

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2015/0001

BETWEEN:

JEVONE DEMMING

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Patrick Thompson for the Appellant
Ms. Leslie-Ann Faulkner, with her Ms. Melissa Brewley for the Respondent

2019: March 29;
2020: January 14.

Criminal appeal – Attempted murder – Appeal against conviction – Joint enterprise – Whether the judge erred in law when directing the jury on joint enterprise – Section 20 of the Criminal Code 1997 – Application of proviso – Section 37 (1) of the Supreme Court (Virgin Islands) Act

The appellant, Jevone Demming (“Demming”) and Sherman Williams were jointly tried and convicted for the attempted murder of Neil St. Rose (“St. Rose”). On 30th September, St. Rose, Demming, Sherman Williams and others attended a social gathering at the Rock Café and Restaurant (“the Rock Café” or “the Café”). Whilst inside the Café, St. Rose felt someone push him and when he turned around, he saw Demming standing directly behind him and inquired of him what was wrong. Shortly after, there was a non-physical confrontation between St. Rose, Demming and another. After the social gathering ended, a physical altercation ensued when St. Rose pushed Sherman Williams, who was ahead of him in queue to exit the Café and allegedly obstructed his way. Following this altercation, St. Rose began walking towards his parked vehicle. At that point, Sherman Williams

withdrew and discharged a firearm, causing St. Rose to turn around to find both Demming and Sherman Williams approaching him (Sherman Williams with a gun in hand). St. Rose testified that when the men got to him, Sherman Williams struck him in the back of his head with the gun, causing him to fall to his knees. Demming fisted St. Rose in the nose and both Demming and Sherman Williams kicked and punched him while he was on his knees. Sherman Williams then placed the firearm at St. Rose's neck and discharged it. Demming and Sherman Williams thereafter fled the scene. At the trial, the case against Demming was grounded in joint enterprise. Demming denied being present at the time the altercation in the parking lot took place and stated that he was not at the Café when he heard what sounded like gunshots. The jury accepted the prosecution's version of events and found Demming guilty of attempted murder.

Demming has appealed against his conviction on the ground that the trial judge misdirected the jury on the law of joint enterprise thus rendering his conviction unsafe and unsatisfactory. The main issues which arose in this appeal are (1) whether the relevant law on joint enterprise in the Virgin Islands is governed by the common law or by the **BVI Criminal Code 1997** and (2) whether the learned judge erred in her direction on the requisite mental element of a secondary party to a joint enterprise.

Held: dismissing the appeal and affirming the conviction that:

1. Section 20 of the **BVI Criminal Code** requires two conditions for the liability of parties to a joint enterprise, namely; (1) two or more persons with a shared intention to prosecute an unlawful purpose in conjunction with each other; and (2) that while pursuing the unlawful purpose, an offence is committed that was a probable consequence of the prosecution of the unlawful purpose. Section 20 essentially provides that a person, who participates in a joint enterprise, is liable for the commission of an offence committed in the furtherance of the joint enterprise if the secondary party had foresight that the offence committed would have been committed. It follows therefore that the relevant law on joint enterprise in the Territory of the Virgin Islands is governed by the **Criminal Code**, and in particular that the mental element for the liability of a secondary party to a joint enterprise is contained in section 20 of the **Criminal Code** and not the common law.

Section 20 of the **Criminal Code** Act No.1 of 1997 applied; **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7 distinguished; **Teiko David Jamel Furbert et al v The Queen** [2000] UKPC 12 applied; **Anjay Charles v The Queen** SVGHCRA2013/0016 (delivered 6th April 2017, unreported) applied.

2. When a judge's summation is subject to review, the directions given by the judge must be looked at as a whole. An appellate court's examination of a summation 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 judge's misdirection occasioned a miscarriage of justice and resulted in an unsafe conviction.

Daniel Dick Trimmingham v The Queen [2009] UKPC 25 considered; **Jay Marie Chin v The Queen** ANUHCRA2012/0005 (delivered 5th April 2017, unreported) considered.

3. The judge misdirected the jury on the relevant law to be applied to the issue of joint enterprise given that the judge's direction was in effect a **Jogee** direction. However, the presence of a misdirection is not itself determinative of an appeal against conviction. The effect of the judge's misdirection in this case, is that the misdirection enured to the benefit of the appellant as the jury was directed on the higher standard on intention to kill. No real prejudice can be suffered where a jury convicts a secondary party to a joint enterprise having been given a **Jogee** direction instead of a section 20 direction.

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

4. **Per Blenman JA:** The learned judge was required to direct the jury in accordance with section 20 of the **Criminal Code**. However, the learned judge's direction to the jury that "[e]ven if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences" is inconsistent with **Jogee**. More critically, that direction that was given did not comport with section 20 and would therefore amount to a misdirection. The jury could have easily formed the view that Mr. Demming could have been found guilty for unusual or unforeseen consequences, which would have prejudiced him at trial.
5. The application of the proviso requires this Court to look beyond the errors of a trial judge to examine whether, having regard to the admissible evidence before the jury, a conviction was inevitable. There was overwhelming, corroborated and virtually unchallenged evidence before the jury which supported the prosecution's case. Therefore, the jury would have found that the appellant foresaw that the firearm would have been used in the course of the altercation, and further the jury would inevitably have convicted the appellant.

Section 37(1) of the **Supreme Court (Virgin Islands) Act** Cap. 80, Revised Laws of the Virgin Islands 1991 applied; **Stafford v The State** [1999] 1 WLR 2026 applied; **R v Matenga** [2010] 2 LRC 36 considered; **Rupert Anderson v The Queen** [1972] AC 100 applied; **Freemantle v R** [1994] 3 All ER 225 applied; **Maxo Tido v R** [2011] UKPC 16 applied.

JUDGMENT

- [1] **PEREIRA CJ:** Jevone Demming (“Demming” or “the appellant”) and Sherman Williams were jointly tried and convicted for the attempted murder of Neil St. Rose (“St. Rose”) contrary to section 152 of the **Criminal Code 1997** (“the Criminal Code”).¹ This is an appeal by Demming against his conviction. This appeal, in the main, is concerned with determining whether the learned trial judge properly directed the jury on the issue of joint enterprise, and by extension, determining the state of the law on joint enterprise in the Territory of the Virgin Islands. A brief background to the appeal is set out below.

Background

- [2] In the early morning of 30th September 2012, St. Rose, Demming, Sherman Williams and other members of the public, attended a social gathering at the Rock Café and Restaurant (“the Rock Café” or “the Café”) located in the Valley, Virgin Gorda.
- [3] The prosecution’s case was founded on the evidence of three material witnesses - St. Rose who was the virtual complainant, along with Dayna Hillhouse and Reberty Williams, who were also attending the social gathering. On the prosecution’s case, St. Rose, whilst inside the Rock Café felt someone push him from behind. When he looked to see who had pushed him, he observed that Demming was standing directly behind him. He confronted Demming enquiring what was wrong, in response to which Demming gesticulated towards him and gave an unclear response. Shortly after, there was a brief non-physical altercation between St. Rose, Demming, Sherman Williams and another patron.
- [4] In due course, the social gathering ended. St. Rose alleged that Sherman Williams, who was ahead of him in the queue to exit the Café, was deliberately obstructing his way. St. Rose then pushed Sherman Williams in the back, which resulted in a physical altercation that was eventually separated by other patrons.

¹ (Act 1 of 1997) of the Laws of the Virgin Islands.

The prosecution's case was that, following the brawl, St. Rose began walking towards his parked vehicle, at which point, Sherman Williams withdrew and discharged a firearm. Demming was about two (2) feet away from Sherman Williams at the time, and had no adverse reaction to the gun or it being discharged.

- [5] St. Rose then turned around to find Sherman Williams approaching him with a gun pointed in his direction. When he realised that both Demming and Sherman Williams were approaching him, St. Rose grabbed a rock to defend himself, which he threw away as they neared him. He testified that when the men had got to him, Sherman Williams struck him (St. Rose) to the back of his head with the gun, causing him to fall to his knees, and that Demming grabbed him by the collar of his shirt and fisted him in the nose.
- [6] Both Demming and Sherman Williams kicked and punched St. Rose while on his knees. While St. Rose attempted to defend himself from the attack, Sherman Williams placed the firearm at his (St. Rose's) neck and discharged it, injuring him. St. Rose fell to the ground. Demming and Sherman Williams thereafter fled the scene.
- [7] The prosecution's case against Demming, was grounded in joint enterprise. The prosecution's case was essentially that, even though Demming was neither in possession of the firearm, nor the one who discharged it, he was liable for the attempted murder, having formed a joint enterprise with Sherman Williams to kill St. Rose. Neither Demming nor Sherman Williams gave oral evidence at trial. They relied solely on their counsel's cross-examination of the prosecution witnesses and on the contents of their transcribed police interviews. As far as is discernible, Sherman Williams' case was to the effect that St. Rose was mistaken as to who shot him and that the witness Dayna Hillhouse, who was his former girlfriend, had fabricated her evidence against him. Demming admitted to an altercation with St. Rose inside the Café but denied being involved in any

altercation in the parking lot, stating that he heard what sounded like gunshots by which time he was not at the Café. In essence, Demming denied that he was a party to a joint enterprise with Sherman Williams.

- [8] Sherman Williams was charged for attempted murder and possession of a firearm with intent to endanger life. Demming was charged for attempted murder. The jury accepted the prosecution's version of events; and accordingly found Sherman Williams guilty of possession of a firearm with intent to endanger life and both Sherman Williams and Demming guilty of attempted murder.

The Appeal

- [9] The appellant appealed against his conviction, alleging two grounds upon which the learned judge's direction to the jury is said to have occasioned a miscarriage of justice. The grounds of appeal are as follows:

- (i) The learned trial judge misdirected the jurors on the law of joint enterprise thus rendering the appellant's conviction unsafe and unsatisfactory; and
- (ii) The learned judge erred in failing to inquire of the jurors, after they had deliberated for four hours, whether they were likely to arrive at a verdict in accordance with section 36 of the **Jury Act**,² and to give a **Watson** direction to the jurors.

- [10] At the hearing of the appeal, the appellant abandoned the second ground and focused solely on the complaint that the judge failed to direct the jury appropriately on the state of mind required for the formation of a joint enterprise, in accordance with the common law principles set out in the UK Supreme Court and Privy Council decisions of **R v Jogee**; **Ruddock v The Queen**.³ During the course of the appeal the parties treated as a matter of fact, that the relevant law on joint

² Cap. 36, Revised Laws of the Virgin Islands 1991.

³ [2016] UKSC 8; [2016] UKPC 7.

enterprise derives from **Jogee**. Neither the appellant nor respondent, at any time, made reference to section 20 of the **Criminal Code** which appears to speak to the law of joint enterprise in the Territory of the Virgin Islands in relation to the liability of secondary parties to a joint enterprise.

[11] Being mindful of section 20 of the **Criminal Code**, and of the cases of **Teiko David Jamel Furbert et al v The Queen**,⁴ and **Anjay Charles v The Queen**⁵ which interpret provisions similar to section 20 of the **Criminal Code**, the parties were ordered to file further written submissions and authorities on the meaning of section 20 and its relevance to the judge's summation.

[12] On the sum total of the grounds of appeal, written submissions and oral arguments made before the Court, the issues for determination on this appeal are:

- (i) Whether the relevant law on joint enterprise in the British Virgin Islands is governed by the common law or by the **BVI Criminal Code 1997**; and
- (ii) Whether the learned judge erred in her direction on the requisite mental element of a secondary party to a joint enterprise.

The Section 20 Issue – The Applicable Law on Joint Enterprise

[13] The appellant's broad submission on this point appears to be that the judge was required to direct the jury in accordance with the common law as stated in **Jogee**, notwithstanding the existence of section 20 of the **Criminal Code**. He submitted further that the cases of **Teiko** and **Anjay Charles** are factually distinguishable and do not assist the Court. Alternatively, the appellant argued that even where it is accepted that section 20 of the **Criminal Code** applies, the judge had a duty to direct the jury that they must be satisfied that the attempted murder (by way of a firearm) was a probable consequence of the attack on St. Rose.

⁴ [2000] UKPC 12.

⁵ SVGHCRA2013/0016 (delivered 6th April 2017, unreported).

- [14] The respondent sees this issue differently. The respondent's position is that section 20 of the **Criminal Code** codifies the common law position on joint enterprise which existed at the time the **Criminal Code** was enacted in 1997. Taking the submissions as a whole, I understand the respondent to accept that section 20 of the **Criminal Code** is the standard against which the propriety of the judge's direction to the jury on joint enterprise should be adjudged. The respondent adopted the learning in **Teiko** and **Anjay Charles** as instructive on the interpretation of section 20 and submitted that the direction given by the judge comports with section 20 of the **Criminal Code**.

Analysis and Discussion

- [15] This issue is preliminary in nature, as the Court must determine the requirements for the formation of a joint enterprise in the Territory of the Virgin Islands in order to assess the correctness of the judge's direction to the jury on that issue. I would commence my analysis of this issue by making it plain that section 20 of the **Criminal Code** very directly addresses the requirements for the formation of a joint enterprise. In particular, section 20 speaks to the conduct and state of mind required for a secondary party to a joint enterprise to be liable for the actions of the principal offender. Section 20 reads:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such unlawful purpose an offence is committed of such a nature that its commission was a probable consequence of prosecution of such unlawful purpose, each of them is deemed to have committed the offence.”

- [16] I note also that the question of the source of the law on joint enterprise has been dealt with by the Privy Council on appeal from the Court of Appeal of Bermuda and by this Court on an appeal from Saint Vincent and the Grenadines. Both Bermuda and Saint Vincent and the Grenadines, have enacted criminal codes containing provisions identical to section 20. In **Teiko**, the Privy Council had to determine, among other things, whether the common law on joint enterprise (at that time

reflected in **Chan-Wing Siu v The Queen**⁶ and the progeny of cases following that decision) was to be preferred over section 28 of the Bermudian Criminal Code, which is identical in terms to section 20 of the **Criminal Code**. The Privy Council, dismissed the appellant's contention that the common law principles remained applicable and stated thusly:

"The appellants submitted that in accordance with the principles of the common law the judge should have directed the jury that before they could convict the person who fired the gun they must be satisfied that he intended to kill or cause grievous bodily harm. They further submitted that in accordance with the principles of the common law established in *Chan Wing-Siu v. The Queen* [1985] AC 168 and *Reg. v. Powell (Anthony)* [1999] 1 AC 1 the judge should have directed the jury that before they could convict the accomplice they must be sure that he foresaw that the person who fired the gun intended to kill or cause grievous bodily harm. Their Lordships are unable to accept these submissions because it is clear that in Bermuda the liability for murder and the liability of a party to a joint enterprise are governed by the provisions of the Criminal Code and not by the rules of the common law...". (Underlining supplied)

[17] This Court, in **Anjay Charles**, when faced with a submission similar to that of the appellant in this appeal, adopted the dictum of the Privy Council in **Teiko** and arrived at the same conclusion; that is, that the Saint Vincent and the Grenadines Criminal Code, and not the common law, was the source of the law on joint enterprise in Saint Vincent and the Grenadines. In the face of the decisions of **Teiko** and **Anjay Charles**, I disagree with the appellant that the common law governs the law on joint enterprise in the Territory of the Virgin Islands, and find no difficulty with concluding that the relevant substantive law on joint enterprise is contained in the **Criminal Code**, and not the common law. I would further add to this finding, the observation of Gibbs J in **Stuart v The Queen**,⁷ which was cited with approval in **Teiko** in relation to the co-existence of concepts within a criminal code and the common law. In **Stuart**, Gibbs J observed:

"[It] does not mean that it is never necessary to resort to the common law for the purpose of aiding in the construction of the Code – it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously

⁶ [1985] AC 168.

⁷ (1974) 134 CLR 426.

acquired a technical meaning, or on some such special ground: see *Robinson v. Canadian Pacific Railway Co.* [1892] AC 481, at p 487, cited in *R. v. Scarth* [1945] St. R. Qd. 38, at p 44. If the Code is to be thought of as 'written on a palimpsest, with the old writing still discernible behind' (to use the expressive metaphor of Windeyer J. in *Vallance v. The Queen* (1961) 108 CLR 56, at p 76), it should be remembered that the first duty of the interpreter of its provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance."

[18] In other words, the finding that the **Criminal Code** is the source of the law on joint enterprise does not estop a court from referring to the common law in so far as it is helpful to interpreting the provisions of the **Criminal Code**. Having examined the contents of section 20, I would go further to say that, in any event, even if the appellant's argument was that the common law contained in **Jogee** was to be used as an aid to interpreting section 20, such an argument would not avail him, as the contents of section 20 are not wholly compatible with the common law requirements for the formation of the joint enterprise contained in **Jogee**. It is clear that section 20 requires the following two conditions for liability of parties to a joint enterprise:

- (i) Two or more persons with a shared intention to prosecute an unlawful purpose in conjunction with each other; and
- (ii) That while pursuing the unlawful purpose, an offence is committed that was the probable consequence of the prosecution of the unlawful purpose.

[19] Section 20 essentially provides that a person, who participates in a joint enterprise, is liable for the commission of an offence committed in the furtherance of the joint enterprise if the secondary party had foresight that the offence committed would have been committed. In **Anjay Charles**, this Court made the following remarks on the interpretation on section 21 of the Saint Vincent and the

Grenadines Criminal Code, which is identical in terms to section 20 of the **BVI Criminal Code**:

“The position in Saint Vincent and the Grenadines regarding this form of joint enterprise is now governed by section 21 of the Criminal Code ...

...

Section 21 is self-explanatory and codifies the common law position in cases such as *Regina v John Swindall and James Osborne*. The deeming provision at the end of the section confirms that each participant in the unlawful activity can be found guilty without evidence as to how he or she participated in the unlawful activity. Under the section he or she is deemed to have committed the offence. (Underlining supplied)

- [20] Quite differently, **Jogee** is noted for crystallising the common law position that all parties to a joint enterprise must be found to have intended the unlawful result of the joint enterprise in order to be jointly liable. The current state of the common law is reflected at paragraph 87 of **Jogee**, wherein the Privy Council stated:

“It would not be satisfactory for this court simply to disapprove the Chan Wing-Siu principle. Those who are concerned with criminal justice, including members of the public, are entitled to expect from this court a clear statement of the relevant principles. We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre Chan Wing-Siu practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose.”

- [21] The Privy Council stated further at paragraphs 89 and 90 of **Jogee** that:

“[89] In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms.

...

[90] The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1... If the crime requires a particular

intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent.”

[22] **Jogee**, with respect to the state of mind required for joint liability, clearly differs from section 20. **Jogee** requires that a secondary party to a joint enterprise intended to assist or encourage the principal to act with the particular intent required in the commission of the offence, and displaces the notion that foresight of the end result of a joint enterprise may be equated to intention to commit that resultant crime; the latter rejected position is that which is codified by section 20. The **Jogee** standard is, therefore, higher than section 20 which simply requires that the unlawful result was the probable consequence of the joint enterprise. On account of this difference, **Jogee** is not relevant authority for the interpretation and application of the mental element of a secondary party to a joint enterprise as reflected in section 20.

[23] In all the above premises therefore, I am of the firm view that the relevant law on joint enterprise in the Territory of the Virgin Islands is governed by the provisions of the **Criminal Code** and, in particular, that the mental element for the liability of a secondary party to a joint enterprise is contained in section 20 of the **Criminal Code**, and not the common law as reflected in **Jogee**. And further, that, **Jogee** is unhelpful with interpreting the mental requirement contained in section 20.

The Judge’s Summation - Joint Enterprise

[24] This issue is the crux of the appeal. With all due respect to counsel, I have summarised the essential complaints as follows:

- (i) The judge did not direct the jury that the Crown was required to prove that the appellant participated in the joint enterprise with Sherman Williams with the requisite intention to kill St. Rose.

- (ii) The judge erred in failing to direct the jury on the question of whether the appellant had any knowledge of the gun which Sherman Williams was alleged to have used to shoot St. Rose.
- (iii) The judge ought to have directed the jury on the issue of whether the appellant foresaw the use of a firearm by Sherman Williams as a real possibility.
- (iv) The judge misdirected the jury in so far as she referred to the commission of authorised or unauthorised acts committed in the course of a joint enterprise, as opposed to foreseeable or unforeseeable acts.

[25] When a judge's summation is subject to review, the directions given by the judge must be looked at as a whole. In the Privy Council decision of **Daniel Dick Trimmingham v The Queen**,⁸ Lord Carswell stated at paragraph 12 that:

"It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular [an appellate court] must determine, whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention."

[26] An appellate court's examination of a summation 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 rather concerned with whether the judge's misdirection occasioned a miscarriage of justice and resulted in an unsafe conviction.⁹ Accordingly, the issue which falls to be determined is whether the judge adequately directed the jury in accordance with section 20 of the **Criminal Code**. If it is found that there are defects in the judge's direction to the jury, it

⁸ [2009] UKPC 25.

⁹ See also *Jay Marie Chin v The Queen* ANUHCRA2012/0005 (delivered 5th April 2017, unreported).

further falls to be determined whether the defects in the judge's direction in fact occasioned a miscarriage of justice.

- [27] The trial judge's direction on joint enterprise was brief. The judge first sought to define the concept of joint enterprise. This portion of the judge's direction is uncontroversial. The judge said:

"Now as you are aware, the Prosecution's case is that the two Accused persons committed this offence together and they say that they were in a joint enterprise. What is a joint enterprise? Now when a criminal offence is committed by two or more persons, each of them may play a different part. But if they are in it together as part of a joint plan or agreement or common purpose, they are each guilty of it. So the question you have to put to yourself is, were they in it together. The words 'plan', 'agreement' or 'common purpose', whichever one that has been used, does not mean that there has to be any formality about it to come to that decision. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It could be made with a nod, a wink, a knowing look and even without such actions you may infer from the behavior of those involved that they agreed to commit the offence. I repeat, an agreement can be inferred from the behavior of the parties.¹⁰

- [28] The judge then went on to speak to the state of mind required for participants in a joint enterprise. The judge directed:

"The essence of joint responsibility for a criminal offence is that each Accused shared the intention to commit the offence and took some part in it however great or small so as to achieve the final aim. Now I have to direct you that mere presence at the scene of the crime is not enough to prove guilt. But if you find that a particular Defendant was on the scene and intended and did by his presence alone encourage the other in the offence, then he is equally guilty. Your approach to the case should, therefore, be as follows. If looking at the case of either Accused you are satisfied so that you are sure with the intention that I mentioned earlier, he committed the offence on his own or that he took some part in committing it with his co-Accused, he is guilty."¹¹

- [29] Following this, the judge directed the jury on "unusual or unforeseen consequences" committed during the course of a joint enterprise, and the effect of a "departure" from the agreed joint enterprise, as follows:

¹⁰ Record of appeal Vol. 2, p. 22, lines 1-20.

¹¹ Record of appeal Vol. 2, p. 22, lines 21-25 and p. 23, lines 1-10.

“Even if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences. But if one of them departs completely from what has been expressly or tacitly agreed as of the joint enterprise, the other is not liable for the consequences of that unauthorized act.” Therefore, before you can convict the Accused so as to make one of them liable for the act of the other, you must be satisfied first that they agreed to commit the crime in question or had a common purpose to commit it and, secondly, that what each did was part of what had been agreed for that common purpose.

If you conclude that what one man departed or may have departed, what one man did, sorry, departed or may have departed completely from what was agreed or from that common purpose, then you cannot convict the other as a result of what was done by the first one. It is for you, Members of the Jury, to decide whether what was done was part of a joint enterprise or what was or may have been an unauthorized act which was outside of the joint enterprise, just as it is for you to decide whether there was in the first place any agreement at all between them. You must, therefore, consider all of the circumstances in this case when you come to decide whether the Prosecution has proven that each of the two Accused was responsible for the offence.”¹² [Underlining supplied]

- [30] It ought not be disputed that the judge did not mention section 20 in her directions to the jury. Neither did the judge use the particular language contained in section 20. Further, and as the appellant points out, there was no express direction to the jury on the question of foresight that the gun would be used in the attempt to murder St. Rose, that the use of the gun was the probable consequence of the joint enterprise with Sherman Williams, or any direction to consider the effect of either of those considerations on the guilt of the appellant. That, however, is not the end of the matter. Taking cognisance of these omissions, one must now go further to ascertain whether the substance of the judge’s direction, taken as a whole, comports with the substantive law contained in section 20 or, stated differently, whether the jury would have been able to understand the standard to which they ought to have been satisfied in order to convict the appellant, notwithstanding the judge’s failure to use the express statutory language.

¹² Record of appeal Vol. 2, p. 23 lines 21-25 and p.-24, lines 1-23.

[31] The closest sort of reference to foresight or probability of consequence, are in my view, contained in the judge's directions quoted at paragraph 29 above. That portion of the direction speaks to "unforeseen and unusual circumstances" and departures from a joint enterprise. First, having regard to the contents of section 20, I find that the judge's remark on the effect of unforeseen and unusual circumstances on the liability of parties to a joint enterprise, is plainly wrong. For emphasis, the judge directed: "Even if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences". Section 20 does not impose liability on a party to the joint enterprise for unforeseeable acts. Rather, a person can only be liable under section 20 if the crime committed was a probable or foreseeable consequence of the joint enterprise. This statement therefore does not take the judge's direction any closer to the requirements of section 20.

[32] With respect to the judge's directions on departure from the joint enterprise, the reference to one party "depart[ing] completely" from the joint enterprise may be interpreted as reference to acts which wholly escape the contemplation of the parties as agreed when the joint enterprise was formed. I note that, section 20 permits the jury to find a secondary party liable for the acts of a principal offender, even where there is a departure from the agreed joint enterprise; the operative question would be whether the departure was a probable consequence or not. If the departure was a probable consequence, liability would occur. If the departure were not a probable consequence, liability would not follow. The judge's statement on departure does not take this nuance into account. On any view, therefore, the judge's statements on unusual or unforeseen circumstances, and on departure from the joint enterprise would not be sufficient to notify the jury of their duty to convict Demming if they found that the attempted murder was a probable consequence of the joint enterprise. Taking all the above into consideration, I find that the judge misdirected the jury on the relevant law to be applied to the issue of joint enterprise.

Effect of the Misdirection

- [33] As stated above, the presence of a misdirection is not itself determinative of an appeal against conviction. The further question is whether, having found that there was this misdirection, one can go further to say that the misdirection occasioned a miscarriage of justice or has affected the safety of the conviction. I have already spoken of the Court's required posture when assessing a summation – the summation must be examined as a whole. In conducting this examination, I have carefully examined, in particular, the learned judge's direction to the jury on the law of attempted murder. The essence of the learned judge's direction in this regard is captured at Volume 2 of the Record of Appeal, Tab 11, page 18, lines 20 to 25 and page 19, lines 1 to 9, where the judge directed:

“Of course, as you know, the Accused are not charged with murder, they are charged with attempted murder. Thus, Members of the Jury, the offence of attempted murder is committed where a person commits an act sufficiently close to the complete offence of murder, and I must emphasize, and at the time of the commission of the act he had the intention to kill. Nothing less than the intention to kill will suffice. Therefore, the constituent elements of the offence of attempted murder which the Prosecution must establish are the physical act by the Accused sufficiently close to the complete offence of murder and, two, an intention on the part of the Accused to commit the complete offence of murder, that is an intention to kill.”

The judge continued at lines 13 to 16 of page 20 of the summation: “So the Accused are not guilty of attempted murder unless they had the requisite intention to kill; committed an act that was more than mere preparation to commit the crime.”

- [34] The judge very clearly, and on more than one occasion, indicated to the jury that, in order to convict the accused men, they must be satisfied that they both had an intention to kill St. Rose. When one looks at the judge's direction in this regard, within the context of her failure to give a direction in terms of section 20, the effect of the judge's directions are that the jury was left with the impression that, in order to find Demming guilty of attempted murder, the prosecution was required to prove that:

- (i) Demming acted jointly with Sherman Williams in carrying out the attempted murder; and
- (ii) Demming needed to possess an intention to kill St. Rose.

[35] When these two elements are combined, the judge's direction was in effect a **Jogee** direction, in as much as it requires the jury to be satisfied that the appellant (who is the secondary party to the enterprise) had an intention to commit the offence which was committed. This does not comport with the requirements of section 20, which, as stated earlier, solely required the jury, on these facts, to be satisfied that the use of the gun to shoot St. Rose, during the course of the altercation, was a probable consequence of Sherman Williams' and Demming's joint conduct.

[36] By giving what was in effect a **Jogee** direction, the judge required the jury to be satisfied of a higher standard than that which is contained in section 20. In other words, by putting to the jury that they were required to be satisfied that the appellant had intended kill St. Rose, the jury was required to be satisfied of a standard in excess of the requirement of section 20 that the attempted murder was a probable consequence of the joint enterprise with Sherman Williams. Undoubtedly, the judge's direction placed a higher standard on the case than that which the prosecution was required to prove to the jury. Notwithstanding this higher standard imposed on the state of mind required for the appellant as a secondary party to the joint enterprise, the jury nonetheless convicted the appellant. It is this fact that leads me to the conclusion that there was no miscarriage of justice in this case. If anything is to be said of the effect of the judge's misdirection in this case, it is that the misdirection enured to the benefit of the appellant, as the jury was directed on the higher standard on intention to kill.

[37] As a matter of practicality, I find that it is difficult to conclude that real prejudice can be suffered where a jury convicts a secondary party to a joint enterprise having been given a **Jogee** direction instead of a direction in terms of section 20 as, in cases where a **Jogee** direction is given instead of a section 20 direction, the prosecution has a higher standard to satisfy the jury – that, if anything, is a benefit to the accused. Notwithstanding this, my observation is not meant to create some rule of broad application that a judge’s misdirection in terms of **Jogee** will never be sufficient to disrupt the safety of a conviction. Neither does this finding dispense with the general and important need for careful directions in accordance with section 20 of the **Criminal Code**.

The Proviso to Section 37(1) of the Supreme Court (Virgin Islands) Act

[38] Even if one were to form a contrary view on the propriety of the judge’s direction on joint enterprise, I take the further view that given the totality of the evidence, no miscarriage of justice has occurred and that this is an appropriate case for the application of the proviso contained in section 37(1) of the **Supreme Court (Virgin Islands) Act**. Section 37(1) provides:

“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.

Provided that the Court may, notwithstanding it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.”¹³ (Underlining supplied)

[39] The application of the proviso requires the Court of Appeal to look beyond the errors of a trial judge to examine whether, having regard to the admissible evidence before the jury, a conviction was inevitable. A summary of the governing

¹³ Cap. 80, Revised Laws of the Virgin Islands 1991.

principles, the Court is required to apply when considering the application of the proviso, is found in **Stafford v The State**,¹⁴ where Lord Hope explained:

“The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see Woolmington v. Director of Public Prosecutions [1935] A.C 462, 482-483, per Viscount Sankey L.C.... . Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence.” (Underlining supplied)

[40] Similarly, the Supreme Court of New Zealand in **R v Matenga**,¹⁵ in a passage cited with approval by the Privy Council in **Lundy v The Queen**,¹⁶ stated:

“The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding that there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the Court must itself feel sure of the guilt of the accused.”

[41] It is noteworthy, that the jury convicted Sherman Williams of possession of a firearm with the intent to endanger life and of the attempted murder of St. Rose.¹⁷ It is further noteworthy, that this appeal relates solely to the sufficiency of the judge’s direction on the mental element of the joint enterprise. No issue is taken with the judge’s directions on the requirement that the co-accused were acting pursuant to a common intention to prosecute an unlawful purpose. The narrow question, therefore, to which this Court must direct its mind is whether the jury, having found that Demming and Sherman Williams acted jointly in the prosecution of an unlawful purpose, would inevitably have found Demming guilty of attempted murder, having been properly directed on the issue of foresight reflected in section 20 of the **Criminal Code** and the pre-**Jogee** cases.

¹⁴ [1999] 1 WLR 2026.

¹⁵ [2009] 3 NZLR 145.

¹⁶ [2013] UKPC 28.

¹⁷ His appeal to this Court was dismissed.

[42] There was overwhelming, corroborated and virtually unchallenged evidence before the jury which supported the prosecution's case. The prosecution relied on three material witnesses, and the expert evidence of Sergeant Wendell Ballantyne and Dr. Rotimi Oyetunji. The evidence of the three material witnesses consistently speak to the altercation between Demming, Sherman Williams and St. Rose on the outside of the Café. The three material witnesses consistently spoke to a combination of the following facts, that:

- (i) Demming and Sherman Williams were in close proximity to each other during the earlier stages of the altercation outside the Café;
- (ii) Sherman Williams removed what appeared to be a firearm from his waist;
- (iii) Sherman Williams cranked and fired the gun which was removed from his waist (while in close proximity to Demming);
- (iv) Demming left the immediate company of Williams, to walk ahead towards St. Rose;
- (v) Sherman Williams followed behind Demming with a gun in hand; and
- (vi) St. Rose retreated from Sherman Williams and Demming who were approaching him.

[43] Demming did not give evidence in his defence and relied on the contents of his transcribed police interviews. His case, as put to the material crown witnesses in cross-examination, was that St. Rose was the aggressor in any altercation that occurred between them, that he (the appellant) did not have a gun outside the Café, that he did not approach St. Rose in a threatening manner and that he never

hit St. Rose in the face in the parking lot. These are all matters which St. Rose denied. Those denials are the evidence which this Court must consider. Apart from the matters raised in cross-examination, St. Rose affirmed his answers in his examination-in-chief to the effect that the altercation in the parking lot was firstly between himself and Sherman Williams, that Demming joined in to the altercation after it started, that he saw Sherman Williams with a gun and that after seeing Sherman Williams with a gun, that Demming punched him on the nose, that he had received a hit to the back of the head (which St. Rose says in his examination-in-chief was a from the butt of Sherman Williams' gun) and that the hit at the back of the head was less forceful than the punch to the nose.

- [44] There is no direct evidence that the appellant saw Sherman Williams' firearm. However, from the evidence, to the effect, that he removed the gun from his waist, cranked it and fired a round prior to approaching St. Rose and ultimately discharging the firearm, causing injury to St. Rose, I am of the view that the only inference which could be drawn from this series of events is that Demming would have been aware that Sherman Williams had a gun in his presence, and intended to use it during the course of the altercation with St. Rose. It would have been a different case were the evidence that Demming could only have become aware that the firearm was in play at the time that it was used to hit St. Rose, or at the time it was discharged to injure St. Rose. In such a case, there would be little time for the appellant, after having become aware of the firearm to withdraw from the joint enterprise, and the possibility of the appellant excluding himself from liability with Sherman Williams would be thin. In this case, the inference is unavoidable that the appellant would have had both the knowledge of the firearm and would have consented to proceeding into the joint attack knowing that it had been withdrawn, cranked and discharged by Sherman Williams prior to the gun being used on St. Rose. To my mind, the ineluctable inference from the evidence is that the joint enterprise would have proceeded on the knowledge or contemplation that the gun was in play and likely to be used. On the state of the evidence therefore, I find no difficulty in concluding that the jury would have found that the appellant

foresaw that the firearm would have been used in the course of the altercation, and further that the jury would inevitably have convicted the appellant.

[45] In any event, as I have stated above, the direction of the judge was tantamount to a **Jogee** direction which sets a higher standard than that required by section 20. It follows that had the jury been properly directed, they would inevitably have convicted the appellant on the much lower foresight standard contained in section 20.

[46] I would therefore apply the proviso to section 37(1) of the **Supreme Court (Virgin Islands) Act**, in any event, and uphold the conviction on the basis that no miscarriage of justice resulted from the judge's misdirection to the jury.

Order

[47] For all the above reasons, I would dismiss the appeal and affirm the conviction.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Mario Michel
Justice of Appeal

[48] **BLENMAN JA:** This appeal is the first from the Territory of the Virgin Islands which seeks to interrogate what the law is on joint enterprise in the Virgin Islands post the landmark decision of the UK Supreme Court and the Judicial Committee of the Privy Council in **R v Jogee; Ruddock v The Queen**.¹⁸ I have read the carefully reasoned judgment of the learned Chief Justice and I am in full agreement with her conclusion. I wish to add, in concurring with the judgment, my reasons for concluding that Mr. Jevone Demming's ("Mr. Demming") appeal should be dismissed and his conviction affirmed. In this appeal, two main issues arise for this Court's determination, namely: (1) whether the learned judge erred in

¹⁸ [2016] UKPC 8.

directing the jury on the principle of joint enterprise; and (2) if so, whether this is an appropriate case for the application of the proviso. I will discuss both issues in turn, adopting the learned Chief Justice's very helpful recitation of the background to the appeal and the submissions of learned counsel.

Discussion

Issue 1 – Joint Enterprise Direction

- [49] It is noteworthy that the learned trial judge gave a careful and full direction on the offence of attempted murder and the standard directions of burden and standard of proof. These directions cannot be faulted. The learned judge also directed the jury on the principles of joint enterprise. The jury, having received the directions from the learned judge on joint enterprise and attempted murder, convicted both Mr. Demming and Mr. Williams of the attempted murder of Mr. Neil St. Rose ("Mr. St. Rose"). Mr. Williams was also convicted of possession of a firearm. They both appealed to this Court against their respective convictions. This Court heard the submissions on behalf of both Mr. Demming and Mr. Williams and those of the Crown. In an oral judgment, this Court dismissed Mr. Williams' appeal on the basis that the trial judge did not misdirect the jury in relation to his offence and that his conviction was not unsafe. This written judgment therefore addresses Mr. Demming's appeal.
- [50] The crux of Mr. Demming's appeal is the complaint that the learned judge failed to direct the jury on the requisite intention in order to ground joint enterprise in accordance with the guidance thus, rendering his conviction for attempted murder unsafe. In a word, Mr. Demming contended that without the Crown's reliance on the principle of joint enterprise, he could not have been charged or tried for the attempted murder of Mr. St. Rose.
- [51] At the hearing of the appeal, oral submissions advanced on behalf of Mr. Demming were made on the basis that the applicable principles in relation to liability of a party to a joint enterprise were those outlined in **R v Jogee**. Indeed,

neither counsel for Mr. Demming nor counsel for the Crown referred to section 20 of the **BVI Criminal Code, 1997**¹⁹ (the “Criminal Code”) which indicates the applicable principles of joint enterprise in the Territory of the Virgin Islands. The Court therefore directed learned counsel to file further written submissions on the applicability of section 20.

[52] In his further written submissions, learned counsel, Mr. Patrick Thompson, for Mr. Demming stated that the judge was required to direct the jury in accordance with **Jogee**. He also stated that, even if it is accepted that section 20 of the **Criminal Code** applies, the section requires proof that attempted murder with a firearm was a probable consequence of an unlawful purpose and there was no proof on the facts of this case. He posited that it would stretch credulity to contend that the production and use of a firearm was a probable consequence of ‘an attack with fists and feet’. Senior Crown counsel, Ms. Leslie-Ann Faulkner, on behalf of the Crown stated that section 20 is a codification of the common law existing at the time the **Criminal Code** came into force and is therefore the law against which the correctness of the learned judge’s direction is to be determined.

[53] The common law on joint enterprise is outlined in **Jogee**. The effect of **Jogee** is that, at common law, it is no longer sufficient for the Crown to prove that the principal’s conduct was a probable consequence, in the ordinary course of things, of the criminal enterprise agreed to by the secondary party. At paragraphs 89 and 90 of the Board’s decision, Lord Hughes and Lord Toulson restated the relevant principles thus:

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

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

¹⁹ Act No. 1 of 1997.

crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. To take a homely example, if D2 encourages D1 to take another's bicycle without permission of the owner and return it after use, but D1 takes it and keeps it, D1 will be guilty of theft but D2 of the lesser offence of unauthorised taking, since he will not have encouraged D1 to act with intent permanently to deprive. In cases of concerted physical attack there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least and D2 having the intention himself that such harm be caused. In such cases it may be simpler, and will generally be perfectly safe, to direct the jury (as suggested in Wesley Smith and Reid) that the Crown must prove that D2 intended that the victim should suffer grievous bodily harm at least. However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. That may well be the situation if the assistance or encouragement is rendered some time before the crime is committed and at a time when it is not clear what D1 may or may not decide to do. Another example might be where D2 supplies a weapon to D1, who has no lawful purpose in having it, intending to help D1 by giving him the means to commit a crime (or one of a range of crimes), but having no further interest in what he does, or indeed whether he uses it at all."

- [54] In the Territory of the Virgin Islands, however, section 20 of the **Criminal Code** which addresses "[o]ffences committed by joint offenders in prosecution of common purpose" provides in full as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another and in the prosecution of such unlawful purpose an offence is committed of such a nature that its commission was a probable consequence of prosecution of such unlawful purpose, each of them is deemed to have committed the offence."

- [55] In Saint Vincent and the Grenadines, a similar statutory provision exists to section 20. Indeed, section 21 of the Criminal Code of Saint Vincent and the Grenadines is in pari materia to section 20 of the **Criminal Code** of the Territory of the Virgin Islands.

- [56] It is of significance that this Court in **Anjay Charles v The Queen**,²⁰ examined section 21 of the Criminal Code of Saint Vincent and the Grenadines which is similar in terms to section 20 of the **Criminal Code**. Webster JA [Ag.] concluded

²⁰ SVGHCRA2013/0016 (delivered 6th April 2017, unreported).

that that section governs the law of joint enterprise in Saint Vincent and the Grenadines. At paragraph 22 of the judgment, his Lordship explained thus:

“The position in Saint Vincent and the Grenadines regarding this form of joint enterprise is now governed by section 21 of the Criminal Code...Section 21 is self-explanatory and codifies the common law position in cases such as *Regina v John Swindall and James Osborne*. The deeming provision at the end of the section confirms that each participant in the unlawful activity can be found guilty without evidence as to how he or she participated in the unlawful activity. Under the section he or she is deemed to have committed the offence.”

[57] Additionally, the Privy Council in **Teiko David Jamel Furbert et al v The Queen**²¹ considered whether section 28 of the Criminal Code of Bermuda, which is in the same terms as section 20, or the common law established in the pre-**Jogee** authorities of **R v Powell**²² and **Chan Wing-Siu v The Queen**,²³ governed the law on joint enterprise in Bermuda. The Board concluded that the Criminal Code and not the common law was the governing law. At paragraph 27 of the opinion of the Board, Lord Hutton stated:

“27. The appellants submitted that in accordance with the principles of the common law the judge should have directed the jury that before they could convict the person who fired the gun they must be satisfied that he intended to kill or cause grievous bodily harm. They further submitted that in accordance with the principles of the common law established in *Chan Wing-Siu v. The Queen* [1985] AC 168 and *Reg. v. Powell (Anthony)* [1999] 1 AC 1 the judge should have directed the jury that before they could convict the accomplice they must be sure that he foresaw that the person who fired the gun intended to kill or cause grievous bodily harm. Their Lordships are unable to accept these submissions because it is clear that in Bermuda the liability for murder and the liability of a party to a joint enterprise are governed by the provisions of the Criminal Code and not by the rules of the common law, and it is also clear that section 287(1)(c) provides for an offence which can be termed 'constructive murder'.”

[58] Let me say straight away that, I agree with Ms. Faulkner's submissions on the applicability of section 20 of the **Criminal Code**. Section 20 is in plain and unambiguous terms and indeed codifies the law on joint enterprise in the Territory

²¹ [2000] UKPC 12.

²² [1999] 1 AC 1.

²³ [1985] AC 168.

of the Virgin Islands. By extension, the common law position as set out in **Jogee** does not apply. The learned judge's direction, which stated that "the essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence" is in my view squarely based on the common law expressed in **Jogee** which essentially states that in order to rely on joint enterprise the Crown must prove that the secondary party had the requisite intention to commit the offence. Section 20 of the **Criminal Code**, however, requires the commission of the offence to be a "probable consequence" of an unlawful purpose. It is immediately clear that the mens rea required to establish liability of parties to a joint enterprise under **Jogee** is at higher standard than what is required under section 20, and to that extent is inconsistent with the requirements under section 20. Accordingly, I am also of the view that the law on joint enterprise in the Territory of the Virgin Islands is governed by the provisions of the **Criminal Code**, and it is to the Code that this Court must look when examining the learned judge's direction to the jury on joint enterprise.

[59] I will now examine the learned judge's direction on joint enterprise.

[60] The learned judge at the beginning of her direction to the jury on joint enterprise defined 'joint enterprise' in the following way:

"Now as you are aware, the Prosecution's case is that the two Accused persons committed this offence together and they say that they were in a joint enterprise. What is a joint enterprise? Now when a criminal offence is committed by two or more persons, each of them may play a different part. But if they are in it together as part of a joint plan or agreement or common purpose, they are each guilty of it. So the question you have to put to yourself is, were they in it together. The words 'plan', 'agreement' or 'common purpose', whichever one that has been used does not mean that there has to be any formality about it to come to that decision. An agreement to commit an offence may arise on the spur of the moment. Nothing need be said at all. It could be made with a nod, a wink, a knowing look and even without such actions you may infer from the behavior of those involved that they agreed to commit the offence. I repeat, an agreement can be inferred from the behavior of the parties.

[61] The learned judge then explained to the jury the mens rea required for participants in a joint enterprise to be liable. She stated that:

“The essence of joint responsibility is that each Accused shared the intention to commit the offence and took some part in it however great or small so as to achieve the final aim. Now I have to direct you that mere presence at the scene of the crime is not enough to prove guilt. But if you find that a particular Defendant was on the scene and intended and did by his presence alone encourage the other in the offence, then he is equally guilty. Your approach to the case should, therefore be as follows. **If looking at the case of either Accused you are satisfied so that you are sure with the intention that I mentioned earlier, he committed the offence on his own or that he took some part in committing it with his co-Accused, he is guilty.**” (emphasis mine)

[62] Thereafter, the learned judge directed the jury in relation to the participants’ liability for unforeseen consequences which arise during the course of a joint enterprise as well as the significance of a departure from what has been agreed as the joint enterprise in the following way:

“Even if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences. But if one of them departs completely from what has been expressly or tacitly agreed as of the joint enterprise, the other is not liable for the consequences of that unauthorized act. Therefore, before you can convict the Accused so as to make one of them liable for the act of the other, you must be satisfied first that they agreed to commit the crime in question or had a common purpose to commit it and, secondly, that what each did was part of what had been agreed for that common purpose.

If you conclude that what one man departed or may have departed, what one man did, sorry departed or may have departed completely from what was agreed or from that common purpose, then you cannot convict the other as a result of what was done by the first one. It is for you, Members of the Jury, to decide whether what was done was part of a joint enterprise or what was or may have been an unauthorized act which was outside of the joint enterprise, just as it is for you to decide whether there was in the first place any agreement at all between them. You must, therefore, consider all of the circumstances in this case when you come to decide whether the Prosecution has proven that each of the two Accused was responsible for the offence.” (emphasis mine)

[63] The uncontroverted evidence indicates that Mr. Demming was present when Mr. Williams cranked the gun, hit Mr. St. Rose and shot him - all being part of the

unlawful act of Mr. Williams. It is of significance that the injuries, which were at the heart of the attempted murder charge, were the serious gunshot wounds that were inflicted by Mr. Williams on Mr. St. Rose. It is settled that in order to ground a charge of attempted murder there must be evidence of an intention to kill. The learned judge correctly stated this. It is apparent to me that Ms. Faulkner conflated the requirement to give a proper direction on attempted murder with the requirement to give a proper direction on attempted murder and joint enterprise in circumstances where the Crown, in the case at bar, was relying exclusively on joint enterprise to ground their case. However, she was able to redeem herself in her further written submissions at the invitation of the Court and in the face of the Court.

- [64] As indicated earlier, what is immediately apparent is that the judge did not expressly refer to section 20 of the **Criminal Code** in her direction on joint enterprise. The learned judge also neglected to direct the jury that the use of the gun was the 'probable consequence' of the joint enterprise with Mr. Williams, in accordance with the requirements of section 20. Instead, the learned judge directed that "the essence of joint responsibility is that each accused shared the intention to commit the offence". As stated earlier, under section 20, an intention to commit the offence occasioned as a consequence of a joint enterprise is not required. Further, the aspect of the judge's direction which states that "[e]ven if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences" is inconsistent with the law as expressed in section 20. It is clear that section 20 imposes liability for probable and foreseen consequences of a joint enterprise, not unusual or unforeseen consequences as stated by the learned judge. In considering the learned judge's direction, in my view, the judge's direction on the mens rea required for liability to arise as well as the liability for unusual or unforeseen consequences is wholly inconsistent with the direction required in light of the provisions of section 20.

[65] Having considered the learned judge's direction, Senior Crown Counsel, Ms. Faulkner, in my view quite rightly conceded during oral arguments that the learned judge misdirected the jury on the applicable principle of joint enterprise, even though, Ms. Faulkner, at that time, did not refer to section 20 of the **Criminal Code**. In view of my conclusion above, on the applicability of section 20 of the **Criminal Code**, the learned judge, in directing the jury gave directions which were essentially in accordance with **Jogee** and were of a higher standard than what was required. Accordingly, the learned judge misdirected the jury on the law of joint enterprise.

[66] It is settled law that a misdirection by a trial judge, without more, does not automatically result in an appellate court quashing a conviction.²⁴ It is the law that when a case is being reviewed on appeal the starting point must always be that in a trial on indictment the jury is the body to which all important decisions on the guilt of the accused are entrusted. This does not mean that every deviation from procedural regularity and legal correctness vitiates a jury's verdict of guilty. That would impose an unattainable standard of perfection and frustrate, to an unacceptable extent, the effective administration of criminal justice. A similar sentiment was echoed in **Jay Marie Chin v The Queen**,²⁵ when this Court explained that the trial judge's omission to state or do certain things could be fatal only if it undermines the safety of the conviction. Further, that where a judge falls into error, the appellate court would only hold that the consequence of that error should result in the quashing of the conviction, if the error undermines the safety of the conviction.

[67] Also, the dictum of Lord Carswell in **Daniel Dick Trimmingham v The Queen**²⁶ is quite instructive on this point. At paragraph 12 of the opinion of the Board, Lord Carswell enunciated thus:

²⁴ See: *Furlonge v The Queen* ANUHCRA2009/0006 (delivered 27th January 2014, unreported).

²⁵ ANUHCRA2012/0005 (delivered 5th April 2017, unreported).

²⁶ [2009] UKPC 25.

“There are few cases in which the judge's summing up could not be criticised in some respects and submissions advanced that the content or wording could have been improved upon. The present case is no exception. It is possible in various places to say that the judge should have spelled matters out more fully or in a different fashion, but what an appellate tribunal must do is to look at the thrust of the directions and consider if they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide. In particular, the Board must determine whether, if there has been any defect, there has been any miscarriage of justice which requires their intervention. Their Lordships are fully satisfied that the trial judge's careful summing up stated the law adequately and put the issues properly and fairly before the jury. They consider that any deficiencies to which exception might be taken were minor and that they fall well short of a miscarriage of justice which should cause them to set aside the verdict.”

[68] In the appeal at bar, the focus must be on the direction on joint enterprise in an effort to determine whether the learned judge's misdirection resulted in a miscarriage of justice, thereby rendering Mr. Demming's conviction for attempted murder unsafe. I will now examine whether Mr. Demming's conviction is unsafe in the circumstances.

[69] As indicated earlier, utilizing the principle of joint enterprise, the prosecution grounded its case based on the evidence of the main witnesses for the Crown. The learned judge was required to direct the jury in accordance with section 20 of the **Criminal Code**, that the attempted murder “was a probable consequence of prosecution of such unlawful purpose.” Instead, the learned judge directed the jury that Mr. Demming ought to have had the intention to kill Mr. St. Rose, and also that “[e]ven if unusual or unforeseen consequences arise in the execution of the agreed joint enterprise, all are liable for those consequences.” It is therefore pellucid that the learned judge's direction to the jury on joint enterprise did not comport with section 20 and would therefore amount to a misdirection, which in the totality of the circumstances could, at the very least, have served to confuse the jury. Further, in so far as it relates to that aspect of the direction, it was not even in compliance with **Jogee**. In my view, the jury could have easily formed the view that Mr. Demming could have been found guilty for unusual or unforeseen

consequences, which could have prejudiced him at trial. Given the totality of the circumstances, I will now consider the applicability of the proviso.

Proviso

- [70] In determining whether this is an appropriate case for the application of the proviso, the Court ought to consider whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence. Section 37(1) of the **Supreme Court (Virgin Islands) Act**²⁷ (the “proviso”) provides as follows:

“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.

Provided that the Court may, notwithstanding it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.”

- [71] In **Rupert Anderson v The Queen**,²⁸ the Board explained the test of whether the proviso should be applied thus:

“The test which an Appeal Court is to apply to the proviso was recently referred to by Viscount Dilhorne in *Chung Kum Moey v. Public Prosecutor for Singapore* [1967] 2 A.C. 173, at p 185 quoting the classic passage by Lord Sankey in *Woolmington v. The Director of Public Prosecutions* [1935] A.C. 462 whether ‘if the jury had been properly directed they would inevitably have come to the same conclusion.’ Viscount Dilhorne also referred to *Stirland v. Director of Public Prosecutions* [1944] A.C. 315 where Lord Simon said that the provision assumed ‘a situation where a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict’.”

- [72] The test was later applied by the Board in **Freemantle v R**,²⁹ where the learned judge, at the appellant’s trial, did not give the jury a Turnbull direction. However,

²⁷ Cap. 80, Revised Laws of the Virgin Islands 1991.

²⁸ [1972] AC 100.

the Board in dismissing the appeal concluded that “the visual identifications of the appellant...was exceptionally good and was therefore an exceptional circumstance which justified the application of the proviso by the Court of Appeal”.

[73] In the more recent decision of **Maxo Tido v R**,³⁰ Lord Kerr explained the application of the proviso in the following way:

“A summary of the principles that govern the application of the proviso is perhaps most conveniently to be found in the judgment of Lord Hope in *Stafford v The State* (Note) [1999] 1 WLR 2026 where he said at 2029:

‘The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence: see *Woolmington v Director of Public Prosecutions* [1935] AC 462, 482-483, per Viscount Sankey LC In *Stirland v Director of Public Prosecutions* [1944] A.C 315, 321 Viscount Simon L.C said that the provision assumed: ‘a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict.’ As he explained later on the same page, where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility. **Where the verdict is criticised on the ground of a misdirection such as that in the present case, and no question has been raised about the admission of inadmissible evidence, the application of the proviso will depend upon an examination of the whole of the facts which were before the jury in the evidence’.**” (emphasis mine)

[74] Additional guidance on the application of the proviso is found in the Privy Council decision of **Lundy v The Queen**.³¹ At paragraph 160, Lord Kerr cited with approval a pronouncement in the decision of the Supreme Court of New Zealand in **R v Matenga**.³² His Lordship stated:

²⁹ [1994] 3 All ER 225.

³⁰ [2011] UKPC 16.

³¹ [2013] UKPC 28.

³² [2010] 2 LRC 36 at para. 31.

“The present position about the application of the proviso in New Zealand has now been authoritatively stated in *Matenga*. At para 31, Blanchard J said:

‘... having identified a true miscarriage, that is, something which has gone wrong and which was *capable* of affecting the result of the trial, the task of the Court of Appeal under the proviso is then to consider whether that potentially adverse effect on the result may *actually*, that is, in reality, have occurred. The Court may exercise its discretion to dismiss the appeal only if, having reviewed all the admissible evidence, it considers that, notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on that evidence. Importantly, the Court should not apply the proviso simply because it considers there was enough evidence to enable a reasonable jury to convict. In order to come to the view that the verdict of guilty was inevitable the court must itself feel sure of the guilt of the accused. ...’.

- [75] At this juncture, the Court must determine whether the jury would have inevitably found Mr. Demming guilty of attempted murder in any event, if they had been properly directed in accordance with section 20 of the **Criminal Code**.
- [76] As stated earlier, if the Court of Appeal considers that notwithstanding there has been a miscarriage, the guilty verdict was inevitable, in the sense of being the only reasonably possible verdict, on the evidence, the Court may exercise its discretion to dismiss the appeal. Critically, the evidence adduced in support of the Crown’s case was cogent and overwhelming. I am fortified in my view on the evidence that Mr. Williams had removed the gun from his waist, cranked it and fired shots before approaching Mr. St. Rose and firing the gun at him. It is clear that Mr. Demming was part of the unlawful joint enterprise. The evidence plainly suggests that Mr. Demming had knowledge of the gun being in possession of Mr. Williams and being used by Mr. Williams and reasonably ought to have foreseen that Mr. Williams would have used the gun to attempt to murder Mr. St. Rose. Indeed, in the circumstances, the attempted murder of Mr. St. Rose was a probable consequence of the unlawful joint enterprise, applying the standard of foresight expressed in section 20 of the **Criminal Code**. Accordingly, in my view, the jury

would have inevitably convicted Mr. Demming as the evidence suggests that he not only knew that Mr. Williams had a gun, but also that he reasonably ought to have contemplated that the gun would have been used in the altercation.

[77] Based on everything I have foreshadowed, it is apparent that I am of the view that this is a fitting case for the proviso to be applied.

Conclusion

[78] For the reasons stated above, I too would therefore dismiss Mr. Demming's appeal and affirm his conviction.

[79] I gratefully acknowledge the assistance of learned counsel.

Louise Esther Blenman
Justice of Appeal

By the Court

Chief Registrar