[2020] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 3/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

TERRY FOSTER v R

Delano Harrison QC for the appellant

Miss Maxine Jackson and Rosheide Spence for the Crown

17 January 2019 and 1 May 2020

FOSTER-PUSEY JA

[1] On 25 November 2013, after a trial before Sykes J (as he then was) and a jury in the Saint Elizabeth Circuit Court, the appellant was convicted of the offence of murder of Jerome Miller and Shereda Brooks. On 9 December 2013, the learned trial judge sentenced the appellant to 40 years' imprisonment at hard labour, on each count, with a stipulation that he should serve 20 years in prison before becoming eligible for parole.

[2] On 12 June 2017, a single judge of appeal granted the appellant leave to appeal and the appeal was heard on 17 January 2019. On that date, the court ordered as follows:

> "(1) The appeal is allowed.

(2) The convictions for murder are quashed and the sentences are set aside.

(3) Judgment and verdict of acquittal entered."

These are the promised reasons for the court's decision.

[3] The particulars of the charge against the appellant were that on either 6 or 7 August 2008 he murdered Jerome Miller ('Jerome') and Shereda Brooks ('Shereda') in the parish of Saint Elizabeth.

[4] The prosecution's case relied substantially on the statement which the appellant had given to the police under caution. In light of the grounds of appeal which will fall to be considered, the contents of the caution statement are outlined in detail (see pages 44-56 of the court's transcript).

[5] On Wednesday 6 August 2008 at about 3:30pm, Jerome drove a car to the appellant's home at Sun Valley Road, Glendevon, in the parish of Saint James. He told the appellant that they would be going to Saint Elizabeth. The appellant got ready and went with Jerome to Cornwall Court, where Jerome played dominoes until it became "dark". The appellant then asked Jerome, "how yuh say yuh ah guh ah St. E., if a night you a go up deh". Jerome played dominoes for a little longer and then told the appellant that he was going to "link Gary".

[6] Jerome then picked up Gary "below one school a Green Pond". He then picked up another man, whom the appellant described as "one brown youth" (hereafter referred to as 'the brown youth'), at Paradise. Having picked up the brown youth, Jerome called his

girlfriend, Shereda, and told her to meet him on the road. Jerome picked up Shereda and then the group headed towards Chetham in Saint Elizabeth.

[7] While they were driving in Chetham, the appellant saw three women whom he knew. He wound down the car window and called out to one of them. According to the appellant, the woman looked on him but did not stop, and so he wondered whether she had not recognized him. When they reached close to an ackee farm, the brown youth directed Jerome to drive into a lane which led to a dead end where they saw a ply board hut.

[8] The brown youth was the first person to alight from the vehicle. The appellant then left the vehicle, and was told by the brown youth to knock on the door of the hut, because some men were supposed to be in the hut with something for him. The appellant said that, as he was about to knock on the door of the hut:

> "Three shot bus. When mi look mi si di brown youth wid a shine gun, spin barrel with a long mouth. Then him say to Shereda, to come out a di car and then Shereda come out a di car and run towards the back and when him run as him was passing di back him shoot him. An den him go over Shereda and look. Him then go over Jerome. Mi never see where Jerome drop until when him go over him. And him shoot Jerome one more time. Di brown youth seh mi must goh and push di hut. Mi push di hut and it open" (see page 51 of the court's transcript)

[9] Upon pushing the door open, the appellant saw a number of bags packed in the hut. The brown youth told him to place the bags in the car and then said: "mek wi get rid a dem people yah". Going to Jerome firstly, the brown youth held his feet and said: "wi have one place fi drop dem into". The appellant assisted the brown youth to pull

Jerome’s body near to a wall. Gary pulled Shereda’s body. The brown youth climbed onto the wall and said he was looking for a hole. When he found the hole, the brown youth said: “mek wi swing dem off inna di hole … inna dah hole yah”. The brown youth and Gary picked up Jerome’s body and threw the body into the hole. Then the appellant and the brown youth lifted Shereda’s body and threw her into the hole which had “some wist, wist”. Shereda’s body got caught up in the “wist”, and the brown youth was planning to leave the body in that position, however the appellant said to the brown youth “mek wi finish it up and done. If wi a do some ting mek wi do it good and done”. So the brown youth and Gary lifted out Shereda’s body and threw it into the hole again. The appellant assisted to also place Jerome’s body more securely in the hole.

[10] The appellant, the brown youth and Gary then returned to the car and decided to wash their hands. It was at that time that the appellant noticed that the brown youth and Gary removed gloves from their hands before washing them. On re-entering the car, the brown youth searched Shereda’s bag, found $8000.00 and asked whether they should divide the money between them. The appellant then remembered that Jerome had owned a blackberry cellular phone. The brown youth said that they would have to remove the chip, break it up and throw it away. The appellant, having found more than one chip in the telephone, threw the chips away behind the car.

[11] After the shooting, the brown youth told the appellant that he could not tell him what was going on because maybe the appellant would have “bait dem up because” he “wind down car glass and a call to girl”.

[12] They left the area and went to a party at a club named G-spot. At the appellant's request, the brown youth gave him $1000.00 from the monies taken from Shereda's handbag. After attending another party, the men returned to Montego Bay where the appellant was left at his home. While at the appellant's home, the brown youth told him that the "weed" in the car was for a shipment and as soon as he was finished he would make the appellant "nice". The brown youth then left with Gary.

[13] The appellant was taken into custody at the Free Port Police Station on 7 August 2008. Thereafter, he was taken to the Black River Police Station in Saint Elizabeth, where, on 26 September 2008, he gave the caution statement reflecting the facts outlined above. On 4 October 2008, the appellant participated in a question and answer session in the course of which he stated that what he had said in the statement was true.

[14] On 6 October 2008, the appellant was arrested and charged for the murder of Jerome and Shereda. Under caution, when charged, he said: "a nuh mi kill dem, mi only help dash dem inna di hole".

[15] At the trial, the appellant made an unsworn statement from the dock in which he said that Jerome came to meet him and asked him to accompany him to Saint Elizabeth. They went to Jerome's girlfriend's house with some things and then headed on the journey in the course of which they stopped at a few bars and clubs. He asked Jerome for $1000.00 to buy some drinks and Jerome gave it to him. They had drinks at the clubs and then left. They returned to Montego Bay where Jerome dropped him off at home. Three days later he received a telephone call that Jerome had been shot in Saint

Elizabeth. He made many calls to Saint Elizabeth. He heard "how they shoot Jerome and his girlfriend", pull them to a cave hole and threw them into the hole. All this information he received through the calls he had made. The police asked him to sign papers so that he could get out of the lock-up and he complied with their request.

The appeal

[16] At the onset of the hearing of the appeal, Mr Harrison QC, for the appellant, sought and was given permission to argue the following supplementary grounds of appeal in substitution for the grounds originally filed by the appellant. They are as follows:

> "i. The learned trial judge failed to afford the jury adequate directions with respect to the applicant's unsworn statement from the prisoner's dock.
>
> ii. The learned trial judge failed to direct the jury, adequately, or at all, with respect to the proper approach to the drawing of inferences.
>
> iii. (a) The learned trial judge misdirected the jury, as regards the law governing the issue of whether the applicant had participated, in a secondary capacity, in a joint enterprise to commit the murders with which he was charged.
>
> (b) Alternatively, on the state of the evidence, based as it was on the applicant's statement under caution, it is submitted that the doctrine of joint enterprise on which the prosecution proceeded, did not apply. It is submitted, rather, that the common law principle of accessory after the fact still applies to criminal proceedings in this jurisdiction. And, in that event, it is submitted, the material indictment ought to be framed in terms plainly expressing the factual basis for the act of receiving, relieving, comforting or assisting the felon [principal offender] (see **Levy** [1912] 1 KB 158).

iv. The verdict is unreasonable having regard to the evidence."

Submissions

Ground (i):-

The learned trial judge failed to afford the jury adequate directions with respect to the applicant's unsworn statement from the prisoner's dock

[17] Mr Harrison submitted that the learned trial judge failed to adhere to long established guidance given by the Privy Council in the case of **Director of Public Prosecutions v Walker** (1974) 12 JLR 1369; [1974] 1 WLR 1090, as to the directions to be given to the jury in respect of the unsworn statement of a defendant. Queen's Counsel argued that the learned trial judge failed to make it clear that the appellant was not obliged to go into the witness box, but that he had a completely free choice whether to do so, or make an unsworn statement, or to say nothing. Furthermore, the jury should be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and if so, what weight they would attach to it. In addition, in considering their verdict, they should give the unsworn statement only such weight as they think it deserves. He also referred to the case of **R v Ian Bailey** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 12/1996, judgment delivered 20 December 1996, as cited in paragraph [37] of **Alvin Dennison v R** [2014] JMCA Crim 7.

[18] Queen's Counsel submitted that this error on the part of the learned trial judge constituted "grave misdirections sufficient to warrant interference with the verdict."

The Crown's response

[19] Miss Jackson, on behalf of the Crown, agreed that the directions given by the learned trial judge were inadequate. Counsel referred to section 9(h) of the Evidence Act, which recognises the right of a person charged with an offence "to make a statement without being sworn", and agreed that the relevant legal principles, as regards the directions to be given by a trial judge, were outlined in **DPP v Walker**. She, however, submitted that, notwithstanding that error, the learned trial judge gave adequate directions on the burden and standard of proof, and the presumption of innocence, and this was sufficient to afford the appellant a fair consideration of his defence.

Analysis

[20] Close to the end of his summation to the jury, the learned trial judge asked counsel whether there was anything else which he ought to have addressed. At pages 261-262 of the court's transcript we note the following exchange:

> Crown Counsel - "I am just wondering, just the option given to Mr. Foster and his choice to give an unsworn statement."

The learned trial judge then said:

> "Oh, I am being told to tell you that the Defence had three choices, keep quiet, make an unsworn statement and give sworn evidence. He chose to give an unsworn statement the law gives him the right to do so and I have indicated what he is saying in his unsworn statement that he really was not there and whatever you see in the police statement is a product of the policeman's imagination and that he was always trying to tell the police that whatever he, Mr. Foster, knew about it was what he heard. He was never there, he had not seen anything when he heard that his cousin had died, he made a phone call and he came by the information. So what he has in there, if

> you accept these things, it was the product of information, not on the spot knowledge. At best, that is what he was told by whomever it was that he called, if that may be true then he is not guilty. If you say that this is the biggest hocus pocus that I have heard, you set it to one side. Bear in mind the Prosecution's case and you bear in mind … the question and answer, and the caution statement in particular, that is where the heart and soul of where the Crown's case is in the caution statement … So, if you reject the caution statement and accept the question and answer, then it would be not guilty, so the question answer does not tell you anything about the details. So, for you to convict Mr. Foster, you have to accept the caution statement and the things being put on it by the Crown."

[21] In **DPP v Walker** the Privy Council provided the following guidance as regards the appropriate direction to be given to a jury where a defendant makes an unsworn statement. At page 1096, Lord Salmon stated:

> "There are … cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that is for them to decide whether the evidence for the

> prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

[22] The guidance provided in **DPP v Walker** remains good law in Jamaica (see analysis provided by Morrison JA (as he then was) at paragraphs [49]-[52] in **Alvin Dennison v R**).

[23] The learned trial judge did not provide the necessary guidance to the jury as regards the value and weight of the unsworn statement. His directions did not refer to the fact that it was a matter for them to decide whether the unsworn statement had any value, and if so, what weight should be attached to it. It was insufficient, in fact, it could be argued that it was somewhat prejudicial, for him to tell them that they could set aside the unsworn statement if they thought that it was "the biggest hocus pocus" that they had heard.

[24] We therefore agree with the position taken by counsel on both sides, that the learned trial judge's directions in respect of this issue, were inadequate.

[25] While all the grounds of appeal argued had substance, we will address grounds ii, iii and iv which we found were successful, as a result of which the conviction could not be sustained.

Submissions

Ground (ii):-

The learned trial judge failed to direct the jury, adequately, or at all, with respect to the proper approach to the drawing of inferences

Ground (iii):-

(a) The learned trial judge misdirected the jury, as regards the law governing the issue of whether the applicant had participated, in a secondary capacity, in a joint enterprise to commit the murders with which he was charged

(b) Alternatively, on the state of the evidence, based as it was on the applicant's statement under caution, it is submitted that the doctrine of joint enterprise on which the prosecution proceeded, did not apply. It is submitted, rather, that the common law principle of accessory after the fact still applies to criminal proceedings in this jurisdiction. And, in that event, it is submitted, the material indictment ought to be framed in terms plainly expressing the factual basis for the act of receiving, relieving, comforting or assisting the felon [principal offender] (see Levy [1912] 1 KB 158).

Ground (iv):-

The verdict is unreasonable having regard to the evidence

[26] Mr Harrison submitted that the learned trial judge did not follow the well-established guidelines concerning the approach to be taken by trial judges in directing juries on the drawing of inferences. He relied on the case of **Sophia Spencer v R** (1985) 22 JLR 238 in which Carey JA indicated that, having ascertained facts which have been proved to the jury's satisfaction, the jury would then be entitled to draw reasonable inferences from those facts to assist it in coming to a decision. An inference should only be drawn from proved facts and, furthermore, should only be drawn if the jury is sure that it is the only inference which can reasonably be drawn.

[27] Queen's Counsel highlighted that, in the instant case, the learned trial judge directed the jury that in order to find the appellant guilty, there were a number of things about which they had to be sure. Such things included the appellant's liability as a secondary party to the murders, for instance, and that his presence at the material time was not accidental, but rather was voluntary and deliberate. However, the learned trial judge had omitted to direct the jury that the appellant's "criminal presence" could only have been arrived at by inference. This was so as, on the caution statement, the appellant's presence at the material place and time, was due to a mere public holiday "lyme".

[28] The learned trial judge, nevertheless, without providing the jury with the necessary guidance, told the jury that the Crown was inviting them to infer that the appellant knew that the shooter had a gun before it was produced, he realized that the shooter, being armed with the gun beforehand, may have had the intention to kill or cause serious bodily harm and, further, the appellant, with that kind of understanding about the shooter, was there ready, willing and able to assist the shooter in committing the murder, should his help be required.

[29] Queen's Counsel submitted that the learned trial judge did not make it clear to the jury that they could only draw such inferences from proved facts and they could only draw such inferences if they were the only reasonable inferences which could be drawn. The learned trial judge directed the jury that before they could draw an inference they should "look at the totality of the evidence in the caution statement". In so doing, Queen's

Counsel submitted, he was plainly directing them to consider as significant evidence, the appellant's conduct after the commission of the murders, including the fact that the appellant assisted the shooter in the disposal of the two bodies, assisted in loading bags from the hut into the car, and interacted socially with the shooter for some hours after the murders were committed. Queen's Counsel argued that while those proved facts could have been ascertained from the evidence, they could not discretely or cumulatively have given rise to an inescapable inference that the appellant assisted and/or encouraged the principal offender in the commission of the murders. As a consequence, Queen's Counsel argued, the convictions for murder could not stand.

[30] Turning to the question as to whether the appellant had participated, in a secondary capacity, in a joint enterprise to commit the murders, Queen's Counsel submitted that the doctrine of joint enterprise on which the prosecution proceeded, did not apply. He relied on **R v Jogee** [2016] UKSC 8 and **Ruddock v R** [2016] UKPC 7. He submitted that, instead, it was the common law principles relating to accessories after the fact which applied, and this would have had to be reflected in an indictment with the factual basis plainly expressed. He relied on the case of **R v Levy** [1912] 1 KB 158.

[31] In light of all of the above arguments, Queen's Counsel submitted that the verdict of the jury was unreasonable having regard to the evidence.

The Crown's response

[32] Counsel for the Crown agreed that, given the circumstances of the case, a more comprehensive and detailed direction on inferences would have been helpful to the jury, in particular, a direction which captured the guidance outlined in **Derrick Lloyd v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 68/2004 and **Sophia Spencer v R** (1985) 22 JLR 238.

[33] In so far as the directions given by the learned trial judge on the law concerning joint enterprise/secondary accessory liability were concerned, counsel for the Crown submitted that, while the learned trial judge gave thorough directions, the directions were not in keeping with the evidence.

[34] Counsel submitted that the learned trial judge ought to have provided further guidance in relation to whether:

a. the appellant and the shooter set out with a common purpose to commit the murders;

b. at the time when the appellant turned around and saw the shooter, by merely looking on he was acting with a common purpose to commit the offences or foresaw from the common purpose that the murder would occur; or

c. at the material time when the appellant looked on he was a party to the commission of the murder or "to aid in its

> commission and with knowledge of the facts constituting the commission of the acts."

[35] Counsel agreed with the submission made by the appellant's counsel, that, on the other hand, the principle of accessory after the fact was in keeping with the conduct of the appellant in the instant case. In addition, the learned trial judge erred when he failed to give directions to the jury as to how to treat with the evidence that, after the shooting, the brown youth told the appellant that he could not tell him what was happening, as perhaps the appellant would have "bait them up". In counsel's view, this failure, diminished the directions given by the learned trial judge on joint enterprise/secondary accessory, intent and foreseeability.

[36] In relation to whether the verdict was reasonable having regard to the evidence, counsel for the Crown referred to the well-known case of **R v Joseph Lao** (1973) 12 JLR 1238, in which it was established that the court will set aside a verdict if it is so against the evidence as to be unreasonable and unsupportable. Given the caution statement, which was the sole evidence against the appellant, counsel submitted that it would be difficult to say that the appellant shared a common purpose with the shooter or aided and supported the murder or murders. This was because, among other things, when the appellant heard the explosions, his back was to the shooter, and it was only when he turned around that he saw that the shooter had a gun. In the circumstances, given the long established principles on joint enterprise and secondary accessory liability, the conviction of murder is unreasonable.

The law

[37] In **Sophia Spencer v R**, at page 243, Carey JA, in outlining the guidance to be provided to a jury on the matter of the drawing of inferences, said as follows:

> "We would have expected the jury to be told at some point in the summing up, something such as:
>
> > 'Having ascertained the facts which have been proved to your satisfaction, you are entitled to draw reasonable inferences from those facts to assist you in coming to a decision. You are entitled to draw inferences from proved facts, if those inferences are quite inescapable. But you must not draw an inference unless you are quite sure it is the only inference which can reasonably be drawn'."

To date, this guidance remains good law.

[38] In February 2016, in the cases of **R v Jogee** and **Ruddock v R**, the Judicial Committee of the Privy Council delivered a landmark ruling. **Ruddock v R** was an appeal of a decision from this court. Their Lordships restated the applicable legal principles in cases where it is alleged that a defendant assisted or encouraged another individual to commit a crime. The actual perpetrator is known as a principal, while the individual said to have provided encouragement or assistance is known as an accessory or secondary party. Their Lordships, at paragraph 1 of their judgment, stated:

> "… It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal…"

[39] However, in what circumstances will it be appropriate to arrive at this conclusion? Having conducted an extensive review and analysis of previous cases which appeared to

impact the issues under consideration, their Lordships, at paragraphs 88-99 of the judgment, restated the relevant principles. In the judgment, D1 refers to the principal, and D2, the accessory or secondary party. We now highlight aspects of the guidance below:

> "…
>
> 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** (as stated in para 10 above). If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent …
>
> …
>
> 93. **Juries frequently have to decide questions of intent … by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2,** who joined with others in a venture to commit crime A, **shared a common purpose or common intent** (the two are the same) **which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1.** A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.

94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

…

98. … **What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence**. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind or weapon D1 has in his possession. **The tendency which has developed … 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 … **Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but is evidence and no more.**" (Emphasis added).

[40] Earlier in the judgment, at paragraphs 8-12 and 14-17, their Lordships also outlined a number of principles including the following:

a. "The mental element in assisting or encouraging is an intention to assist or encourage the commission of the

crime and this requires knowledge of any existing facts necessary for it to be criminal." (Paragraph 9);

b. "Both association and presence are likely to be very relevant evidence on the question whether assistance or encouragement was provided … Nevertheless, neither association nor presence is necessarily proof of assistance of encouragement; it depends on the facts…" (Paragraph 1); and

c. "Secondary liability does not require the existence of an agreement between the principal and the secondary party to commit the offence. If a person sees an offence being committed, and deliberately assists in its commission, he will be guilty as an accessory." (Paragraph 17).

[41] On the other hand, the role of an accessory after the fact is different. An accessory after the fact provides assistance after a crime was committed. The case of **R v Levy** [1911-13] All ER Rep 222; [1912] 1 KB 158, demonstrates the principle. We outline the digest of the case which suffices for present purposes:

> "A man was charged with having in his possession a mould for coining counterfeit florins and was later convicted of the felony, and after his arrest the appellant removed fragments of other coining moulds from his workshop. She was charged with being an accessory after the fact on the ground that she did "feloniously receive, harbour and maintain" the man, knowing that he had committed the felony. The jury were directed that, if they were satisfied that she removed the articles knowing that the man was guilty of committing the felony charged against him and did so to assist him to escape conviction, they should find her guilty. The jury duly convicted.
>
> Held: **the test to be applied in determining whether a person was an accessory after the fact was whether he had given any assistance to one known to be an offender in order to prevent his being apprehended, tried, or suffering the punishment to which he had been condemned**, and, therefore, the direction to the jury

> was in accordance with the law and the jury had rightly convicted." (Emphasis added)

The summation

[42] It is now necessary to examine the directions provided by the learned trial judge on the matter of inferences, as well as on the question of joint enterprise/common design.

[43] At pages 179-180 of the court's transcript the learned trial judge stated:

> "And I also indicated to you that the principle that the Prosecution is relying on is what is known as the Principle of Joint Enterprise. So, the evidence that you have before you is that Mr. Foster was not the shooter, there is no evidence that he had a gun. There is no evidence that he handled a gun. There is no evidence that he put a finger on any of the victims, that is the deceased, before they died. What the evidence suggests is that after they were shot, he assisted in removing the bodies from where they had fallen and placed the bodies in a hole….
>
> So then, that being so, the question is, can Mr. Foster be found guilty of murder, even though he was not the shooter? Even though he did not put a finger on them before they were shot and killed? And he had no firearm, no weapon of any kind? The answer to that question is yes, Mr. Foster can be convicted of murder, even though he never had the gun, even though he didn't fire the gun, even though he did not beat up the deceased before they died, even though he did not put a finger on them before they die. So how is that possible? This is what is known as the Principle of Joint Enterprise. It is what is known as secondary or accessory liability."

[44] Later, at pages 200-210 of the court's transcript, the learned trial judge stated:

> "So now, listen carefully, in order to find Mr. Foster guilty, there are a number of things that you must be sure about in respect of Mr. Foster. Firstly, you must be sure that Mr. Foster was present at the scene when the shooting took place; secondly, you have to be sure that his presence was not accidental, it was voluntary and deliberate. That is to say, he

wanted to be there and he was there. The third thing is, and this, now, depends on your interpretation of the evidence. **The Crown is asking you to infer one of two inferences. Inference Number 1, they are asking you to draw an inference that Mr. Foster knew that the shooter had a gun before it was produced.**

And that Mr. Foster realized not only that the shooter had the gun, but that the shooter may have shot both deceased and that the shooter being armed with the gun beforehand, may have had the intention to kill or to cause serious bodily harm and with that kind of understanding about the shooter, Mr. Foster was there ready, willing and able to assist the shooter in committing the murder, should his, Mr. Foster, help be required. So I am going to go over this again, the Crown, one inference that the Crown is asking you to infer is this, that Mr. Foster knew that the shooter had the gun beforehand.

…

Before you draw an inference, it must be reasonable and inescapable, that is to say, when you look at the totality of the evidence in the case, look at the whole caution statement. You must say to yourselves, well, this inference that the Prosecution is asking you to draw is reasonable and inescapable, that is to say, when you look at the totality of the evidence, everything said in this caution statement, you say to yourselves, from the Prosecution's standpoint that is, 'Yes, I am satisfied so that I feel sure that this inference is reasonable, inescapable,' and therefore based on that inference, the Prosecution is asking you to go on now to say that inference and to conclude that -- Mr. Foster knew that the shooter had a gun, knew that the shooter may use the gun, knew that the shooter may use the gun to cause serious harm or serious bodily harm and with that kind of knowledge of the shooter in Mr. Foster's brain, now says, 'I am here voluntarily, deliberately to encourage the shooter in the event that he decides to kill and I am also here to help the shooter in the event that he needs my help.'… If you are satisfied, so that you feel sure about that, then it is opened to you to convict Mr. Foster on the counts of murder on the indictment.

So, you ask yourselves then, **did Mr. Foster participate in this murder? The Crown is saying to you, yes because participation, according to how the Crown has put its case means in this case, voluntary deliberate presence, being willing able and ready to assist the shooter to commit murder.** It does not matter that Mr. Foster didn't put a finger on Shereda or Jerome, before they were shot and killed, the Crown does not have to prove that. So once you accept - if you accept that they were there, that his presence was deliberate, he was voluntarily present and he was there to assist the shooter, he foresaw that the shooter may use the gun to kill or to cause serious bodily harm and that he knew that the shooter had the gun beforehand, then it is opened to you to convict Mr. Foster of murder.

Now, supposed so, that is the inference on the premise that Mr. Foster knew that the gentleman had a gun. **But supposed you said to yourselves, 'Well, when I look at all the evidence, the whole caution statement, I am not sure that Mr. Foster knew that the shooter had a gun.' Suppose you say that, 'Well, I conclude that it is when the gun was produced at the scene that is the time when Mr. Foster knew about the gun.' What is the position then? Listen carefully now, when we speak of a Joint Criminal Enterprise, that is where two or more persons reach an understanding or an arrangement amounting to an agreement between them that they will commit a crime. The understanding or agreement need not be expressed and may be inferred from all the circumstances.**

The agreement need not have been reached any time before the crime is committed. Critical principle. **So in other words, if you say before the shooting started down at the ackee farm - I don't see any evidence that the shooter and Mr. Foster had any agreement or understanding before the gun was produced. The law is saying that is not the end of the story, because if the shooter produced the gun at the scene, and it is at the scene, Mr. Foster appreciated, or knew that he had a gun, yes, and at that time when the gun is produced, Mr. Foster realizes at that time, that the shooter has this gun, that the shooter may use the gun with an intention to kill or cause serious bodily harm but, Mr.**

Foster, even at that late stage, forms the intention in his brain, right there and then, he says "Oh, okay, a gun is here, uhmm mm. I appreciate that this man may use the gun now, that he has produced the gun, I am here ready to assist him, you know. I stand ready to assist even though I didn't know he had the gun before, but now I know that he has the gun, and I think that or foresaw or foresee that he may use the gun, right here right now, with an intention to kill or cause serious bodily harm, but despite that late realization, I Foster, I am here ready to help him, should it become necessary. I Foster, I am here going to encourage - now that I am here, I am going to encourage him to do this murder… then it is open to you to find Mr. Foster guilty of murder.

…

If that is - if you are sure that, that was Mr. Foster's state of mind, he can be convicted of murder. That is how the principle of joint enterprise works in these circumstances. So, Mr. Foster can't escape liability by saying, is after the people dem drop and them dead, that is the first time I am beginning to put my hand on them. What the law is saying, no, Mr. Foster, you have it all mixed up there. The law doesn't require you to put a finger on them leading up to their death.

So, if you - so that is the two scenarios the Crown is putting before you and asking you to accept one or the other. But on either one, if you are sure, with the things, in respect of scenario one and two, you can convict Mr. Foster of murder…It is not sufficient for you to say, Mr. Foster is there, therefore he is guilty of murder**. No, the law say being present at the scene of the murder is not sufficient. You have to have what lawyers call 'mens rea'…. The mental state of Mr. Foster, before you can convict him, must be that I, Terry Foster at the scene of this murder, had an intention or formed the intention to encourage the shooter; formed the intention to give his assistance to the shooter, if necessary, and he formed that intention after realized or knew that the shooter had a gun…**

What happen, this kind of joint enterprise depends on what was going though Mr. Foster's brain.

> What foreknowledge he had and then, what was his own thinking at the time the shots were fired." (Emphasis added)

[45] At pages 217-218 of the court's transcript, the learned trial judge addressed the jury on the content of the caution statement. He stated:

> "So, up to that point - so far up to that point of the shooting, Mr. Foster has not said explicitly in the statement, 'I saw the brown youth with a gun, or indeed, saw anybody with a gun.' This is why the defence is saying to you, that even if you were to accept that Mr. Foster said these words, there is no basis for you to infer that the brown youth had a gun, or that the brown youth may use it, or that the brown youth may shoot anybody out there. The defence is saying to you, that when you read the caution statement, Mr. Foster was shocked to see the gun produced, because he is on his way up to knock on the hut door and him hear, bang, bang, bang, and when him look, him see the gun. Is that so, or might that be so? So you have to interpret the statement now … **if you say, well, based upon this statement, I am not too sure whether Mr. Foster was party to this thing, you know, I not too sure I can draw the inference that the prosecution is asking me to draw, that he knew there was a gun beforehand. Yes, him was there, but it look like the brown youth just decide to shoot the people them by himself. If that is how you interpret it, then your verdict is not guilty on any of the counts, but if you interpret it in the way the prosecution is suggesting, it is open to you to say that he is guilty on both counts.**" (Emphasis added)

[46] In further commenting on the caution statement, at pages 220-221, the learned trial judge said:

> "Now, the defence is saying to you, up to that point now, that the gun has been produced, coward man keep sound bone. So now that Mr. Foster now knows that not only a gun is there, but that the man who have the gun nuh 'fraid fi use the gun, since him done shoot the two people them. Mr. Foster, from the defence's standpoint, him not in a position now to say to the shooter - 'Well, look here now, me finish with you

and this thing. A nuh dat mi come yah for. Mi gone 'bout mi business.' That is how the defence is asking you to look at this. When disposing of the body, it wasn't because he was a willing participant to this gunman, because him now know that this gunman is a serious man, so serious that the man had the very evidence before him, two bodies and him don't want to make the third one. So, if gunman say help me carry the body, then of course, I am going to help him carry the body. Mi nah go do anything to antagonize the man. Next thing the man shoot me and I become the third body in the hole. This is how the defence is asking you to look at this. On the other hand, the prosecution is saying, that me a tell you long time, you don't see any sense of hesitation or reluctance. The prosecution is saying, but the man just fall into line quick, quick. Why would he have done that? Isn't that because he was part and parcel of this enterprise to kill the two people.

So, you will have to decide now, when you come to interpret the statement, how you interpret it. If you interpret it in the way the defence is saying, or what the defence say may be true, then your verdict must be one of not guilty for both counts. In order to convict, you have to reject the defence's interpretation completely and accept the prosecution's interpretation, before you can convict Mr. Foster. If you are not too sure whether the prosecution's version, is so it should be interpreted, then your verdict must also be not guilty in respect of both counts." (Emphasis added)

[47] Continuing on pages 223-224, the learned trial judge said:

"So the Prosecution is saying now, well here you have this part of it, here it is, Shereda is thrown, but apparently they never throw her far enough over the edge, but she hitch up ... Mr. Foster seh, 'No man, mek we finish it up and done, if we a do something mek we do it good and done'. So what the Prosecution is saying to you on this is that these are Mr. Foster's expressed words, this don't sound like a man who 'fraid that the man with the gun is going to shoot him. This sound like a man who is part and parcel on this and he is saying to the gunman, 'Look here gunman, look like you want to do a half done job on this thing, man, let us do the thing

> good man.' So, how do you interpret this section in light of all that was said so far in his statement? ... or is it that since him know say the gunman is a serious man, him don't want to do anything to antagonize this man."

[48] Further on page 226 of the court's transcript, the learned trial judge said:

> "Now, so the Prosecution is saying that is not what is passing through his brain when the brown youth searched and found the $8000 and asked if we are to split up. Mr. Foster is there, he is there trying to decide whether it should split up or not and what the Prosecution is saying is that if you are not a party or in agreement to this shooting, why are you having those thoughts?"

[49] Later on in the summation the learned trial judge also highlighted submissions made by the prosecution, that after the appellant, the brown youth and Gary left the scene, they went on to party together. The prosecution suggested that this mode of behaviour on the part of the appellant, did not suggest that he was in fear of the shooter.

Analysis

[50] The learned trial judge reminded the jury that any inference to be drawn must be inescapable. He also clearly outlined for the jury, the interpretation of the facts which the defence wished for the jury to accept. As was required, the learned trial judge instructed the jury that if they accepted the defence's interpretation of the facts, or felt unsure of the prosecution's interpretation of the facts, they would have to acquit the appellant.

[51] The issue lies with how the learned trial judge dealt with both the interpretation of the facts, as well as the suggested inferences to be drawn, which were urged by the prosecution. When we examine the points on which the prosecution relied, as related by the learned trial judge, to persuade the jury that the appellant was a part of a joint

enterprise, it is clear that they relied on events which occurred after the three shots were fired by the brown youth and after Jerome and Shereda had died. In our respectful view, the learned trial judge ought to have better assisted the jury by asking them to consider whether the established events after the three shots were fired, and after Jerome and Shereda had died, could have led, inescapably, to the drawing of either of the two inferences suggested by the prosecution.

[52] It was while the appellant was about to knock on the door of the hut that he heard three shots fired. When he turned around, he saw the brown youth with a gun. It was the brown youth who ordered Shereda to step out of the vehicle and shot her as she ran. The brown youth then went to Jerome, who was lying on the ground and fired another shot at him.

[53] Could these facts be relied on to draw an inescapable inference that the appellant knew, before the shooting, that the brown youth had a gun, knew that the brown youth could use it to cause grievous bodily harm, and was ready to assist? Or, could the events as they unfolded be relied on to support an inescapable inference that the appellant, in the course of the shooting, having now realized that the brown youth had a gun and had fired three shots, made up his mind then and there to assist the shooter or encourage him in what he was doing? In our view, the answer is no to both of these questions.

[54] On an examination of the caution statement, the actions of the appellant were: helping to place the bodies in a hole, taking bags out of the hut and placing them in the car, sharing in the monies taken from Shereda's handbag, among other things. Contrary

to the stance taken by the prosecution in the trial, these acts could not be used to draw an inescapable inference that the appellant knew that the shooter had a gun beforehand and was prepared to assist in any crime to be committed, or decided, in the course of the shooting, to assist and encourage the commission of the murders. The established facts, as counsel for the Crown admitted, were more in keeping with the actions of an accessory after the fact - see **R v Levy -** and the learned trial judge should have provided guidance to the jury in this regard.

[55] We, therefore, agree with Mr Harrison's submissions that there is no evidence that can reasonably support the drawing of an inference that the appellant participated in a common design or joint enterprise to commit the murder of his cousin Jerome and his cousin's girlfriend, Shereda. The evidence did not allow for an inescapable inference that he knew of any plan to commit the murders or that he assisted in, encouraged or supported their commission.

[56] While the appellant was not present at the scene by accident, the most that could be gleaned from his caution statement was that he was there for a "holiday lyme". The appellant's presence at the scene, and association with the brown youth, could not properly be used to conclude that he was a part of a plan to commit a crime. As their Lordships stated, at paragraph 77 of their judgment in **R v Jogee** and **Ruddock v R**:

> "… It is important to emphasise that guilt of crime by mere association has no proper part in the common law."

[57] There is also force in the point made by counsel for the Crown, that while the learned trial judge correctly outlined the principles relating to joint enterprise, on the facts which were proved, the principles were inapplicable.

[58] We also agree with counsel for the Crown that, in commenting on the inferences which the prosecution was urging the jury to draw, and in relaying them to the jury, there was some significant evidence which the learned trial judge ought to have emphasised. According to the caution statement, the brown youth told the appellant that he could not have told him what was going on, because maybe the appellant would have "bait dem up because" he "wind down car glass and a call to girl". This bit of evidence supported an inference that the appellant did not know that the brown youth had a gun and did not know of the brown youth's intention to commit murder or any act of grievous bodily harm.

[59] In all the circumstances, we also agree with counsel on both sides, that the verdict of the jury was unreasonable having regard to the evidence; it was obviously and palpably wrong (see **R v Lao**). Consequently, the conviction of the appellant for the offence of murder cannot stand.

Re-trial

[60] The question as to whether it would be appropriate to order that a re-trial take place arose for consideration. Counsel for the Crown submitted that a re-trial could be considered in the circumstances. Mr Harrison disagreed. He submitted that there was no evidence that could ground a re-trial for murder. The material which the prosecution would have to advance would necessarily be the same, and would therefore be

insufficient to prove that the appellant was guilty of murder. We agree with Mr Harrison's submissions.

[61] In **Vince Edwards v R** [2017] JMCA Crim 24, Brooks JA helpfully distilled the matters to be considered in determining whether a retrial should be ordered. At paragraph [141] he wrote:

> "Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, 'if the interests of justice so require'. **Dennis Reid v R** (1978) 16 JLR 246 provides guidance in assessing this issue. The Privy Council, in that case, **ruled that a 'distinction must be made between cases in which the verdict of a jury has been set aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder'** (see the headnote). Based on that judgment, some of the considerations that should be taken into account in deciding whether or not to order a new trial are:
>
> **a. the strength of the prosecution's case;**
>
> b. the seriousness or otherwise of the offence;
>
> c. the time and expense that a new trial would demand;
>
> d. the effect of a new trial on the accused;
>
> e. the length of time that would have elapsed between the event leading to the charges, and the new trial;
>
> **f. the evidence that would be available at the new trial;**
>
> g. the public impact that the case could have.

> That is not an exhaustive list of the relevant factors, and each case will depend on its peculiar facts." (Emphasis added)

[62] In the instant case, the evidence on the case for the prosecution was clearly inadequate and, as Mr Harrison submitted, it is the same evidence that would be available at a new trial. It would therefore be inappropriate to order a new trial.

[63] It was for the above reasons that we made the orders outlined in paragraph [2] of this judgment.