BARBADOS.

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeals Nos.13 and 12 of 2008

BETWEEN:

THEO ATHELSTAN TAITT	}	
	}	***Appellants***
VINCENT LEROY GOODING	}	
AND		
THE QUEEN		***Respondent***

Before: The Hon. Frederick Waterman, C.H.B., The Hon. Sherman Moore,

The Hon. Sandra Mason, Justices of Appeal

2009: 16 and 17 November

2011: 29 November

Mrs. Angella Mitchell-Gittens and Mr. Andrew Pilgrim for the Appellant Taitt

Ms. Rita Evans and Mr. M. Tariq Khan for the Appellant Gooding Ms. Manila Renée for the Respondent

DECISION

Introduction

MOORE JA: Theo Athelstan Taitt (Taitt) and Vincent Leroy Gooding (Gooding) were indicted for the murder of Carl Nurse (the deceased) on 11 May 2004. They both pleaded not guilty and on 14 May 2008, were found guilty of murder and sentenced to death. They have both appealed their conviction and sentence.

Facts

[2] On 11 May 2004 about 8:15 p.m. the body of Carl Nurse, the deceased, was found lying in a pool of blood at Horse Hill Road in the parish of St. Joseph. The deceased lived in Bridgetown and was awaiting a bus home having earlier visited Coral Taitt, the mother of appellant Taitt. While at the bus stop the deceased was attacked and robbed of cash, jewellery and a mobile telephone. He died of haemorrhage and shock resulting from a stab wound to the chest.

The Prosecution's Case

[3] It was the prosecution's case that Gooding visited Taitt's house and they hatched a plan to rob the deceased and that having effected the robbery, the deceased was stabbed.

[4] There was no eyewitness to the incident. The prosecution's case was based largely on oral and written statements made by the appellants, the evidence of witnesses and the circumstantial evidence surrounding the property taken from the deceased.

Statements of Taitt

[5] On 19 May 2004, Taitt was interviewed by Sgt. 131 Frederick Catwell in the presence of PC Lynch. Taitt made the following oral statements:

> "Sir, I wanted to come to the police every since when this thing happened but I was frightened. Vincent tell me let we rob the man and I went with he. It is Vincent who stabbed the man. I didn't have no knife."
>
> "Yes, I tell my mother I telling the police what happened."
>
> "Sir, I prefer to tell you what happened and you write what I say."

Sergeant Catwell then recorded the following statement from Taitt:

> "I come home from school. I don't know what time it was. I went and bathe, eat and went upstairs in my mother's bedroom and watch TV. I end up dropping to sleep. My sister come and wake me up and ask me if I still going up Market Hill. I tell she yeah. When I went back downstairs, I see Leo by the door sitting down. He ask me if I was home every since. I tell he yes that I was upstairs in my mother's bedroom watching TV. I left from where Leo was by the door and went out by the shop. I see Vincent in the shop sitting down. He come and tell me he don't like that man out there sitting down. He point to a man that was out there sitting down in St. Joseph graveyard. Vincent tell me that he want to rob the man and he want me to help he. He tell me that when we rob he I can't tell nobody 'bout it.
>
> Vincent start to walk off and ask me if I got a knife. I tell he yeah. When I tell he yeah I still didn't have no knife on me. Vincent ask me if we could get out by the bus stop if we go through the track by the banana trees. I tell he yeah that we could get right behind the bus stop. He tell me come along. We walked down the road and turn through the church road walking by Trotman where a house building. Trotman usually got a big dog there, so we wait on the opposite side. The dog didn't bark. I tell Vincent that something wrong that the dog ain't bark that it got to be let go. He tell me don't mind that to come along.
>
> When we get in the banana trees behind the bus stop the man hear like the crackling of the leaves when we walk. He start looking back all the time to the banana trees. Vincent tell me don't move that he was going to rob he. He walk between the gutter so that the man can't hear nothing. Then he climb up and sneak 'round by the bus stop. Vincent run out and the man start to run like to go through Vaughns Land. Vincent and I run behind he. The man went to turn and two of them start to fight. The two of them fall 'pon the ground. The man start hollering for help.
>
> I hold on 'pon Vincent hand and tell he to come 'along Vincent wouldn't come 'along. He take away the man gold and he cell phone. I remember that he had a bracelet or a bangle. I hear a car coming so I run and leave Vincent. I went through a track that will carry me back in the graveyard. When I get in the graveyard I went and sit down. Vincent come through the same part as me and tell me he now stab the man. I ask he why he stab the man for. He tell me that the man wouldn't let go he shirt. I ask he if he couldn't take off the shirt and left it in the man hand or something. I ask he how much times he stab the man, he tell me once.
>
> I left the graveyard with Vincent and went home. Vincent show me the man cell phone and ask me how to turn it off so that it wouldn't ring. I take off the phone battery and give it back to Vincent. I went inside and tell my mother, "Ma, you believe that Vincent just stab the man?" My mother ask me why Vincent just stab the man?
>
> I tell she I don't know. A fellow name Mervin come by the shop to buy a small Embassy and he tell my mother that a man down the road dead. My mother come and tell me that the man dead. We did plan to rob the man not to kill the man. Vincent tell me that he woulda give me something out of what he get from the man but the next time I see he, he tell me that he couldn't give me nothing because he had to give he lawyer some money."

[6] On 20 May, 2004 Taitt accompanied Sergeant Catwell and other police officers to Horse Hill where he pointed out certain areas to the police and made the following oral statements:

> "I showed Vincent the track through them banana trees to get behind the bus stop."
>
> "I bring Vincent through here to get behind the bus stop. I accustom coming through here when we going for coconuts."
>
> "I sit down on that step and that is where I meet back Vincent after I run and leave he."
>
> "I showed Vincent the track through them banana trees to get behind the bus stop"; and referring to the deceased he said, "The man was waiting at the bus stop."

Statements of Gooding

[7] On 19 May 2004 while at Holetown Police Station, Gooding was interviewed by Acting Inspector Victor Forde and Gooding said, "I was there. I will say what happened". The police then recorded the following statement from Gooding:

> "Tuesday, 11th of May, I caught a bus at 6:00 a.m. and went by Coral Taitt. I did some work around her house. Her daughter Tammy was present, Coral was also present. I cleaned up her backyard, watch TV, watch video until about a quarter to 3:00.
>
> Me and Coral Taitt went to the primary school to the top of Horse Hill just beyond the police station. I went and collected Tamara, Coral's granddaughter from the classroom. I left there about 15 minutes past 3:00 and we went in Coral's car, a brown Charmant. Coral was driving and from there we went to Parkinson School, where we collected her two twins, Jamar and Jamal. We also collected her other son, David. He was at the Parkinson School but
>
> he doesn't go there. We left Parkinson and went to Julie 'N Supermarket, Haggatt Hall, and did a little shopping. When we finished the shopping, Coral Taitt got a phone call on her cell phone from her daughter Tammy. The phone call was that Carl Nurse was coming by her, Coral, to Tammy. We got back there around 4:30 p.m. I got out the car by the graveyard, went into Vaughns and bought a piece of weed, a ten-piece a weed from "Shabba." When I got back 'cross by Coral, I did not see Carl.
>
> I went in by Coral's house, ate some food that Tammy cook, and went in Coral's bedroom. I was in the bedroom watching video and smoking weed. I was told by Coral that Carl Nurse was there. I breeze in the bedroom until about 7:30 p.m. I then left by Coral a little before 8 o' clock, me and her son, Theo. It was planned, that is, that me, Theo and Coral, and Tammy would rob Carl.
>
> Me and Theo went down through the graveyard and went by the bus stop at the bottom of the hill. About 10 past 8:00 her daughter Tammy dropped off Carl by the bus stop. She was driving a white motor car which was driven to her house by Roger Barker of St. Philip.
>
> Me and Coral's son, Theo, went to rob Carl. We robbed him of a gold chain, one bangle, a cell phone and $120.00 Barbados money. Both of us had knives. I pushed down Carl and took off his gold chain. Theo took off his bangle off his hand and took his cell phone. I took the money from his pants pocket. A struggle assume, that is, that me, he and Theo start to struggle, and I give he a stab with the knife that I had. I don't know where he get stab. I don't know if Theo stab him.
>
> During the struggle, Carl was shouting out for help. Car lights came down the hill and both of us ran. Before we ran I took the bangle and cell phone from Theo. Carl was still alive because I saw him get back up when I look back. I then ran and went through Vaughns and bought weed from Fabie. "Moussie Bear" was there and I talk to him. We then left, and me and "Moussie Bear" walk and went through Vaughns back to the main road and to Coral's house, Theo and her entire household

was there. The knife I stab Carl with, I had with me then. It was a white-handled knife. I then took it and left it in Coral's kitchen. I ain't sure which direction Theo went in after we ran through Vaughns. I then took a bath at Coral and changed my clothes. Coral then dropped me to Bush Hill in her car and from there I walk home. I had the clothes I was wearing when I was by Coral with me, and when I get home I burn them with Carl's cell phone. I really sorry about what happen."

[8] On 20 May 2004 Gooding accompanied Inspector Forde and P.C. Clarke to Horse Hill pointed to an area there and said:

"That is the bus stop where me and Theo attacked Carl."

"I hide behind this wall."

"I ran through that track after I stabbed Carl."

At 6:00 p.m. the same day, at Gooding's home in Chelsea Road, he pointed to an area on the south-eastern side of the house and said:

"I burn the clothes I was wearing and the cell phone there."

The Witnesses

[9] At the trial Coral Taitt, mother of appellant Taitt, testified that on 11 May 2004, appellant Gooding was a passenger in her motor car and when she returned to Horse Hill Gooding saw the deceased and told her that he wanted to talk to the deceased. Gooding then disembarked from her car and walked away. Later that evening she said that as she was going upstairs her son came in sweating, like he was running and told her "Vincent hard ears, Vincent hard ears", that Vincent had just robbed a man down the road. Coral Taitt said that she told her son, "Well, Vincent robbed a man down the road. Well the man down the road dead." She said that she then saw Vincent. "He was outside running coming towards me. He was sweating, perspiring a lot. He asked me for a drop to go home. He told me he now robbed a man. I say, "You robbed a man and stabbed a man, what you stabbed the man for?" He told me that Theo ran." She said that she dropped Vincent Gooding to his residence that evening and about two or three days later she saw him on Bay Street, St. Michael. She denied knowledge of a plan to kill Nurse.

[10] Tamara Taitt, sister of appellant Taitt, testified that she lied to the police and to a Magistrate. She further testified that Nurse was visiting her on 11 May 2004 and that same day she overheard a plan between Taitt and Gooding to rob Nurse.

[11] Trevor Codrington testified that on 11 May 2004 about 5 minutes after 8:00 p.m Gooding came to his house and that he was "bareback", sweating and wearing a dark blue boxer pants. Codrington also testified that he asked Gooding if he (Gooding) "passed out by the incident over there by the church" where Codrington had heard someone screaming for help and Gooding said he had come through the graveyard. Whereupon Codrington told Gooding that as he had come through the graveyard he could go back through the graveyard. To which Gooding replied that he was not going back through the graveyard "to get charge for nuh murder."

[12] Tyrone Forde alias "Chuckie" testified that he bought gold from Gooding, paid for the gold and left it with Gooding to break into pieces.

[13] Kent Wayne Parris alias "Big Wayne" testified that he weighed the gold for Gooding and that he recognized it as belonging to Carl Nurse, the deceased.

The Defence

<u>Taitt</u>

[14] The appellant Taitt called no witnesses. He made the following unsworn statement (pages 621 to 624 of the record):

"My name is Theo Taitt of Church Village, Horse Hill, St. Joseph. On the 11th of May 2004, my mother sent me to the shop for soap powder for her. On my way there, I met Vincent on the front road sitting down. He told me about a plan to rob a man and I told him I don't want any part of it. The same road to the shop is the same road we had to use to get wha' part the whole situation happened.

When we got there, Vincent attacked the man. The two of them starting fighting. I got afraid. I told Vincent to – I hold on 'pon Vincent hand and told him to come along and he did not come, so I ran off. While I ran off, I ran through the track to the graveyard, stopped and waited for a little while. Soon after I hear the bushes rattling and Vincent told me, well he stabbed the man. I asked him what he stabbed the man for? And he said the man didn't want to let go he shirt. I asked him why he couldn't tek it off and leave it in the man hand and he did not reply.

Soon after, he told me that he was going through Vaughns to buy weed, to buy herb, and I carry on my way home. When I got home, I told my mother that Vincent is hard ears, he now stabbed a man down the road – he now tell me he stabbed a man down the road, and she told me, 'Well, the man down the road dead.' That is it. That is it."

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Gooding

[15] Gooding elected to make an unsworn statement. He spoke of being at Coral Taitt's home on 11 May 2004 from 9 o'clock in the morning and working on the construction of apartments in her backyard until 2 o'clock. At minutes to 3 o'clock he went with Coral Taitt to collect her grand-daughter and her three sons. On their return to St. Joseph, Gooding was asked by two of Coral Taitt's sons if he had any weed and his response was no. In Horse Hill, Gooding and David, one of Coral Taitt's sons, went to Vaughns Land to buy weed, while Coral Taitt drove on home. After returning to Coral Taitt's home, he went to her bedroom with David and another of Coral Taitt's sons who is a rasta. Coral Taitt then left the bedroom and went to her shop and he did not see her again until 6 o'clock.

[16] Around 7:30 p.m. Coral Taitt came back into the bedroom and told Gooding she was going to the Garrison between 8:00 and 8:30 p.m. He bathed and dressed in a white Fubu pants, a red and brown stripish shirt and a pair of Timberlands. He then said he went to Vaughns to buy weed. He said that as he was leaving to go to Vaughns he saw a man he knew to be Carl Nurse from Bayland getting into a car driven by Roger Barker to Coral Taitt's house. He also said that both Tammy and Theo Taitt were getting into the car. He went to buy the weed from one "Fabie" and on his way back, he saw lights flashing down the road. At that time he saw persons gathered but did not see Coral, Theo or Tammy Taitt. It was 20 minutes later that he saw Coral Taitt and she told him that there was an accident down the corner. He then left with Coral Taitt. He said that on the 14 May 2004 Coral Taitt gave him broken up gold to sell for her. He got the gold weighed by one "Big Wayne" and he was given $580.00 for the gold by one "Chuckie". He left the gold with "Chuckie." He gave Coral Taitt the money on 15 May.

[17] On 18 May 2004, Gooding went to Hastings Police Station where he was interviewed. He said he wrote a statement himself and was then put in a cell for 5 or 6 hours. He said he was questioned again after his statement was ripped up. The following day, he said he was questioned, handcuffed and bagged. He said he blanked out and awoke in a cell. He said that 2 or 3 hours later, Coral Taitt was brought into the room to tell him what she had told the police, but he was unable to recall what she had said. His statement continued:

> "I never tell Sergeant Forde I stabbed Carl Nurse. I never tell he that me and Theo planned to rob he, or that I burn my clothes and tek way any money from he and split it up. I ain't even know that the man get robbed or killed. Carl Nurse did my friend. I ain't had no reason to rob or kill Carl Nurse. He was my friend.
>
> Forde and Hackett bring a statement and tell me to sign it. I tell them I ain't signing no statement and they bagged and gagged me about two more times. Hackett tell me sign the statement and dem gine let me go. Forde also tell me the same thing. I didn't sign the statement and they bagged and gagged me again. I was forced to sign that statement.
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> After I was forced to sign the statement, Forde asked me about the gold. I tell he I get the gold from Coral Taitt, and I sell the gold to "Chuckie". I never went in Town wid Chuckie to get no gold weigh at any jewellery man, and when I sell he the gold he pay me for it and I give he. The police never tell me to sign no jewellery.
>
> After they forced me to sign the statement they carry me to Horse Hill, St. Joseph. I ain't point out no area to the police, cause I ain't know wha' part the man get robbed or killed. The statement that the police bring to me did already write up. I never dictate no statement to the police. Coral Taitt, Tammy Taitt, and Theo Taitt and them friends telling bare lies pon me. I tell the police I get the gold from Coral Taitt and all now she still got my carpenter tools and my weed wacker up by she. I ain't know nothing about the death of Carl Nurse."

[18] Gooding also called 3 witnesses to give evidence on his behalf. Station Sargeant John Boyce and Station Sargeant Fiona Roach testified concerning his detention at Holetown Police Station and Hastings Police Station, respectively from the stations' diaries at Hastings and Holetown Police Stations. Gilbert Gibson a nurse at H.M. Prison, Dodds testified with respect to his medical history whilst on remand there.

The Appeal

[19] Counsel for Taitt filed 12 grounds of appeal on behalf of appellant Taitt. Ground 12 was not argued. Counsel for Gooding filed 13 grounds of appeal. The grounds that are common to both appellants are dealt with together.

Ground 1: Taitt

[20] Ground 1 alleged that the learned trial judge erred in law when she failed to uphold the 'no case' submission made on Taitt's behalf.

[21] At the close of the prosecution's case it was submitted on behalf of the appellant Taitt that there was no case to answer.

[22] It was contended on behalf of the appellant that the Crown's case against Taitt was to be found only in the oral and written statements attributed to him and that those statements indicated that he was not a party to a joint enterprise and/or that had there been a joint enterprise Taitt had clearly withdrawn from it.

[23] Counsel submitted that on the authority of ***Chan Wing-Siu v. R. [1985] AC 168*** the important factor is foreseeability. She said that there was nothing in Taitt's statements, which were the only evidence against him, which indicated that he knew or ought to have foreseen that the appellant Gooding would have used a knife. Counsel submitted that the words, "Vincent start to walk off and he ask me if I got a knife. I tell he yeah. When I tell he yeah I still didn't have no knife", were not enough to put him on notice that appellant Vincent Gooding had a knife and was prepared to use it. She submitted that the only plan to which Taitt was a party was the plan to rob Carl Nurse, the deceased. That plan is found in Taitt's statement – the prosecution's evidence – "We did plan to rob the man, not to kill the man." In support of her submissions counsel cited, *inter alia* ***R. v. Powell; R. v. English [1995] 1 AC 1; Bootman and Moseley v. R. Criminal Appeals Nos. 9 and 11 of 1997 (unreported).***

[24] Counsel also submitted on behalf of appellant Taitt that he had effectively withdrawn from the joint enterprise before the fatal injury was inflicted and therefore could not be guilty of murder or manslaughter. On that submission counsel relied on ***R. v. O'Flaherty***, ***Ryan and Toussaint [2004] 2 Cr. App. R 20*** in which ***Mantell LJ*** said at paragraph 64:

> "We have noted that for there to be withdrawal, mere repentance does not suffice. To disengage from an incident a person must do enough to demonstrate that he or she is withdrawing from the joint enterprise … Account will be taken *inter alia* of the nature of the assistance and encouragement already given and how imminent the infliction of the fatal injury or injuries is, as well as the nature of the action said to constitute the withdrawal."

[25] Counsel further submitted that Taitt's statement,

> "So the man went to turn and the two of them start to fight. The two of them start to fight. The two of them fall pon the ground. The man start hollering for help. I hold Vincent and tell he come 'long. Vincent would not come 'long. He take money from the man, gold and he cell phone. I hear a car coming and I run and leave Vincent", effectively communicated his withdrawal to appellant Gooding.

[26] Counsel relied on ***R. v. Galbraith [1981]2 All ER 1060*** and submitted that the case for Taitt fell within the following passage taken from ***Galbraith*** in which ***Lord Lane CJ*** said at page 1042:

> "How then should the judge approach a submission of 'no case'? *(1)* If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. *(2)* The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence *(a)* where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case."

She submitted that following ***Galbraith*** the no case submission should be allowed.

[27] Counsel for the respondent contended that there was a case to answer. She submitted that when Gooding asked Taitt if he had a knife that question should have alerted Taitt of Gooding's intention to use a knife which is an intrinsically dangerous weapon. She also submitted that Taitt's words, "I tell he yeah", in response to Gooding's question whether Taitt had a knife was encouragement to Gooding or support for the plan to use force if necessary. She said that the question was whether Taitt not having had a knife was material to foreseeability. She contended that Taitt not having a knife did not mean that he did not foresee from Gooding's question that Gooding would have used a knife to kill or cause serious bodily harm. She submitted that Taitt by the question asked should have foreseen that Gooding would have used a knife. On the question of foreseeability counsel also relied on ***Powell and English*** (above).

[28] On the question whether Taitt had withdrawn from the enterprise when the fatal blow was struck, counsel submitted that based on the evidence Taitt had not withdrawn. She said that in order to avoid detection, he ran away when he heard a motor car coming. Taitt went to the nearby graveyard where he was joined by Gooding. Taitt took the deceased's mobile telephone from Gooding and removed the battery. She submitted that there was no effective withdrawal by Taitt from the plan to rob or to kill or to cause serious bodily harm. In that regard she relied on ***R. v. Adrian Rook [1993] 97 Cr. App. R. 327*** where it was held that it was not sufficient for the appellant not to turn up. He had to withdraw unequivocally from the plan, and in order for him to do so, it should have been communicated to the other parties. Counsel also relied on ***R. v. Whitehouse [1941] 1 WWR 112*** in which ***Sloan LJ*** said at page 565:

> "Can it be said on the facts of this case that a mere change of mental intention and a quitting of the scene of the crime just immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his

companions' change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case…"

[29] Counsel also relied on ***R. v. Antonio Becerra [1976] 62 Cr. App. R. 212*** in which it was held that the appellant saying, "Let's go", and subsequently jumping through the window was not enough to prove that there was withdrawing from the plan. She likened the instant case to ***Becerra*** and submitted that on the evidence Taitt did not withdraw from the plan.

[30] Counsel submitted that there was sufficient evidence on which a jury properly directed could find the appellant guilty of murder. In that regard she relied on Part (B) of the second limb of ***Galbraith*** where ***Lord Lane*** at page 1062, said:

"Where however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on the possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[31] In overruling the no-case submission the trial judge said:

"I turn now to accused Theo Taitt, and again, I am of the view that the issues raised by counsel on his behalf involves questions of fact for the jury to decide on the evidence. The jury will decide whether there was a common design. Did Taitt have a knife? Do they believe if he had a knife, and if he had a knife, why did he have it? Did Taitt know that the accused Gooding was armed, or did Taitt encourage the joint enterprise and entertain the real possibility that violence would be used?

The jury will have to decide whether Taitt was part of a plan to rob with violence, that is, to kill or cause grievous bodily harm, and it is also for the jury to determine the scope of the joint enterprise, and whether the accused Vincent Gooding departed substantially from that plan."

[32] The evidence adduced by the prosecution disclosed that *(a)* the appellants had hatched a plan to rob the deceased; *(b)* before embarking on the robbery appellant Gooding asked appellant Taitt whether he had a knife and appellant Taitt answered in the affirmative even though, as he said, he did not have a knife; *(c)* during the course of the robbery appellant Taitt withdrew to the nearby graveyard on the approach of a motorcar and waited until appellant Gooding joined him and reported that he had stabbed the deceased; *(d)* appellant Taitt then disabled the deceased's mobile telephone and sought his share of the spoils of the robbery. We agree with the trial judge that the evidence raised issues of fact for the jury to decide. There is no merit in this ground.

Grounds 2 and 3: Taitt; Ground 2: Gooding

[33] These grounds are common to both appellants. They arose out of an article published in the Sunday Sun Newspaper of 10 May 2008 under the heading "Both Guilty". Counsel for Gooding submitted that the article created the possibility of prejudice and prevented the jury from reaching a safe and satisfactory verdict.

[34] On behalf of Taitt grounds 2 and 3 alleged that the trial judge erred in law when she failed *(1)* to declare a mistrial after statements of the guilt of the accused were published in the newspaper prior to the summation of the evidence in the case; and *(2)* to warn the jury how to treat the newspaper report regarding the case.

[35] Counsel submitted that prejudicial publicity during a trial may prevent a fair trial from taking place. Counsel said that if the media coverage of a trial has created a real risk of prejudice against the appellant, the conviction should be regarded as unsafe. Counsel also submitted that the judge's warning to the jury to disregard things heard or read outside the courtroom was not enough in light of the newspaper article.

[36] Counsel for the respondent submitted that the report only echoed the closing speech of the prosecution and introduced no new material. She also submitted that the trial judge gave the jury the appropriate warning to ignore things contained in newspapers or heard outside the court room.

[37] This Court was faced with the same issue in ***Bolden and Cumberbatch v. R. Criminal Appeals Nos. 4 & 5 of 2007 (unreported).*** In that case details of a *voir dire* were published in a newspaper and the judge gave the jury a warning in much the same terms as did the judge in the instant case. Having reviewed ***Mitchell (David) v. R. (1997) 52 WIR 25*** and ***Nankissoon Boodram et al v. The State (1997) 53 WIR 352*** this Court said at paragraph 25:

> "The jury is under an obligation to reach its verdict based only on the evidence heard by them in the court room and not on anything heard or read outside the court room and they were so instructed by the trial judge. In our opinion, the appellants suffered no prejudice from the publication."

[38] In the instant case the remark was made to the jury during the prosecutor's closing speech which the newspaper article reported. The article contained no new or sensational material that could have been prejudicial.

[39] In the instant case the judge directed the jury as follows:

> "And you are not to allow yourself to be influenced by anything you may have seen, heard or read outside of this courtroom. What is required of you is a calm, dispassionate assessment of the evidence and a verdict in accordance with the oath that you have taken. That is what justice requires of you."

We find no merit in these grounds.

Grounds 4 and 5: Taitt

[40] By these grounds counsel contended that the trial judge failed *(4)* to put adequately the defence of the appellant; and *(5)* to point out to the jury the case against the appellant, in particular, to distinguish between the appellant's case and the Crown's case and failed to analyse adequately the issues.

[41] Counsel for the appellant submitted that the judge failed to analyse adequately the issues and highlight the relevant portions of evidence from which the jury could make a determination on the issues. She drew attention to pages 856 to 861 of the trial record.

[42] Counsel for the respondent submitted that the trial judge directed the jury appropriately on the case for the appellant and that the summation was fair and balanced – the judge having analysed, identified and assessed the relevant points of law for the jury. She referred to pages 856 to 865 of the trial record.

[43] At page 856 line 4 of the trial record the trial judge said "I will now turn to Theo Taitt's defence." Thereafter she dealt with his written statement and his unsworn evidence. She directed the jury how they should treat those bits of evidence. She analysed the statements. She reminded the jury that there was no objection on Taitt's behalf to the written statement. She reminded the jury of the law of joint enterprise. From page 864 line 20 to page 865 line 7 the trial judge concluded thus:

> "If you are satisfied beyond a reasonable doubt that Theo Taitt was part of a plan with Gooding to inflict grievous bodily harm on Carl Nurse or to kill Carl Nurse, then you should return a verdict of guilty of murder. If however, you are satisfied beyond a reasonable doubt, that Taitt was part of a plan only to rob Carl Nurse, then you must find him not guilty of murder.
>
> If you are satisfied beyond a reasonable doubt, that Taitt was part of a plan to inflict serious injury or to kill Carl Nurse, but that Taitt clearly and unequivocally withdrew from that plan and communicated his withdrawal to Gooding, then it is for you – you must find Taitt not guilty of murder."

We can find no fault with the trial judge's direction. There is no merit in these grounds.

Grounds 6 and 7: Taitt

[44] These grounds dealt with the same issue, it is therefore convenient to discuss them together. The grounds alleged that the trial judge erred when she failed to warn the jury *(a)* not to draw any unfavourable inference from the evidence of Coral Taitt and Tamara Taitt; and *(b)* how to treat their evidence because there was the possibility that their evidence might be tainted by an improper motive.

[45] Counsel for the appellant submitted that the judge's analysis of the evidence of Coral Taitt and Tamara Taitt could have prejudiced the jury's perception of the appellant Taitt and that the review of their evidence was misleading, inadequate and prejudicial.

[46] Counsel for the respondent submitted that the trial judge dealt appropriately with the evidence of those witnesses and that their evidence was favourable to the appellant and as such presented no risk of prejudice.

[47] From pages 821 to 825 and pages 825 to 827, the judge reviewed and explained the evidence of Coral Taitt and Tamara Taitt,

respectively and gave the jury the following directions:

> "If you are of the opinion that Coral Taitt was not a witness of the truth when she gave evidence in this court, you must disregard her evidence. If you believe she told the truth in this court, then you are bound to consider her evidence and give it whatever weight you deem to be appropriate."

> "Again, Madam Foreman and members of the jury, it is for you to decide whether you believe Tamara Taitt told the truth in this Court. She admitted lying to the police and she admitted perjuring herself in the Magistrate's Court. Do you believe that she came to this Court as a witness of the truth? This is a matter for you. If you find that she was not truthful in giving her evidence in this Court, then you must disregard all of her evidence. If, however, you are persuaded that she told you the truth, then you should consider her evidence and give it whatever weight you deem to be appropriate."

[48] In our opinion the trial judge acted correctly. We find no merit in these grounds.

Ground 8: Taitt

[49] The Court granted leave to amend this ground. The amended ground alleged that the trial judge erred in law when she allowed the Crown to proceed on an indictment for murder against the appellant Taitt when there was no evidence of any intention to cause death or serious bodily harm and as a result the conviction is perverse and contrary to justice. Counsel for the appellant submitted that the no case submission should have been upheld.

[50] There is no merit in this ground. (See paragraphs [20] to [32] above).

Grounds 9, 10 and 11: Taitt

[51] By these grounds it was alleged that *(a)* the trial judge failed to adequately explain to the jury the law relating to joint enterprise; *(b)* the trial judge misdirected the jury on withdrawal when she told them that Taitt did not get as far away as possible from the scene; and *(c)* the verdict is unsafe or unsatisfactory.

[52] Counsel for Taitt submitted that the trial judge ought to have told the jury that they would have to be sure before convicting that he had participated in the joint enterprise and that he foresaw that in the course of that joint enterprise Gooding might use a knife with intent to kill or cause serious bodily harm. She also submitted that the judge ought to have directed the jury that they had to consider whether Gooding went beyond the agreed plan and by using a knife committed an act which was fundamentally different from what was agreed.

[53] At paragraph 9 of ***A, B, C, & D v. R. [2010] EWCA Crim. 1622 Hughes LJ*** gave three examples of the expressions "common enterprise" or "joint enterprise". The example applicable to the instant case is as follows:

> "Where two or more people join in committing a single crime, in circumstances where there are, in effect, all joint principals, as for example when three robbers confront the security men making a cash delivery."

[54] In answering the question – "If in the course of it, one or more participants inflicted not simply injury but grievous bodily harm, when had crime B (murder) been committed by those who did not themselves personally inflict it? Hughes LJ at paragraph 12 said:

> "12. In ***Rahman*** there was a group attack by something between 7 and 15 people on two. The group of 7 – 15 was armed with sticks, bars and the like. In the course of the attack, somebody (unknown) delivered a fatal stab in the back to one of the victims in circumstances which suggested that it must have been done with an intent to kill (not merely to do GBH). The defendants contended that there was no basis for attributing to them any intention to kill, but rather (at most) an intention to cause GBH. The judge directed the jury that the defendants would be guilty of murder if they foresaw that another participant might, in the course of the common enterprise to attack the victims, use a lethal weapon to kill the deceased with intent to kill him or to do him really serious injury. The issue was whether he ought also to have directed the jury that the stabber's intent to kill (as distinct from an intent to cause GBH) either amounted to a fundamental departure from the common purpose or was capable of doing so, so that unless a defendant foresaw that heightened intent he was not guilty. That question was answered 'no'. The common factor in the reasons given in their Lordships' speeches was that since murder may be committed either with the intention to kill or with the intention to cause really serious bodily harm, the difference between those two intentions could not form a fundamental departure from the common purpose. Therefore it mattered not which of them the secondary participant foresaw. What mattered in that case was whether a secondary participant had foreseen the use of a knife."

[55] In considering the liability of parties to a joint enterprise ***Thomas LJ*** said at paragraph 22 of ***R. v. Laura Mitchell and Henry Ballantyne [2009] Cr. App. R. 31***:

> "22. The general principle is that where two persons embark on a joint enterprise, each is liable for what is done in pursuit

of that joint enterprise, unless one of the parties goes beyond the scope of what was agreed. It is therefore necessary to decide what was agreed, tacitly or expressly, by the defendant whose case the jury is considering as being within the scope of that enterprise, see ***R. v. Chan Wing-Siu*** at page 177-8: ***R. v. Powell; R. v. English [1999] 1 AC 1*** at 17-18. Often there is little distinction between tacit agreement and foresight of the probable commission of an act: see ***Powell*** at page 20 relying on the observation of ***Lord Lane CJ*** in ***Wakely [1990] Crim LR 119***: ***Lord Hutton*** (who gave the opinion with which all agreed) made clear at 20:

> "that as stated by the High Court of Australia in ***McAuliffe v. The Queen (1995) 69 AJLR 621*** at 624 … 'that scope of the common purpose is to be determined by what was contemplated by the parties sharing the purpose'. Therefore when two parties embark on a joint criminal enterprise one party will be liable for an act he contemplates may be carried out by the other party in the course of the enterprise even if he has not tacitly agreed to that act…

and at page 21

> There is therefore a strong line of authority that participation in a joint criminal enterprise with foresight or contemplation of an act as a possible incident of that enterprise is sufficient to impose criminal liability for that act carried out by another participant to that enterprise."

On the question of withdrawal in the said case ***Thomas LJ*** said at paragraph 26:

"26. As to the issue of whether the enterprise was still continuing and whether the appellant was still in it or had withdrawn, a series of decisions of this court sets out the correct approach:

i) In ***R. v. Mitchell & King [1990] Crim LR 496***, ***Otton LJ*** made clear that the jury had to consider whether at the time the death occurred the defendant was acting within a continuing enterprise. In considering whether a person had withdrawn, there must usually be some act and not merely a mere mental change of intention or physical change of place by the person contending he had withdrawn.

[56] In her summation the judge dealt with joint enterprise at pages 861 to 865:

"In looking at the question of whether there was a joint plan, a joint agreement, or we may say, a joint enterprise, you have to look at the evidence of the other witnesses in this case and at what each accused said about himself. Of course, you will only consider such evidence as you consider to be truthful, bearing in mind any directions that I have already given.

Madam Foreman and members of the jury, do you believe that Theo Taitt agreed with Vincent Gooding to commit a criminal offence? Was the offence to rob Carl Nurse or to inflict serious bodily harm on Carl Nurse or to kill Carl Nurse? If you find that they agreed to inflict serious bodily harm on Carl Nurse or to kill Carl Nurse, then they are both guilty of murder. But Taitt's defence is that the plan was limited to robbery and did not include serious bodily harm or murder.

Madam Foreman and members of the jury, the law states that where two persons embark on a joint enterprise, a joint plan, each is liable for the acts done in pursuance of that joint enterprise or joint plan, and that includes the liability for unusual consequences, if they arise from the execution of the agreed joint enterprise. But, if one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorised act.

Finally, it is for you as members of the jury, in every case to decide whether what was done was part of the joint enterprise, the joint plan or whether it went beyond it and was, in fact, an act unauthorised by that joint enterprise. It is for you to determine whether the killing of Carl Nurse was an unusual consequence or whether the accused Gooding stabbed Carl Nurse and in so doing went beyond what he had agreed with Taitt. Taitt says that he did not have a knife, but that is not what he told Gooding when Gooding asked him if he had a knife. What did Taitt understand by Gooding's question? Did he understand and appreciate that the plan would include armed robbery? Did Taitt understand and appreciate that a serious injury or death could result from armed robbery?

Madam Foreman and members of the jury, even if you accept that Taitt did not have a knife, did he embrace the plan knowing full well that by asking about a knife, Gooding was contemplating violent armed robbery? In his written statement, Taitt did not make it clear to Gooding that he would only be part of the plan to rob if neither party was armed. These are matters for you to decide.

Taitt's defence is also that even if the plan with Gooding included serious or fatal injury to Carl Nurse, he withdrew from the plan before Nurse was killed. Again, Madam Foreman and members of the jury, look at the evidence and determine whether there was a plan to seriously injure or kill Carl Nurse and whether Taitt effectively withdrew from the plan. I must again guide you on the law here.

The law says that before you can find that Taitt withdrew from a plan to seriously injure or kill Carl Nurse, he must do something more than just change his mind or remove himself from the scene. Taitt must have communicated his intention to abandon the joint plan in a timely manner. If it is practicable and reasonable, Taitt must have made it abundantly clear to Gooding that he wanted to play no further part in the plan. Taitt must have made Gooding aware that if Gooding continued, he Gooding, was doing so without further aid or assistance from Taitt. Did Taitt give Gooding such clear an unequivocal notice that Taitt was withdrawing from the plan? In his various statements, Taitt says that he told Gooding to come along and he held on to Gooding's hand and urged him to come along. In the circumstances, was this a clear and certain withdrawal from the plan that was communicated to Gooding or was this just Taitt removing himself from the immediate scene?

In his statements Taitt went into the graveyard and Gooding met with him there. Taitt did not get as far away as possible from the scene. Taitt also says that he assisted Gooding with Carl Nurse's cell phone by removing the battery. Is this the action of a man who has withdrawn from a plan? Taitt was also expecting a share of the proceeds from Carl Nurse's property. He didn't get it because Gooding told him that he had to use the money to pay a lawyer.

Madam Foreman and members of the jury, I may express a particular opinion or view of the evidence in this case, but you are not bound to accept my opinion or the opinion of the prosecution or the defence counsel. You have only to accept my directions on the law. You are the sole judges of the facts in this case.

If you are satisfied beyond a reasonable doubt that Theo Taitt was part of a plan with Gooding to inflict grievous bodily harm on Carl Nurse or to kill Carl Nurse, then you should return a verdict of guilty of murder. If however, you are satisfied beyond a reasonable doubt, that Taitt was part of a plan only to rob Carl Nurse, then you must find him not guilty of murder.

If you are satisfied beyond a reasonable doubt, that Taitt was part of a plan to inflict serious injury or to kill Carl Nurse, but that Taitt clearly and unequivocally withdrew from that plan and communicated his withdrawal to Gooding, then it is for you – you must find Taitt not guilty of murder."

[57] The appellant Taitt confessed that he agreed to rob Nurse and that even though he told Gooding that he (Taitt) had a knife he did not in fact have one. Counsel for Taitt submitted that the trial judge ought to have told the jury that they would have to be sure before convicting that he had participated in the joint enterprise and that he foresaw that in the course of that joint enterprise Gooding might use a knife with intent to kill or cause serious bodily harm. She also submitted that the judge ought to have directed the jury that they had to consider whether Gooding went beyond the agreed plan and by using a knife committed an act which was fundamentally different from what was agreed.

[58] In the instant case it is clear that the judge did not use the word "foresee" or any of its derivatives when summing up on joint enterprise. She used the word "understand." In the context of the use of language in Barbados the word "understand" used by the trial judge in the circumstances of this case, conveys the idea contained in the word "foresee". It is important that the judge direct the jury in language they understand. The language used by the judge does not have to be the technical language of the law. In my opinion, the judge gave the jury the appropriate direction on what in essence was foreseeability. (See paragraph [34] above).

[59] The trial judge having directed the jury *(a)* that they had "to look at the evidence of the other witnesses in this case and at what each accused said about himself" in deciding the question whether there was a joint enterprise; *(b)* on joint enterprise, including foreseeability of consequences and withdrawal from a joint enterprise, said:

"If you are satisfied beyond reasonable doubt that Taitt was part of a plan to inflict serious injury or kill Carl Nurse, but that

Taitt clearly and unequivocally withdrew from that plan and communicated his withdrawal to Gooding, then it is for you – you must find Taitt not guilty of murder." (See paragraph [34] above).

[60] Following the authorities referred to above I consider that the direction of the trial judge on joint enterprise was adequate. Taitt did not detach himself mentally or physically from the plan. He ran away only after he had heard the approach of a motor car and he waited until Gooding joined him with the spoils of the robbery. He disabled the deceased's mobile telephone and asked Gooding for a part of the money from the robbery. He got none because Gooding needed it to pay a lawyer. Taitt's conduct does not reveal a mind detached from the plan. His withdrawal to the graveyard was made only to avoid detection. In my opinion the judge gave the jury adequate directions. I find no merit in these grounds.

Ground 1: Gooding

[61] This ground alleged that the trial judge erred in law by failing to uphold the no case submission. Counsel for appellant Gooding submitted that given the discrepancies and inconsistencies in the evidence for the prosecution the trial judge ought to have upheld the no case submission. Counsel relied on limbs (1) and (2)(a) ***R v. Galbraith*** (above).

[62] Counsel referred to ***R. v. Slippey [1988] Cum. L.R. 767*** in which ***Turner J*** held with reference to ***Galbraith*** that the requirement to take the prosecution evidence at its highest did not mean "picking out all the plums and leaving the duff behind". The judge should assess the evidence and if the evidence of the witness upon whom the prosecution case depended was self explanatory and out of reason and all common sense, then such evidence was tenuous and suffered from inherent weakness. His Lordship did not interpret ***Galbraith*** as meaning that if there are parts of the evidence which go to support the charge then that is enough to leave the matter to the jury, no matter what the state of the rest of the evidence is. It was, he said, necessary to make an assessment of the evidence as a whole and it was not simply a matter of the credibility of individual witnesses or of evidential inconsistencies between witnesses, although those matters may play a subordinate role. ***Archbold 2001 paragraph 4 – 295.***

[63] Counsel for Gooding highlighted discrepancies and inconsistencies in the evidence of prosecution witnesses such as:

(1) at page 129 lines 16 to 18 Sgt. Lynch said that Sgt. Catwell allowed appellant Taitt to speak with his mother, Coral Taitt. Whereas at page 173 Coral Taitt denied that is what happened;

(2) discrepancies between the evidence of the witnesses as to whether appellant wore blue boxer shorts or black boxer shorts; and

(3) whether Trevor Codrington had asked Coral Taitt anything about appellant Gooding to which Codrington said "yes". Whereas Coral Taitt denied that Codrington had asked her such a question.

[64] Counsel submitted that evidence of that kind brought the case against appellant Gooding within limbs (1) and (2)(a) of ***Galbraith*** and therefore the submission of no case to answer should be upheld.

[65] Counsel also submitted that the prosecution did not establish that the appellant intended to kill Carl Nurse or to cause him serious bodily harm. Counsel relied on ***Neverlaine Springer v. R. (No. 2) Criminal Appeal No. 17 of 2005 (unreported)***. Counsel also submitted that Gooding's written statement to the police in which Gooding said that he stabbed Nurse goes only to the voluntariness of the statement and not to its truth and therefore it was not enough to rely on that statement alone to find the *mens rea* for murder.

[66] Counsel for the respondent contended that there was a case for Gooding to answer. Counsel distinguished ***Springer*** (above) from the instant case. In ***Springer***, counsel said that the defences of self-defence and accident arose on the evidence and there was no other evidence in that case to contradict ***Springer's*** evidence. Counsel submitted that in the instant case the appellant Gooding had given the police a statement in writing, he told Coral Taitt that he had stabbed Nurse and shortly after Nurse's death, Gooding was in possession of Nurse's jewellery. Counsel submitted that on the evidence the case should be left to the jury.

[67] In overruling the submission of no case to answer, the judge said:

"Let me deal first with the submissions made against accused Vincent Gooding. Having looked at the evidence there were two things submitted on behalf of him. One, that the Crown had not proved an intention on his part to kill the deceased, and under the second limb of ***Galbraith*** that there were so many inconsistencies that the matter should not go to the jury.

With respect to the question of intention, the court is of the view that this question of intention is a fact in issue for the jury to decide, based on the evidence, especially the medical evidence and whatever view the jury takes of the statement of the accused Gooding.

With respect to the second limb, which it was that given the number of inconsistencies the case should be withdrawn from the jury, the court is of the view that even if the jury did not refer to the evidence of the two main witnesses, the mother and the sister of accused Taitt, the court is still satisfied that there is enough evidence that can be placed before the jurors for them to determine the facts, and whether on those facts the accused Gooding is guilty of murder."

[68] The evidence adduced by the prosecution disclosed that *(a)* the appellant hatched a plan to rob the deceased; *(b)* the appellant stabbed the deceased; and *(c)* the deceased died from the injury. It is our opinion that the evidence raised issues that were well within the province of the jury. The judge acted correctly when she overruled the submission. There is no merit in this ground.

Ground 3: Gooding

[69] On this ground, counsel contended that the trial judge erred in law when she misdirected the jury on how they should treat the oral and written statements of the accused. Counsel submitted that the trial judge implied that regardless of the circumstances of the confession, the jury were entitled to rely upon it if they believed it was true. Counsel for the respondent contended that the judge properly directed the jury. In support of her submission, counsel referred to several pages of the trial record where the judge dealt with the statements.

[70] An examination of the record discloses that the judge gave full directions to the jury and at page 836 she concluded thus:

"The truthfulness and voluntariness of the statements are matters for your determination. If you conclude that the statements were made by Gooding but under oppressive circumstances, or by the use of force, you have to reject those statements."

[71] The trial judge further reminded the jury that what one accused said against the other could not be used in evidence against that other accused. There is no merit in this ground.

Ground 4: Gooding

[72] The complaint on this ground is that the judge misdirected the jury on the issue of *mens rea.* Counsel submitted that it was incumbent on the trial judge to direct the jury that the intention to kill or to cause serious bodily harm must be found before the appellant could be convicted for murder. Counsel said that the judge failed to give such a direction and the appellant was prejudiced by her failure.

[73] Counsel for the respondent submitted that the direction on *mens rea* was correct. She referred to pages 800 to 801; and 854 to 855 of the trial record.

[74] In our opinion there is no merit in this ground. At page 800 to 801 the trial judge directed the jury that they must be satisfied that there was an intention to kill or cause serious bodily harm and at page 854 to 855 she gave the following direction: