

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

CASE NO: ANUHCR 2021/0047

BETWEEN:

THE KING

vs

[1] JASON MODESTE
[2] SHAKIEL THOMAS
[3] ARMAL WARNER
[4] ALIYAH MARTIN

Appearances:

Mr. Valston Graham with Mrs. Shannon Gittens-Jones and Mr. Sean Nelson, Counsel for the Crown

Mr. Wendell Alexander, Counsel for the First Defendant

Mr. Andrew O’Kola, Counsel for the Second Defendant

Mr. Sherfield Bowen, Counsel for the Third Defendant

Mr. Lawrence Daniels, Counsel for the Fourth Defendant

2023: March 20th, 21st, 23rd, 27th, 28th, 29th, 30th, 31st,
April 3rd, 4th, 5th, 6th, 7th, 11th, 12th, 13th, 14th, 28th,
May 2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 17th, 18th,
19th, (22nd, 23rd,)
June 12th, 13th, 14th, 15th, 19th, 20th, 21st

RULING

- [1] **WILLIAMS, J.:** The ultimate question to be answered at this stage of the proceedings is: Do the defendants, Mr. Jason Modeste, Mr. Shakiel Thomas, Mr. Armal Warner and Ms. Aliyah Martin, have a case to answer?
- [2] A submission of ‘no case to answer’ at the end of the Prosecution’s case is governed by the celebrated case of **Regina v Galbraith** [1981] 1 WLR 1039, [1981] 2 All ER 1060, in which Lord Lane, C.J, said, at 1042 letters B - D:

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

(1) If there is no evidence that the crime has been committed by the defendant, 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 case to be tried by the jury.”

[3] A trial judge may only uphold a ‘no case submission’:

(1) Under what is commonly referred to as the ‘first limb of **Galbraith**’ where there is no evidence that the crime has been committed by the defendant; or

(2) Under part (a) of ‘the second limb of **Galbraith**’ if the judge forms the opinion that the prosecution’s case taken at its highest, a jury properly directed could not properly convict upon the evidence.

[4] Where the issues to be considered on the ‘no case’ concern the findings of facts from the evidence, assessing the reliability of witnesses, the weight to be given to the testimony from a particular witness, resolving contradictions in the evidence and all the other matters that are within the province of the fact finding forum, such as the drawing of inferences, a judge must leave the case to be tried by the jury. A ‘no case’ submission cannot succeed in those circumstances even if the judge was convinced in his own mind that the Crown’s witnesses were unreliable and untruthful.

[5] The weight to be given to testimony for example from the witnesses Mr. Brandon Brodie or Mr. Jean-Pierre Hector or Police Corporal Owen Rigby or Police Sergeant Clint Spencer or the lead investigator Inspector of Police Theodore Horne, remains entirely in the province of the jury. This is notwithstanding the views taken of their testimony by the defence. Counsel Mr. Andrew O’Kola during his no case submission used the terms “disputed evidence” and “contentious facts.”

The Charge

- [6] The four defendants, Mr. Modeste, Mr. Thomas, Mr. Warner and Ms. Martin, were jointly indicted for the murder of Mr. Bruce Greenaway.
- [7] The indictment, as amended (on 11th May, 2023) alleged that the four Defendants “between [the] 8th and [the] 14th days of April, 2020 in the Parish of Saint Paul in the State of Antigua and Barbuda, murdered [Mr.] Bruce Greenaway.”
- [8] (The original indictment, dated the 10th day of September, 2021 and filed on the 15th of September, 2021 recited “between the 9th and 13th days of April, 2020.” This is mentioned only for completeness; nothing turns on the amendment).
- [9] The offence of murder was stated to be contrary to the common law.
- [10] The elements of the offence that the Crown was required to establish were:
- i. Bruce Greenaway was dead.
 - ii. Bruce Greenaway’s death was as a result of unlawful harm.
 - iii. The four defendants – Mr. Modeste, Mr. Thomas, Mr. Warner and Ms. Martin – were the ones who inflicted the unlawful harm.
 - iv. At the time the unlawful harm was inflicted the four Defendants had the intention to either kill Bruce Greenaway or to do him grievous bodily harm.
 - v. Bruce Greenaway died within a year and a day of the harm being inflicted on him.
- [11] The Defendants have all pleaded ‘not guilty.’
- [12] Not only did the Defendants deny the Crown’s allegation that they jointly murdered Mr. Greenaway but they also put the Crown upon proof of each and every element of the offence. Counsel Mr. Sherfield Bowen on behalf the third defendant, (Mr. Thomas), pointedly tested the issue of the identification of the body that was in the case and found at Indian Creek, Saint Paul, on the 13th April, 2020 as being that of Bruce Greenaway. This questioning of the quality of the identification extended to the basis upon which the decomposed body was identified at the postmortem.

Applicable Principles

- [13] There were two points of law which intersected upon the consideration of ‘no case to answer’ in this matter. One related to the law governing joint enterprise. The other had to do with circumstantial evidence.
- [14] When the Learned Director of Public Prosecutions (acting), Mrs. Shannon Jones-Gittens, opened the Crown’s case, she pointed out:
- i. There were no eyewitnesses in this matter and the Crown relied on circumstantial evidence, which would require the jury to “draw conclusions.”

- ii. The Crown relied on the principle of joint enterprise, of persons “working together.”

The Evidence

- [15] The chronology of the salient points as they emerged from the evidence adduced can be summarily outlined. While some of the matters may have been challenged by Counsel for the various Defendants, or testimony from one witness may be in conflict with that of another witness, what has to be considered at this stage is the evidence that is most favourable to the Crown.
- [16] In April 2020, the four Defendants were all assigned to the *ad hoc* Joint Task Force (“the JTF”), which was a seasonal patrol team of selected officers of the Royal Antigua and Barbuda Police Force (“the RABPF”) and the Antigua and Barbuda Defence Force (“the ABDF”). (The other members of the JTF were not involved in this matter).
- [17] The three police officers assigned to the JTF worked 24 hour shifts followed by 48 hours off. The six soldiers assigned to the JTF worked 48 hours rotations – 48 hours on, 48 hours off. In 2020, when mobile patrols were done, the JTF team in the vehicle would comprise one police officer and three soldiers.
- [18] The area of operation for the JTF unit was the Falmouth-English Harbour-Dockyard-Piccadilly area of Saint Paul in Antigua and Barbuda.
- [19] The focus of the JTF was usually to provide security support for the tourism sector. In 2020 however, the JTF had the additional responsibility of enforcing the highly restrictive curfew that was proclaimed as a result of the infectious corona virus, COVID-19. The curfew ran from midday to 8:00 am the following day.
- [20] The incident which is the subject matter of this case spans the Easter weekend in 2020, beginning on Holy Thursday on 9th April, 2020.
- [21] On Holy Thursday on 9th April, 2020 the second defendant, Mr. Thomas, a Lance Corporal, L/Cpl, in the ABDF, was driving the maroon-coloured JTF pickup vehicle. He was traveling along the Falmouth main road, on his way back to the JTF base with water that he had gone to collect. Upon reaching the area of the Saint Paul’s Anglican Church sometime around 1:00 pm, L/Cpl Thomas encountered Mr. Bruce Greenaway on the road; Mr. Greenaway was in breach of the curfew. Mr. Thomas first slowed down the vehicle then brought it to a stop. L/Cpl Thomas engaged Mr. Greenaway in relation to the breach of the curfew regulations. Mr. Greenaway did not comply with the instructions from L/Cpl Thomas.
- [22] Police Officer, Sergeant Clint Spencer, was traveling in the opposite direction to the JTF vehicle. Sergeant Spencer, a member of the Tactical Operations Unit of the Criminal Investigations Department of the RABPF, was driving an unmarked police vehicle. He said that he was dressed in civilian clothing. There was also another unmarked vehicle on the scene when Sergeant Spencer

got there; that vehicle was driven by a soldier, Mr. Al Hilaire, whom Sergeant Spencer knew. Mr. Hilaire was also in civilian clothing according to Sergeant Spencer and L/Cpl Thomas was in “half order” (he was wearing only a part of his ABDF uniform). Sergeant Spencer saw Bruce Greenaway sitting on the ground holding a bucket. Officer Spencer resided in the Piccadilly area, Saint Paul; he knew Bruce Greenaway, but did not know exactly where Mr. Greenaway lived. Officer Spencer exited his vehicle and instructed Mr. Greenaway to stand and cooperate. Sergeant Spencer then touched and confined the body of Bruce Greenaway. Sergeant Spencer secured Mr. Greenaway’s hands behind the detained man’s back with the use of tie straps. (Note: “The person making the arrest shall actually touch and confine the body of the person to be arrested unless the person submits by words or action.” Points to Prove, 2nd edition, 2014 National Prosecution Service of Saint Vincent and the Grenadines). Officer Spencer then instructed Mr. Greenaway to sit in the tray of the JTF pickup vehicle. Two witnesses, Mr. Brandon Broodie, who was Mr. Greenaway’s cousin and Mr. Jean-Pierre Hector said that they saw the “soldiers” beating and generally ill-treating Mr. Greenaway. According to Mr. Hector the person who was wearing a black top and a black or navy blue special unit pants held Mr. Greenaway in a “lock position” (‘choke hold’) while Mr. Greenaway was on the ground and the two other individuals hit and kicked Mr. Greenaway then eventually he was placed in the pickup vehicle. Mr. Hector said that he could not identify who did what to Mr. Greenaway, but, the witness said, that “at the time of the interaction when Bruce in distress” the three persons were “dealing with him.”

- [23] L/Cpl Thomas drove the JTF pickup vehicle to the JTF base with Bruce Greenaway in the tray of the JTF vehicle. The vehicle was seen passing the CCTV camera at Jenny’s Corner at about 1:20 pm with someone in the tray.
- [24] After L/Cpl Thomas returned to the JTF base, he picked up the other three Defendants to proceed on patrol. The JTF team comprising of the four Defendants left the base in the vehicle. The maroon pickup vehicle was again seen passing the CCTV camera Jenny’s Corner at about 1:41:53 pm, this time traveling in the opposite direction to which it was traveling roughly 22 minutes earlier. The blurred image of a vehicle then passed the CCTV camera on Paradise Road at 1:43:00 pm, heading in the direction of Piccadilly. The vehicle was then seen on the same camera at Paradise Road traveling in the opposite direction at 2:03:24 pm heading towards Cobbs Cross.
- [25] Bruce Greenaway’s relatives neither saw nor heard from or about him during the next few days following Holy Thursday. Eventually there was communication from family members to the police commencing on Sunday 12th April, 2020 inquiring about Mr. Greenaway’s whereabouts, since Mr. Greenaway was last seen in the tray of the JTF pickup vehicle sometime after 1:00 pm on Thursday 9th April, 2020.
- [26] Queries were made of the first defendant, Mr. Modeste, by police colleagues regarding the whereabouts of Mr. Greenaway. Corporal Semone Vigilante of the Dockyard Police Station testified that sometime after 10:30 am on Monday 13th April, 2020 she called Constable Modeste and asked him whether Bruce Greenaway was picked up on Holy Thursday. The First Defendant said that Mr. Greenaway was picked up by the soldiers and taken to the Coast Guard Base in English Harbour

from where the JTF operate. Mr. Modeste told Corporal Vigilante that “the man was warned and taken back to the village.”

- [27] At about 3:00 pm on Easter Monday 13th April, 2020 a trio of farmers who were at the waterfront area of Indian Creek, Saint Paul, discovered the swollen, decomposing body of a man in the mangroves. The farmers then decided to go to the police to report the matter. On their way out of Indian Creek, the men were intercepted by a team of police officers in a vehicle, who had journeyed from the Block House in the Shirley Heights look out area. The officers, who were based in Saint John’s, were driving around various parts of Antigua when, from the vantage point of the Block House, they noticed the farmers who were in the sea and the officers proceeded to Indian Creek.
- [28] Later that afternoon of Monday 13th April, 2020 the District Medical Officer, DMO, Dr. Rasheda Gilbert-Charles was summoned to Indian Creek by officers of the Dockyard Police Station. The DMO observed the body of what appeared to be a middle aged male lying on the sand in a prone position, face down. There was an odor of decomposition emanating from the body. Dr. Gilbert-Charles noted the body had erythematous red bruising to the right hand and posterior trunk. There were no signs of life and she pronounced the person dead at 5:15 pm on Monday 13th April, 2020.
- [29] On 19th May, 2020 a post mortem was conducted at the Holberton Hospital autopsy room by pathologist, Dr. Lester Simon, on the body found at Indian Creek on Easter Monday. The body was identified as that of Bruce Greenaway prior to the postmortem. Dr. Simon said that the external examination of the body revealed haemorrhagic areas of the skin to include the left back (centre), below the left buttocks, in the pelvic area near the penis, the left and right forearm, the center of the chest and the underside of the chest plate. Upon internal examination of the body, Dr. Simon found that there was a fracture to the right upper part of the thyroid cartilage of the deceased neck. Dr. Simon concluded that: “Death was due to strangulation associated with the fracture of the upper bone connected to the thyroid cartilage.”
- [30] According to Dr. Simon, strangulation referred to external pressure to the neck resulting in the death of someone. He said that there were three mechanisms at work or involved which may occur singly or in combination. The mechanisms were:
- i) Where the force was such that the person could not breathe; that had to do with air getting into or out of the lungs.
 - ii) Where the external force is applied to the neck such that it compromises the blood circulation; the veins then the arteries are affected and the brain as a result cannot function.
 - iii) Where the external force affects the vagus nerve and compromises the heart, lungs, intestines and descendant parts.

- [31] The pathologist said that while he stood by his diagnosis of strangulation as the cause of death in this case, he could not say the manner in which strangulation occurred,
- [32] With regard to the identification of the body, relatives of Bruce Greenaway were taken to Indian Creek by the police on the evening of Monday 13th April, 2020. Ms. Monica Jackson of Falmouth, with whom Bruce Greenaway resided said that “It was dark. I could not see what they [the police] were showing me at the time.” The police then took what they were showing her to the “police post, English Harbour, in the Shirley heights area... they opened a body bag, I looked in the bag, [and] I observed the body of Bruce Greenaway.” Another of Mr. Greenaway’s cousins, Ms. Tricia Greenaway, said that she was taken to the base at Clarence House on the way to Shirley Heights where she “viewed and identified the body” that was in “a white body bag.” The body bag was zipped down to the chest area and she identified the body as that of Bruce Greenaway. She identified him by the clothing. The last time she saw Bruce Greenaway alive was on Sunday 5th April, 2020. Ms. Greenaway also identified the body of the deceased at 10:30 am on Friday 17th April, 2020 at Straffie’s Funeral Home and also identified him on Tuesday 19th May, 2020 at the old Holberton Hospital morgue. When Ms. Greenaway identified the deceased at the autopsy, she did so based on the facial structure of the deceased as the Greenaway men had a distinctive forehead.
- [33] Video footage was recovered from multiple cameras with the aim of tracking the movement of the JTF vehicle between 12:00 noon and 3:00 pm on Holy Thursday 9th April, 2020. The retrieved footage did not cover the entire time period between when Mr. Greenaway was last seen on Holy Thursday and when the body said to be that of Bruce Greenaway was discovered on Easter Monday. The focus was solely on the maroon JTF pickup. No movement of any other vehicle was monitored. The video footage from an apartment building on Dr. Yele Akande Drive showed the maroon JTF vehicle traveling southwards on Thursday 9th April, 2020 at about 2:43:51 pm according to the camera time, with what appears to be a person in the back of the vehicle. Then, almost 19 minutes later, at 3:02:10 pm camera time, the video footage showed the maroon JTF vehicle heading northwards without any figure visible in the back of the vehicle. Corporal Rigby of the Regional Cyber Investigations Laboratory who extracted the footage said that the time shown on the camera ought to be adjusted backwards by an hour. Instead of 2:43.51 pm, it should be 1:43:51 pm and instead of 3:02:10, it should be 2:02:10 pm.
- [34] Among the areas that travels southwards, passing the camera on the apartment building on Dr. Yele Akande Drive, can lead to is the dirt road that branches off towards Indian Creek where the body was discovered on Easter Monday.
- [35] Investigations were launched by the police into what happened to Bruce Greenaway. The police and soldiers assigned to the JTF were withdrawn on Tuesday 14th April, 2020 and reports requested of them.
- [36] The Defendants all gave accounts, whether in reports, statements or interviews. According to the Defendants, after leaving the base, they went to patrol in Piccadilly, then to Falmouth. During their tour of duty, they ended up journeying to Saint Johns. The totality of their accounts was that after

they left the base with the prisoner in the tray of the pickup vehicle, while they were proceeding along Piccadilly Main Road, the tie straps to the hands of the prisoner, Bruce Greenaway, were removed by Officer Modeste and the prisoner was released from the JTF custody with a caution to comply with the curfew regulations.

Defendants' Statements

- [37] Constable No. 460 Modeste submitted a written statement dated the 14th April, 2020 to the police. (That written statement was not tendered in evidence).
- [38] The witness, Sergeant Spencer, said that sometime in 2020, he saw Mr. Modeste at the St. John's Police Station, in the vicinity of the canteen, and he asked Mr. Modeste "how he was doing because there were rumours circulating regarding Bruce Greenaway." Mr. Modeste told him: "I was not involved with what you are talking about. All I know is I never hit anybody."
- [39] On the 22nd May, 2020 three days after the autopsy, Mr. Modeste gave a caution statement to Inspector of Police Theodore Home. In that brief statement the First Defendant said: "I do not know anything about the death of the gentleman. I never beat nor strangle anyone. That's the truth."
- [40] Immediately after Inspector Home obtained the caution statement from Mr. Modeste, the Inspector proceeded over the next six and a half hours to interview Mr. Modeste. (There was a break for lunch between 1:11 pm and 2:33 pm).
- [41] The First Defendant explained that he, along with Corporal Walsh and Constable Roberts were the police officers assigned to the JTF. Corporal Walsh was his immediate supervisor. During Constable Modeste's 24 hour shift, he would assist with patrols and carry out "vehicle stop and search."
- [42] Mr. Modeste said he had a conversation with the Second Defendant in the early afternoon of 9th April, 2020 when Mr. Thomas returned to the base. Mr. Modeste said he looked in the tray of the vehicle and recognised "'Yankee'... He was sweating heavily... to myself I say boss we go just drop off the man." The team went on patrol a "few minutes later." After making a right at the Cobbs Cross junction, they "dropped off the man, warned him and tell him to go home. Then we continued on patrol."
- [43] Mr. Modeste said that when he first saw 'Yankee' "he [Greenaway] was upset or something of that sort. I didn't pay him no mind. I just said to myself I not getting involved with them people." He explained that "'Yankee' was in the back of the pick up making plenty noise, so I didn't really entertain him." Mr. Modeste said that Mr. Greenway was released sometime before 2:00 pm. The First Defendant conceded that it was a "blunder" on his part to put Mr. Greenaway out of the vehicle during curfew time. Mr. Modeste said he did not know where Bruce Greenaway lived; neither did he know where Indian Creek was.

- [44] When Mr. Modeste was pressed by the interviewer as to whether he [Mr. Modeste] murdered “Bruce Greenaway alias ‘Yankee’ on Thursday 9th April, 2020” the First Defendant reiterated: “No sir. Never beat, never strangle, I never murder Bruce.”
- [45] The second defendant, L/Cpl Thomas, in his interview with the police on 28th April, 2020 said that he, being the most senior of the soldiers, had command of the other two soldiers on the JTF team. They worked 48 hour rotations. Mr. Thomas said that on the 9th April, 2020 he went to get water. While returning to base around 1:00 pm, he was stopped by a female who said to him “that the guy Bruce was causing a lot of trouble.” Mr. Thomas tried to speak with Mr. Greenaway. Sergeant Spencer arrived and helped in detaining Mr. Greenaway and the detainee was taken in the JTF pickup to the base. Mr. Thomas said that upon his reaching the base, he informed Officer Modeste of the presence of the detained man in the vehicle. Mr. Thomas said he then went to get the other soldiers to go on patrol. Mr. Thomas said that the First Defendant later said that he, Mr. Modeste, was going to release the detained man because “he assessed the situation” and saw “that the guy was intoxicated or drunk.” (The L/Cpl could not remember which one of the terms Mr. Modeste used). Mr. Thomas said having left the base on patrol “after turning right into Piccadilly, the police then told me to remember to stop to drop off the guy.” Mr. Thomas said that he stopped the vehicle, Mr. Modeste got out, removed the plastic ties from Bruce Greenaway’s hands and returned to the vehicle. They then proceeded to patrol into Marsh Village, through Piccadilly, then back to Cobbs Cross and Falmouth. They eventually returned to the base at about 4.00 pm, then left on patrol again at 8:00 pm.
- [46] Mr. Thomas explained that when Bruce Greenaway was detained, Mr. Greenaway was left in the tray of the vehicle because “at this time the virus was going around; we are not taking chances with putting him on the inside with us.” Mr. Thomas said the protocol when someone was found breaking the curfew was that “the police will make the decision what to do with them.” The Second Defendant also said that he was not sure where Bruce Greenaway lived.
- [47] On the 22nd May, 2020 the lead investigator, Inspector Horne, interviewed the Second Defendant in the presence of his lawyer Mr. Lawrence Daniels and Major Alando Michael of the Antigua and Barbuda Defence Force. For most of the 62 questions, L/Cpl Thomas indicated that he had nothing to say. However the following exchange occurred during questions 17 to 20:
- Q: Did you murder Bruce Greenaway?
- A: No Sir.
- Q: Do you know how Bruce Greenaway came to his demise?
- A: No Sir.
- Q: Were you present when Bruce Greenaway was murdered?
- A: No Sir.
- Q: What part did you play in the death of Bruce Greenaway?

A: None.

- [48] Private Warner did a video recorded interview at the Langsford Police Station on the 28th April, 2020. He said that he was at the JTF base when L/Cpl Thomas returned to the base on the 9th April, 2020 sometime after 1:00 pm with Bruce Greenaway in the tray of the vehicle. Private Warner said the Second Defendant explained what transpired that led to Mr. Greenaway being in the pickup. Private Warner said he finished having his lunch then put on his uniform “because at that time I was in half order. Got my weapon, put on my vest and I got into the vehicle.” He said that L/Cpl Thomas was the driver, Constable Modeste was in the front passenger seat, Ms. Martin was seated behind Mr. Modeste, while he (Private Warner) was behind the driver of the vehicle. When the vehicle got to Cobbs Cross Primary School, they turned to go into Piccadilly. The Third Defendant said that as they were “going along the road, I heard the guy in the back of the truck said something along the lines of ‘right here’ or ‘right yah.’” Then time Corporal Thomas pulls off the road and Constable Modeste came out the vehicle and went to the guy. When I heard the tail gate of the vehicle open, that’s when I look back and I saw Modeste cut the zip tie off the guy, helped him out of the back of the vehicle, close back the tailgate, go back into the vehicle and we continued our patrol into the Marsh area or Marsh Village. We patrolled there for some time then came back out onto the Piccadilly main road, continued the patrol going up Horsford Hill, through Liberta, coming down through All Saints.”
- [49] Mr. Warner said it was his second year in the ABDF, but his first time working in English Harbour. He said that while he knew the general area where Mr. Greenaway was dropped off, he would not be able to say exactly where.
- [50] The Third Defendant said that the role of the soldiers in the JTF was to support the police and that the police would normally take the lead to “talk to the person, give the person a warning, things like that.” He said that Bruce Greenaway was not in any way aggressive while in the tray of the pickup, but “his hands were zip tied behind his back” until Mr. Modeste cut the ties with a grey handle scissors.
- [51] The fourth defendant, Ms. Aliyah Martin, was interviewed by Corporal Chatam at the Langsford Police Station on 28th April, 2020. Private Martin recalled that the Second Defendant returned to the base after 1:00 pm on Thursday 9th April, 2020 when L/Cpl Thomas returned to the base and told her and the Third Defendant to get ready to go out on patrol. She saw someone in the tray of the vehicle. While in the process of leaving, Mr. Modeste said that the person in the pickup was someone he knew and that the person seemed intoxicated and that he, Mr. Modeste, would release the person. In the vehicle, she was seated behind officer Modeste; no one was seated in the tray of the vehicle with the individual. They drove into English Harbour, to Cobbs Cross then into Piccadilly. The vehicle came to a stop, Mr. Modeste went to the back of the pickup, helped the person out of the vehicle and cut the tie straps from the person’s hands and came back into the vehicle. The person was released “just around the bend going into Piccadilly there was a trailer on the left hand side.” They then continued their patrol into Marsh Village for about ten minutes and returned via the same route that

they had traveled earlier, back through Piccadilly, on to Cobbs Cross, Falmouth and Liberta. She was dressed in digital uniform, with a bullet proof vest and armed with a Baretta in a leg holster.

Defence Submissions

- [52] Counsel representing the four Defendants all relied on the first limb of **Galbraith** in grounding their 'no case' submissions. Counsel contended that there was no evidence that the crime alleged was committed by their clients, therefore it was the duty of the trial judge to stop the case at this point. Although there were passing references to the second limb of **Galbraith**, that argument was not strenuously advanced by Counsel.
- [53] Mr. Lawrence Daniels on behalf of the Fourth Defendant submitted that there was no evidence adduced that Ms. Martin inflicted any injury to Bruce Greenaway. Counsel said there was no CCTV footage or forensic evidence that linked her. Mr. Daniels said that there was no direct nor circumstantial evidence pointing to Ms. Martin. Mr. Daniels said that there was not a scintilla of evidence against his client.
- [54] Mr. Sherfield Bowen on behalf of the Third Defendant highlighted that the Crown was required to prove the *mens rea* – that is, to show the state of mind of Mr. Warner, in that he intended to kill or cause grievous bodily harm to Mr. Greenaway. Counsel also noted that the Crown was required to prove the *actus reus* - that Mr. Warner did some act to Bruce Greenaway. Mr. Bowen stated that on both counts, the Crown failed. Counsel opined that the Crown did not have the necessary strands to build a circumstantial case. Mr. Bowen said that there were many unanswered questions, including when, where and the instrumentality of Bruce Greenaway's death. Counsel also stated that there was no evidence that his client was part of any joint enterprise or that Mr. Warner was in concert to cause any unlawful act. Mr. Bowen said it would be a travesty to ask Mr. Warner to mount a defence.
- [55] Mr. Wendell Alexander appeared via zoom for the purpose of making submissions on behalf of the First Defendant. Counsel contended that the Crown has failed to make out a *prima facie* case. Mr. Alexander stated that Mr. Modeste was not involved in any joint enterprise within the parameters outlined in **R v Jogee** [2016] UKSC 8. Counsel also referred to Lord Goddard's judgment in **R v Lane and Lane** (1986) 82 Cr App R 5, regarding the challenge in joint enterprise cases when the Crown is unable to identify which defendant committed the act. Mr. Alexander also noted that the mere presence of someone in a vehicle was not enough to ground a joint unlawful enterprise.
- [56] Mr. Andrew O'Kola appeared via zoom as well, to make submissions on behalf of the Second Defendant. Mr. O'Kola noted what he considered to be three shortcomings of the Crown's case: the absence of direct evidence, the absence of circumstantial evidence, and the inability to establish joint enterprise. Counsel noted that the Crown could not say which of the four Defendants was the principal and which ones were a secondary party. He relied on the earlier cited case of **R v Lane and Lane** as well as **R v Aston and Mason** (1992) 94 Cr App R 180 for the proposition that where

two [or more] 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, they ought to be acquitted.

Crown's Response

[57] The Learned Prosecutor, Mr. Graham, grounded his response on how a court should treat a no case submission when the Crown is relying on circumstantial evidence. He stressed that it was the cumulative strength of the Crown's case which must be borne in mind, with the inter-dependence of the different strands. Mr. Graham was of the view that learned Counsel for the Defendants "picked at snippets" of the evidence. He described that as a "piecemeal" approach. Mr. Graham said what was important was the overall strength of the complete case, rather than merely looking at the frailties.

[58] Mr. Graham highlighted the leading authority on circumstantial evidence in the sub-region – **DPP v Selena Varlack**, (PC), [2008] UKPC 56. Counsel noted Lord Caswell's judgment at paragraph [21] and [22]:

"The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane, CJ, in **R v Galbraith** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge is equally applicable in cases such as the present, concerned with the drawing of inferences."

"It follows from the principles as formulated in **Bilick** (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence... He is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence....

"I would re-state the principles, in summary form, as follows... 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.

“A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in R v Jabber [2006] EWCA Crim 2694 when Moses, LJ, said at paragraph 21:

“The correct approach is to ask whether a reasonable jury properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstance necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.”

- [59] Prosecuting Counsel canvassed that the issue of joint enterprise could be proved by circumstantial evidence. Mr. Graham referred to the decision in Jogee. That case, however, could not be of much assistance to his submissions since what was addressed in Jogee had to do with parasitic accessory liability.
- [60] Mr. Graham, in response to a question posed as to what are the different strands of evidence that could be relied on to infer joint enterprise, said that the starting point was the lies told by the Defendants. He noted that it was not just one defendant that said Bruce Greenaway was dropped off on the way to Piccadilly, but all four said so. Counsel noted that the Crown's evidence was that the investigator said the person in the back of the JTF pickup that was seen on the CCTV from the Apartment building on Dr. Yele Akande drive was Mr. Greenaway. This would be subsequent to the point the Defendants said Mr. Greenaway was dropped off. Further, the vehicle was heading in the general direction that the body was discovered days later. Mr. Graham conceded that much could not be made of the Defendants being together on patrol, since that was a proper basis for them being together.

Joint Enterprise

[61] The fundamental challenge to the Crown's case highlighted in the submissions from Counsel for the Defendants focused on the issue of joint enterprise.

[62] The Caribbean Association of Judicial Officers, CAJO, in its Criminal Bench Book for Barbados, Belize and Guyana, February 2023, introduces the considerations of joint enterprise this way, at page 152:

"Joint enterprise' is a common law doctrine where two or more parties embark on a joint enterprise, either as principal offender/s or secondary party/parties, and where each will be liable for acts committed in pursuance of that joint enterprise with the necessary intent, unless the principal offender/s go beyond the scope of what was agreed. However, note that a contending development in the law is that a member of a group cannot be found guilty of an offence unless there is proof that they positively intended that it should be committed; mere foresight of what someone else might do is not enough."

[63] The essence of joint enterprise is that more than one person shared in the intention to commit the offence and took some part in its commission. If two or more people – and in this case the Crown is alleging that it was four persons – act together with a common criminal purpose to commit an offence, they are each responsible. The role played by one or another party may be greater, or lesser, or different, to that played by others.

[64] Multiple defendants must have acted together with a common criminal purpose for them to be held jointly responsible. The Crown must prove the participation of all the defendants in pursuing the common purpose. Although the fundamental basis on joint participation to fulfill a common purpose implies that there is an agreement between the parties, there is no requirement for the Crown to prove any formal agreement. The agreement may be without any extended planning or discussion but can be arrived at spontaneously, or may be inferred.

[65] The Law Lords of the Privy Council, in the consolidated cases of R v Jogee and Ruddock v The Queen, [2016] UKSC 8, [2016] UKPC 7, started out by reiterating that:

"In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others."

[66] The Law Lords make two relevant points early in the Jogee decision, at paragraphs 7 and 10:

"...accessory liability requires proof of a conduct element accompanied by the necessary mental element."

"10. If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent. D2's intention to assist D1 to commit the offence, and to act with whatever mental element is required of D1, will often be co-extensive on the facts with an intention by D2 that the offence be committed."

[67] In this matter, the Crown was required to prove that the four Defendants had the intention to murder or cause grievous bodily harm to the deceased and there was an agreement among the Defendants to do so.

[68] Mere presence at the scene of a crime is not sufficient to prove the guilt of a person. Such presence would have to be accompanied by an intention on the part of the bystander and proof that the person by their presence encouraged the perpetrator.

[69] The learned authors of Blackstone's Criminal Practice 2017 note at paragraph D16.63, which addresses 'Prima Facie Case against Two Accused', that problems arise "where there are co-accused and the evidence establishes that one or other committed the offence charged but it is impossible to say which."

"In such cases, and assuming there is no evidence of joint enterprise, both are clearly entitled to be acquitted on a submission of no case. Lord Griffiths stated the principle succinctly in his judgment in Bellman [1989] AC 836 (at p. 849A):

"It, of course, goes without saying that if the evidence shows that one of two accused must have committed a crime but it is impossible to go further and say which of them committed it, both must be acquitted."

[70] The Crown Court Compendium, Part 1: Legal, Summaries, Directions and Examples, May 2016, provides useful guidance in summing up cases. At paragraph 7-2 it provides the useful reminder about 'Joint participation in an offence':

"Legal liability for a criminal offence may arise in the following circumstances in which D is involved with another or others:

(1) by his own conduct and with the necessary fault, D committed the offence with another (P) [joint principal];

(2) by his own conduct and with intent, D assisted another (P) to commit the offence [assisting];

(3) by his conduct and with intent, D encouraged another (P) to commit the offence [encouraging];

(4) D 'commanded and commissioned' (i.e. ordered or suggested) the offence committed by another (P) and P committed it with the necessary fault [procuring]."

[71] The Crown Court Compendium then goes on to note at 7-2.3 that:

"It has always been sufficient to prove that D was either the principal or accessory. It is not necessary to specify what role D is alleged to have played. The Crown should draw the particulars of the offence 'in such a way as to disclose with greater clarity the real nature of the case that the accused has to answer'."

[72] Of particular importance or relevance to the present case involving these four Defendants is the guidance provided at sub-paragraph 7-2.4 of the Compendium. This concerns where there are joint defendants and there is no clarity as to who may have acted as principal in committing the offence. The cases cited are **R v Abbott** [1955] 2 QB 497; **R v. Banfield and another** [2013] EWCA Crim 1394, [2014] Crim LR 147, and **R v Lane and Lane** (1985) 82 Cr App R 5. It is noted in The Crown Court Compendium:

“If all that can be proved is that the principal offence was committed either by D or by P, both must be acquitted. Only if it can be proved that the one who did not commit the crime as principal must have aided, abetted, counselled or procured the other to commit it can both be convicted.”

[73] It is useful to briefly look at each one of the cited cases [**Abbott**, **Banfield**, and **Lane and Lane**].

R v Abbott

[74] In **R v Abbott**, the appellant, Mr. Charles Abbott and a female, Ms. Ruth Wales, who was employed as his secretary were charged with, *inter alia*, forgery. The offences concerned an insurance policy that was taken out by the Appellant’s wife. The married couple separated. The fact of the separation was unknown to the insurers. Steps were taken (unknown to the wife) to surrender the policy and to collect its value in cash. There were several telephone conversations between a representative of the insurance company and persons at the Appellant’s home including a woman purporting to be Mrs. Abbott. The insurance representative eventually visited the Appellant’s premises where the representative met a lady who received the refund in cash and signed as Mrs. Abbott. The person who signed was the co-defendant, Ms. Wales.

[75] At the close of the case for the prosecution a submission was made on Mr. Abbott’s behalf that there was no evidence against him to go to the jury. The submission was rejected by the trial judge. Evidence was then given by Ms. Wales incriminating Mr. Abbott. Both Mr. Abbott and Ms. Wales were convicted.

[76] The decision not to uphold the ‘no case’ submission was successfully appealed.

[77] According to the head note of the case, the Court of Appeal held that “the judge had come to a wrong decision in point of law in rejecting the submission of no case and in leaving the case to the jury when there was no evidence against him at the close of the case for the prosecution.”

[78] Two extracts of the judgment from Lord Goddard, CJ, both of which appear at page 503 of the judgment, are worth noting. The first one states:

“If 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 return a verdict of not guilty against both because the prosecution have not proved the case.”

[79] Lord Goddard noted that essentially if it was left to the accused persons “to get out of it if they can” it would in fact reverse the onus of proof, requiring the accused “to prove themselves not guilty.” He then said:

“Finnemore J. remembers a case in which two sisters were indicted for murder, and there was evidence that they had both been in the room at the time when the murder was committed; but the prosecution could not show that either sister A or sister B had committed the offence. Probably one or the other must have committed it, but there was no evidence to show which, and although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and the law maintained that the prosecution should prove its case.”

[80] The last sentence in the extract above from Lord Goddard’s judgment has been repeated in several judgments, including **R v Lane and Lane**.

R v Lane and Lane

[81] In **R v Lane and Lane**, Mrs. Linda Lane and her husband, Mr. James Lane, were jointly charged on a two count indictment in relation to the death of Mrs. Lane’s 22 month old daughter from a previous marriage named Sara. Count One was for manslaughter. They were both convicted of the offence and appealed.

[82] Prior to Sara’s death on 2nd September, 1983 she was hospitalized on three separate occasions between April and July 1983 suffering from injuries that had not been caused by accident. Those injuries however were the basis of another count on the indictment.

[83] The Lanes contended that Sara fell and sustained the injuries. An x-ray examination showed a fracture of the skull. The doctor who conducted the examination said that it was not possible for the bruising or fracture to have been caused by a simple fall. In his professional opinion, the injuries would have required considerable force. Additionally, the post mortem examination confirmed that the injuries were consistent with having been caused by a single blow, sometime between 12:30 and 8:30 pm. During that time each of the Appellants had been alone for some time with Sara.

[84] The Crown’s case was that the injuries which caused Sara’s death was caused by one or other or both of the Appellants. The Crown could not establish which of the Defendants had done so. There was no evidence of the time when the blow was struck, who did it, or even who was present when it happened.

[85] The police arranged three separate confrontations between the Lanes; neither one made any admissions. During the first confrontation, Mrs. Lane accused her husband of killing her child. He responded by saying: “I can’t believe she really means what she is saying.” In the second confrontation, Mr. Lane repeated what he said in an interview with the police, that Mrs. Lane was feeding Sara in a high chair and that in getting the child out, she accidentally dropped Sara on the

floor. He went on to say Mrs. Lane asked him not to mention it. Mrs. Lane however denied it and accused her husband of lying. In the third confrontation, Mrs. Lane continued to deny the suggestion about the high chair. Mr. Lane said: "You know it was an accident. You will never hurt Sara." Mrs. Lane responded by telling him to tell the truth, because he was the one who hurt the baby.

[86] The challenge in the case was described by Lord Justice Croom-Johnson thus, (at page 9 letter D):

"The appeal raises again the problem of where the evidence available to the prosecution goes to prove that someone caused the injury to the baby but there is no admissible evidence implicating one defendant rather than the other."

[87] The prosecution also sought to rely on lies told by the Appellants about their whereabouts and how the child got injured.

[88] The Appellants for their part stressed on their appeal that "the likelihood is that the fatal injury to Sara was the result of a single blow or a single incident, therefore inflicted by one person and in all probability in a very short space of time. At all times the prosecution were unable to show when it was inflicted, by whom it was inflicted, or how many people were present." (Page 17, letters C-E).

[89] Croom-Johnson, LJ, in delivering the judgment in **R v Lane and Lane**, quoted extensively from **R v Abbott** and held that the 'no case' submission should have been upheld. He went on to say at page 21 letter F to page 22 letter A:

"By themselves the lies do not lead to an inference of guilt or of presence at the time of the incident and the lies stand alone.

The evidence against each defendant, 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 made any admission; both had denied taking part in any injury; both told lies but lies which did not lead to the inference of that defendant's presence.

The conclusion is that the learned judge ought to have ruled in favour of the appellants on their submission of no case to answer."

[90] Lord Justice Croom-Johnson noted that it was a misdirection to assume that because both Appellants were caring for the child at the time in question, whether jointly or separately, meant that they were jointly guilty. Croom-Johnson, LJ, said at page 23, letters C-D:

"It is importing into the law relating to proof of manslaughter a new test. It is converting the general responsibility for custody and care into actual presence at the time when the blow was struck, even though on the acknowledged facts there were substantial periods when only one of them was present. Evidence of general custody and care does not establish presence; it is only a step towards proof."

R v Banfield and another

- [91] In **R v Banfield and another**, a 63 year old man, Mr. Donald Banfield, disappeared in May 2001; this was shortly after his retirement in January of that year.
- [92] In 2012, Mrs. Shirley Banfield, who was the deceased's wife, along with her daughter, Ms. Lynette Banfield, were convicted of Mr. Banfield's murder. The two women were charged jointly on a five count indictment; the murder charge was Count One. The other four charges on the indictment related to dishonesty/fraud offences where the Appellants proceeded to make claims and collect money, including pension, in Mr. Banfield's name for several years after his death, pretending that he was still alive. At trial, they pleaded guilty to the dishonesty/fraud charges and were convicted of the murder. They appealed.
- [93] The circumstantial evidence against Shirley and Lynette Banfield came from a number of sources. The last substantial evidence of Mr. Banfield being alive was 11th May, 2001 when he co-signed the contract for the sale of the family home. That same day he expressed his concerns to a police officer about the attitude of his family towards him. Four days later, on 15th May, 2001 Lynette, at Shirley's request, forged a letter redirecting payment of Mr. Banfield's pension to an account that Shirley had access to. On the 19th May, 2001 a friend of Mr. Banfield reported him missing. The Crown relied on complaints which Mr. Banfield made to his doctor, the police and his friends of assaults by his family since his retirement that were indicative of failed murder attempts, inclusive of an attempt to suffocate him as he slept. The day after Mr. Banfield's friend reported him missing, Lynette informed the police that three months earlier, her father started moving his possessions out of the house and that his passport was missing. Shirley claimed that Mr. Banfield had a habit of disappearing and claimed that he had accumulated debts and that he returned to his native Trinidad and Tobago. Shirley petitioned the High Court in June 2001 that Mr. Banfield had gone missing and not seen locally and requested the appointment of a trustee to complete the sale of the property. Within six months of Mr. Banfield's disappearance in May 2001, the property which was jointly owned between the husband and the wife was sold; Shirley and Lynette Banfield moved and set up home 200 miles away. They acted jointly in the deception offences for a period in excess of seven years. They benefitted financially. They admitted telling lies that they had seen Mr. Banfield alive after May 2001.
- [94] Counsel for the Appellants conceded that Mr. Banfield was murdered. Counsel agreed to a number of other things: Mr. Banfield's death occurred on a date unknown between the 11th and 16th May, 2001 as alleged by the Crown. Counsel agreed Mr. Banfield was murdered either by both Appellants together or by one of them. Counsel noted however the indictment did not plead, although it could have done, conspiracy to murder, so the Crown had a simple joint enterprise choate offence.
- [95] Counsel contended however that there were five explanations for Mr. Banfield's death:
- i. The Appellants acted in concert.
 - ii. Mrs. Banfield killed him and the daughter encouraged her.
 - iii. The daughter killed him and Mrs. Banfield encouraged her.
 - iv. Mrs. Banfield killed him and the daughter was absent.

v. The daughter killed him and Mrs. Banfield was absent.

[96] Paragraph [47] of the **Banfield** judgment stated: “It was agreed that for the crown to succeed, it must prove that at the infliction of the fatal injury that both women were present and acting in concert.” Defence counsel argued that “since the Crown could not even prove the presence of either [defendant], necessarily proof of concert fell away.” Counsel contended that if the Crown was “able to prove the Appellants acted in concert, it did not have to prove who was the principal and who the secondary party.” The Crown, as pointed out at paragraph [55], “relied on animus. It contended it had proved the intention to cause grievous bodily harm and each Appellant had both opportunity and motive.”

[97] Rafferty, LJ, DBE, in delivering the Court’s decision, agreed with counsel for the Appellants that the ‘no case’ submission should have been sustained by the trial judge. He said at paragraphs [61] and [62]:

“The five postulations as to what might have explained the death, lucidly set out by Mr. Clegg, QC, are an useful guide to the problem the Crown’s choice of a count of murder not of conspiracy to murder created:

- i. SB killed him and LB encouraged her.
- ii. LB killed him and SB encouraged her.
- iii. SB killed him absent LB.
- iv. LB killed him absent SB.
- v. The Applicants acted in concert.

“The first four show how obvious were the tenable alternatives which could have led to DB’s death. Once the Crown was unable to identify of which of the four options the jury could be sure, the fifth could not on the evidence provide a backstop.”

[98] Earlier in the judgment, Rafferty, LJ, noted that:

“[52] The appeal turns on whether there were evidence at the close of the case for the Crown from which the jury could infer that the two Defendants must have killed together and not one in the absence of the other.”

“[53] It is true that the test for the judge hearing a submission was whether a jury could infer joint responsibility, not whether it were obliged to do so. The test for the jury was whether the Crown had made it sure of joint responsibility. The Crown’s difficulty is readily apparent. If at the close of its case the evidence were consistent both with inculpation and exculpation of either defendant then it had not established a *prima facie* case of murder against either.

“[54] If circumstantial evidence, upon which much of this case was built, were to allow of but one interpretation, then a jury would be driven to a finding of guilt. That was not the position here.

...

[57] ...the Crown's consequential difficulty was its inability to prove that the two women acted in concert to bring about DB's death. It could, many would accept, prove that they had a motive so to do, and that each, singly and with the other, had in his life done enough to suggest *animus*... What it could not do was prove a joint enterprise to be present when he was murdered either as killer or as participant in a joint enterprise.

[58] As the authors of Smith and Hogan's Criminal Law, 13th ed, para 8.4.15 remark, if all that can be proved is that the principal offence was committed either by the first or the second accused, each must be acquitted."

- [99] The five postulations enumerated in **Banfield** are considerably increased in the present circumstances where there are four defendants. This is so because any one of the defendants could have killed the deceased either in the presence or conversely in the absence of one or another of the defendants.
- [100] Two of the cases referred to during the no case submission may be of some assistance in resolving this matter.
- [101] Mr. O'Kola relied on **R v Ashton and Mason**, (1992) 94 Cr App R 180. In that case, Mr. Roy Ashton and Ms. Christine Mason lived together. In September 1987, Ms. Mason's 16 month old daughter, Doreen, was admitted to hospital suffering from a subdural haemorrhage from which she died 24 hours later. Doreen had multiple other injuries: a fracture of the left fifth rib at the back, fractures of the left tibia and fibula, a severe burn covering most of the left palm and bruising of the face, back left arm and both legs. The view of the pathologist was that the fatal injury was caused by a single moderately severe blow to the back of the body, probably caused by throwing or slamming the child against some hard surface. Both Mr. Ashton and Ms. Mason had custody of the infant either together or separately at the time the injuries could have been inflicted. Both were convicted of manslaughter. They successfully appealed, contending that their no case submission ought to have been upheld. The Appellate Court said: "There was, so far as we can see, no evidence upon which the jury could properly come to the conclusion that either of these two expressly or tacitly agreed that Doreen should suffer physical harm; or that either had willfully and intentionally encouraged the other to cause injury to Doreen... this is one of those situations exemplified by the judgement of Lord Goddard in **Abbott**."
- [102] Mr. Graham for the Crown referred to **R v Lewis and another**, [2017] EWCA Crim 1734. That was an appeal brought by the Crown against the decision of a judge to uphold a submission of no case to answer at the close of the prosecution case. The case involved persons who on occasions stayed at a shelter and who were known to each other. The Crown's evidence included an utterance, CCTV footage, forensic and circumstantial evidence. The Appeal against the Judge's decision was unsuccessful. The concluding paragraph states: "Clearly there were highly suspicious circumstances here. But suspicion is not enough. In a case where the issue revolves around the inference that a reasonable jury may draw from the evidence which is circumstantial the essential question is whether or not there is evidence, taking the prosecution case at its highest, upon which a reasonable jury,

properly directed, could convict... the judge's ruling to the effect that, on the particular facts of this case, there was not a case to answer was a reasonable ruling. That being so we must confirm the ruling, dismiss the appeal and direct that both defendants be acquitted of the offence with which they are charged."

Application

- [103] How then do the facts of this matter correspond with or depart from the cases that were just reviewed?
- [104] The Crown's case is that Bruce Greenaway was killed either on Holy Thursday on 9th April, 2020 or on any of the days up to Easter Monday 13th April, 2020. The Crown alleges that the Four Defendants killed Bruce Greenaway. What, however, is the evidence of a joint enterprise?
- [105] Constable Modeste, L/Cpl Thomas, Private Warner and Private Martin worked together on Holy Thursday 9th April, 2020. Given their respective schedules, the next time after that they were due to work together was Easter Monday on 13th April, 2020. There was no evidence placing all of the Defendants together at any other time during the time period the offence is alleged to have been committed besides Holy Thursday on 9th April, 2020 (and up to 9:00 am on Good Friday on 10th April, 2020 when Mr. Modeste's 24 hour shift ended).
- [106] Bruce Greenaway was transported in the tray of the JTF pickup vehicle to the JTF base sometime after 1:10 pm on Thursday 9th April, 2020. Only the second defendant, L/Cpl Thomas, was in the vehicle at that time. The Four Defendants then left the base in the JTF pickup vehicle with Bruce Greenaway in the tray of the vehicle prior to 1:40 pm on the same Thursday 9th April, 2020. The vehicle traveled into Piccadilly and then in a southerly direction on Dr. Yele Akande Drive with someone in the tray of the vehicle. Almost 20 minutes afterwards, the vehicle traveled northwards on Dr. Yele Akande Drive without anyone being visible in the tray of the JTF pickup vehicle. The Defendants all say that Bruce Greenaway was released from their custody when they went towards Piccadilly on patrol. However, the CCTV footage indicates that someone was in the tray of the pickup after the point the Defendants said that Bruce Greenaway was released from their custody. The Defendants were apparently not truthful nor accurate regarding when and where they say that Bruce Greenaway was released. The body identified as Bruce Greenaway was discovered in the afternoon of Easter Monday on 13th April, 2020.
- [107] Only two persons on the evidence were affirmatively identified as touching Bruce Greenaway - Sergeant Spencer when he arrested Mr. Greenaway and placed the tie straps on the prisoner's hands; and Constable Modeste when he cut the tie straps that the arresting officer used to bind Mr. Greenaway's hands.
- [108] The charge against the Defendants recited that Bruce Greenaway was murdered on a date unknown between the 8th April, 2020 and 14th April, 2020 (that is to say either the 9th, 10th, 11th, 12th or 13th April, 2020). However, based on the timing advanced by the Crown, Bruce Greenaway was in the

company of the four Defendants on Thursday 9th April, 2020 only, for less than half an hour, from sometime before 1:40 pm until just before 2:02 pm. The Crown does not place the four Defendants and Bruce Greenaway together outside of that time period.

[109] The Crown is unable to say:

- when precisely (on which day) Bruce Greenaway may have been killed.
- who – that is which of the Defendants – may have strangled Bruce Greenaway.
- how the deceased was strangled (that is, the methodology). The pathologist stated while there are three different mechanisms by which strangulation can be done (as well as a combination of all three), he could not say which was applicable in this case.
- which Defendant may have assisted the principal in committing the act or how that other defendant may have assisted.
- who all were present at the time Bruce Greenaway was killed and whether a defendant may have encouraged the commission of the offence by virtue of his or her presence and with the requisite intention.
- whether any one of the Defendants gave any instructions to kill or do grievous bodily harm to Bruce Greenaway.
- when or where the Parties agreed to do any unlawful act to Bruce Greenaway.

Conclusion

[110] The oft repeated words of Lord Goddard, CJ, on the 12th July, 1955 in **R v Abbott** still reverberate:

“...although it is unfortunate that a guilty party cannot be brought to justice, it is more important that there should not be a miscarriage of justice and the law maintained that the prosecution should prove its case.”

[111] In the present case could it be said that there is *prima facie* evidence upon which a jury can properly return a verdict of guilty against the four Defendants? Has the evidence marshalled by the Crown reached the evidential threshold of establishing the elements of the offence? In short, can the prosecution prove its case?

[112] It was not impossible for one or any of the Defendants – or indeed someone not indicted - to have inflicted injury to the deceased with the requisite *mens rea*, to kill or cause grievous bodily harm. However, even if the Crown could have established, which it did not, evidence of *mens rea*, there

was the further obstacle of affixing the *actus reus* to one of the Defendants. The question would remain: which one? Who?

- [113] The ultimate question posed earlier was: Do the defendants, Mr. Jason Modeste, Mr. Shakiel Thomas, Mr. Armal Warner and Ms. Aliyah Martin, have a case to answer? Clearly, the answer is no.
- [114] There may have been reason for suspicion. But the threshold of evidence to support a charge of murder and a successful prosecution were patently absent.

Postscript

- [115] In Star Trek: The Next Generation, Season 5 Episode 19 – ‘The First Duty’ – The Character Admiral Brand, Starfleet Academy, said in reference to an inquiry surrounding an incident in which a member of the flight team was killed:

“Your unwillingness to offer any explanation for the contradictions is disappointing and raises suspicion. We cannot escape the conclusion, either that the [evidence collected] is faulty in some way or you have lied to us. **However, suspicion is not proof**, and I have no proof that you have lied to this inquiry.” (Emphasis added)

- [116] Suspicion. Evidence. Proof. Guilt. They are not synonymous.

Colin Williams
High Court Judge

By the Court

Registrar