IN THE COURT OF APPEAL OF BELIZE, A.D. 2004

CRIMINAL APPEAL NOS. 1 & 2

BETWEEN

JEREMY HARRIS **DEON SLUSHER**	**APPELLANTS**
v.	
THE QUEEN	**RESPONDENT**

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**

Mrs. Antoinette Moore for Jeremy Harris.
Mr. Jeremy Courtenay for Deon Slusher.
Mr. Kirk Anderson, Director of Public Prosecutions, for the Respondent.

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9 - 11June and 15 October 2004.

MOTTLEY P

1. The appellants were convicted on 12 January 2004 of the murder of Phillip Chin and sentenced to death on 26 January 2004. The murder of Phillip Chin occurred on 4 February 2002.

2. Chin, a land surveyor, owned a 38 special revolver which had his initials scratched on its right side. The appellants were aware of this. Earlier in February 2002, they sought to obtain information about Chin from Katherine Fairweather, who at that time was aged 17. They wanted to know whether any other persons resided at his residence with him; his financial status and where he kept his gun; and what times he left home and where he would go. Katherine Fairweather was friendly with Rosita Castellanos, the girl friend of Chin. Rosita Castellanos had a conversation with Harris and Slusher at the house of Fairweather in the presence of Fairweather. During this conversation, Slusher told her that he wanted Chin's gun.

3. Shortly after the appellants sought this information, Castellanos took the gun from Chin's residence and showed it to Fairweather. Castellanos then hid the gun under her mother's car which was not in a working condition and which had been parked in front of her mother's house. Later that day, Chin discovered that his gun was missing and sought to ascertain its

whereabouts. He went to the house of Fairweather. There, he met and questioned Castellanos about the gun.

4. After the questioning had been completed, Chin attempted to leave the house when Harris pushed him and pulled the gun from the waist of his pants. Harris then proceeded to rob Chin of his wallet and money. At that time, Slusher was present. He had ordered Fairweather and Castellanos to leave the kitchen and to go upstairs.

5. Shortly after the two young ladies returned to the kitchen, Chin was lying face down with his hands tied behind his back "with something like a black rope or cord". Harris told Fairweather and Castellanos to go to Chin's house and take all "valuables which could be sold".

6. On returning to Fairweather's house, Castellanos and Fairweather did not see the appellants but the appellants subsequently returned to the house. Slusher went upstairs and while laughing, told Fairweather and Castellanos, that he had shot Chin three times, once in the chest, once in the back and once in the head for surety.

7. Harris and Slusher had taken Chin to his pick-up with his hands still tied behind his back. In his statement to the police, Harris said that he sat in the passenger seat of the vehicle while Slusher drove. On reaching mile 25, Slusher stopped the vehicle and told Chin whose hands were still tied behind his back to get out of the vehicle which he did. After Chin left the vehicle, Harris turned the vehicle to face in the direction of Belize City. While doing this, Harris heard three shots being fired in the direction in which Slusher had taken Chin. Harris then drove the vehicle in that direction. Slusher got into the vehicle and Harris drove back to Belize City.

8. Harris said that Slusher, who threw away a spent shell from the gun, told him that he had "put one of the bullet in the head and because his body was still moving he then put two more shots to Mr. Chin's back part of his body". Harris then asked Slusher to give him the gun so that he could take it back home. Slusher complied with this request and gave the gun to Harris.

9. In his statement to the police, Slusher said that he told Chin that Harris wouldn't hurt him if he would just sit and be calm. He stated that he knew that Harris was going to kill Chin and he

feared for his own life. He alleged that it was Harris who shot Chin.

10. In his statement from the dock, Harris said that on 4 February 2002, he was at home with his mother as it was her birthday. In short, he raised the defence of alibi.

11. In his defence, Slusher also raised the defence of alibi. He said that on 4 February he could not recall seeing either Fairweather or Castellanos.

12. On behalf of both appellants a number of grounds of appeal were filed and argued. The Court however called upon the Director to respond to the first ground filed by Harris which dealt with the directions given by the judge in relation to the scope and extent of the joint enterprise. In relation to the second appellant, Slusher, we required the Director to address us on the ground of appeal relating to whether Fairweather and Castellanos should be treated as accomplices. We also required the Director to address the Court on the ground of appeal by both appellants which related to the sentence of death.

13. As his first ground of appeal Harris alleged that the "judge erred in law by failing to adequately provide the jury with instructions

on the scope and extent of the joint enterprise…and the implication of the scope and extent of the joint enterprise". Counsel for Harris complained that the judge failed to tell the jury that, if one of the participants in a joint enterprise goes beyond the scope of the joint enterprise and acts with the intention to kill and does in fact kill the deceased, he alone would be guilty of murder and the other participant may be entitled to a verdict of manslaughter.

14. In his summation, the judge dealt with this issue in the following way:

> *"Where two or more Accused persons are charged jointly with an offence, as in this case, it is necessary for the Prosecution, in order to secure a conviction of each Accused person, to prove that each was acting in concert with the other, and accordingly, it is open to you that jury to convict each Accused person of independently committing this crime of murder. However, whenever two or more Accused persons are charged in the same court in an indictment, as in this case, with an offence, and the evidence clearly demonstrates that one helped the other to commit the crime, it is sufficient to support a conviction against each of them, to prove that either he himself, one of them himself did a physical act which is an essential element to the crime, or that he helped the other to do such an act and in doing the act or in helping the other Accused to do the act, he himself has the necessary criminal intent and this Accused person then would have or be deemed to have the necessary criminal intent if in this case, one person had the gun, as the evidence shows, and the other knew of it and contemplated and foresaw that the gun was to be used by the other person in pursuance of the joint plan or joint*

enterprise with an intention to kill, in this case, Phillip Chin.

Now, I have given you this direction on the separate treatment of evidence in respect to the two Accused persons, and this is so, Mr. Foreman and Members of the Jury, because the Prosecution's case is that both Accused persons, Jeremy Harris and Deon Slusher murdered Phillip Chin, and the Prosecution naturally based their case on joint enterprise or joint plan or joint responsibility. And these terms basically means one in the same thing, that is, that both Jeremy Harris and Deon Slusher agreed with a common purpose or common intention to kill Phillip Chin. So, as I have just said, the Prosecution's case is that the two Accused persons, Jeremy Harris and Deon Slusher committed this crime of murder, together, and the law says that where a criminal offence is committed by two or more persons each of them may play a different part. But if they are in it together, as part of the joint plan or agreement to commit it, they are each guilty of the crime. And the words 'plan, agreement or enterprise' do not mean that there has to be any formality about it. You don't have to get into a room, as you will get into the Jury room in the next few minutes and decide whether The Accused persons are guilty or not, have disagreements about the evidence, and then have agreements subsequently and finally come to a conclusion. No. That is not how the joint enterprise or the joint plan operates. An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod and a wink, or a knowing look. Indeed, an agreement can be inferred from the behavior of the parties to the crime. The essence of joint responsibility for a criminal offence is that each Accused shared the intention to commit the offence or crime, and took some part in committing it with the other, however great or however small, so as to achieve that aim. Your approach to the case should therefore be as follows: If looking at the case of either of the Accused persons you are sure that with the intention I have told you about that is, intention to kill, one of them committed the offence on his own and that or he took some part in committing it with the other, that person is guilty, and even if unusual

consequences arose from the execution of the plan, each is responsible for the consequences of that unauthorized act. However, if one of The Accused persons went beyond that which has been agreed, expressly or impliedly, as part of the joint plan, the other is not responsible for the consequences of that unauthorized act. Therefore, before you can convict either of The Accused persons, you must be sure that there was an unlawful plan and that Jeremy Harris agreed to Deon Slusher acting as he did, or foresaw that Slusher might do what he did in carrying out the plan that is, the killing of Phillip Chin and still joining in it, sharing the other's intention to kill Phillip Chin, or contemplated or realized that the other might use the gun, as he did intending to kill Phillip Chin, and indeed, as the evidence shows to kill him if you accept the evidence for the Prosecution."

15. Counsel submitted that the judge had a duty to direct the jury that it was necessary for them to determine the nature and extent of the joint enterprise before deciding whether the act which caused the death was outside the scope of the joint venture. Counsel relied upon judgment of this Court in **Sho and Cal Criminal Appeal No. 19 & 20 of 2000.** In that appeal, the appellants had been charged jointly with the murder of a young woman. Cal, stated that on the date and at the killing he was at his father-in-law's house watching television. Sho admitted that he had a knife which Cal used to injury the deceased. Sho blamed Cal for the killing. While Cal placed himself at the scene at the time of the killing, he nonetheless placed the blame for

the killing on Sho. Both Cal and Sho had stated that they had set out to rob the deceased.

16. After reviewing a number of authorities including **Aguilar & Martinez v. The Queen, Criminal Appeals Nos. 5 and 6 of 1992, Powell and English (1997) 3 WLR 959 and Charles Carter and Carter v. The State (1999) 54 WIR 455** and **Bariltas & Rivera v. The Queen, Criminal Appeals No. 3 & 4 of 1990**, this Court concluded that the common thread between these decisions is that the jury must be directed to determine the nature and scope of the joint enterprise. The Court held that:

> *"The jury should have been invited to determine if the enterprise was simply to rob, why did the appellants not just take the knapsack at the roadside and run away. Why did they take her into the bushed at knife point? After the woman has been killed why did appellant Cal go to the appellant Sho's house later for his share of the money? Those are questions which the trial judge should have left for the determination of the jury in order for them to determine the scope of the joint enterprise upon which appellant Cal had entered and what was his intention at the time when the deceased was killed."*

17. In this case the judge did not invite the jury to determine the nature and extent of the joint venture nor did he invite the jury to determine if the plan was only to rob Chin why was his hands handcuffed behind him and why was he taken from the house after the robbery was completed. In addition, the judge

did not invite the jury to determine why he was taken for a drive in the back seat of the car while his hands were handcuffed behind his back? Finally, after Chin had been shot by Slusher, why did Harris take the gun from Slusher and take it home to his house?

18. The learned Director conceded that the judge did not give the direction in the classical way in the sense that he did not tell the jury that they would have to determine what was the scope of the joint enterprise but he nevertheless did tell them that they had to determine whether or not there was a plan to kill and whether Harris knew that Slusher had a gun and that he knew or foresaw that Slusher might use the weapon with the intention to kill Chin and nevertheless still lent his assistance to the plan.

19. In this submission the Director was clearly relying on the decision of **Charles, Carter and Carter v. The State (1999) 54 WIR. 457** where **Lord Slynn of Hadley** in delivering the opinion of the Board had this to say:

> *"It seems to their lordships that what is missing from the summing up is a clear direction that it is not enough for Curtis Charles and Leroy Carter to be convicted as secondary parties that they knew that Steve Carter would*

> *or might use the weapon or that it was foreseeable that he might use a weapon. What they should have been directed is that they jury must be satisfied that Curtis Charles and Leroy Carter knew or foresaw that Steve Carter would or might use the weapon with the intention of killing.....and that with that knowledge or foresight they continued to take part in the joint enterprise."*

20. The direction set out in paragraph 15 is also open to criticism on the ground that the trial judge did not initially correctly direct the jury on what evidence was required before they could convict Harris as the secondary party. The judge told the jury:

> *"...if in this case, one person has the gun, as the evidence shows, and the other knew of it and contemplated and foresaw that the gun was to be used by the other person in pursuance of the joint plan or joint enterprise with an intention to kill, in this case, Philip Chin."*

This direction clearly fell short of what was required as the judge did not tell the jury that in order to find Harris guilty they had to go on and to find that with knowledge that Slusher was armed with a gun and that he might use the gun to kill Chin, Harris continued to take part in the plan.

However, the judge subsequently gave the jury the correct direction in relation to what was required in order to find Harris guilty as the secondary party.

He told them:

> *"Therefore, before you can convict either of The Accused persons, you must be sure that there was an unlawful plan and that Jeremy Harris agreed to Deon Slusher acting as he did, or foresaw that Slusher might do what he did in carrying out the plan that is, the killing of Phillip Chin and still joining in it, sharing the other's intention to kill Phillip Chin, or contemplated or realized that the other might use the gun, as he did intending to kill Phillip Chin, and indeed, as the evidence shows to kill him if you accept the evidence for the Prosecution."*

While it may be said that the direction was less than clear, the summation must be looked at as a whole. In our view, the jury would have been left in no doubt that in order to convict Harris as the secondary party they had to be satisfied beyond a reasonable doubt that Harris knew that Slusher had the gun and he knew or foresaw that Slusher might shoot Chin and with this knowledge and foresight still joined in the plan.

21. The evidence showed that after Harris and Slusher had robbed Chin they took him from the house with his hands still tied behind his back and placed in the rear seat of his car. Slusher then drove the car to Mile 25 on the Northern Highway. Harris who was a passenger in the car, knew and was aware that Slusher was armed with Chin's gun. Slusher stopped the car and while still armed with Chin's gun, took Chin whose hands

were still bound behind his back, away from the car. After Slusher left the vehicle, without any request from him, Harris turned the vehicle to face in the direction of Belize City. Having, having heard three shots, and being subsequently told by Slusher that he had shot Chin, in a manner which left no doubt that Slusher intended to kill Chin, Harris requested and took the gun from Chin. It was open to the jury to conclude, as they must have done, that in the circumstances Harris knew or foresaw that Slusher would or might use the gun with the intention of killing Chin and nonetheless continued to take part in the plan.

22. In respect to Slusher, we requested the Director to address the ground in which counsel complained that the trial judge had erred in directing the jury that the prosecution witnesses, Fairweather and Castellanos, were not accomplices. Counsel for Slusher argued that the judge ought to have given the proper directions in relation to the effect of the evidence of accomplices. We also heard him on the issue where there were witnesses "with an interest to serve".

23. In dealing with the evidence of Fairweather and Castellanos, the judge told the jury:

> *"And less* (sic) *I forget, Mr. Foreman and Members of the Jury, let me tell you which I intended to tell you in respect to the evidence of Rosita Castellanos and Katherine Fairweather. Though Katherine Fairweather and Rosita Castellanos are not accomplices to the murder itself because they were not at the scene, there was no talking, there was no nodding look on their part to kill Phillip Chin. In fact, their evidence is that when they went to search Phillip Chin's house on the request of The Accused person that Phillip Chin was taken up the road and then shot. So the evidence does not disclose that they were part and parcel to the crime, therefore, they are not accomplices. But, Members of the Jury I have to tell you, and I must tell you that because Rosita Castellanos and Katherine Fairweather signed an agreement to testified against these two Accused persons in consideration of the charge of murder being dropped against them, I will have to direct you that you have to be cautious in how you deal or how you take into consideration the evidence of Rosita Castellanos and Katherine Fairweather because in their circumstances, in their signing the agreement to get off from the murder charge, they have an interest of their own to serve. And a person who had an interest of his own to serve, as in this case, cannot be looked at in the same way as a person day an expert witness who has no axe to grind. Clearly in this case, Rosita Castellanos and Katherine Fairweather had an axe to grind. In return for their testimony against these two Accused persons, the charge of murder was dropped against them. So it is for you to be cautious and careful when relying on their evidence."*

24. It is not in dispute that Fairweather and Castellanos had in fact been charged with the murder of Chin. The evidence, counsel for Slusher submitted, clearly indicated that Fairweather and Castellanos stole the gun from Phillip Chin. This is the gun that Slusher later used to kill Chin. The witnesses had stolen and

had removed various articles from the home of the deceased, Chin. The evidence, counsel further submitted, showed that Fairweather and Castellanos had made an attempt to lure the deceased to Fairweather's home so that he could be robbed by the appellants.

25. The Court's attention was drawn to the Privy Council case, from Belize **Privy Council Appeal No. 56 of 1998 Dean Tillett v. The Queen**. In his submission on this issue of whether the witnesses Fairweather and Castellanos were accomplices, the Director relied heavily on Tillett's case. He submitted that there was no evidence that either of them was an accomplice to murder. In Tillett's case it was not conceded by the Crown or admitted by the witness Sanchez, that he was an accomplice. Lord Hobhouse of Woodborough in rendering the opinion of the Board had this to say:

> *"In the present context "accomplice" means a person who was an accomplice of the defendant in the commission of the crime with which the defendant is charged. The relevant crime is the murder of Suresh Gidwani (Davies v. Director of Public Prosecutions [1954] A.C. 378, Reg. v. Farid (1945) 30 Cr. App. R. 168). If there is evidence that the witness in question was an accomplice the question whether he was or not must be left by the judge to the jury (Davies supra). The judge did not leave to the jury the question whether Billy Sanchez was an accomplice to the murder of Suresh Gidwani. He said to them:-*

"I find that there is no evidence before this Court that Bill Sanchez was an accomplice to this charge or murder....."

Although in passages which preceded and succeeded this direction, the judge used language consistent with his leaving the accomplice question to the jury, the direction was on any view seriously defective if there was evidence upon which the jury could have concluded that he was an accomplice to the murder.

The judge should have warned the jury that they should exercise caution before accepting his evidence (Reg. v. Beck (1981) 74 Cr. App. R. 221, Reg. v. Witts [1991] Crim. L.R. 562). He gave them no such warnings".

In our view, the judge was correct in not having treated Fairweather and Castellanos as accomplices as there was no evidence that they were accomplices of the appellants in the commission of murder of Phillip Chin.

26. Section 92(3) of the Evidence Act Cap. 95 provided as follows:

92(3) "Where at a trial on indictment –

(a) ...

(b) an alleged accomplice of the accused gives evidence for the prosecution,

the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution."

27. As stated earlier, both Fairweather and Castellanos were charged with the murder of Chin. Pursuant to an Agreement signed with prosecution the charges of murder were withdrawn in consideration of these witnesses giving evidence on behalf of the Prosecution. Clearly these witnesses had their own interest to serve in this matter and this would require the judge to give the caution as required by section 93(3)(b) of the Evidence Act.

28. This Court accepts that the direction which the judge gave to the jury and to which we earlier adverted was correct. Our attention was also drawn to **Chan Wai-Keung v. Reginan [1995] 2Cr. App. R. 194,** where it was held by the Privy Council:

> *" ....that the courts had recognized that circumstances might justify the calling of a witness who stood to gain by giving false evidence, but that what was required was that the potential fallibility of that witness's evidence should be put fairly before the jury."*

29. The judge had, in our view, properly drawn it to the attention of the jury that Fairweather and Castellanos had signed an agreement with the prosecution as a result of which "the murder charges against them had been withdrawn" in consideration of both of them giving evidence for the prosecution. He correctly warned the jury that they had to approach the evidence of these two witnesses with caution and

care because, by signing the agreement, they had their own interest to serve. He reminded the jury that these two witnesses "had an axe to grind".

30. The prosecution's case was that Slusher was the person who actually did the shooting and Harris was the secondary party. As stated earlier, some criticism could be made of the summation in relation to Harris on the ground that it was less than clear. It is necessary nonetheless to view the summation as a whole. Once this is done we are satisfied that it was open to jury, on the state of the evidence to conclude that Harris was guilty as the secondary party. In relation to Slusher the jury must have rejected, as it must have done in relation to Harris, the evidence of alibi and must have accepted the evidence of Fairweather and Castellanos that Slusher was the person who actually shot Chin.

SENTENCE

31. The appellant Harris alleged that the trial judge erred in imposing sentence of death on him. Slusher sought and obtained leave to file a ground relating to the sentence of death which had

been imposed on him. He alleged that the judge had erred in not allowing more time for the preparation of a full and complete report by the social worker, Audre Rivero, in order that he might have had a proper foundation to decide whether any special extenuating circumstances which existed could require him not to impose the death penalty.

32. After the appellants had been convicted on 12 January 2004, the judge indicated to counsel that he understood that they wanted time to prepare their mitigation. Counsel intimated that they required at least a week. The sentence hearing was fixed for 17 January 2004 but did not in fact take place until 23 January 2004.

33. Counsel for Harris, called Mr. Maskall, a pastor of Zoe Ministries World Outreach Centre of Belize City. After his evidence had been completed, counsel intimated to the judge that she intended to call a social officer by the name of Audre Rivero who had conducted a social inquiry and had produced a report. This witness was not present at the court. It appears that he was before the Magistrate's court where he was engaged in a sentencing of a juvenile.

34. At the outset of his evidence, it was clear that Mr. Rivero did not have sufficient time to carry out adequate investigations. The original date fixed for the sentencing hearing was 19 January 2004. The witness said that on 16 January 2004 he had been asked by his Director, presumably of the Committee Rehabilitation Department, to conduct an inquiry into the two appellants. In response to a question from counsel for Harris, Mr. Rivero conceded that he "was under a bit of time pressure to produce" his report. This reply ought to have alerted the judge that the witness had not carried out any adequate investigation in order to provide the Court with a report on which it could base the decision whether any special extenuating circumstances existed and whether the death sentence should be imposed on the appellants. Indeed, at a later stage, he made reference to the fact of his brief contact with Harris.

35. The witness informed the Court that Harris had struck him as a person who definitely could be reformed and be very productive in society. He went on to express the opinion that at the initial interview, Harris did not strike him "to be person of a hideous character, a person "capable of doing anything as heinous as he was convicted of". This statement seemed to have upset the

judge who inquired of the witness if he did think that Harris was capable of murdering. The witness then sought to explain what he meant by his earlier statement but was cut short by the judge who said:

> *"The Court: I know you said that then you begun to draw certain conclusion, and that you're letting me your observations of him and from the way he spoke to you, you not of the view that he would commit any offence like murder. Is that what you said?*
>
> *Witness: Beirgas.....I mean, your Lordship, he have (sic) raised, in a Christian and the values that he have (sic) shown and...*
>
> *The Court: Yeah but didn't Hitler was raised in a Christian house also?*
>
> *Ms. Moore: Well, the comparison is...*
>
> *Witness: Well, yes, Sir we could say that. But I haven't had the opportunity, your Lordship, to me with Ms. Budna.....*
>
> *The Court: Aren't almost everybody in Belize who commit crimes raise in a Christian home?*
>
> *Witness: You could say that, sir, but for Jeremy Harris, this what of have seem (sic) in the young man and am here, your Lordship to say exactly how I've seen him sir.*
>
> *The Court: Yes that's not capable of committing murder?*
>
> *Witness: No, am not saying that he's not capable.*
>
> *The Court: I think you said that.*
>
> *Witness: Yes, your Lordship, but then.....*

The Court: You see, if you begin to overdo it then I will start to have a negative impression on your view. You see? You understand me?

Witness: Yes, your Lordship. Obliged sir.

The Court: Because you as a professional person have to be objective rather than to take sides. I mean, I expect you to guide me in that manner, rather than you coming to some conclusion and want me to accept your conclusion because its obvious that's what you're trying to so.

Witness: Obliged."

36. Reference to Hitler by a judge, in a criminal trial, and particularly at a stage when the judge is required to make an important decision as to whether the appellants are to be sentenced to death, is otiose and uncalled for and should not happen. It could have the effect on the mind of the appellants that the judge was attempting to compare them to Hitler. It is unfortunate that the judge made the remark which has no place in a criminal trial.

37. The judge appeared, on his own admission, to be forming an adverse impression of the evidence of the witness who had not even completed his evidence in chief. Without any evidential basis for so doing, the judge accused the witness of taking sides. This comment was made by the judge at a time when he did not have all the evidence of the witness Rivero, before him.

Indeed, he also expressed the view that the witness was forming conclusions and trying to get the judge to accept those conclusions.

38. In cross examination by the Director, Mr. Rivero admitted that he had spent a total of three hours with Harris. The Director then sought to find out from the witness whether he considered that "by virtue of a three-hour valuation" he could tell whether or not Harris is a person capable of changing his life. Mr. Rivero conceded that probably, while he could not "hit the nail on the head, he could" draw some sort of conclusion on the genuineness of the person. The witness again made reference to the pressure of time.

39. It is significant that at this stage the judge commented on the constant reference by Mr. Rivero that he was under time constraint to conduct the inquiry and produce a report. The judge said:

> *"But that no excuse, witness, due to pressure of time. That is a phrase that is.....just to get around ones inefficiency, am not saying that you are but you can't be saying because of pressure of time. I mean, this a very serious matter, as you would recognize."*

The judge again appeared at a very early stage to be forming an adverse impression on the witness by suggesting that the expression "due to pressure of time" was a cover for incompetence, even though the judge said that he was not accusing the witness of incompetence. However, it is not a conclusion that any reasonable person could have reached in the circumstances.

40. While the judge properly recognized that the sentencing phase was a serious matter, he failed to appreciate that what the witness was in fact complaining about was that he did not have sufficient time in which to conduct the investigation and to write his report. The witness went on to tell the judge that it was not the norm that a report, relating to a serious crime, is produced in such a short space of time.

41. The witness finally agreed with the suggestion from the Director that the recommendation contained in his report "must be taken in the context" that he did not have "sufficient time and opportunity to prepare the report in the typically thorough way that you would ordinarily wish to do"....This question clearly demonstrated that the Director appreciated that there was

insufficient time in which to investigate, conduct and prepare a proper report.

42. In response to a question from the counsel for Slusher, as to the length of time it would take to prepare a report on the two appellants, Mr. Rivero said that a month would be the minimum time it would take to produce a comprehensive report. The witness indicated that it would take that time to interview all the relevant parties and to check the information and conduct background checks and information. He again repeated that time constraint prevented him from conducting an adequate inquiry on which his report would be based.

43. In his sentencing remarks, the judge, in dealing with the reports of Mr. Rivero, said:

> *"I must say that I found the social worker's report to be of very little assistance in this regard, and I find the testimony of Mr. Rivero even less helpful. The report did not appear to me to have been adequately prepared and lack the balance expected of a professional person. In my view, it was not objective to say the least."*

In the last finding the judge repeated the remark he made at the very beginning of the evidence of Mr. Rivero.

44. Section 106(1) of the Criminal Code Cap. 101 provides as follows:

i) Every person commits murder shall suffer death:

Provided that in the case of Class B murder (but not in the case of Class A murder) the court may, where there are special extenuating circumstances which shall be recorded in writing, and after taking into consideration any recommendations or plea for mercy which the jury hearing the case may wish to make in that behalf, refrain from imposing a death sentence and in lieu there of shall sentence the convicted person to imprisonment for life.

45. By removing the mandatory imposition of the death penalty, the legislature clearly intended that the sentencing phase should not result in an automatic imposition of the death penalty. If the sentencing process were treated as being a mere formality then the provisions of the amended subsection would be meaningless. What is intended in this aspect of the trial is that the accused person should have a full and fair opportunity to put before the Court all the relevant information so that the judge could decide whether there are any special extenuating circumstances which would cause the Court to refrain from imposing the death sentence.

46. We do not consider that it is appropriate to lay down what would amount to special extenuating circumstances as each case must depend on its own peculiar circumstances.

However, regard may be had to what was said by Byron CJ in **Newton Spenser v. The Queen, Criminal Appeal No. 20 of 1998 of the Court of Appeal St. Vincent and the Grenadines**. In dealing with the question of the appropriate form of punishment of a person who had been convicted of murder the Chief Justice stated:

> *"The mitigating factors may relate to the gravity of the offence or the degree of culpability of the particular offender and may include such factors as the offender's character and record, subjective factors that might have motivate his or her conduct; the design and manner of the execution of the particular offence and the possibility of reform and social re-adaptation of the offender".*

47. Some of the factors would have been disclosed during the course of the trial. Others could only come to the attention of the judge by way of social and psychiatric reports. It is by means of these reports that the judge may become aware of the peculiar circumstances of the person who has been convicted.

48. In our view, it is absolutely essential that the trial judge should ensure that he has all the circumstances before him which might or could amount to special extenuating circumstances. He has a duty to ensure that the sentence phase is conducted in a manner that is fair to the appellant. To this end, he is under a duty to ensure that he has that material before him

before he makes a decision and reasonable time allowed to ensure that the appropriate material is produced.

49. It was clear from the outset of the evidence of Mr. Rivero that he did not have sufficient time to prepare the social welfare report. It is at this stage that the judge ought to have intervened to postpone the sentencing hearing, even though no request was made by counsel for either of the appellants. The judge was required to ascertain whether any special extenuating circumstances existed which would require him to refrain from imposing the death penalty. Social and psychiatric reports might have afforded the judge the opportunity of finding out what special facts, if any, existed in relation to each appellant which could or might be considered by him as capable of amounting to special extenuating circumstances which might have assisted him in deciding whether or not to impose the death penalty.

50. Unfortunately, the judge failed at an early stage to appreciate that Mr. Rivero did not have adequate time to produce a proper report. He certainly appreciated this when he came to consider the sentence. He found that Mr. Rivero's report and evidence was of little assistance. Indeed, he concluded that the report

appeared to him to have been inadequately prepared. Had the judge appreciated this at the outset of the testimony of Mr. Rivero, and in our view he ought to have done so, he should have adjourned the sentencing phase to give Mr. Rivero adequate time to prepare the report on the appellants. Had he done so, he would have had before him all the relevant material. His failure to do so meant that it cannot be said that all the relevant material was before him which could or might show whether there were any special extenuating circumstances which would require him to refrain from imposing the death sentence. This failure to afford the social worker adequate time to prepare and present his report has the effect of imposing the death as a mandatory sentence. This was inconsistent with the amended law and amounted to denying the appellant a fair hearing in the sentencing phase.

51. Before leaving this matter, this Court wishes to express its disapproval of what had taken place on 18 December 2003. On that day the record indicates that one of the jurors would be unable to attend court until 22 December 2003. The judge then decided that the case would be adjourned until 29 December 2003 because counsel would not have been available until that date. When the hearing resumed on 29 December, the defence

closed its case. On the following date counsel for the prosecution and defence complete their address to the jury. The matter was then adjourned until 12 January 2004 when the trial judge commenced and completed his summation. Such interval of time between the completion of the evidence and deliberation of the jury could possibly have a prejudicial effect on a trial. This Court hopes that in the future a judge at trial would not adjourn the hearing at the end of the evidence so that there is such a lapse of time between the presentation of evidence and the summation by the judge. Nothing turned on it in the instant case but the Court recognizes that such an adjournment could in certain circumstances, have an adverse effect on a trial to the extent that it might be said that the defendant did not receive a fair trial. We hope that it does not occur again and if it is a common practice it should be immediately discontinued.

It was for these reasons that we dismissed the appeal against conviction and varied the sentence to life imprisonment.

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MOTTLEY, P.

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CAREY, J.A.