

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

ANTIGUA AND BARBUDA

ANUHCRA2014/0012

BETWEEN:

EDWIN GOMEZ

Appellant

and

THE QUEEN

Respondent

Consolidated with:

ANUHCRA2014/0013

BETWEEN:

ISAIAH BENJAMIN

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Sherfield Bowen for Edwin Gomez

Mr. Wendel Alexander for Isaiah Benjamin

Mr. Anthony Armstrong, Director of Public Prosecutions, Ms. Shannon Jones-Gittens and Mr. Sean Nelson for the Respondent

2022: May 25;
August 17.

Criminal appeal – Murder – Appeal against conviction and sentence – No case submission – Whether the judge erred in failing to uphold the no case submission – Joint Enterprise – Whether the judge erred in leaving the question of joint enterprise to the jury and applied the wrong test as to what constitutes joint enterprise – Directions – Whether the terms and focus of the judge’s directions prejudiced the trial – Whether the judge erred in failing to give specific directions in relation to the police interview of co-accused persons – Whether the judge erred in admitting the caution statement of co-accused persons as part of the evidence – Whether the sentence was manifestly excessive

The appellants Edwin Gomez (“Gomez”) and Isaiah Benjamin (“Isaiah”) along with Jerome Benjamin (“Jerome”) were jointly tried and convicted for the murder of Lyndon Isaac. Gomez was sentenced to 30 years imprisonment with a review after 23 years, while Isaiah was sentenced to 25 years’ imprisonment to be reviewed after 18 years.

The prosecution’s case was centered on a joint enterprise to commit robbery at T’s Natural Bamboo Bar in Antigua whereto the appellants, along with Jerome and another person travelled in a vehicle driven by Isaiah. They were masked and armed. When they entered the bar, a member of the party discharged a firearm close to a patron - Mr. George Lewis. Two of the assailants dragged him outside; one patted him down, took some steps backwards and fired at him. Mr. Lewis, the owner of a licensed firearm, returned fire, hitting Jerome. Gomez and Isaiah ran back into the vehicle and sped off, leaving Jerome at the scene. They returned in the vehicle driven by Isaiah and picked up Jerome. While the vehicle was leaving the scene, Gomez discharged two shots from within it, killing a pedestrian, Lyndon Isaac. Gomez admitted to being armed and masked in the vehicle and discharging the firearm which killed Lyndon Isaac. Isaiah stated that he remained in the vehicle and was not aware of the robbery and denied any participation therein. Isaiah’s counsel made a no case submission which the learned judge rejected.

Being dissatisfied with their conviction and sentence the appellants appealed on several grounds. During the hearing, Gomez withdrew his appeal against conviction. The main issues with respect to Isaiah’s appeal against conviction were: (i) whether the judge erred in rejecting the no case submission; (ii) whether the judge erred in leaving the question of joint enterprise to the jury and applied the wrong test as to what constitutes joint enterprise; and (iii) whether the judge erred in failing to give specific directions during the summation thereby prejudicing the trial. Both appellants argued the ground that the sentence was severe and manifestly excessive.

Held: dismissing Isaiah Benjamin’s appeal against conviction and sentence and affirming the conviction and sentence; and dismissing Edwin Gomez’ appeal against conviction (that appeal having been withdrawn) and sentence and affirming the conviction and sentence, that:

1. The basic rule where there is a submission of no case to answer 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. An appellate court, when reviewing an appeal against conviction on the ground that there was no case to answer will focus on whether there was in fact a case to answer. The real question in considering the judge's ruling that there was a case to answer is not whether his statement of the legal principles as understood by him were correct but whether his assessment of the sufficiency of evidence was correct. In the present case, there was sufficient evidence on which a reasonable jury properly directed could find the charge in question proved beyond reasonable doubt. Accordingly, the judge did not err in rejecting the no case submission.

R v Galbraith [1981] 1 WLR 1039 applied; **Director of Public Prosecutions (British Virgin Islands) v Varlack** [2008] UKPC 56 followed; **R v Tas** [2018] EWCA Crim 2603 applied.

2. The issue as to the identification of a joint enterprise and its scope is ordinarily a matter for the jury. It is a question of fact for the jury whether a joint enterprise existed. There was no proper basis for contending that the learned judge erred in leaving the issue of joint enterprise to the jury. There was evidence upon which a jury properly directed, could conclude that the joint enterprise extended to Gomez and Isaiah. It was clear from the jury's verdict that they concluded that a joint enterprise was established. Accordingly, the learned judge acted properly in leaving the question of fact as to whether Isaiah was involved in a joint enterprise to the jury.
3. The case giving rise to this appeal was decided before the law was changed in **R v Jogee**; **Ruddock v The Queen**. The trial judge could not therefore be criticised for using the law with respect to joint enterprise as understood in **Chan Wing-Siu and others v The Queen**. The principle in **Chan Wing-Siu** made it sufficient for a conviction under the principle of joint enterprise if the jury found that a defendant foresees that the principal may commit an offence which goes beyond the plan, even if he does not intend that the offence be carried out. The principle was however changed in **Jogee**. It is now established by **Jogee** that the correct condition for guilt is that he intended, whether conditionally or otherwise, that there should be at least grievous bodily harm. The judge therefore did not err in applying the law as it stood at the time.

Chan Wing Siu and others v The Queen [1985] A.C. 168 considered; **R v Jogee**; **Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7 considered; **R v Anwar and others** [2016] EWCA Crim 551 applied.

4. When a judge's summation is subject to review, the directions given by the judge must be examined as a whole. An appellate court is not concerned solely with determining whether a judge made errors in directing the jury on the law or in the

summing up of the evidence. The Court is concerned with whether the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory, or whether there was a wrong decision of any question of law or a material irregularity during the trial. In the present case, the judge followed the law as it stood at the time, took into account all the available evidence, and explained the accused's defence to the jury. In the circumstances, Isaiah was not prejudiced by the summation nor the directions of the learned judge.

Section 40 (1) of the Eastern Caribbean Supreme Court Act Cap 143, Revised Laws of Antigua and Barbuda applied.

5. An appellate court will not usually review the approach of a sentencing judge sentencing many defendants for their various roles. The trial judge will have heard and read the evidence and will be well placed to consider the role, nature and extent of each defendant's involvement. The judge is also uniquely well placed to calibrate the sentences imposed so as to achieve parity among the defendants and reflect their various levels of responsibility. Only if it can be shown that in sentencing a particular defendant, the judge did so on a factual basis which is obviously mistaken or made an error of principle, or when assessing weight formed a view which no reasonable judge could have formed, is an appellate court likely to interfere. Nothing has been urged upon the Court which could properly allow it to interfere with the discretion of the learned judge in imposing sentence. It has not been demonstrated that the learned judge erred in principle or that the sentence imposed was manifestly excessive.

R v Hughes and another [2021] EWCA Crim 477 applied; **R v Williams (Declan Craig) and others [2019] EWCA Crim 279** applied.

JUDGMENT

- [1] **BAPTISTE JA:** Edwin Gomez and Isaiah Benjamin ("the appellants") along with Jerome Benjamin ("Jerome") were jointly charged with and found guilty of the murder of Lyndon Isaac. Edwin Gomez ("Gomez") was sentenced to 30 years' imprisonment with a review after 23 years, while Isaiah Benjamin ("Isaiah") was sentenced to 25 years imprisonment to be reviewed after 18 years. The appellants appealed their conviction and sentence. During the hearing of the appeal, Gomez's counsel withdrew his appeal against conviction.
- [2] The prosecution's case was predicated on a joint enterprise to commit robbery at T's Natural Bamboo Bar in Antigua where to the appellants, on 24th September 2010

along with Jerome and another person, proceeded in a vehicle driven by Isaiah. They were masked and armed. Having entered the bar, a member of the party discharged a firearm close to a patron - Mr. George Lewis. Two of the assailants dragged him outside; one patted him down, took some steps backwards and fired. Mr. Lewis, the owner of a licensed firearm, returned fire, hitting Jerome. At this point Gomez and Isaiah ran back into the vehicle; Isaiah then sped off, leaving Jerome at the scene. They returned in the vehicle driven by Isaiah and picked up Jerome. While the vehicle was leaving the scene, Gomez discharged two shots from within it, killing a pedestrian, Lyndon Isaac. Gomez admitted to being armed and masked in the vehicle and discharging the firearm which killed Lyndon Isaac. Isaiah stated that he remained in the vehicle and was not aware of the robbery and denied any participation therein. Isaiah's counsel made a no case submission which the learned judge rejected.

- [3] Isaiah appeals his conviction on the grounds that the judge erred in:
- (i) rejecting the no case submission;
 - (ii) leaving the question of joint enterprise to the jury;
 - (iii) failing to give specific directions in relation to the police interview and co - accused persons;
 - (iv) failing to give specific directions in relation to the Director of Public Prosecutions' closing statement;
 - (v) failing to give adequate warning to the jury with respect to the evidence of a co-accused;
 - (vi) admitting caution statements of co-accused persons as part of the evidence of the case; and
 - (vii) finally, Isaiah complains that the terms and focus of the judge's direction prejudiced his trial.
- [4] Although several grounds of appeal are advanced, the gravamina of the appeal are whether the judge erred in rejecting the no case submission and in leaving the issue of joint enterprise to the jury. Mr. Wendel Alexander, Isaiah's counsel, submits that

the learned judge applied the wrong test as to what constitutes joint enterprise in murder in deciding whether there was a case to answer. Learned counsel contends that for Isaiah to have been convicted of murder, or at least to be put to his defence for that offence, he must have encouraged or participated in the shooting with the requisite intention to kill or to do grievous bodily harm. Mere presence at the scene or in the car, and mere foreseeability that these consequences would occur cannot suffice. He also asserts that one must juxtapose the evidence of the appellants and Jerome with the evidence of the prosecution's witnesses. In so doing, the better view is that Isaiah remained in the car and was the driver throughout the episode, as opposed to actively participating in any shooting or discharging of any weapon that night.

- [5] Mr. Alexander further complains that the judge erred in not considering whether Isaiah was a secondary party and as such was entitled to find that there was tenuous or no evidence to suggest that he had the requisite mens rea to kill or do serious bodily harm for the offence of murder. Further, Isaiah is either a secondary party to the murder or is not a party.
- [6] In his oral submissions, Mr. Alexander principally submits in respect of the first limb of **R v Galbraith**¹, that the evidence adduced failed to prove that Isaiah had the requisite mens rea for murder. The evidence was that he was the driver of the vehicle. The common purpose was robbery, not murder. The shooting was an independent act on Gomez's part which could not be attributed to Isaiah. The common purpose of robbery had already passed. Counsel contends that the trial judge should have looked at **R v Jogee**; **Ruddock v The Queen**² in respect of the no case submission. The evidence was not sufficient for the case to go to the jury.
- [7] The Director of Public Prosecutions, Mr. Armstrong, submits that the judge used the correct test, that is, the **Galbraith** Test. The limb of the **Galbraith** test proposed by

¹ [1981] 1 WLR 1039.

² [2016] UKSC 8; [2016] UKPC 7.

the appellants at the no case submission hearing was that there was no evidence, so the judge was duty bound to stop the case. Mr. Armstrong asserts that at the no case hearing, the learned judge had to consider that the prosecution's case was one of joint enterprise.

[8] Mr. Armstrong quoted from the learned judge as follows:

“Let me go to what is said with respect to Galbraith, more particularly, 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 made – to stop the case.

Where however, the Prosecution evidence is such that its strength or weakness depend on the view to be taken of a witness 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 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.”³

[9] Mr. Armstrong posits that the judge considered that the case put forth by the prosecution was that Isaiah was there to effect the escape. Additionally, there was evidence that there were four men who came out of the vehicle armed and masked. The reliability of the evidence was one to be considered by the jury. The judge used the correct test and correctly decided to dismiss the no case submission.

[10] I now consider the relevant law on a no case submission. The basic rule was stated in **Director of Public Prosecutions (British Virgin Islands) v Varlack**⁴ at paragraph 21:

“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 stated above is to be found in the judgment of Lord Lane CJ in R v Galbraith [1981] 2 All ER 1060, 144 JP 406, [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

³ Volume IV of the Record of Appeal page 1047 starting at line 6.

⁴ [2008] UKPC 56.

of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases ... concerned with the drawing of inferences.”

- [11] The test in **Galbraith**, which is to be applied on any submission of no case to answer, consists of two limbs. The first limb deals with a case where there is no evidence. The second limb concerns where there is some evidence, but it is of a tenuous character:

“(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will 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 from which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to go to be tried by the jury.”

- [12] On an appeal against conviction on the ground that there is no case to answer, this Court will focus on whether there was in fact a case to answer. The prosecution's case was predicated on a joint enterprise to rob a bar with the use of firearms to which Isaiah was a party and participated by giving encouragement and assistance. A firearm was in fact discharged at the bar by one of the assailants. The robbery was thwarted when an assailant - Jerome - was shot. There was evidence from which the jury could find that Isaiah was the driver of the vehicle which drove the masked and armed men to the bar. He was also the driver of the vehicle which was used to effect the escape from the bar after Jerome was shot. He returned to collect Jerome and in escaping from the scene Gomez - who was in the vehicle with him - discharged two shots from a firearm, killing Lyndon Isaac.

[13] As was said in **Jogee** at paragraph 11, ‘association and presence are likely to be very relevant evidence on the question of whether encouragement or assistance was provided, but neither is necessarily proof of those elements; it depends on the facts’. Isaiah’s conduct was not so distanced in time, place or circumstance from the conduct of Gomez that it would not be realistic to regard Gomez’ offence as encouraged or assisted by it.

[14] Mr. Alexander’s argument that the learned judge should have considered **Jogee** in treating with the no case submission, is not tenable. Learned counsel was referencing the change in the law brought about **Jogee**. As stated in paragraph 100 of **Jogee**, ‘the error identified, of equating foresight with intent to assist rather than treating the first as evidence of the second is important, but it does not follow that it will have been important on the facts to the outcome of the trial.’ **Jogee** was not decided when the learned judge conducted the trial. The learned judge applied the existing law. Importantly, ‘the real question in considering the judge’s ruling that there was a case to answer is not whether his statement of the legal principles as understood by him were correct but whether his assessment of the sufficiency of evidence was correct’. ⁵

[15] With reference to Mr. Alexander’s argument that the shooting was the independent act of Gomez which could not be attributed to Isaiah, I refer to and apply **R v Tas**⁶ at paragraph 41. There, the court stated:

“... whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed as withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is a far better position than this court to reach a conclusion as to evidential sufficiency.”

⁵ See **R v McLeod and Others** [2017] EWCA Crim 800 at paragraph 51.

⁶ [2018] EWCA Crim 2603.

The extent of Isaiah's involvement was a matter for the jury, and so also, the issue of whether there was a fundamental departure from the plan that no one in Isaiah's shoes could have contemplated might happen.

[16] In my judgment, at the close of the prosecution's case, there was sufficient evidence on which a reasonable jury properly directed could properly find the charge in question proved beyond reasonable doubt. There being such evidence, there would be a case for Isaiah to answer. For the reasons given and having regard to the relevant law, the learned judge acted properly in rejecting the no case submission. This ground of appeal accordingly fails.

[17] The second ground of appeal alleges that the learned judge erred in leaving the question of joint enterprise and intention in a joint enterprise case to the jury. The two complaints here are that (i) the judge erred in leaving joint enterprise to the jury and (ii) applied the incorrect principle, that is, the principle stated by the Privy Council in **Chan Wing-Siu and others v The Queen**⁷ in respect of intention in joint enterprise, as opposed to the principle established in **Jogee**. These complaints will be considered separately.

[18] Did the learned judge err in leaving joint enterprise to the jury? Mr. Alexander contends that the action and conduct of Gomez was impulsive and was not the common purpose the men intended. Counsel says that although it can be argued that armed robbers may use force if necessary to escape or resist apprehension, the independent action of Gomez in all the circumstances, albeit related in sequence, time and setting, was not one that can properly and legally be attributed to Isaiah. Putting it another way, Counsel submits that Gomez' conduct was not part of the common purpose of robbing the patrons in the bar or the bar itself. Gomez intentionally fired shots when there was no pursuit of him, when at the time he was not fired at and when he was out of harm's way. His deliberate conduct falls outside of the course and scope of the intended design. There was no immediate danger to

⁷ [1985] A.C. 168.

the car when speeding away from the robbery; and there was no pursuit, and shots were not exchanged at that time.

[19] Mr. Armstrong submits that the judge, having considered all the evidence, correctly left the question of joint enterprise to the jury. Additionally, the judge was correct to leave the question of fact, whether the men were in a joint enterprise to the jury. Mr. Armstrong argues that throughout the trial the prosecution's case was that this was a murder that occurred by joint enterprise. There was a robbery and the car driven by Isaiah was intended to effect their escape. Benjamin was part and parcel of the crime to commit armed robbery. The firearm made all the difference.

[20] Mr. Armstrong points out that it was Isaiah who rented the vehicle through a friend and gathered the men; and on his own evidence knew one of the men who came in the car had a gun. Isaiah was the driving force in the enterprise and the driver of the vehicle also. It was one continuous event in which Isaiah participated with the intention to assist and encourage the offence. Therefore, it was for the jury to determine whether he was in a joint enterprise which led to the death of Lyndon Isaac.

[21] I agree with the submissions of Mr. Armstrong. In my judgment, there is no proper basis for contending that the learned judge erred in leaving the issue of joint enterprise to the jury. The prosecution's case was predicated on a joint enterprise in which Isaiah was a party, giving encouragement and assistance. It is a question of fact for the jury whether a joint enterprise existed. When there is an issue as to the identification of the joint enterprise and its scope, that is ordinarily a matter for the jury.

[22] There was evidence upon which a jury properly directed, could conclude that the joint enterprise extended to Gomez and Isaiah returning to the Bamboo Bar to retrieve Jerome after he had been shot and taking him away from the scene of the thwarted robbery and in escaping from the scene Gomez discharged the firearm

killing Lyndon Isaac. Based on the verdict of the jury, there is no doubt that they found a continuing joint enterprise was established. The learned judge acted properly in leaving the question of fact as to whether Isaiah was involved in a joint enterprise to the jury.

[23] The second complaint raised in ground 2 concerns the judge's direction on intent in a joint enterprise case. In giving the jury directions on joint enterprise, the learned judge stated that the jury would have to be sure that Isaiah foresaw or contemplated or realised that Gomez, based on the Crown's case, would or might use a gun with the intention of killing or causing grievous bodily harm. And with that knowledge or foresight of that intention, he continued to take part in the joint enterprise. The judge also directed the jury that if they found or contemplated that Gomez, with the intent to kill, might have shot at the men on the road and in particular Lyndon Isaac, then one of them would be guilty of murder. If Isaiah did not so contemplate, then he is not guilty of murder.

[24] Mr. Alexander submits that the learned judge erred in applying the principle in **Chan Wing-Siu**. In **Chan Wing-Siu**, Sir Robin Cooke stated on page 175 G:

"The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.

That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorization, which may be express or is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."

[25] The principle in **Chan Wing-Siu** made it sufficient for a conviction under the principle of joint enterprise if the jury found that a defendant foresees that the principal may commit an offence which goes beyond the plan, even if he does not intend that the offence be carried out. The principle was however changed in **Jogee**. It is now established by **Jogee** that the correct condition for guilt is that he intended, whether

conditionally or otherwise, that there should be at least grievous bodily harm. As stated in paragraph 98 in **Jogee**:

“The tendency which has developed in the application of the rule in *Chan Wing- Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least.”

[26] This aspect of the second ground of appeal fails for reasons which are fairly obvious. The case giving rise to this appeal was decided before the law was changed in **Jogee**. The trial judge could not therefore be criticised for using the law with respect to joint responsibility as understood in **Chan Wing-Siu**. This involved the direction that the defendant would be guilty of murder as a secondary party if he continued to participate with the foresight that his accomplice might intentionally kill or do grievous bodily harm. The effect of putting the law right was addressed in **Jogee** at paragraph 100:

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

[27] In **R v Anwar and others**⁸ , the court stated at paragraph 20:

“... we find it difficult to foresee circumstances in which there might have been a case to answer under the law before *Jogee*, but because of the way in which the law is now articulated, there no longer is. In addition to sufficient proof of encouragement and assistance, what is required is an intention, perhaps conditional, to encourage the commission of the relevant offence : see [90] It is clear that any defendant must have knowledge of existing facts necessary for the principal’s intended conduct to be criminal and knowledge, if such there be , that any particular weapon is carried by the principal will be evidence going to the jury’s assessment of the defendant’s intention: see [9], [16], [26].”

⁸ [2016] EWCA Crim 551.

- [28] For the reasons indicated, ground 2 of the appeal cannot be sustained.
- [29] The grounds that the learned judge erred in failing to give specific directions in relation to the police interview of co-accused persons and erred in admitting the caution statement of co-accused persons as part of the evidence, are now dealt with.
- [30] Mr. Alexander contends that the judge did not provide a direction to the jury on how to treat police interviews of co-accused persons. He also argues that the statements of the co-accused should not have been admitted in evidence. Mr. Alexander correctly states that an out of court statement by an accused which adversely implicates another co-accused cannot be used as evidence against that co-accused and that such statement is evidence against the maker only. The trial judge should so warn the jury of that in clear terms. This warning, Mr. Alexander contends, was particularly important in the present case as three persons provided statements or interviews implicating the others.
- [31] Mr. Alexander complains that the warning was not clear and referred to page 1446, lines 10 to 14 of the transcript of proceedings⁹. The learned judge said that while the contents of the statements is not evidence against the other person, it is 'still something you consider and will decide what weight will attend to it'. Counsel posits that the warning was muddled with confusion and was equivocal, leaving the jury with a discretion to use it if they so wish and however, they wish. This, he submits, undermined the fairness of the trial and rendered the conviction unsafe.
- [32] Mr. Armstrong states that the criticisms of the learned judge represent a misstatement of the summation as the judge addressed the issue on numerous occasions. The judge instructed the jury that statements made out of court by an accused implicating the other is not evidence against the person implicated. It is not evidence against the person not making the statement. He also directed the jury

⁹ Record of Appeal Volume V page 36.

with respect to the video enactment, that statements made out of court against one accused – by one accused against the other, is not evidence. The judge also instructed the jury to ignore any utterances made by Gomez against the other accused with respect to the video reenactment.

[33] The learned judge further directed the jury that:

“The statements , the out- of - court statements of a person , in this case, any of these three gentlemen there, the three accused, any out- of - court statement which they made – and in this case, it would have been recorded instead – that they made which implicates or incriminates or otherwise seek to put involvement or liability in respect of another person other than the person making the statement, that is not that evidence against a person not making the statement.”

[34] In my judgment, the learned judge adequately brought home to the jury that statements made out of court implicating another accused is not evidence against that accused but is only evidence against the maker.

[35] In considering whether the statements of co-accused should have been admitted, Mr. Armstrong posits that the judge needed to consider the probative value of the statements. Mr. Armstrong submits that the statements contained confessions by the maker of the statements about the incident. In the Court’s view, and as Mr. Armstrong correctly submits, the statements are admissible because of their powerful probative value. Accordingly, the learned judge did not err in admitting the statements.

[36] With respect to the ground of appeal that the terms and focus of the judge’s direction prejudiced Isaiah, Mr. Alexander submits that the summation was one sided and unbalanced, resulting in an unfair trial and rendering the conviction unsafe and unsatisfactory. In that regard counsel points to the trial judge telling the jury that manslaughter does not arise in Isaiah case, only murder.

[37] I agree with Mr. Armstrong that the summation was fair, and the judge considered all the evidence relating to Isaiah. I consider the criticisms made of the trial judge to

be unwarranted. The judge considered the evidence against each accused separately and explained to the jury the defence put forward by Isaiah.

[38] Mr. Armstrong regarded as incorrect, the ground of appeal that the learned judge confused the jury by saying that manslaughter does not arise at all. Mr. Armstrong contends that the law as it stood in 2014, was clear that the secondary party was only guilty of the offence of the primary for murder but that it could not be manslaughter, since in order to find joint enterprise, they must have foreseen the intention of the primary offender.

[39] In **Archbold Criminal Pleadings, Evidence and Practice**¹⁰ it is stated:

“The House of Lords had held that a secondary party was guilty of murder if he participated in a joint venture realizing that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal did kill with such intent; but if he went beyond the scope of the joint venture (i.e. did an act not foreseen as a possibility), the secondary party was not guilty of murder or manslaughter; ... the other participant would be liable for neither murder nor manslaughter.”

In my judgment, the learned judge did not err in law as he followed the law as it stood. In addition, and as Mr. Armstrong points out, that direction was beneficial to Isaiah, as, if the jury found there was no joint enterprise, he would have gone free. Based on the verdict, the jury found that there was a joint enterprise and as such he was as equally guilty as Gomez.

[40] The ground of appeal that the terms and focus of the summation prejudiced Isaiah at his trial, is not made out. In my view, Isaiah was not prejudiced by the summation nor the directions of the learned judge.

[41] Having regard to some of the arguments raised in the appeal against conviction, it is instructive to set out the statutory basis for interfering with a conviction. **Section 40 (1) of the Eastern Caribbean Supreme Court Act**,¹¹ states:

¹⁰ (2021 edn., Sweet & Maxwell) p. 2214 at para 19-23.

¹¹ Cap 143, Revised Laws of Antigua and Barbuda.

“The Court of Appeal on any such appeal against conviction shall subject as hereinafter provided allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unsafe or unsatisfactory or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal.”

[42] For the reasons given, the verdict of the jury conviction could not be said to be unsafe or unsatisfactory, neither was there a wrong decision on any question of law. The appeal against conviction is accordingly dismissed.

[43] The appeal against sentence falls to be considered. As stated, Gomez was sentenced to 30 years imprisonment with a review after 23 years. Mr. Sherfield Bowen argues that Gomez is a young man, 21 years old at the time of the offence, with previous good character and this was his first offence. In the circumstances, learned counsel submits that an appropriate sentence would be 18 years. The Director of Public Prosecutions suggests that 25 years would be an appropriate sentence with a review after 18 years if the Court were minded interfere with the sentence. I am of the view that given the serious nature of the offence, little weight can be attached to the matters Mr. Bowen advanced in support of a reduction in Gomez’ sentence.

[44] Mr. Alexander contends that, Isaiah’s sentence of 25 years imprisonment to be reviewed after 18 years was too severe. In respect of parity in sentencing, Mr. Armstrong opines that if the Court reduces Gomez’ sentence, it could be minded to reduce that of Isaiah, but the reduction should be short.

[45] I have considered the submissions of the parties with respect to the sentence imposed on Gomez and Isaiah. In considering the appeal against sentence, useful guidance is obtained from **R v Williams (Declan Craig) and others**¹² at

¹² [2019] EWCA Crim 279.

paragraphs 3 and 4, as summarised in **R v Hughes and another** ¹³ at paragraph 19. Although dealing with sentencing in a case of a large conspiracy to supply drugs in a case involving many defendants, I consider the principles stated therein to be apt in the circumstances of this case:

“As identified in *R v Williams (Declan Craig)*..., this court will not usually review the approach of a sentencing judge sentencing many defendants for their various roles in a large conspiracy to supply drugs. In such a case the judge will usually have heard [sic] read or heard the prosecution evidence as it relates to all of the defendants and will be uniquely well placed to consider the different roles of the various conspirators and the nature and extent of each person's involvement. He or she is, thus, also uniquely well placed to calibrate the sentences imposed so as to achieve parity among the defendants and reflect their various levels of responsibility. Only if it can be shown that in sentencing a particular defendant the judge did so on a factual basis which is obviously mistaken or made an error of principle, or when assessing weight formed a view which no reasonable judge acting reasonably could have formed, is this court likely to think it right to interfere. Arguments based on misappraisal or level of role or disparity will seldom have any realistic prospect of success.”

[46] In passing sentence in the present case, the learned judge was evidently well placed to consider the different roles of Gomez and Isaiah and the nature and extent of their respective involvement in the murder. The judge was thus well positioned to calibrate the sentence imposed to achieve parity and reflect their levels of responsibility. Nothing has been urged upon the Court which could properly allow it to interfere with the discretion of the learned judge in imposing sentence. It has not been demonstrated that the learned judge erred in principle or that the sentence imposed on Gomez was manifestly excessive. Likewise, it has not been shown that the judge sentenced Isaiah or Gomez on an erroneous factual basis, or that he made an error in principle, or that in assessing the weight which should or should not be given to one or more relevant factors, formed a view which no reasonable judge, acting reasonably could have formed. In the premises, this Court will not interfere with the judge's assessment of the appropriate sentence. Arguments that the judge misappraised the level of a defendant's role or imposed a sentence which

¹³ [2021] EWCA Crim 477.

is unfair in comparison with that imposed on other defendants will seldom have any realistic prospect of success.

[47] For the reasons indicated, the appellants' appeal against sentence is dismissed.

[48] It is ordered that:

(1) Isaiah Benjamin's appeal against conviction and sentence is dismissed and the conviction and sentence affirmed.

(2) Edwin Gomez' appeal against conviction (that appeal having been withdrawn) and sentence is dismissed, and the conviction and sentence affirmed.

I concur.
Mario Michel
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar