

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 18 of 2010**

**BETWEEN:**

**SHAWN RICARDO PINDER**

**Appellant**

**AND**

**THE QUEEN**

**Respondent**

**Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal**

**2014: November 10, December 10**

**2015: January 13; November 24**

**Mr. Marlon Gordon in association with Safiya Moore and Dr. Lenda Blackman for the Appellant**

**Mrs. Donna Babb-Agard, Q.C. in association with Mr. Elwood Watts for the Respondent**

**DECISION**

**MASON JA:**

**Introduction**

[1] This is an appeal against conviction and sentence.

[2] The appellant was charged along with another person that they on 26 August 2004 murdered Arden Puckerin. They both pleaded not guilty on arraignment on 7 October 2009. The trial commenced on 22 January 2010 against the two accused. However, on 2 March 2010 after a successful no case submission by counsel for the co-accused, the judge directed the jury to return a formal verdict of not guilty against the co-accused. The trial against the appellant continued and on 27 April 2010 the jury returned a majority verdict of guilty of manslaughter. On 10 June 2010 he was sentenced to 15 years imprisonment.

### **Background**

[3] Sometime during the morning of the day in question, the deceased was resting in a bedroom of an abandoned house which he occupied at Tabernacle Road, Lower Cox Hill, St. Philip. The appellant arrived there accompanied by the then co-accused and other men. The deceased's brother was also present. The appellant accosted the deceased, accusing him of stealing his drugs. This the deceased denied, instead pointing the finger at other persons including the co-accused and one of the other men present.

[4] After much arguing the other men left leaving behind the appellant, the then co-accused and the deceased's brother. The appellant and the then co-accused proceeded to beat up the deceased. Another man later came to the

house armed with a pair of wooden shackles which he handed to the appellant and with which the appellant beat the deceased. The evidence is that the appellant also had a knife. The deceased was eventually rendered unconscious.

[5] Later that same day after 6:00 p.m. the appellant arranged with a taxi driver to transport the deceased to the FMH clinic. There the deceased was put into a wheelchair and the taxi man left. The deceased was later wheeled into the clinic where he was examined by a doctor but succumbed to his injuries and died.

[6] According to the medical evidence, death was due to haemorrhage and shock as a result of multiple stab wounds caused by a sharp instrument, most likely a knife.

[7] The appellant and the then co-accused were charged for his murder.

### **The Appeal**

[8] The appellant filed four grounds of appeal:

- (i) breach of **section 18 (1)** of the **Constitution**;
- (ii) failure to uphold the no case submission;
- (iii) unsafe and unsatisfactory verdict, and
- (iv) excessive sentence and sentence outside of manslaughter guidelines.

## **Ground 1**

[9] This ground alleged that the appellant's trial was unfair because it breached **section 18 (1)** of the **Constitution** which provides for the right to a fair hearing and sets the overall standard to be applied in criminal proceedings.

[10] Counsel for the appellant, Mr. Marlon Gordon, suggested that the unfairness in the proceedings was manifested in five instances.

### **Instance (i)**

[11] Mr. Gordon submitted that the facts of the case as presented in the opening address by the prosecution were based on joint enterprise, a position which the prosecution abandoned midstream and proceeded on the basis of circumstantial evidence. Thus, the appellant having already joined issue with the Crown on this basis, the only avenue left to the prosecution without causing injustice or unfairness was to have a new trial before a new jury.

[12] Mr. Gordon contended that the jury having heard evidence against two men, when one was released, the jury would likely have the belief and or formed the opinion that the one who was left was the guilty one.

[13] While acknowledging that the **Indictments Act Cap. 136 (Cap. 136)** gives the trial judge power to allow an amendment at any stage of a trial, Mr. Gordon emphasised that this could only be done if no injustice to the accused person would result. Mr. Gordon argued that the amendment ought

to have been made at an earlier stage in the proceedings when the Crown realised that there was no evidence of joint enterprise and therefore to have requested the amendment just before the summing up was prejudicial. In support, Mr. Gordon cited the case of **R v Gleeson EWCA Crim 3357**.

[14] Mr. Gordon indicated that the appellant's defence was one of alibi. He asserted that it could not be considered inescapable that the appellant had committed the act simply because the injuries from which the deceased died were consistent with having been inflicted by a knife and that no one gave evidence that they saw the appellant use that knife.

[15] In response Mrs. Donna Babb-Agard, QC for the respondent did not agree that **section 18** of the **Constitution** had been breached. She argued that the trial had been fair, that the judge had properly and adequately directed the jury on all relevant issues. She noted that circumstantial evidence was not the only plank on which the Crown had relied after the release of the co-accused, that there was an accumulation of evidence which included the oral statements of the appellant which even though they did not incriminate him per se, put him on the scene of the incident which resulted in the death of Mr. Puckerin where he said he was not. She submitted that because of this evidence when the co-accused was dismissed, enough evidence was left against the appellant and the judge was not duty bound to dismiss the jury.

She further contended that the time at which the co-accused was removed from the indictment could not have prejudiced the appellant because the nature of the facts did not change before the jury once the evidence unfolded.

### **Discussion**

- [16] The right to a fair hearing must always be within the contemplation of a judicial officer since this right is absolute.
- [17] **Section 18 of the Constitution** provides the parameters within which is secured the protection of the law in criminal trials. By **subsection (1)** it is mandated that any person charged with a criminal offence, unless that charge is withdrawn, the case must be afforded a fair hearing within a reasonable time.
- [18] The principle contained therein has been reflected in many of the judgments of these courts which have in turn incorporated the learning from myriad authorities within the Commonwealth. In the decision of this Court in **Mitchel Ken O'Neal Lewis v R Criminal Appeal No. 2 of 2005**, **Waterman JA** cited a number of those cases which emphasise this principle, including **Randall (Barry) v R [2002] 60 WIR 103 (Randall)** where Lord Bingham in rendering the decision of the Privy Council reminded that the right to a fair trial is one to be enjoyed by the guilty as

well as the innocent, for a defendant is presumed to be innocent until proven guilty.

[19] The question in this instance is whether by failing to discharge the jury at the time when the amendment to the indictment was made resulted in prejudice to the appellant and consequently a trial that was not fair.

[20] According to the trial record, on 17 March 2010, a successful no case submission was made on behalf of the co-accused. The trial continued against the appellant. It was only some six weeks later on 27 April 2010 immediately before the judge began his summation that the prosecution sought the amendment to the indictment and the co-accused's name was removed and the new indictment was read to the appellant who repeated his not guilty plea.

[21] This Court concurs with the admission by both appellant and respondent that while the amendment to an indictment can be made at anytime during the trial, it would have been preferable had the amendment to the indictment been effected in a more timely manner because the longer the interval between arraignment and amendment, the more likely that injustice could be caused to the accused. This is made clear by **section 6 of Cap. 136** which permits the judge at any stage of the trial to amend an indictment "unless

having regard to the merits of the case, the required amendment cannot be made without injustice.”

[22] Despite that, can the appellant’s further argument be sustained that the prosecution, having jettisoned the plank of joint enterprise and continued on the basis of circumstantial evidence, caused prejudice to the appellant?

[23] While the opening statement by the prosecution sets the tone for their case, it is not upon that tone that the case is eventually determined. The prosecution is obliged to present cogent, believable evidence which has to stand the test of standard of proof beyond reasonable doubt. In addition it frequently occurs that a case begins with more than one accused, one or more of whom have to be discharged during the course of the trial owing to lack of evidence. It cannot be expected that in every such situation a mistrial must be declared and a new jury empanelled. The test in such situations is whether an injustice would occur were the case to continue against the remaining accused. This must of necessity depend on what further facts are divulged, whether or not the case remains essentially the same after the discharge is made and whether the case against the remaining ones can be proved without reference to the one (s) discharged.

[24] When regard is had to the judge’s summation, it is evident from the outset that he was at pains in his directions to the jury to ensure that they

understood their role and function with respect to the assessment of the evidence and more especially their treatment of the evidence and circumstances under which the co-accused had been discharged. He entreated the jury to “banish” from their memory any evidence which might link the co-accused to the appellant and to concern themselves solely with the appellant. Throughout his very lengthy summation which spanned three days, the judge concentrated his attention on the appellant’s case, only once again mentioning the co-accused in order to remind the jury that the co-accused was to be viewed as never having been part of the case. (See page 2803 of the record). Further in his summing up the judge was careful and thorough in explaining the tenets of circumstantial evidence, giving the appropriate directions regarding circumstantial evidence and indicating the instances where such evidence existed. It is our view that any perceived prejudice would have been nullified by the sage summing up by **Worrell J.**

[25] We agree with the submission of the respondent that the point at which the co-accused was discharged did not affect the case, that the situation was to all intents and purpose the same as if application had been made earlier. After discharge of the co-accused the case continued for a further six weeks during which there was a scrupulous absence of reference to the co-accused or of anything which could have appeared to have included him. The case

continued as if he had not been present at any time. During that six weeks, further evidence was led but that evidence did not alter the facts of the case nor did it introduce new facts. Neither was there alteration of the charge upon which the appellant had been originally arraigned: the charge remained one of murder. The appellant's defence was alibi, a defence which the jury evidently discounted. The evidence had pointed inexorably to his presence at the scene where the deceased was assaulted and stabbed and to the appellant being the only person at the scene in possession of a knife. The deceased died as a result of infliction of stab wounds.

[26] This is in contrast to the facts of the English case of **R v O'Connor [1997] Crim LR 516 B** which was cited by Mr. Gordon. There, after the co-defendant had been acquitted on the direction of the judge at the conclusion of the case for the prosecution, an amendment was made to the indictment proffering what amounted to a new charge because it elicited new evidence. Lord Bingham of Cornhill CJ delivering the judgment of the court, noted that the effect of the amendment was unfair because it deprived the appellant of the opportunity to mount the defence which he would have mounted had the case for the Crown been put in the beginning in the way it ultimately resulted. He was of the opinion that the case changed very significantly and confronted the appellant with a different and much more difficult case to

answer. As indicated above, such was not the position in the case at bar, the appellant's defence was alibi, the facts had not changed. Further the change from joint enterprise to circumstantial evidence made no material difference to the case.

[27] We are of the opinion that despite the time at which the amendment to the indictment was made, there was no prejudice to the appellant and no resulting injustice. There was therefore no need to discharge the jury.

[28] This instance cannot be sustained.

**Instances (ii) and (iii)**

[29] Mr. Gordon next tackled together the issue of the discharge of juror Ms. Lisa Alleyne and the judge's "refusal to take in (sic) consideration that the view of the appellant was materially relevant on the issue concerning the inquiry that the entire jury panel be discharged for fear of bias or prejudice".

[30] Mr. Gordon in his written submission charged that the entire process involving the juror's discharge, and the subsequent enquiry by the court regarding the other sitting jurors, could have led an independent observer to ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger that the tribunal was prejudiced against the appellant.

[31] According to Mr. Gordon, there was a female juror with whom he and the appellant had “issues” and who was subsequently discharged and asked by the judge not to interact with the remaining jurors but whom he later saw taking pictures with those jurors and from her statement was collecting telephone numbers and “discussing the picnic”. In his estimation, an independent observer could not help but form the opinion that a lot more was spoken by the discharged juror to the other empanelled jurors. He argued that there was a strong possibility that the remaining nine jurors were likely to be influenced and did not act impartially.

[32] Mr. Gordon stated that when the appellant discovered who Ms. Alleyne was, that she “had association with people who were in an antagonistic position with himself and his family” and that she did not like the appellant, he became apprehensive about the continuation of the entire panel because he was of the view that she had had eight weeks within which to “contaminate” the other jurors. Mr. Gordon further suggested that the appellant ought to have been given the opportunity to “make his opinion known” to the court and therefore the court’s failure to allow this and to take the appellant’s views into consideration amounted to a breach of the principles which govern his right to a fair trial under **section 18 (1) of the Constitution**. He made reference to the judgment of Lord Hope of Craighead in the English

case of **Magill v Porter; Magill v Weeks [2001] UKHL 67 (Magill v Porter)**.

[33] Mr. Elwood Watts on behalf of the respondent and in answer to these submissions conceded that in light of the disclosures in relation to the juror, Ms. Alleyne's association with an "antagonist" of the appellant, her discharge as a juror was merited. He however rejected the notion that as a result of her discharge the entire panel ought to have been discharged. He referred to the inquiry conducted by the judge with respect to the other jurors which concluded that there was no evidence of any possible "contamination" by Ms. Alleyne.

[34] Mr. Watts drew the Court's attention to **section 36 of the Juries Act Cap. 115B (115B)** and cited the cases of **R v Gough [1983] 2 All ER 724** and **Jippy Joel Doyle v R Criminal Appeal No. 22 of 2008 (Jippy Doyle)**. He contended that the judge having found no such misconduct or irregularity or prejudicial matter exercised his discretion to proceed with the trial in the absence of the discharged juror.

[35] He concluded that since the judge, being mindful of the appellant's complaint, had conducted an enquiry and the appellant was being represented by counsel, this ground was without merit.

## Discussion

- [36] The queries in these instances centred around the discharge of the entire jury panel and the appellant's right to address the court.
- [37] **Section 36 of Cap. 115B** permits the judge in the exercise of his discretion to discharge the jury where for any reason "whether a situation of necessity or any misconduct or irregularity or prejudicial matter arises in the course of the trial". Such a decision must therefore be seriously contemplated and not whimsically determined.
- [38] In this instance both appellant and respondent agreed that based on the information relayed to the judge and outside of the knowledge of the other jurors that juror Ms. Lisa Alleyne had been rightly discharged. They however parted ways over the question of whether the entire jury should also then have been discharged.
- [39] It is well established that it is proper for the judge to exercise his discretion to discharge the jury when they inadvertently learn something to the accused's potential detriment. Such was not the position in this case. According to the trial record, the information about Ms. Alleyne's "antagonism" to the appellant had not been aired before the jury. The jury had been excused from the court when the judge received this information.

[40] In **Jippy Doyle**, this Court in consideration of the question of bias, apparent bias and fair trial rights, cited the English case of **Magill v Porter**. There the House of Lords itself considering the question of bias in relation to the courts generally, approved the test derived from **Re Medicaments and Related Classes of Goods No.2 [2001] 1 WLR 700**: would a fair minded and informed observer conclude that there was a real possibility or real danger the two being the same that the tribunal was biased.

[41] The trial record reveals that after Ms. Alleyne had been discharged by the judge with the warning and direction not to discuss the circumstances of her discharge, she was seen on the steps of the court taking photographs with her former jury colleagues. It was later discovered that they had also exchanged telephone numbers. When his attention was drawn to the possibility of prejudice to the appellant, the judge gave careful consideration to the charge and conducted an enquiry in which the remaining members of the jury were, in the absence of each other, individually questioned. Counsel for both the accused and the prosecution were given the opportunity to question these persons (which opportunity was for the most part declined) and to make submissions to the court. The discharged juror was re-summoned at the request of counsel for the accused and cross-examined by him. Further submissions were made to the court.

- [42] The judge had to determine whether this information imparted to him was of such a nature that it would result in the jury's bias against the appellant. As was stated previously there is no indication that the jury was at all privy to this information. It is clear from the trial record that the judge's questioning of each juror was to seek to elicit principally what went on when the discharged Ms. Alleyne was among the remaining jurors and also whether there was the possibility that the jury's independence could have been compromised.
- [43] The judge determined that Mr. Gordon's allegation that the rest of the jurors had been contaminated by Ms. Alleyne had not been borne out by the enquiry and neither was his speculation that the circumstances of her discharge discussed by her with her fellow jurors.
- [44] In his ruling the judge noted that even if Ms. Alleyne did speak to the other jurors, he could find no evidence that there was anything irregular or anything that would have tainted the remaining jurors to cause them to be automatically disqualified. Based on the enquiry, the judge stated that he could "find no bias, appearance of bias or prejudice or appearance of any prejudice."
- [45] What needs to be emphasised is that the discretion of the judge weighs heavily on his decision whether to discharge the entire jury and therefore,

save in extreme cases, the appellate court is always slow to interfere with the exercise of discretion of a trial judge.

[46] In this instance, the judge had jurisdiction to deal with the matter as he saw fit and having satisfied himself that the continued participation of the rest of the jury was not jeopardised, was within his right not to discharge the jury and cannot therefore be criticised for having exercised that discretion.

[47] This Court agrees with the respondent that there is no merit in the appellant's contention that there was a breach of his constitutional right as a result of the court's failure to permit his personal audience.

[48] **Section 18 (2) (d)** of the **Constitution** provides that any person charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his choice.

[49] Between pages 1764 and 1772 of the trial record, there ensued much discussion of this issue with the judge reminding the appellant's counsel that the appellant being represented by counsel was therefore not legally entitled to address the court and that counsel was the one authorised to speak on the appellant's behalf. The judge then taking note of the appellant's urge to speak, adjourned the court and directed counsel to take further instructions from the appellant after which he could then apprise the court of these instructions if he so wished.

[50] We can find no authority to support Mr. Gordon's contention that the court's failure to personally hear from the appellant his views amounted to a breach of principle of the right to a fair hearing. We therefore reject this instance.

**Instance (iv)**

[51] In this instance Mr. Gordon argued that the cross-examination of defence witness Nigel Pinder was egregious and that the jury may have formed the impression that he was not worthy of belief and that this was a serious attack on the appellant's defence. While he acknowledged that in this adversarial system a witness during cross-examination may be challenged, he noted that the credibility of the witness depends upon his knowledge of the facts to which he testifies, his disinterestedness, his veracity and his being bound by oath to speak the truth. He submitted that in this case, the nature and tone of the prosecution's cross-examination undermined the overall standard for cross-examination to be applied in criminal proceedings. As a result the jury was likely to have drawn the negative inference that the witness was a criminal who could not give cogent evidence which they could accept. He referred the Court to the statement of Lawton J in the case of **R v Sweet-Escott [1971] 55 Cr. App. 316 (Sweet-Escott)**.

[52] In response Mr. Watts admitted that in his cross-examination of a defence witness, it was always his intention and habit to portray that witness in the

most unfavourable light and thereby allow the inference to be drawn that the witness indeed could not give cogent or acceptable evidence. He noted however that in the case of the defence witness, Nigel Pinder, he was so overly effusive in giving his evidence that he at times volunteered certain information. Mr. Watts stated that the judge was always in full control of the proceedings and when necessary intervened in order to preclude any possible prejudicial evidence to be admitted and directed the jury how they should treat such unwarranted evidence.

[53] Mr. Watts concluded that while the cross-examination of the defence witness was robust, it did not have the effect of undermining the integrity of the trial process and could not be considered unfair. He urged the Court to find no merit in this instance.

### **Discussion**

[54] The question here is whether the tactics undertaken by prosecuting counsel, by employing a robust cross-examination of a defence witness, could be considered a departure from good practice such as to render the trial unfair.

[55] In **Randall** Lord Bingham at para (10) asserted that the adversarial format of the criminal trial is directed to ensuring a fair opportunity for the prosecution to establish guilt and a fair opportunity for the defendant to advance his defence.

- [56] It is our opinion then that Mr. Gordon should have expected in this adversarial system of justice to which he has become accustomed, there would have been this type of questioning because while the duty of prosecuting counsel as a minister of justice is not to obtain a conviction at all costs, this does not preclude him from seeking to establish the guilt of the accused by satisfying the jury of that guilt beyond reasonable doubt.
- [57] As stated by Lawton J in **Sweet-Escott**, the purpose of cross-examination is to seek to discredit the witness by showing that he ought not to be believed under oath. Thus the matters about which he can expect to be questioned will relate to his likely standing after cross-examination with the tribunal which must assess his evidence.
- [58] The trial record discloses that this was the strategy employed by prosecuting counsel. It also reveals that, without cajolment or pressure from prosecuting counsel, that witness sought on many occasions to proffer irrelevant and somewhat damning evidence. On each occasion, the judge intervened to exert control over the proceedings, to deflect the line of questioning and to direct the jury in their treatment of this unsolicited and unwarranted evidence. It is to be noted that while Mr. Gordon resented Mr. Watts' method of cross-examination, there was no criticism of the judge's handling of the proceedings. It cannot be considered a departure

from good practice which was so gross, so persistent, so prejudicial or so irreparable that this Court would have to condemn it.

[59] In **Jippy Doyle**, this Court held that it is imperative that nothing should distract the attention of the jury from the crucial issues they had to decide. This ruling has also been reflected by the Privy Council in **Randall** where Lord Bingham stated that one of the rules developed to safeguard the fairness of a trial is that the jury's attention must not be distracted from its central task of deciding whether on all the evidence adduced before it, and on the submissions made, and on the judge's legal directions and summing up of the evidence, the guilt of the defendant is or is not established to the required standard.

[60] It cannot be said that the method of cross-examination employed by prosecuting counsel was a departure from good practice such as to undermine the integrity of the proceedings and render the trial unfair. In the circumstances, we reject this instance.

**Instance (v)**

[61] Mr. Gordon acknowledged that the allegation in this instance that "the learned trial judge (sic) decision to allow the prosecution to proffer (sic) a new indictment against the appellant at the late stage in proceedings before summation" had already been addressed.

## Ground 2

- [62] On this ground the appellant alleged that “the learned trial judge erred in law when the court failed to uphold the defence’s submission of No case to Answer at the close of the case for the prosecution. The fundamental failure by the learned trial judge to uphold the submission deprives the appellant of an acquittal”.
- [63] Relying on the English Court of Appeal case of **R v Galbraith [1981] 2 All ER 1060 (Galbraith)**, Mr. Gordon argued that the submission of no case to answer should have been upheld since the prosecution had failed to prove a case of joint enterprise and the evidence was not of a nature or quality and kind to support that allegation.
- [64] In support of his contention that the judge misappreciated the evidence and the legal issues involved, thereby abdicating his role by passing it on to the jury, Mr. Gordon also cited the cases of **Collins and Fox v Chief Constable of Merseyside [1988] Cr. L.R. 247**; **R v Lane and Lane [1985] Cr. L.R. 789**; **R v Gibson [1985] 80 Cr. App. R. 24** and **R v Abbott [1955] 2 QB 497**.
- [65] Mrs. Babb-Agard QC also cited the case of **Galbraith** but based her arguments on the tenet that where the strength or weakness of the Crown’s case will depend on the credibility and reliability of the witnesses who gave

evidence which the tribunal of fact would have to decide, then the judge's exercise of his discretion to reject the no case submission was not erroneous.

[66] Mrs. Babb-Agard QC conceded that where two persons are charged jointly but the evidence could not identify which one committed the offence, they should both be discharged. She however distinguished the cases cited by Mr. Gordon and insisted that while there were no eye witnesses to the actual inflicting of the knife injuries, there was enough evidence on which the jury could act when they retired to deliberate. She urged the court to find no merit in this ground.

### **Discussion**

[67] It is accepted that the leading authority on the test which a judge should apply in determining whether a no case submission should be upheld is **Galbraith**. According to Lord Lane CJ in the so called "second limb" of that test:

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

[68] It is evident that it was upon that last rung of the second limb that the judge decided that this case should go to the jury. For while the assessment of the

quality and reliability of the evidence is partly the responsibility of the judge by establishing the sufficiency of the evidence and by evaluating it, it is yet the province of the jury to make the final value judgment of the evidence.

[69] It is upon the principle of joint enterprise that Mr. Gordon situated his case maintaining that since joint enterprise could not be proven by the prosecution, then their case was too tenuous to be sent to the jury.

[70] The legal authorities on joint enterprise have in the main decided that where two persons are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other and there is no evidence that they were acting in concert, a verdict of not guilty is appropriate in the case of both. The authorities which Mr. Gordon cited or referred to in support of his submissions are however indicative of instances where it could not be determined who in the joint enterprise was in fact responsible for the injury caused or the infraction complained of.

[71] In the English Court of Appeal case of **R v Andrew Malcolm Rowlands [1972] 56 Cr. App R 168** which involved a joint charge where one defendant was acquitted and the other convicted, it was determined that there was no need for evidence of acting jointly. Stephenson LJ reading the judgment of the court stated:

“In our view, the joint offence has gone with the passing of the first defendant from the case and the second can be convicted of

the offence charged as if he had been charged in a separate court with an independent offence”.

[72] We are of the same mind with respect to the case at bar. It is our view that the principle of joint enterprise having been determined by the discharge of the co-accused, there was sufficient evidence upon which the judge could require the jury to deliberate taking into account that the case for the Crown hinged on the view to be taken by the jury of the witnesses’ reliability and credibility.

[73] The evidence as led by the prosecution indicated that though there were no eye witnesses to the stabbing, according to the evidence of the impugned witnesses – Mondesir and Puckerin – the only person on that scene on that day in possession of a knife was the appellant. It is the uncontroverted evidence that the deceased died of stab wounds. The prosecution’s witnesses also told of the appellant arriving on the scene complaining and raging that someone had stolen his drugs, accusing the deceased and beating him with wooden shackles. It was the appellant who arranged for the wounded man to be transported to the hospital. It was also adduced in evidence that despite his defence of alibi, the appellant after having been picked up by the police, summoned an attorney-at-law to the police station where he dictated to that attorney-at-law a statement which put him at the scene of the incident. The prosecution also put in evidence oral and written

statements upon which the jury were required to deliberate. In sum, despite the circumstantial nature of the evidence which implicated the appellant in the death of Arden Puckerin, the jury in making the determination of the witnesses' credibility or reliability, should perforce be left to determine the appellant's guilt or innocence.

[74] In our opinion and in keeping with the principles laid down in the second limb of **Galbraith**, it was indeed prudent of the judge to allow the jury to carry out their function for as was stated by Lord Widgery CJ in **R v Barker (1977) 65 Cr. App. R 287** at 288:

“...even if the judge had taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury...”

[75] In the circumstances, this ground must fail.

### **Ground 3**

[76] The appellant alleged that the verdict was unsafe and unsatisfactory. Citing section 4 of the **Criminal Appeal Act, Cap. 113A (Cap. 113A)** and the test to be applied as set out by Widgery LJ in **R v Cooper [1969] 53 Cr. App. R.32**, Mr. Gordon argued that there was a lurking doubt about the

tenuous and circumstantial nature of the evidence upon which the respondent was relying and as a consequence the appeal should be allowed.

[77] In his written submissions, Mr. Gordon submitted that the verdict should be quashed because of the “lurking doubt” which arises in the following instances:

- “a. The learned trial judge’s failure to properly assess, analyse and evaluate, in particular, the evidence of Ventil Puckerin and Devrone Mondesir for the benefit of the jury.
- b. The circumstantial evidence on which the prosecution relied was not of a sufficiently strong quality as it was not consistent with the reasonable conclusion that the appellant was guilty of causing the death of the deceased and should not have been left for the jury to deliberate on.
- c. The appellant’s trial was unfair and breached **section 18 (1)** of the **Constitution of Barbados**, and;
- d. There was a major weakness in the case of the prosecution when there was a failure to prove that the appellant acted in concert with the co-accused in a joint enterprise”.

[78] In reference to the evidence of the two witnesses, Ventil Puckerin, brother of the deceased and Devrone Mondesir, on whom the prosecution had heavily relied, Mr. Gordon suggested that their evidence was so riddled with inconsistencies and so weakened under cross-examination that it was unsafe to put to the jury. Using for support the case of **Fuller v The State [1995]**

**52 WIR 424**, Mr. Gordon submitted that the judge had failed to properly assist the jury in their analysis of the evidence of these two crucial witnesses who in his estimation had been discredited under cross-examination and which was so manifestly unreliable that no reasonable tribunal properly directed could safely convict on it. He stated that strong circumstantial evidence lends itself to a set of facts that there is an inescapable conclusion to be drawn but in the present case the evidence though circumstantial was highly speculative and did not lead to the inescapable conclusion that it was the appellant who caused the death of the deceased.

[79] Mrs. Babb-Agard, QC rejected the suggestion that the verdict was unsafe and unsatisfactory. She emphasised the adequacy and thoroughness of the judge's summation in which he directed the jury on their functions, including assessing the witnesses and the oral and written statements, the burden and standard of proof and discrepancies and inconsistencies. She considered that there was insufficient ground for interfering with the jury's verdict and so urged the Court to affirm the conviction and sentence.

### **Discussion**

[80] **Section 2 of Cap. 113A** sets out the grounds on which this Court shall allow an appeal: (1) that the verdict is unsafe or unsatisfactory; (2) that there was a wrong decision on a question of law; or (3) that there was a material

irregularity in the course of the trial. This Court is therefore concerned not only with the fairness of the proceedings but with ensuring the safety of the conviction.

[81] It has been said that the expression “unsafe” does not lend itself to precise definition because in some cases the unsafety will be obvious and in others much less obvious but if on consideration of all the facts and circumstances of the case, the court entertains real doubt, then the court will consider the conviction unsafe: per Lord Bingham CJ in **R v Criminal Cases Review Commission exp. Pearson [2001] 1 Cr. App. R. 141 at 146-147.** Thus a conviction can never be safe even where there is no doubt about guilt but the trial process has been “vitiating by serious unfairness or significant legal misdirection”.

[82] The ultimate test of whether a conviction is safe is whether we are content to let the matter stand as it is or whether there is not some lurking doubt in our minds that makes us wonder whether an injustice has been done: **R v Cooper 53 Cr. App. R 82.** This is considered to be a subjective test carried out by the court, “a reaction produced by the general feel of the case as the court experiences it”.

[83] Mr. Gordon’s principal contention on this ground is that this Court must be experiencing that “lurking doubt” on account of the tenuous and unreliable

nature of the evidence of the Crown's main witnesses, Devrone Mondesir and Ventil Puckerin, and should move to quash the conviction. On the contrary, the jury was satisfied as are we that the evidence against the appellant, circumstantial though it may be, did in fact lead to the conclusion that the appellant was responsible for the death of Arden Puckerin.

[84] We cannot accept the contention by Mr. Gordon that the judge failed to analyse for the benefit of the jury the evidence of these two witnesses. Although the jury would have sat through the trial, seen the witnesses for themselves and listened to their evidence, the judge in an almost impeccable summation, led the jury through the salient parts of the evidence, pausing to reflect on the issues raised by those particular bits of evidence. In our opinion the judge followed all the rules with respect to a summing up.

[85] Perusal of the trial record reveals that the judge, being cognisant of the fact that the case was based on circumstantial evidence, explained what this meant and underscored this aspect of the nature of the evidence by returning time and again to where it was revealed and more particularly to the evidence of the two witnesses. He highlighted the need for the jury to understand their duty with respect to credibility of these witnesses and reminded the jury of that duty in ensuring that they gave the benefit of any doubts entertained to the appellant and to resolve all inferences in his favour.

The judge also reminded the jury of their duty with respect to the oral and written statements and identified discrepancies and inconsistencies where these occurred and reiterated how they should deal with them.

[86] Between pages 2603 and 2664, during recapitulation of the Crown's evidence and pages 2808 and 2816 of that of the defence, the judge fully assessed the evidence of the impugned witnesses, all the time reminding the jury of the questions they needed to ask themselves and emphasising that it was they who had to determine the credibility of the witnesses, the acceptance of their evidence and ultimately the guilt or innocence of the appellant. The judge was faithful to his functions and in no way deflected the jury from their task. The jury thus ably directed, were left to reach the conclusion which they did.

[87] In this case, every issue was set before the jury, the jury was properly instructed, no evidence of unfairness was detected and there is no lurking doubt in our minds that an injustice has been done. Consequently, the trial process having not been vitiated by any unfairness or legal misdirection, the conviction must stand and this ground must fail.

#### **Ground 4**

[88] The appellant alleged that the sentence was excessive and outside the guidelines set by the Court of Appeal for the offence of manslaughter.

- [89] Ms. Safiya Moore for the appellant, submitted that the judge failed to take into account **section 37** of the **Penal System Reform Act Cap. 139 (Cap. 139)** when considering the aggravating and mitigating factors of the offence and that he also failed to refer to the prevailing guideline decision of **R v Lorde (Pierre Alexander) [2006] 73 WIR 28 (Pierre Lorde)** . She argued that the judge erred by focussing heavily in his sentencing remarks on a lack of remorse by the appellant especially since the appellant had used the defence of alibi and had denied committing the offence. She also suggested that the court failed to take into account a relevant mitigating factor treating it instead as an aggravating factor, namely, that the appellant made efforts to have the deceased transported for medical care at a private facility.
- [90] Ms. Moore further submitted that the approach by the judge to make no mention in his sentencing remarks of the guideline decision in **Pierre Lorde** was a blatant disregard for the authority of a decision from a superior court and created uncertainty in the sentencing process. She suggested that if the court were sentencing outside those guidelines that it ought to have so indicated and given reasons for so doing. Consequently the sentence was wrong in principle. She referred to the cases of **Curtis Joel Foster, DPP's Reference No. 1 of 2010** and **DPP's Reference No. 1 of 2003, R v Kurt Skeete**.

[91] Ms. Moore contended that the court in effect had “double accounted”. She argued that having started at 20 years, the court again took into account the aggravating factors resulting in an increase of the sentence, and the full 6 years on remand having been discounted, the resulting sentence would have been 14 years. According to Ms. Moore, if the existing mitigating factors relevant to the offence and the offender were then taken into account, it should have resulted in an even lesser sentence.

[92] In her turn, Mrs. Babb-Agard, QC while accepting the arithmetical calculation made by Ms. Moore, mentioned the fact that immediately before the judge gave his sentencing remarks and passed sentence, both defence and prosecution counsel had referred to both the law and the relevant cases and it was evident that the judge had dutifully followed the provisions of **Cap. 139** and had addressed his mind to the twin concepts of the seriousness of the offence and the proportionality of the sentence. She entreated this Court that, given the seriousness of the offence and the fact that the aggravating factors far outweighed the mitigating factors, if this Court finds that there have been errors made, the proviso to **Cap 113A** should be applied.

## Discussion

[93] This Court will only interfere with a sentence if it is wrong in principle or manifestly excessive. We cannot however agree with the argument of Ms. Moore that because the judge did not specifically mention either the guidelines in **Pierre Lorde** or the provisions of **Cap 139** that the sentence is wrong in principle.

[94] The trial record reveals a liberal use of both of these during the mitigation remarks of Mr. Gordon for the appellant and the submissions on sentencing by Mrs. Babb-Agard QC for the respondent. Hence when the judge prefaces his sentencing remarks by noting that he had “listened carefully” to both counsel, it is clear that it was upon the principles contained in the authorities and the provisions of the legislation that he would have based his decision. In our view the absence of specific or explicit reference to the guidelines or **Cap. 139** cannot be fatal to the sentence. However, if fastidiousness is required in these circumstances, the use by the judge of terms such as “aggravating and mitigating factors”, “only a custodial sentence will suffice” and “indifference to the offence” would bear testimony that both the guidelines and **Cap. 139** were present in the consciousness of the judge.

[95] While this Court has in other cases determined that the guidelines in **Pierre Lorde** should be routinely followed in order to ensure that the public

confidence in the administration of justice is maintained, this does not mean that failure to give reasons for not following those guidelines is fatal to the imposition of a justified custodial sentence and that this Court must then act capriciously to quash it. In any event, it must be noted that the circumstances of this case cannot be fitted within any of the four guidelines set out in **Pierre Lorde** and therefore as approved by this Court in that case: “We fully recognise that there may, from time to time, be the odd case whose special or exceptional facts fall outside these guidelines”. It is our view that this is such an instance.

[96] In **Lorenzo Jordan v R Criminal Appeal No. 22 of 2012** this Court acknowledged that sentencing is not an exact science but an exercise of the judge’s judgment taking into consideration relevant legal principles and the circumstances of the offence and the offender. This Court also noted that while the judge must approach the sentencing decision by reference to any relevant guidelines set by a superior court, those guidelines are mere precepts or working principles not meant to be slavishly followed or to be constraints to the uniquely individual exercise which is the province of the sentencing judge. Nothing is expected or allowed to fetter that discretion. Sentencing guidelines merely indicate the normal bracket for a particular

offence leaving the judge to adjust the sentence based on any relevant aggravating and mitigating factors.

[97] The criticism is made that the judge “double accounted” when imposing the sentence. This Court is mindful of the simple arithmetical computation employed by the judge. Having established that the starting point of the sentence as 20 years and having deducted 6 for the time spent on remand, the result should be 14 years. In the process and subsequently, the judge emphasised the factors he was taking into account, and following the case of **Pierre Lorde**, he was justified in imposing 15 years imprisonment.

[98] In **Pierre Lorde** this Court at paras 17 to 21 made a review of previous decisions in manslaughter cases and then at para 22 made the following observation:

“[22] These paragraphs indicate that the bottom of the scale for a grave case of manslaughter without the use of a firearm is 16 years and the top of the scale is 20 years. But then the court must consider all of the circumstances of the offence including the aggravating and mitigating factors in arriving at a sentence that is commensurate with the seriousness of the offence. **In other words, having arrived at the starting point the judge should then take account of the aggravating and mitigating factors which will take the period of custody above or below the starting point**”. (Emphasis added)

[99] Like the judge, this Court considers that causing the death of another human being is an offence of great gravity and for which in the case of

manslaughter if the circumstances direct, the judge can impose a life sentence, albeit in only the most egregious of cases.

[100] We wish to endorse the following statement of **Simmons CJ** in **Romain Bend and Rodney Murray v R Criminal Appeal Nos. 19 and 20 of 2001**:

“[25] Civil society must be protected and sentences by way of general deterrence must be used in appropriate cases to mark down our disapproval of behaviour such as was witnessed in this case. Courts must do all in their power to deter such behaviour”.

[101] We are satisfied that the judge dealt appropriately with all the required and relevant factors in determining the sentence and accorded with the principles of judicial sentencing as contained in **Cap. 139**. It was therefore within his discretion to have imposed the sentence of 15 years imprisonment which we have decided to let stand. This ground is accordingly dismissed.

### **Disposal**

[102] In the circumstances the appeal is hereby dismissed and the sentence confirmed.

**Justice of Appeal**

**Justice of Appeal**

**Justice of Appeal**