliott were assisting or encouraging.”¹⁶

¹³ Record of Appeal, Vol III, p. 1001, lines 21- 22.

¹⁴ Ibid, p. 1007, lines 19 – 25.

¹⁵ Ibid, p. 1026, lines 24 -25.

¹⁶ Ibid, p. 1040, lines 3 – 5.

- (iv) “He [Jackson] did said [sic] that when he got on to Old Parham Road, he was going to Dee’s Service Station. He knows that he was going there because of the conversation he had with Dion earlier in the day. And this is what he says because then [sic] prosecution has to establish that Mr. Phillip and Mr. Elliott were assisting or encouraging.”¹⁷
- (v) “So he [Jackson] saying all the persons, there was no [sic]. Everyone knew their role, everyone knew what to do and when you review and consider his evidence (inaudible), you will make your own observations and conclusions whether they all knew, they [sic] were weapons in the vehicle, weapons all drawn, ready, where they were assisting or encouraging.”¹⁸
- (vi) “Were they assisting or encouraging? These [sic] are what you have to ask yourself. And that is what the Prosecution is saying that they were.”¹⁹

[42] Taking the judge’s directions as a whole and in the round, at its most expansive the judge directed the jury that “the mental element of the secondary party is the intention to assist or encourage a person who murdered Dorothy Prince to carry out the killing.” I pause here to observe that the six further directions quoted immediately above did not mention that the intention must be to assist or encourage the principal to act with the intention to kill or cause grievous bodily harm.

[43] The correct legal principles governing the liability of a secondary party to a joint enterprise were re-stated in **Jogee**²⁰ and **Ruddock**²¹ after 30 years down the wrong path:

“89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.

90. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, **acting with whatever mental element the offence requires of D1** (as stated in para 10

¹⁷ Ibid, p. 1039.

¹⁸ Ibid, p.1040.

¹⁹ Ibid, p. 1041, lines 22-24.

²⁰ [2016] UKSC 8.

²¹ [2016] UKPC 7.

above). **If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. (Emphasis added)**

.....

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."

- [44] Applying these principles, the critical questions for the jury were whether the appellant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. If the jury accepted the prosecution's evidence, it would have been open to them to easily conclude that the appellant shared the intention to rob the gas station and was a participant in that robbery. However, more critically, the further question for them was whether he not only shared a

common intention to rob the gas station but also shared the intention to kill if necessary to facilitate the robbery, as part of the joint enterprise or to assist or encourage Thomas to act with such intention, if necessary. In other words, the jury was required to determine what was the scope of the common purpose.

Prior knowledge of presence of a firearm

- [45] The evidential relevance of a secondary party's knowledge of the presence of a firearm to his intention was addressed at paragraph 98 of **Jogee** and **Ruddock** in the following terms:

"What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in the *Chan Wing-Siu* case to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged.

... Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was and may be irresistible evidence one way or the other, but it is evidence and no more."

- [46] In other words, knowledge by a secondary party of the presence of a firearm is a fact from which a jury may infer what his intention was but is not in itself evidence of his intention to assist in the crime. As the Board put it in **Bastian v The King**:²²

"...the fact that a secondary party is aware of the presence of a firearm before the time of the commission of the offence is evidence to be considered when determining whether an inference of the specific intent necessary to prove guilt is made out."

- [47] In circumstances where the appellant and Thomas were each in possession of a firearm, it was for the jury to determine whether it could be inferred that the appellant shared a common intention to rob the gas station, and to kill if necessary to facilitate the robbery as part of the joint enterprise.

²² [2024] UKPC 14.

- [48] If the jury accepted the prosecution's case, then not only did the appellant know that Thomas was armed with a gun, but he too was armed with a gun. Further, the evidence was that the appellant and Thomas drew their firearms before exiting their vehicle then proceeded to rob the gas station together. These facts, if accepted, would *prima facie* provide an evidential foundation for the jury to ground an inference that the appellant shared a common intention to rob the gas station, and to kill if necessary to facilitate the robbery as part of the joint enterprise. That was a matter for them.
- [49] However, it was incumbent upon the judge to direct the jury that they had to be sure that the appellant shared the intention that Thomas should act with intent to kill or cause grievous bodily harm, which would include a conditional intention that he should act in that way if necessary if there was resistance to the robbery. This required the judge to give directions to the jury to consider the scope of the common purpose and, in particular to consider whether a common intention extended to the use of lethal force if the circumstances arose, with intention to kill or cause grievous bodily harm.²³
- [50] Regrettably, in my view, the judge's directions fell short of what was required as he failed to direct the jury properly on these matters. The judge failed to invite the jury to consider the scope of the common purpose beyond the plan to rob, particularly whether the common intention extended to kill if necessary to facilitate the robbery as part of the joint enterprise.
- [51] The judge failed to direct the jury properly as to how to approach the evidence that the appellant was in possession of a firearm himself and was aware that Thomas was in possession of a firearm, and how this might bear on the question of the appellant's intention. The directions as formulated, especially the rather truncated form of the six subsequent directions which were devoid of any reference to the appellant's intention, carry the danger that they left the jury with the erroneous impression that the mere presence of the appellant might be taken as evidence of him intentionally assisting or encouraging Thomas in the

²³ See: Bastian at paragraph 37.

murder of Dorothy Prince, or that once they were satisfied that the appellant was assisting or encouraging Thomas in the commission of the robbery then that would suffice to find him guilty of murder.

[52] This is not necessarily so as the learning in **R v Smith (Wesley)**²⁴ instructs:

“...a person who takes part in or intentionally encourages conduct which results in a criminal offence will not necessarily share the exact guilt of the one who actually strikes the blow. His foresight of the consequences will not necessarily be the same as that of the man who strikes the blow, the principal assailant, so that each may have a different form of guilty mind, and that may distinguish their respective criminal liability. Several persons, therefore, present at the death of a man may be guilty of different degrees of crime—one of murder, others of unlawful killing, which is manslaughter. **Only he who intended that unlawful and grievous bodily harm should be done is guilty of murder. He who intended only that the victim should be unlawfully hit and hurt will be guilty of manslaughter if death results.**” (Emphasis added)

[53] This passage was cited with approval in **Jogee and Ruddock**.²⁵ At paragraph 27, the Board stated:

“In a line of cases the courts recognised that where there was a joint intent to use weapons to overcome resistance or avoid arrest, the participant might not share an intent to cause death or really serious harm. If the principal had that intent and caused the death of the another he would be guilty of murder. Another party who lacked that intent, but who took part in an attack which resulted in an unlawful death, would be not guilty of murder but would be guilty of manslaughter, unless the act which caused death was so removed from what they had agreed as not to be regarded as a consequence of it: **R v Smith (Wesley)** [1963] 1 WLR 1200...”

[54] Applying those principles to **Ruddock’s case**, the Board concluded at paragraph 118 that one of the problems with the summing up given in that case was that “the judge failed to tell the jury that if they were sure that Ruddock was a party to carrying out the robbery, it did not automatically follow that he was also party to the murder of the deceased. That question required separate and further consideration.”

²⁴ [1963] 1 WLR 1200; 3 All ER 597 at 600 - 601.

²⁵ See: paragraphs 27-30.

- [55] Similarly, the learned judge here was therefore required to direct the jury on this point and to make it clear to them that the appellant had to have the intention to assist or encourage Thomas to act with the intention to kill or cause grievous bodily harm before he could be convicted of murder.
- [56] As will be seen presently, the judge's failure to direct the jury properly on this issue assumes greater importance when one considers Jackson's evidence of the conversation between the appellant and Thomas after they returned to the vehicle. According to Jackson, during the robbery, he observed the appellant and Thomas pointing their weapons at the gas station attendants. He then heard a gunshot. Elliott then entered the vehicle and slammed the door. Seconds later, the appellant entered the vehicle holding two waist bags. Thomas was the last to enter. Jackson further testified that after the vehicle drove off, "...Omari started to argue with Dion saying, 'what the fuck you do that for?' Dion [Thomas] didn't reply."²⁶ Under cross-examination, Jackson had testified that in his conversations with the appellant and Thomas leading up to the robbery he did not get the impression that anyone would be hurt.
- [57] This evidence was relevant to the jury's determination of the question whether the appellant had the intention to kill or cause grievous bodily harm or shared the intention that Thomas should act with intent to kill or cause grievous bodily harm, which would include a conditional intention that he should act in that way if necessary, in furtherance of the robbery. On one possible view, the jury might have concluded that this evidence tended to negate such an intention as it suggests that the appellant was very irate that Thomas had shot Dorothy Prince. A reasonable interpretation of this evidence that was open to the jury might be that the appellant did not share the intention to kill or cause grievous bodily harm.
- [58] While the judge mentioned this piece of evidence in his summation,²⁷ telling the jury that "there was an argument about why they (inaudible), what he did that for," he never invited the jury to consider this evidence when determining the

²⁶ Record of Appeal Volume II, p. 467, lines 3 – 5.

²⁷ Record of Appeal Vol III, p. 1038, lines 11 – 12.

appellant's intention and whether this evidence was capable of negating any inference as to the appellant's intention, which might otherwise be drawn from the appellant's possession of a firearm and his knowledge that Thomas was similarly armed. This was a serious error.

[59] Viewing the summing up as whole, I cannot feel sure that had the jury been properly directed on the *mens rea* required of a secondary party they would have convicted the appellant of murder. I am driven to conclude that the judge's directions were defective and renders the conviction for murder unsafe.

(d) Judge's failure to leave the alternative verdict of manslaughter

[60] Ms. Daniels submitted that the trial judge should have directed the jury on the alternative verdict of manslaughter. In her oral submissions, Ms. Daniels developed the point, arguing that that the judge did not give the jury proper directions in this regard as it was incumbent on him to explain to the jury what constituted manslaughter and to define the mental element of manslaughter. Furthermore, submitted Ms. Daniels, the judge did not relate his directions on manslaughter to the evidence in the case, to explain to the jury the evidential basis on which they might properly find manslaughter.

[61] A trial judge has always to be alive to whether, on the evidence, it is necessary to leave to the jury the option of returning an alternative verdict to a lesser offence. The rationale and public policy imperatives underpinning this duty were fulsomely articulated by Lord Bingham in **R v Coutts**:²⁸

"The public interest [in the outcome of a criminal prosecution for a serious offence] is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in

²⁸ [2006] UKHL 39.

cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge ...”

[62] Contrary to the appellant’s contention, the judge did not fail to leave the alternative verdict of manslaughter to the jury. He directed them in the following terms:

“Now in this case, there are two accused Omari Phillip and Timorie Elliot. You will have to consider the evidence against them separately. Examine the acts or (inaudible) separately. Then ask yourself whether they by their presence were assisting or encouraging the fateful shooting of Dorothy Prince by (inaudible). If they were, they would be guilty of murder. If they are not, you will have to decide whether they are guilty or not guilty of manslaughter. You will only consider manslaughter only if you find any of the defendants not guilty. Of course (inaudible) all of them, one of them or more, that’s a matter entirely for you.

For the defendant to be found guilty of manslaughter, you must be sure that the accused intentionally participated in an offence in the course of which Dorothy’s death occurred, and a reasonable person would have realised that in the course of that offence some (inaudible) to some person.”²⁹

[63] In my view, in the first passage above the judge directed the jury to first consider whether they found that the appellant had the *mens rea* for murder (leaving aside for the moment the correctness of the direction on the *mens rea* of a secondary party). The judge directed the jury that if they found that he lacked the requisite *mens rea* for murder, then they should consider whether the appellant was guilty of manslaughter. In the second passage, the judge instructed the jury that for such a finding they had to find that the appellant intentionally participated in an offence during which Dorothy Prince lost her life and that a reasonable person would have realised that some harm would be caused.

²⁹ Record of Appeal Vol III, p. 1007 – 1008.

[64] In my opinion the direction as formulated was sufficient to convey to the jury that for the appellant to be guilty of manslaughter they had to be sure that the appellant lacked the *mens rea* for murder, or be in doubt as to whether he did, and that the appellant intentionally participated in the robbery in the course of which Dorothy Prince's death was caused and a reasonable person would have realised that, in the course of the robbery, some physical harm might be caused to some person.

[65] I, however, agree with Ms. Daniels that the judge did not go on to relate this direction to the evidence in the case on which the issue of manslaughter arose. In this regard, the judge was required to draw the jury's attention to the evidence discussed at paragraphs 54 and 55 above, which potentially could have negated the requisite intention for murder.

[66] Nonetheless, by their verdict, the jury must have at least found as a fact that the appellant intentionally participated in the robbery in the course of which Dorothy Prince's death was caused. On the facts which they must have accepted, there was cogent evidence for a reasonable jury to have found that that a reasonable person would have realised that, in the course of the robbery, some physical harm might be caused to some person, given the presence of loaded firearms carried to the scene of the robbery. In my view, therefore, while the conviction for murder must be quashed, the evidence properly supports a conviction for manslaughter.

[67] Section 40(2) of the **Eastern Caribbean Supreme Court Act**³⁰ empowers the Court of Appeal to substitute a different verdict in such circumstances:

“(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.”

³⁰ Cap 143 of the Revised Laws of Antigua and Barbuda.

- [68] Subject to what I say below about ground (iv), it would be open to this court to substitute the jury's verdict with a conviction for manslaughter.

Ground (iv): The summation by the learned trial judge was unfair

- [69] At paragraph 7 of his original written submissions, the appellant asserts that the summation was unfair because:

“It was the duty of the police to conduct the investigation and put the accused on an identification parade. This was not done, therefore the issue identification was a live issue before the court. There was no forensic evidence linking the accused to the crime and there was no evidence that the accused fired the fatal shot. Where there is weak or no identification evidence, then forensic evidence is most important in proving the accused's guilt or innocence. There appears to be some photographic evidence but nothing to identify the accused at the scene of the murder.”

- [70] To the extent that this criticism implies that the judge should have directed the jury on the failure to conduct an identification parade, the submission is misconceived. The evidence implicating the appellant as one of the robbers came from Jackson, the accomplice. None of the persons present at the service station purported to be able to identify any of the perpetrators of the robbery. This is hardly surprising since the evidence is that they had taken steps to conceal their identities. No useful purpose would have been served by asking Jackson to attend an identification parade to identify the appellant whom he said he had known for two to three years prior to the incident, and whom he said was part of the planning and execution of the robbery. He would obviously have picked out the appellant on an identification parade.

- [71] The danger of hosting an identification parade in circumstances such as these were articulated by Lord Hoffman in **Goldson & McGlashan v The Queen**³¹ thus:

“The witness will naturally pick out the person whom he knows and whom he believes that he saw commit the crime. In fact, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, whereas all that it would confirm was the undisputed fact that the witness knew the accused. It would not in any

³¹ [2000] UKPC 9.

way lessen the danger that the witness might have been mistaken in thinking that the accused was the person who committed the crime.”

[72] Here, the appellant’s case was not one of mistaken identification; the contention was that Jackson was deliberately and falsely implicating the appellant to shield the role his brother had played in the robbery. That gave rise to an issue of credibility, not identification. On the facts of this case, the credibility of Jackson’s claim that the appellant was one of the robbers could not be tested by the holding of an identification parade but was a matter to be left to the jury with adequate directions. The judge did so. He directed the jury on the need for caution in accepting the evidence of Jackson since he was an accomplice, and he gave them the requisite warning. The judge highlighted all the reasons canvassed by the defence as to why Jackson might be an unreliable and untrustworthy witness, including the several lies that he had told to the police during the course of the investigation. I am satisfied that the jury were adequately directed in relation to the matters that they should consider when assessing Jackson’s credibility.

[73] As to the absence of forensic evidence linking the appellant to the crime, the judge pointed out that fact to the jury so that was a matter well within their contemplation.

[74] I find no merit in this ground.

Summary of conclusions

[75] To summarise the position at which I have arrived thus far: the appellant succeeds on ground (ii) on the basis that the judge erred in his directions to the jury regarding the mental element necessary to fix the appellant with liability for murder. This makes the appellant’s conviction for murder unsafe. I have, however, concluded that on the facts which the jury must have accepted in finding the appellant guilty of murder, there was cogent evidence on which the jury must have been satisfied that the appellant intentionally participated in the robbery in the course of which Dorothy Prince’s death was caused, and that a reasonable person would have realised that, in the course of the robbery, some

physical harm might be caused to some person. In those circumstances I would apply section 40(2) of the **Eastern Caribbean Supreme Court Act** and substitute the jury's verdict with a conviction for manslaughter.

The sentence

- [76] This leaves the question of what an appropriate sentence in the context of this case would be. The Court has had the benefit of the appellant's written submissions on the range of appropriate sentences for manslaughter, as well as the respondent's submissions on sentence.
- [77] In Antigua and Barbuda, section 5 of the **Offences Against the Person Act**³² prescribes a maximum sentence of 35 years imprisonment for manslaughter. In calibrating the appropriate sentence, I find the following factors relevant in establishing a starting point. In this case, the obvious consequence of the appellant's acts was that death was caused in the course of committing a pre-meditated and unlawful offence of robbery. The offence is further aggravated by the fact that the appellant and one of his accomplices also carried firearms during the commission of the offence; a fact which carried the obvious risk of death or really serious harm being caused. Apart from the deceased, other persons present at the service station were also put at risk of being seriously harmed.
- [78] In addition to these circumstances relating to the commission of the offence itself, it cannot be overlooked that the appellant played a leading role in the venture. He was intricately involved in the planning of the offence. He must therefore shoulder a high degree of culpability.
- [79] In my view, these very serious circumstances relating to the commission of the offence, coupled with the appellant's high degree of culpability warrant a starting point of 18 years imprisonment.

³² Cap 300 of the Revised Laws of Antigua and Barbuda.

[80] The personal circumstances of the appellant are next considered as these may influence whether any adjustment of the sentence is necessary. At the time of committing the offence the appellant was 25 years old. A psychological report commissioned for the sentence hearing below was unremarkable from the point of view that it did not reveal any symptoms exhibited by the appellant that met the criteria for any major or other psychotic disorders or psychiatric diagnosis. The author of the report, Dr. King, was optimistic about the appellant's prospects for rehabilitation, provided that resources were provided for him to pursue his artistic pursuits.

[81] On the other hand, the record indicates that the appellant had a previous conviction for wounding, which is an offence of violence. This is an aggravating factor which produces an uplift in the sentence to 19 years. There are no personal mitigating circumstances in the appellant's favour.

[82] The jurisprudence of the Eastern Caribbean Supreme Court has consistently maintained that real credit must be given for time spent by the prisoner on remand. The rationale and methodology to be employed in so doing was articulated by Baptiste JA in **Shonovia Thomas v The Queen**.³³ In so doing, the Court of Appeal was following the guidance given by the Privy Council in **Callachand & Anor v State of Mauritius**³⁴ and the Caribbean Court of Justice in **Romeo Da Costa Hall v The Queen**.³⁵ In **Callachand**, the Board stated at paragraph 9:

"It seems to be clear too that any time spent 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." (Emphasis added)

[83] In **Romeo Da Costa Hall** the CCJ explained the role of the judge in this process at paragraph 26:

"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 mitigating and aggravating factors, that being the

³³ HCRAP2010/006 (delivered 27th August 2011, unreported).

³⁴ [2008] UKPC 49.

³⁵ [2011] CCJ 6 (AJ).

sentence he would have passed but for the time spent by the prisoner on remand.

In the interests of transparency in sentencing and in keeping with the principles relating to the imposition of custodial sentences in the Penal System Reform Act, Cap. 139 a sentencing judge should explain how he or she has dealt with time spent on remand in the sentencing process.”

- [84] Baptiste JA summed up the salient propositions derived from **Callachand** and **Da Costa Hall** at paragraph 73 of **Shonovia Thomas**:

“I am of the view that in the absence of exceptional circumstances, real credit has to be given to the time spent on remand. There can be no ambiguity or uncertainty about it. Real credit is not necessarily obtained by the judge saying that the time spent on remand is taken into account in arriving at the sentence, even if the judge goes on to state the period spent on remand. The sentencing exercise must demonstrate how the time spent on remand is taken into account in order to give efficacy to it thus redounding to the actual benefit of the prisoner. This conduces to transparency, avoids uncertainty or ambiguity and importantly, eliminates or reduces the risk of injustice occasioned by an error in principle.”

- [85] In both **Thomas** and **Da Costa Hall**, the court calculated and deducted the time spent in custody from what it regarded as the appropriate sentence. These principles and this approach have been consistently applied by the Eastern Caribbean Supreme Court over the ensuing years and are now enshrined in all of the Sentencing Guidelines promulgated by the Court.

- [86] I am not unmindful that in Antigua and Barbuda, Section 63A of the **Criminal Procedure Act**³⁶ provides that where a person has been remanded in custody in connection with an offence or a related offence for which he is charged, the number of days for which the person was remanded in custody in connection with the offence or related offence shall count as time served by the person as part of the sentence imposed by a Court, and such time shall be credited by the Superintendent of Prison as time served by him as part of the sentence imposed by a Court. However, this does not absolve the judge of his or her own

³⁶ Cap 117 of the Revised Laws of Antigua and Barbuda.

responsibility to transparently explain during the sentencing exercise how they have treated with time in custody, consistent with the authorities cited above.

[87] The prison authorities have advised the Court that the appellant spent an initial period of 297 days on remand from 28th February 2012 to 21st December 2012. He was further remanded to prison on 5th April 2013 where he has remained to date. The prison authorities have already deducted the 297 days he had been initially remanded. This means that he has spent four thousand, six hundred and four days (4604) or twelve years, seven months and seven days in custody from 5th April 2013 to the present. The appellant must be credited for this period.

[88] Accordingly, it should be clearly understood that the appropriate sentence I would have imposed on the appellant for manslaughter would have been 19 years imprisonment, but as he has already served four thousand, six hundred and four days (4604) or twelve years, seven months and seven days in custody I deduct that period, so that the sentence I pass is six years, five months 23 days.

Disposition

[89] A verdict of manslaughter is substituted for the verdict of guilty of murder. The sentence of 25 years is set aside and a sentence of six years, five months and 13 days is substituted.

I concur.
Margaret Price Findlay
Justice of Appeal

I concur.
Esco L. Henry
Justice of Appeal

By the Court,

Chief Registrar