

EASTERN CARIBBEAN SUPREME COURT

TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Criminal Case 11 of 2023

BETWEEN:

THE KING

and

**DAJSHON BENJAMIN
EDWARD CROOKE
MICAHA ORMOND
K'VAWN CHOUCOUTOU**

Appearances:

Ms Khadija C.V. Beddeau, Senior Crown Counsel with Mr Jamal Bridgewater, Crown Counsel

Mr Michael Maduro for the First Accused

Mr Stephen Daniels for the Second Accused

Mrs Valerie Gordon for the Third Accused

Mr Valston Graham for the Fourth Accused

2024: October 14th 15th

RULING ON NO CASE SUBMISSION

- [1] **Persad J:** The Accused in this matter are indicted on a charge of murder contrary to section 163 of the Criminal Code 2013 (as amended) of the laws of the Virgin Islands. The particulars of the offence are as follows: on 10 September 2020, DAJSHON BENJAMIN, EDWARD CROOKE, MICAHA ORMOND and K'VAWN CHOUCOUTOU together in Spring Ghut on the island of Tortola in the Territory of the Virgin Islands murdered Matthew David Daly.

- [2] After the prosecution closed its case, counsel for the four Accused indicated that they wished to raise legal submissions in the absence of the jury.

Evidence for the Crown

- [3] Mr Maduro in his written submissions provided the following summary, which effectively encapsulates the overall evidence.

- a. Officer Bruce Huggins of the Armed Response Unit stated that on Thursday 10 September 2020, he was on mobile patrol in the Bellevue/Hope Hill area when he received the call of shots fired in the Spring Ghut area. He stated that he and Constable George then proceeded to the Spring Ghut area and that they arrived at about 13:15hrs. It took Officer Huggins about 3 to 5 minutes to arrive at the scene, where he found about 2 to 3 persons already gathering. His evidence was that they observed a black male laying in the middle of the road adjacent to a white Tucson vehicle registered as RT4593. The driver's door of the said vehicle was open, and the engine still running. The man lying in the road was dressed in a black shirt, black pants with white stripes and black shoes, surrounded by spent shell casings. Officer Huggins immediately recognised the male to be Matthew "Shorty" Daly (hereinafter "the Deceased"), with whom he had conversed earlier that day at Island Sizzle bar. He then proceeded to secure the scene until officers of the East End Police Station arrived and cordoned off the area. In cross-examination, Officer Huggins confirmed that the Spring Ghut Road was the fourth right off the Hope Hill/Ridge Road.
- b. Officer Ricardo Blackwood, a uniformed officer, was on duty at the East End Police Station when he was made aware of a report. He proceeded to Spring Ghut and was given certain instructions by Chief Inspector Berkley to escort the body of the Deceased to the hospital morgue. He identified the said body being placed on the hospital morgue.
- c. Susan Daly, the sister of the Deceased, also gave evidence. She confirmed that she received the report that her brother had been gunned down at about 13:45 hrs and that he had subsequently succumbed to his injuries. She stated in her evidence that she had to visit the hospital morgue along with her aunt to identify the Deceased's body.

- d. Scene of Crime Officer Shanika Jennings was the notetaker at the processing of the scene at Spring Ghut Road.
- e. Officer Michel Etienne was the exhibits officer and photographer at the scene. Along with Ms Jennings, he identified, photographed, documented and collected the various exhibits from the scene. He identified and collected the spent shell casings that were on Spring Ghut Road for further processing. Officer Etienne was also responsible for processing the Deceased's White Tucson at the Road Town Police Station. He also confirmed that the Deceased's latent prints were the only prints that were identified by Officer Forbes Washington on the White Tucson.
- f. Kamal Frett of 88 Car Rental confirmed that he is the owner of a black Kia Soul that he rented to Edward "BJ" Crooke. Orlando Bonnick followed him and tendered his rental agreement with the Deceased for the white Tucson registered as RT-4593.
- g. Dr. Marisa Jacob-Leonce, deemed an expert in forensic pathology, stated that the autopsy of the Deceased was conducted on 17 September 2020 and the cause of death was multiple gunshot wounds. She identified some seven entrance wounds, namely a wound entering the right eyebrow ridge, the nose-left nasal ala, the lower lip, the mid anterior neck, the right lateral neck, the mid hypogastric region and the right iliac region.
- h. Officer Alston Butler of the Intelligence Unit and Jamal Osborne, the System Administrator employed with the Police Force, gave formal evidence on the extraction and collection of various private and governmental CCTV video footages that were provided to Officer Brad Remy, as part of the investigation.
- i. Vernon Larocque, the former Senior Investigation Officer, recalled that he was a Detective Inspector in Major Incidents in September 2020. He was one of the initial investigators at the scene and recognised the body of the Deceased to be that of Mr Matthew Daly. Several lines of inquiry were pursued, a CCTV trawl was instructed, and searches were conducted.

- j. Mikey Farara of the BVI Health Services Authority and Jagnarine Persaud of Delta Petroleum extracted various footages for the investigators.
 - k. Officers Brendon Simon of Major Incidents and Kelleon London of Special Investigations mainly conducted the searches of the premises of the Accused and caution interviews in 2020 and 2021. Furthermore, Officer Brendon Simon and Brad Remy were responsible for conducting a drive through operation from Hope Hill through Lambert and exiting at Parham Town, near Alphonso Gas Station using a vehicle registered as GV-0798.
 - l. The final witness for the Crown was Inspector Brad Remy of the Major Incidents Team. He confirmed that a search was conducted of Mr Benjamin's home and vehicle, and nothing relevant to the investigation was found. Further, as part of the investigation into the murder of the Deceased, various CCTV video footages were collected and compiled by the investigators for analysis. Officer Remy was responsible for analysing the same, reducing it to clips and preparing a report that was tendered into evidence.
- [4] The evidence for the Crown in this matter centers around three core pieces of evidence. Firstly, there is the CCTV camera footage from various points on the island. There are also interviews with each of the accused persons, both in 2020 and 2021. Finally, there is evidence from the investigators of "timed runs" between certain points in the East End, in and around the area of the crime scene.

CCTV Footage

- [5] The police in carrying out the investigations obtained the footage from a variety of private residences, business places and government institutions. From the footage from these cameras, police were able to track the movements of the Accused on 10 September 2020. These cameras covered various points from Hope Hill, the Ridge Road down to East End police station near the entrance to Greenland, and then going West along the Blackburn highway passing by several business places including Rightbreeze supermarket, Alphonso gas station, Island Sizzle bar, the roundabout allowing access to Hope Hill, Tobacco Wharf, Admin Drive, J Blakx food truck, Peebles's Hospital, VI Motors and Mulligans in Nanny Cay in the west.

- [6] From these cameras, police were able to identify the Accused's movements in a report tendered by inspector Brad Remy which spanned the hours of 10:00 am to 2:00 pm on the date of the murder.
- [7] There is no dispute that, from the footage obtained by the police, the vehicles used by the Accused are seen on the Ridge Road approaching 1:00 pm or shortly thereafter. There is no dispute that the murder took place sometime between 1:00 pm and 1:10 pm. There is no dispute that the murder took place in Spring Ghut which is off the Ridge Road.
- [8] There is no footage available to support the idea that any of the Accused persons left the Ridge Road in order to go to Spring Ghut. There are other vehicles seen on the Ridge Road just before and after 1:00 pm. The cars belonging to the Accused are seen on the cameras at East End police station after 1:00 pm, and there is no dispute that all of the Accused who are known to each other (except for Choucoutou who in his interviews stated he did not know Ormand) meet at the park next to the home of Accused Crooke to "smoke a joint".

The Interviews

- [9] There were eight interviews conducted by the police investigators. Four were conducted in October 2020, with each of the Accused, and a further four interviews were conducted in October 2021 just before charges were laid for murder.
- [10] All the interviews were played for the jury for their considerations. All eight of the interviews were exculpatory in nature and the police relied on the statements to confirm that the vehicles seen in the closed-circuit TV were in fact the vehicles belonging to the Accused. The interviews allowed the various Accused an opportunity to explain their whereabouts and movements on the day of the murder.
- [11] The interviews revealed that each of the Accused denied any participation or knowledge in relation to the murder of the deceased, and provided explanations for their being present in the area of the Ridge Road just before 1:00 pm and 1:30 pm that day.

- [12] The prosecution indicated that there were several inconsistencies and omissions between what some of the Accused said in their 2020 interview, as opposed to what they told the police in 2021. The Crown in their submissions indicated that in some cases it was open to the jury to find that some of the Accused may have lied, and that was a matter for the jury to take into consideration in the determination of guilt.

The “Timed Runs”

- [13] The Crown also led evidence of several “timed runs” conducted by police officers in order to determine an average time that it would take to move between several points along the Ridge Road and other points covered by the camera footage. The purpose of these runs and recording of the times it would take for persons driving between those points was presumably to establish to the jury the length of time it would take for a person driving a vehicle along that route to move from point A to B.
- [14] There was a presumption that, if the Accused took longer than the average times put forward by the police in their timed runs, it could be inferred that the Accused must have stopped to do something which caused them to exit the Ridge Road sometime in excess of what the police found to be an average time for traversing that route.

Overview of submissions

- [15] On behalf of the Accused it was contended as follows:-
- a. Counsel for the defence invited this Court to not leave the case to the jury for their consideration. They submitted firstly that there was simply no evidence led by the prosecution that was sufficient to establish either that any of the Accused had committed the actus reus of the offence, or that any of these Accused had the mens rea to commit the offence.
 - b. Their position was that the Crown had failed to lead any evidence in support of these two essential elements of the offence. They submitted that, notwithstanding the evidence led by

the Crown that the persons charged were all in the general area in which the murder took place, and based on CCTV cameras they were present within a timeframe of when the murder is supposed to have taken place, it was insufficient in law and in fact to warrant a finding of guilt by a jury simply because the Accused may have had an opportunity to commit the offence, without more.

- c. Counsel for the Accused argued that being merely present in the proximity of where the murder took place without more was insufficient to establish the commission of the offence, as well as the requisite knowledge in order to sustain the offence. They submitted that there was no evidence led by the Crown connecting any of the four Accused to the deceased, and that besides being in the general area at the time of the murder, there was nothing else that linked them to the specific crime scene. The mere fact that each of them was seen driving on one of the main roads of the island at the time when members of the public were required to observe a curfew and return to their homes was plainly insufficient to establish the *actus reus* and *mens rea* of the offence.
- d. Counsel for the defence also submitted that, insofar as the Crown had taken the position that this was a circumstantial case, the evidence led by the Crown was also so weak and tenuous that no jury properly directed could convict the Accused. They also submitted that when one looked closely at the evidence led by the Crown, at its highest, the evidence was incapable of giving rise to any inference that any of the Accused was guilty of the offence. They argued that, for a Court to properly direct any jury on the question of circumstantial evidence, it was necessary for the prosecution to lead sufficient evidence to give rise to an inference of guilt. They submitted that the Court could have referred the matter to the jury for their consideration where there were competing inferences for the jury to determine. In this case, they contended that circumstantial evidence capable of giving rise to an inference consistent with the guilt of the Accused was simply insufficient, weak, tenuous, and highly speculative. Accordingly, they submitted that no jury properly directed could convict.
- e. Insofar as the Crown had suggested in the course of trial that they would be relying on what may be perceived as lies being told by the Accused individually, they contended that the use of lies in the circumstances of this case as a basis to establish presence on the scene of the

crime is not possible, and relied on authority in the case of **Layne** to submit that it was not open to the Crown to use lies attributed to an Accused person in this manner.

- f. All counsel on behalf of the Accused invited this Court to uphold the no case submission and discharge the Accused.

[16] The Crown in response to counsel for the defence contended as follows:

- a. On behalf of the Crown it was argued that there was sufficient evidence in order to satisfy the essential elements of the offence, and there was sufficient evidence that a jury properly directed could draw the inference that these Accused not only committed the actus reus, but also had the requisite intention when they committed the act.
- b. The Crown invited the Court to not only see the evidence in the context of the fact that each Accused was in the proximity of the murder scene around the time that the crime is supposed to have taken place, but to look at the movements of the Accused before and after the murder took place, as well as the fact that some of the Accused in their interviews may have lied (that being a question for the jury). Altogether, that was a sufficient basis for a jury to make a finding of guilt. On the Crown's case it was their submission that there were sufficient coincidences to allow a jury properly directed to make a finding of guilt, and accordingly the Court should leave the case for the jury's consideration.

[17] The Court, in seeking to properly analyse the submissions before it, will address its mind to the prevailing law relating to submissions of no case, both generally and in particular the application of those principles to cases involving circumstantial evidence. Having reviewed the relevant applicable legal principles, the Court will proceed to consider the evidence led on behalf of the Crown and apply the appropriate legal principles.

Approach of the Court to Submissions of No Case

[18] An accused's right to make a no case submission is long established and has long been recognised in this jurisdiction in the case of **Riley -vs- Barron 1965 8 WIR - 164 at 165.**

Phillips J.A. at 165 letter H held as follows:

‘A submission that there is no case can be properly made and upheld

- (a) Where there has been no evidence to prove an essential element of the alleged offence and
- (b) Where the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict.’

[19] In **Sanjit Chaitlal v The State (1985) 39 WIR 295** the Court of Appeal dealt at length with the approach that Courts should adopt in dealing with a submission of no case to answer. In delivering the judgment of the Court, Bernard J.A. (as he then was) said at Page 311 Letter “d”:

‘In R v Galbraith (1981) 73 Cr App Rep 124, the decision which has caused this Court to examine the various authorities, the English Court of Appeal (Criminal Division) had cause to examine the position when there is a no-case submission. Speaking of the doubts which attended the approach of the judge upon a no-case submission at the close of the prosecution’s case, Lord Lane CJ said (at page 125):

‘There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between, on the one hand, a usurpation by the judge of the jury’s functions and on the other, the danger of an unjust conviction.’

After referring to the dictum of Lord Widgery CJ in R v Barker quoted earlier in this judgment, he continued thus (at page 127):

‘How then should the judge approach a submission of “no case”?

(1) If there is no evidence that the crime alleged has been committed by the Accused, there is no difficulty. The judge will of course stop the case.

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.

(b) Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.'

If by the preference of the second school of thought is meant that it is only where there is no evidence upon which a jury properly directed could convict that the judge should stop a case, we respectfully beg to disagree.

We are of opinion that this is too restricted a view for, while it may cover the case where the verdict is unsafe and unsatisfactory, it does not seem to meet the situation where the verdict is unreasonable or cannot be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion). We feel that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there is no miscarriage of justice.'

[20] In **Director of Public Prosecution's Reference (No2 of 1980) (1981) 29 WIR 154** a decision of the Court of Appeal of Guyana where the question was considered, Luckhoo J.A. expressed his view in this way at page 167:

'A judge would have to decide what were the constituent (or essential) elements of an offence. If the facts adduced by the prosecution in proof of the offence fell short of proof of any of the Constituents of that offence it would be the function of the judge as a matter of law to direct the jury to acquit.

If, on the other hand, the prosecution adduced evidence in proof of each and every essential element of the offence, thereby making out a prima facie case against an accused, it would be the function of a judge to leave those issues of fact for the jury's consideration and the function of that jury to resolve the issues of facts.

So, put in these general terms, whether there was any evidence on which a jury might convict would be a question of law for a judge to decide. Should he so decide, he must leave the matter with them as judges of the facts.

A question posed during the hearing of the reference was: what would be the position if evidence was adduced by the prosecution on each of these constituents of the offence, but that evidence was very weak, either so manifestly unreliable or so discredited as a result of cross examination that no reasonable tribunal could safely convict on it? It was not denied that in such cases a judge could properly direct a jury to return a verdict of ' Not Guilty'.

In so doing, I should think that he would be acting from an inherent sense of justice in the conduct of a trial so as to avoid a perverse verdict being given against an accused. Counsel for the accused said that the trial judge would be acting *ex debito justitiae*. I would describe such a direction not as one resulting from a decision on a point of law arising at the trial, but as one given by virtue of an overriding discretion vested in the judge in the fair administration of a jury to ensure that justice did not miscarry.'

[21] In Anand Mohan Kissoon and Rohan Singh v The State (1994) 50 WIR 266 the Court of Appeal of Guyana held as follows:

‘The fact that inconsistencies in a witness’s evidence may have weakened the prosecution case against an accused is no ground for the trial judge withdrawing the case from the jury; a case should only be so withdrawn in the extreme circumstances that the prosecution witnesses are totally discredited.’

[22] Similarly in Taibo (Ellis) v R (1996) 48 WIR 74 the JCPC held as follows:

‘On the submission of no case to answer, the criterion to be applied by the trial judge is whether there is material on which a jury could, without irrationality, be satisfied of guilt; if there is, the judge is required to allow the trial to proceed.’

How a Court should deal with a Prosecution based on Circumstantial Evidence

[23] In this matter, the position of the Crown is that the case is a circumstantial one, as they have no direct evidence linking the Accused to the murder of Mr Daley. Nonetheless, it is well accepted that a person can be properly convicted on circumstantial evidence, even of murder, once a jury is sure that the facts proved are not only consistent with guilt of the Accused but also exclude every possible explanation other than the guilt of the Accused.

[24] In the case of R v Clarice Elliot 1952 6 JLR 173 O’Conner CJ sitting in the Cayman Islands noted as follows:-

‘The proper rule to apply to cases which depend solely on circumstantial evidence is well known and is as follows:

A jury may convict a prisoner on purely circumstantial evidence but they should be satisfied:— “not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with

any other rational conclusion than that the prisoner was the guilty person.” (Hodge’s Case (1), 2 Lew. C.C. at 228; 168 E.R. at 1137, per Anderson, B.)

Or, as it was put by Lord Hewart, C.J. in R. v. Podmore (3):

“Circumstantial evidence consists of this, that when you look at all the surrounding circumstances you find such a series of undesigned, unexpected coincidences that, as a reasonable person you find your judgment is compelled to one conclusion.”

Or, as stated in Wills on Circumstantial Evidence, 7th ed., at 320 (1936), in what is called the fundamental rule:

“In order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt.”

Or, as Macdonald, L.C.B. enunciated the same rule in R. v. Patch (2):

“[T]he nature of circumstantial evidence was that the jury must be satisfied that there is no rational mode of accounting for the circumstances, other than the conclusion that the prisoner is guilty.”

[25] The Appeal Court in Elliot after allowing the Appeal and deciding not to order a retrial had this to say:

‘Having carefully considered and analysed the evidence, we were of the opinion not only that each item of the circumstantial evidence but the totality of it fell far short of the test for circumstantial evidence which the authorities lay down. The evidence in the case established nothing but a very high degree of suspicion and no reasonable jury properly directed and approaching the matter with an open mind could convict upon it. It would, therefore, have been improper and unjust to send the case back for a re-trial.’

[26] In Director of Public Prosecutions v Varlack, Lord Carswell referred to the passage from the judgment of King CJ in the Supreme Court of Australia, which their Lordships regarded as an accurate statement of the law. At paragraph 22, it was stated:

“I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is capable of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.”
[emphasis added]

Analysis of Legal Submissions of No Case

[27] The issue for this Court to determine is whether on the Crown’s case there is sufficient evidence to leave the matter for the jury’s consideration. The Court in making its decision is mindful of the learning in relation to no case submissions generally, and also mindful of the principles as they relate to circumstantial evidence.

[28] This is not a case where there is direct evidence that the Accused persons committed the offence of murder. As a matter of fundamental principle, the prosecution in putting forward their case in any criminal matter is not required to have direct evidence and are well-entitled to build their case on circumstantial evidence.

- [29] Of course, in so doing, there is an onus on the prosecution to put before the Court sufficient material for the jury's consideration. Such evidence once sufficient will be left to the jury for their consideration upon the requisite legal directions on circumstantial evidence.
- [30] If however, the Court in deciding what were the constituent (or essential) elements of an offence, found that the evidence adduced by the prosecution fell short of proof of any of the constituents of that offence, it would then be the function of the judge as a matter of law to direct the jury to acquit.
- [31] The elements of the offence of murder that the Crown is required to establish are as follows:
- (a) The Deceased is dead.
 - (b) The Deceased's death was because of an unlawful harm.
 - (c) The four (4) Accused – Mr Benjamin, Mr Crooke, Mr Ormond and Mr Choucouteu were the ones who inflicted the unlawful harm.
 - (d) At the time the unlawful harm was inflicted, the Accused had the intention to either kill or cause grievous bodily harm to the Deceased.
 - (e) The Deceased died within a year and a day of the unlawful harm being inflicted on him.
- [32] There is no dispute that the elements at (a), (b) and (e) are established. Counsel for the Accused men all submit that there is no evidence in support of ingredients (c) and (d).
- [33] According to Counsel for the Accused, the Crown is required to prove the mens rea of the offence—that is, to show the state of mind of the Accused that they intended to kill or cause grievous bodily harm to the Deceased. Further, the Crown is required to prove the actus reus – that these Accused did some act to the Deceased. On both counts, they contend that the Crown has failed and there is neither sufficient nor any strands at all to build a circumstantial case.

- [34] A careful review of the Crown's case, at its highest, establishes that each of the Accused in this matter was in the area of the Ridge Road around the time of the murder. The evidence of the interviews support that the vehicles being monitored on CCTV were driven by the various Accused.
- [35] There is evidence from the timed runs that suggests that the Accused, in the 3 different vehicles being used when seen at the Ridge Road, must have stopped along the route as the times they exited on the East End Police cameras were in excess of the average "run times" conducted by the police.
- [36] The Crown suggests that the fact that the Accused met up at the park next to the Crooks home is something the Court should consider. Finally, the Crown contends that the Court should also take into account that it is open to the jury to find that at least one of the Accused lied in his interviews, and that this Court could rely on this to direct the jury as a possible strand of circumstantial evidence consistent with guilt.
- [37] On a proper analysis of the Crown's evidence, can this Court find a prima facie case that these Accused committed the actus reus of this offence? Is it sufficient to leave to the jury on this element? In this Court's view, the evidence led by the Crown at its highest suggests that all of these persons charged were on the Ridge Road just before 1:00 pm and exited the Ridge Road by the East End police station before 1:30 pm on the day of the murder. The scene of the murder which took place in Spring Ghut is off the Ridge Road, and there is no evidence whatsoever that links these Accused persons to that scene.
- [38] In other words, there is no admission by any of the Accused that they went to Spring Ghut, and they deny any involvement in the murder of Daly. There is no evidence of them turning on the Spring Ghut Road, no evidence linking them to the scene of the crime scientifically or forensically. The camera footage reveals that the three vehicles being occupied by the Accused persons on the Ridge Road that day were among other vehicles on that particular road at that particular time. The evidence revealed that, on the day of the murder, 1:00 pm was the beginning of the curfew period and persons were rushing to get off the streets and into their homes. One clip in particular from the camera of Mr Neville Smith's home showed the accused Ormond's vehicle being passed on the Ridge Road just about 1:00 pm by four other vehicles unrelated to the Accused.

- [39] This evidence in the Court's respectful view is insufficient of itself to suggest that these Accused committed the act of murder. The evidence suggests that they were in the general proximity but it does not establish that they were on the scene of the crime. It suggests, having regard to the timing and location of the vehicles, that they had the opportunity to commit the crime. However, on that logic, presence on the Ridge Road in and around the time of the murder would also give rise to an inference that all other persons using the Ridge Road between just before 1:00 pm and 1:30 pm would have had an equal opportunity to commit the crime. On what basis are these persons singled out?
- [40] Presence on the Ridge Road in and around the time of the incident is insufficient evidence of itself to establish a prima facie case that these Accused committed the actus reus of the offence.
- [41] That having been said, what of the other evidence the Crown wishes this Court to take into account? Are those matters sufficient to take the evidence to the level of a prima facie case on this element?
- [42] In this Court's view, even if the jury were to accept that there were lies told, the lies do not lead to an inference that the Accused were present at the scene of the crime. The mere fact that the Accused met up after 1:30 pm in the park cannot be a basis for this Court to direct the jury that the Accused meeting up, without more, is evidence that they committed the actus reus of the murder in this case.
- [43] It is interesting to note the line of authority that mere presence at the scene of the crime is not sufficient to affix criminal liability without proof of assistance or encouragement. Support for this proposition may be found in **R v Johnson 10 WIR 359** where it was held that a person's mere presence when someone else commits a crime will not of itself amount to such encouragement as will make him an aider and abettor. Consequently, evidence of wilful encouragement is essential to establish a common design. Similarly **Blackstone's Criminal Practice 2007 para A 5:13 provides as follows :**

'Neither mere presence at the scene of a crime nor a failure to prevent an offence will generally give rise to liability. However, presence at the scene of a crime is capable of constituting encouragement (see Jefferson [1994] 1 All ER 270 for a recent example and

contrast Coney (1882) 8 QBD 534 — spectators at illegal prize fight, conviction quashed since jury directed that presence was conclusive evidence of encouragement).

If the accused is present in pursuance of a prior agreement with the principal, that will normally amount to aiding and abetting, but if the accused is only accidentally present then he must know that his presence is actually encouraging the principal(s).....
Where the accused is present and has both the right and ability to control the principal offender, his failure to exercise that right of control may make him liable as an accomplice.'

[44] Moving to the element of mens rea, the Accused argue through their Counsel that there is no evidence that any of the persons charged were part of any joint enterprise, or that they were acting in concert to cause any unlawful harm. There is no evidence that they were on Spring Ghut Road, or that they participated in the offence, or who was a principal or secondary party to the said offence.

[45] The Accused relies on the principle set out in Regina v Lane and Lane and restated in Regina v. Aston and Mason that where two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to acquit both.

[46] In R v Lane and Lane, the English Court of Appeal highlighted the legal dilemma that arose as follows:

"The evidence against each appellant taken separately at the end of the prosecution's case did not establish his or her presence at the time when the child was injured, whenever that was, or any participation. Neither had made any admissions; both had denied taking part in any injury; both had told lies but lies which did not lead to the inference of that Accused's presence. The conclusion therefore is that the learned judge ought to have ruled in favour of the appellants on their submission of no case to answer."

[47] I agree with the learning in Layne, there is simply no evidence directly or inferentially that there was any plan, agreement, or discussion to kill or cause grievous bodily harm to the victim in this case.

The evidence presented by the Crown from the CCTV, interviews and timed runs does not address this issue whatsoever.

[48] Much reference has been made in the course of argument to the case of **DPP v Varlack UKPC 2009**, and this Court takes no issue with the legal principles espoused therein. However, **Varlack** is a very different case factually.

[49] In that case, the prosecution's case was as follows:

- a. The murder was carried out sometime after 10:00 pm on the night of 29-30 August in the execution of a joint enterprise to which Parsons, Hamm, Mario Pemberton and the respondent were parties.
- b. The evidence against each of the defendants was circumstantial. It tended to establish Parsons' possession of the murder weapon, an Uzi pistol, and to prove that a car which was driven on that evening by Hamm was seen parked at or about 11:30 or 11:45 pm on the night of the murder on a lonely road at the other end of the dirt track, a short distance from the place at which Todman's body was found.
- c. The judge found that Parsons and Hamm each had a case to answer, a conclusion which was upheld by the Court of Appeal. She acceded to the submission of no case at the close of the prosecution's evidence made on behalf of Pemberton, and at the end of the case he was acquitted by the jury on the charge of keeping a firearm without a licence.
- d. The prosecution's case against the respondent was that she was used as a lure to get Todman to go to a meeting place on the mountain road, where he was to be murdered. It was based largely on evidence of telephone calls made between the accused, from which the prosecution sought to draw the inference that she knew and agreed to the plan to kill Todman.
- e. It was claimed that she was instrumental in getting him to travel into the mountains and that she tipped Hamm off by telephone when he left her apartment for the meeting.

- f. The prosecution assembled detailed evidence at trial of the significant number of telephone calls made between Hamm, Parsons and the respondent in the space of nine days from 25 August to 2 September 2004.
- g. Expert evidence was called to determine the general area in which the caller and the person called in each case were located, by identifying the location of the telephone relay stations that processed the telephone calls.
- h. On the morning of 29th August 2004, the last day the deceased was seen alive, Hamm made three calls, two to the workplace and the third to the home of the deceased. Varlack called three times to the deceased's home telephone, apparently reaching him once.
- i. That evening, at 8:49 pm Varlack telephoned from the neighbour's home and spoke with Hamm on his mobile phone. At 9:31 pm the deceased made his final telephone call: it was to Hamm's mobile. Three minutes later Hamm used his mobile telephone, from an East End location, and spoke with Parsons on his mobile telephone. Five minutes later, Hamm again telephoned Parsons on his mobile. Twenty minutes after that call (at 9:58 pm) Varlack, from another neighbour's telephone, called Hamm on his mobile. Hamm was still in the area of East End. Less than a minute after that, Hamm telephoned Parsons, who was in the Road Town area of Tortola, on his mobile. Five minutes later, at 10:04 pm, Hamm telephoned Varlack at the same neighbour's home. The final call that night was at 10:57 pm when Hamm called the telephone company's balance check number.
- j. The following morning, the morning that the body was discovered, Hamm telephoned for Varlack twice and in the afternoon Varlack telephoned Hamm. On the next day, 31st August 2004, Hamm and Varlack each telephoned the other a number of times, Parsons and Hamm each telephoned the other a number of times and Parsons telephoned Varlack twice. On 1st September 2004, after the police interviewed Varlack, Parsons telephoned Hamm twice and Varlack telephoned Hamm twice.
- k. At 4:11:33 am and at 4:11:37 am in the morning of 2nd September 2004, after the Uzi firearm was recovered from Parsons' mother's jeep, Varlack telephoned Hamm.

- l. It was submitted on behalf of the prosecution that the timing of some of these calls was significant in relation to several matters which occurred, both before and after the killing.
- m. The respondent and Todman had been in a sexual relationship and had cohabited at her apartment until sometime within a period of two weeks before Todman was killed, when he left and commenced a relationship with Kishma Martin. It was alleged by the prosecution, but denied by the accused, that the respondent had begun a relationship with Hamm when Todman left.

[50] The evidence led in the case of **Varlack** was very different from the evidence of this case. In **Varlack**, there was material that supported the inferences that the respondent and the others had participated in the commission of the actus reus. There was also material that a jury could consider as being suggestive of a plan to cause serious harm. That is simply not the case in the instant matter.

Conclusion

[51] The issue for this Court to determine is whether on the Crown's case there is sufficient evidence to leave the matter for the jury's consideration. The Court in making its decision has considered the learning in relation to the submissions generally, and has taken into account the principles as they relate to no case submissions and circumstantial evidence.

[52] Having reviewed the evidence for the Crown, I find that there is no evidence when taken at its highest that is capable of amounting to a prima facie case that any of the persons charged with this offence committed the actus reus or had the necessary mens rea to constitute the offence.

[53] I find that the evidence as led is not capable in law of supporting a conviction, and that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt.

- [54] Having carefully considered and analysed the evidence, I am of the opinion not only that each item of the circumstantial evidence but the totality of it fell far short of the test for circumstantial evidence which the authorities have outlined.
- [55] The evidence in the case established nothing but a very high degree of suspicion and no reasonable jury properly directed and approaching the matter with an open mind could convict upon it.
- [56] It would, therefore, be improper and plainly wrong to send the case to the jury. Accordingly, the submissions of no case to answer are allowed and I will direct the jury to bring back a verdict of not guilty in relation to each Accused person.
- [57] The Court wishes to put on record its appreciation to all Counsel in this matter, both for the Crown and for the Defence, for their very helpful submissions and the manner in which they worked together amicably to deal with the issues that must of necessity arise in the course of the trial.

Rajiv Persad SC

Judge (Ag)

By the Court

Registrar