IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CRIMINAL APPEALS NOS. 20, 22 and 23 of 2004

BETWEEN

FRANCIS EILEY **ERNEST SAVERY** **LENTON POLONIO**	**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**

Mr. B. Simeon Sampson S.C. for Francis Eiley and Ernest Savery.
Mr. Hubert Elrington for Lenton Polonio.
Mr. Kirk Anderson, Director of Public Prosecution, for the Crown.

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28 February & 18 October 2005.

MOTTLEY P

THE PROSECUTION CASE

1. In the early morning of 2 November, 2002, Justo Jairo Perez was severely beaten at San Pedro in Ambergis Caye, as a result of

which he died. On August 13, 2004, Francis Eiley, Ernest Savery and Lenton Polonio were all convicted of his murder and, on 27 September, 2004, were sentenced to imprisonment for life.

2. The prosecution relied entirely on the evidence of Frank Vasquez who, at an early stage of the investigation, had also been charged with the murder of Perez. This charge was subsequently withdrawn consequent upon Vasquez reaching an agreement with the Director of Public Prosecution to become a witness for the prosecution.

3. Shortly before 2 November, 2002, Vasquez, along with his uncle Frederick Dougal, left Belize City and went to San Pedro Ambergis Caye. While in San Pedro, he met with Eiley, Savery and Polonio. On the night of 31 October, around 9:00 p.m. the three appellants, along with Vasquez, were in the room of one 'Mei Mei'. While there, Savery told Eiley "to go and get the stuff". Eiley left and later returned with a knapsack which he placed on the bed. Eiley told Savery that the "bag was too small as the crowbars were showing". The crowbars along with a silver tape and shoe lace were placed in another black bag.

4. In the earlier hours of Saturday 2 November, 2002, Vasquez again saw the three appellants. On this occasion, he had spoken to Savery concerning money he had given him. Savery, Eiley and Polonio, accompanied by Vasquez, subsequently left Mei Mei's

room and went to a Pre-school where he saw a person he described as “someone like a white person”. This person whom he had seen earlier at Mei Mei’s room, took a bunch of keys from his pocket and opened a grill gate which led to a yard where he saw “a green, white and yellow two storey building”.

5. The three appellants, together with “a dark guy”, “the white person” and Vasquez entered the yard and went to the back. At this point, Vasquez was told to remain downstairs. After about five minutes, he heard a noise which caused him to go upstairs of the building. As he was going up the stairs, on reaching the third step from the top, he saw “the white person” in the corner of the verandah. He heard a noise like someone shouting as if he was in pain.

6. On looking to his left, Vasquez saw Savery and Eiley kicking someone who was on the ground. This person was the deceased Perez. He also saw Savery and Eiley, each armed with a crowbar, using them to beat Perez about his head. Eiley placed duct tape over Perez’s mouth. Vasquez observed that blood was spattering about. He saw Polonio kicking the person on the ground in his stomach while the “dark skin guy” was using a shoe lace to bind his feet together. He indicated that “the dark skin guy” and Polonio then turned over Perez who was still on the ground and tied his hands to his feet. He claimed he observed all of this for about five

minutes with the aid of direct lighting from a nearby street light. Perez was lying on the ground in a pool of blood. Vasquez said he left in shock because he had never seen so much blood. When he left upstairs, Eiley and Savery were still hitting Perez who was still lying on the ground, about his head.

7. As Vasquez was about to walk down the stairs, Savery called him back and handed him a jacket which was soaked with blood. When he became conscious that the jacket was soaked with blood, he dropped it on the step. He stated that blood got on his clothes when he was upstairs close to where they were beating Perez about his head.

8. On returning to the yard, Vasquez was held by Dimas Guerrero, the head of a security firm, who placed handcuffs on him. At that time, Vasquez was armed with a kitchen knife, which he said, had been given to him by Polonio. He was subsequently handed over to the police.

9. Dr. Mario Estradabran, who conducted the post mortem, said that he found nine injuries on different parts of the body of the deceased. These were inflicted by a blunt instrument. Death was due to shock consequent upon blunt wounds to the head.

EVIDENCE OF VASQUEZ

10. It is necessary to examine the evidence of Vasquez. He was the sole witness called by the prosecution who gave evidence surrounding the circumstances which led to the death of Perez. It has to be borne in mind that Vasquez was the only person who was held at the scene of the murder.

11. Dimas Guerrero said he went to the house of his mother-in-law Elvia Staines where Perez was living. On arrival at the premises, he jumped over a fence at the back of the yard. He then saw Vasquez who was armed with a knife standing under the step. He disarmed Vasquez and then placed handcuffs on him. He later took him to the San Pedro Police Station. At that time, when he was held, he had fresh blood on his pants.

12. Vasquez stated that, after he had gone upstairs and had observed what was taking place, he returned downstairs in the yard. Later Savery called him and gave him his grey and blue jacket. After he took the jacket, he realized that it was soaked with blood. He immediately dropped the jacket. This was his explanation as to the presence of blood on his pants and his hands. As regards the blood on his shirt, he said that when the deceased was being struck with the crowbars, he was in close proximity. This explanation was

left to the jury for their consideration in deciding whether he was speaking the truth.

13. Vasquez, who volunteered, was taken by a Police Sergeant to the docks to see if he could point out the appellants and Marcel Bermudez. He then pointed out the appellants and Bermudez to the police officers who then arrested them. However he did not identify them as being parties to the incident. He was placed in the cell until he was taken before a justice of peace and gave a statement to the police. He did not implicate the appellants in this statement. Along with the appellants, he was charged with the murder of Perez.

14. About four days after he had been charged, Vasquez had a meeting with the Director of Public Prosecution. The purpose of this meeting was to discuss the possibility of his giving evidence for the prosecution. The agreement which he signed specified that, in consideration of Vasquez providing completely truthful testimony, the Director would guarantee immunity from prosecution on the charge of murder in respect of the death of Perez. The rule of practice which has developed in relation to an accomplice against whom proceedings have not been concluded, is, that if, the prosecution wishes to call him as a witness for the prosecution, then, before doing so, they must undertake to discontinue

proceedings against him. See **R v Pipe (1967) 51 Cr. App. R. 17**. On 12 November, 2002, he gave a statement to the police in which he implicated the appellants. This statement contradicted his earlier statement.

DEFENCE

15. Eiley, in his evidence, denied the allegations made against him. He said he was not present and took no part in the commission of the offence. He also said that he did not know Vasquez. He did not leave his house between 10:00 p.m. and 5:00 a.m. on the night of the incident. Savery gave evidence in which he also said he was not present at the commission of the offence. He denied taking any part in the murder of Perez. He agreed with the evidence of Eiley, that they both slept at Eiley's house. Polonio also denied being involved in the commission of the offence. He stated that he had spent the night at a hotel with a lady who was a visitor to Belize. All three appellants thus raised alibi as their defence.

APPEALS OF EILEY and SAVERY

16. In ground one, Eiley and Savery alleged that the judge failed to assist the jury in determining the exact scope of the joint enterprise having special regard to the fact that there were multiple alleged assailants inflicting simultaneously fatal injuries. He also

complained that, even after the addition of the words “and others” to the appellants’ names on the Indictment, the trial judge omitted to reflect fairly and adequately on the likely impact of the change on the scope of the joint enterprise with the larger participation caused by the amendment. He further alleged that the criminal participation of each appellant should have been separately isolated by the judge for the assistance of the jury.

17. Counsel specifically complained about the summation to the jury where the Judge told the jury:

> “Now, in respect to the elements, these elements which I have just indicated to you, I have to tell you, Madam forelady, and members of the jury, or direct you that you are to consider the case against these accused persons in this matter. I direct you to consider the case against, and for each accused persons separately. You see? You can’t lump them together you have to look at the evidence against each one of them. If you find, naturally, the evidence as it came out, covers the three of them, then that’s a matter for you, but you must look at the evidence, and say, oh, yes, this evidence applies to first accused, second accused, three accused. Okay? And I say this to you because you may find as judges of the facts that the evidence is different in

respect to each of accused persons, and, therefore, your verdicts may not be the same. Okay? If, for instance, you were to find one guilty on the evidence, unless the evidence implicates the others, and you are not sure of their guilt, you cannot convict the others. Okay? You cannot come to conclusion that because you think one is guilty, the others are necessarily guilty. No. The evidence must relate to each and everyone of the three persons accused."

18. Later the judge told the jury:

"Your approach to this case should be as follows: If looking at the case of either of the three accused persons, you are sure that with the intention I have just mentioned, either of the three accused persons committed the offence of murder on his own, or that each took come part in committing it, with the other two persons; and even if unusual consequence arose from the execution of the plan, each person is responsible for the consequences. However, if one of them went beyond what had been agreed, expressly or impliedly, as part of the joint plan, the others are not responsible for the consequences of the unauthorized act. Before you can convict any of these three accused persons, you must be sure that there was an unlawful joint plan to murder Jario

Justo Perez by the three accused persons. If you find on the evidence that anyone of the accused persons agreed to the act, or acts done to Perez, but did not do the actual killing, then you must find that at the time of the doing of the act, or acts, namely, the hitting of Perez to death, that person knew that the others knew that the others were going to kill Justo Jario Perez. The law used to be a little different, should have foreseen, but now, the law, I would say is more a little bit for the benefit of the accused, and it says, the person must have known that the other person was going to be killed, and still joined in it."

19. Counsel submitted that the trial judge ought to have directed the jury in accordance with what was said by this Court in **Sho & Cal v. R, Criminal Appeal Nos. 19 and 20 of 2000**. This Court said:

> "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 bush 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."

20. We do not consider that such a direction was required in this case. The evidence showed that Eiley and Savery were beating the deceased about his head with crowbars. At the same time Polonio was also kicking the deceased about his body. The other person, the "dark skin guy", was tying the deceased legs together. Polonio and the "dark skin guy" turned Perez over and tied his hands to his feet. The judge told the jury that the prosecution had built their case on joint enterprise. He explained that the prosecution had to prove that each of the accused were acting together with a common purpose to commit the crime of murder. He went on to point out that it is possible that each person may play a different role. He also explained what was meant by joint enterprise.

21. Eiley and Savery armed themselves with crowbars which they then use to assault Perez, inflicting injuries on him which caused his death. Hitting the deceased about his head with the crowbars is evidence, from which the jury could infer that they were acting in common to inflict injury to Perez with the intention of causing his death.

22. In **Mohan v. R (1966) 11 WIR 29** at Lord Pearson in rendering the opinion of the Privy Council said at p. 32:

> "It is however clear from the evidence for the defence, as well as from the evidence for the prosecution, that at the material time both the appellants were armed with cutlasses, both were attacking Mootoo, and both struck him. It is impossible on the facts of this case to contend that the fatal blow was outside the scope of the common intention. The two appellants were attacking the same man at the same time with similar weapons and with the common intention that he should suffer grievous bodily harm. Each of the appellants was present, and aiding and abetting the other of them in the wounding of Mootoo. That is the feature which distinguishes this case from cases in which one of the accused was not present or not participating in the attack or not using any dangerous weapon, but may be held liable as a conspirator or an accessory before the fact or by virtue of a common design if it can be shown that he was party to a pre-arranged plan in pursuance of which the fatal blow was struck. In this case one of the appellants struck the fatal blow, and the other of them was present aiding and abetting him. In such a case the prosecution do not have to prove

that the accused were acting in pursuance of a pre-arranged plan."

Mohan's case shows that, if two persons attack another at the same time, with similar weapons, with the same intent to kill, then each person is considered as aiding and abetting the other in the commission of the offence of murder in circumstances where it is clear one struck the fatal blow causing death and the other was present aiding and abetting the other and it was not necessary in these circumstances to show that they were acting in pursuance of a pre-arranged plan.

23. In our view, on the facts of the instant case, it was impossible for either Eiley and Savery to contend that the beating of Perez about his head with the crowbars, with which they had armed themselves, was outside the scope of any common design. They were both assaulting Perez, at the same time, each with a crowbar, beating about his head in circumstances in which it may be inferred that they must have shared the common intention to kill him. Eiley and Savery were aiding and abetting each other inflicting the injury on Perez which caused his death. It was impossible to say which of the injuries to the head of Perez caused his death. Having regard to the facts it was not necessary in these circumstances in our view, to prove that there was a prearranged plan to kill Perez.

24. In **DPP v Merriman [1972] 3 All ER 42**, Lord Diplock said at p. 60:

> "… whenever two or more defendants are charged in the same count of an indictment with any offence which men can help one another to commit it is sufficient to support a conviction against any and each of them to prove *either* that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant do such an act, *and*, that in doing the act or in helping the other defendant to do it, he himself had the necessary intent."

The appellants Eiley and Savery were, along with Polonio, charged jointly for the murder of Perez. Both beat the deceased about his head with crowbars. The injuries to the head led to his death. Beating the deceased about his head with the crowbars was clearly done with the intention to kill him. It was, therefore, open to the jury, in the circumstances, to convict both appellants for murder.

25. In relation to Polonio who, while participating, did not inflict any injury which, in itself would have caused death, it would have been necessary to examine his presence at the scene to decide whether he was guilty of murder. We will do this when we consider his grounds of appeal.

26. Complaint was also made that the judge, in leaving the issues to the jury, misdirected them when he told them that all the appellants must be found guilty or all must be found not guilty either of murder or manslaughter. The judge told the jury:

> "Now, let me tell you about your verdicts. When you retire to consider your verdict, Madam forelady, and members of the jury, you will look at the prosecution's evidence, and you will also consider the defence evidence. And if on the prosecution's evidence, you find that the accused persons are guilty for the crime of murder, you will return a verdict of guilty. But if on that evidence, you are not sure of their guilt, or if you have any reasonable doubt about it, you cannot return a verdict of guilty, you must acquit them. Having done that, you may wish to consider the alternative verdict of manslaughter, and you go through the same exercise. If on the prosecution's evidence taking into consideration, of course, the evidence for the defence, you find, or you conclude that the accused are guilty of manslaughter, then you return that verdict of manslaughter. But if you are not sure of that verdict, then your duty is to acquit them. Okay? I will now ask you to retire and consider your verdict.

27. It would be wrong to isolate this portion of the summation and not to look at the summation as a whole. The judge had earlier told the jury that they had to consider the evidence against each appellant separately in order to decide his guilt. Indeed, the judge cautioned the jury against “lumping them together”. He pointed out that the evidence was different in respect to each of the appellants. He stressed that, even if they found one appellant guilty, they could only find the other guilty if the evidence made them sure of their guilt. The judge warned the jury against coming to the conclusion that they could find the other appellant guilty because they found one appellant guilty.

28. The jury were not left in any doubt as to how they should consider the case against each appellant. It was, in our view, made abundantly clear that they had to consider the evidence against each appellant separately and could only convict him if they were satisfied beyond a reasonable doubt that each appellant was guilty. It was made clear to them that they could not convict the other appellants merely because they felt that one was guilty. The evidence against each appellant had to be considered separately and if satisfied beyond a reasonable doubt about his guilt then they could convict.

29. Counsel for Eiley and Savery also complained that the judge misdirected the jury when he told them that, in considering the prosecution's evidence, if they found that the three appellants or any of them were guilty of manslaughter "they should convict the three appellants or any of them for that offence." Further, the judge went on to tell the jury that, if they were sure of their guilt based on the evidence the prosecution had adduced or acquit if they had any reasonable doubt.

30. In advising the jury on the possible verdicts that were open to them, the judge told the jury that they had to look at the prosecution's evidence, and the evidence for the defence. The judge went on to say that if on the prosecution's evidence you find the accused guilty, that they had to return a verdict of guilty.

31. Counsel submitted that the judge was inviting the jury to consider the prosecution's evidence alone in coming to a verdict against Eiley and Savery. Was there a danger that this direction could lead or cause the jury to consider only the prosecution's evidence and not that of the appellants? In making this submission, counsel appeared to ignore what the judge told the jury when he was directing them on the manner in which they should treat the testimony of the appellants. The judge told the jury:

> "And I have to direct you that these testimonies which these witnesses have given in court, you will consider it, you must consider it, and you must give it the same weight and cogency as you will give the prosecution's witnesses evidence when considering whether or not the prosecution have made out their case against the accused persons, or any of them."

32. In our view, taking the summation as a whole, the jury would not have been left in any doubt that, in considering whether the prosecution had discharged their burden of proving the guilt of the appellant, they also had to consider the evidence of the appellants.

33. Counsel for Eiley and Savery said that Vasquez was an accomplice and that he had an interest to serve. The judge, he submitted, ought to have warned the jury and, "over and above telling the jury to approach the evidence of Vasquez with caution as he was an accomplice, he ought to have directed them that Vasquez had been shown to have made an inconsistent statement and in the circumstance his evidence was unreliable". Counsel adopted the submission which was to be made on behalf of Polonio on this issue. We therefore propose to deal with this submission when dealing with the submission on behalf of Polonio.

APPEAL OF POLONIO

34. Counsel for Polonio submitted that the judge ought to have withdrawn the case from the jury at the end of the prosecution's case on the ground that the prosecution had "failed to discharge the evidential burden applicable to visual identification". He further submitted that, at the end of the case for the defence, the judge ought to have withdrawn the case from the jury on the ground that "at that stage of the trial" no evidence existed to show that Polonio was the person or one of the persons who had killed Perez.

35. Mr. Elrington, who appeared for Polonio at the trial, did not make a submission that there was no case to go to the jury. While it is accepted that a judge has the power at the end of the prosecution's case to intervene on his own motion and to withdraw the case from the jury, it is customary for counsel to make a no case submission. In this case, experienced counsel, who appeared, we think chose not to make a no case submission because he had no confidence in its success. If the judge considered that the quality of the identifying evidence was weak he was under a duty to withdraw the case from the jury and direct an acquittal unless there was other evidence which supported the evidence of identification (See **R v Turnbull [1976] 3 All ER 549 [1977] QB 224**. The judge did not appear to be of that view, and considered that there was evidence

on which the matter should be left to the jury. We think the judge was right in light of the identification evidence which was adduced.

36. In his written submission, Mr. Elrington stated that the standard of proof required in cases involving identification is different from the standard of proof that is normally required in criminal. Counsel contended that, whereas in the ordinary criminal case the standard of proof is beyond reasonable doubt, in cases involving visual identification "the requisite standard can only be reached if the prosecution's evidence passes the prima facie test and is coupled with the adequate judicial warnings".

37. It appears that counsel is seeking to incorporate into the burden of proof the warning which is required to be given by judges to juries in cases involving evidence of identification and recognition. In our opinion the **Turnbull** principles do not create any new standard of proof in criminal cases. The warning is designed to bring to the attention of juries the dangers inherent in cases involving visual identification and recognition.

38. Vasquez stated that, along with the three appellants and a "dark guy", they left Mei Mei's room and went to the yard where they met a "white guy" who opened the grille gate in order to gain access to a yard. All of them, with the exception of the "white guy" entered the yard. As Vasquez did not accompany the others to the room,

the issue arose as to whom he actually saw later in the building. Identification or in fact recognition therefore became an issue. The judge explained to the jury the circumstances under which the recognition was made. He pointed out to the jury that Vasquez said that he had recognized the persons who were attacking Perez and was able to recognize them because he had dealt with them before; had seen them before; had spoken to some of them and had gone to the scene of the crime with them. The judge reminded the jury that the recognition was made in poor lighting condition.

39. He reminded the jury that mistakes are often made by relatives and close friends even though the identification or recognition is being made in conditions of good lighting. He went on to warn the jury of the special need for caution before they can convict in reliance on the evidence of identification. He pointed out to them that an honest witness may be a mistaken witness and an apparently convincing witness may nonetheless be mistaken. As Vasquez was the sole witness who saw the three appellants assaulting the deceased, the judge cautioned the jury that they had to examine carefully the circumstances under which the identification was made.

40. The judge pointed out that the jury were required to examine the circumstances under which the identification was made. He

reminded them that Vasquez said that he had the parties under observation for about five minutes, at which time he was between a couple to three yards away. He reminded the jury that, on visiting the locus, Vasquez had pointed out that the area where Perez was being attacked and the third step where Vasquez was standing. He invited the jury to form their own conclusion as to the distance. He reminded them that it was important for the jury to consider the lighting condition on that morning. The witness had said that there was nothing impeding or interfering with his observation. The judge indicated to the jury that Vasquez had seen the three appellants previously and had spent some time with them during the three days leading up to the commission of the crime with them.

41. In our view, the judge had correctly followed the principles set out in **Turnbull's** case in relation to evidence of recognition. The issues were placed fairly before the jury. They were left in no doubt as the manner in which they should approach their task. The warning brought to their attention the dangers inherent in cases involving visual identification.

42. Counsel for Polonio had made submission that they were differences in the warning laid down in **R v. Turnbull [1976] 3 All ER 549 [1977] QB 224** and **R v. Whylie (1979) 25 WIR 430**. We mean no disrespect to counsel but we do not consider it necessary

in the circumstances of this case to examine these cases to ascertain whether these alleged differences are real or perceived.

43. In ground three, it was alleged that the judge did not give the jury any adequate warning as to the dangers involved in convicting Polonio on the uncorroborated or unconfirmed evidence of Vasquez. It was submitted that the Police and Director believed that Vasquez was the principal author of the crime. It was further submitted that they knew that Vasquez was a habitual criminal who had been shot by the police subsequent to the murder of Perez. It was contended that the Police and the Director knew that Vasquez was not a credible witness and that no reasonable person could act on his unsupported evidence.

44. As stated earlier, Vasquez was the only person who was found at the scene of the crime and, when found, had a knife in his hand and his clothes were soaked with blood. He had an interest to ensure that he would be removed from any suspicion in respect to the murder of Perez. At first, he denied any knowledge of the murder and, indeed, did not in any way implicate the appellants. Along with the three appellants, he had been charged with the murder of Perez. Without the evidence of Vasquez, the case of the prosecution would almost certainly not be sufficient to convict the three appellants.

45. The judge told the jury that Vasquez was a witness who had an interest to serve or was an accomplice to the crime. The judge said:

> "Now, I tell you that this person have (sic) an interest to serve because…well, first I tell you he's an accomplice to this crime because he said he had been charged with the crime of murder, and if you remember the evidence, he was found in the area under a step in a crouching position by a security guard, Dimas Guerrero, so there was evidence that he was at the scene of the crime, and he had been charged with murder along with others, and the three accused persons. And I also tell you that he have (sic) an interest to serve because Frank Vasquez had made a deal with the DPP to testify. And let me tell you that nothing is wrong with the actions of the learned DPP to enter into agreement with anyone to assist in the successful prosecution of a crime. And you cannot hold that against the learned DPP because the law provides that he has the authority, the duty, and the right to seek assistance from anyone to have a case successfully prosecuted, so you can't hold against him. But be that as it may, I must direct you to approach the evidence of Frank Vasquez critically and with much caution. This is so because there is no evidence to corroborate, or to confirm

> his evidence by any independent person or source. Okay? Here is an accomplice….here is a witness who made a deal who is testifying against other persons, but he has no one to corroborate, so I have to ask you, direct you to be careful, and cautious when critically examining his evidence. Okay? And because nobody had come to corroborate, or confirm when he has testified to, it is dangerous to convict in reliance of this evidence of Vasquez alone. You see? You have to be careful, cause he's a man who has compromised himself. But, Members of the jury, I also have to tell you that even though the evidence of Vasquez is not independently confirmed by anyone, provided you exercise caution when considering the evidence to convict these three accused persons, and provided you bear in mind the danger of convicting without corroboration, that is, his evidence being independently confirmed by another person, you may still rely upon Vasquez evidence, and convict, but you must be sure that he was telling you the truth. So let me just give a highlight of Vasquez' evidence, what he said with respect to the deal. I think I will deal with that later on. It's best I deal with that towards the end of this portion."

46. In those directions the judge warned the jury about the dangers of convicting on the uncorroborated evidence of Vasquez as he was

an accomplice and a witness with an interest to serve. He pointed out to the jury that, even though there was no evidence of corroboration, it was still open to them to convict the appellants provided they exercised caution when considering the evidence of Vasquez and they bore in mind the danger of convicting on the uncorroborated evidence. The jury had to be sure that he was speaking the truth. It was the traditional warning in this regard and cannot be faulted.

47. The judge made reference to the agreement which Vasquez made with the Director when the murder charge against him was discontinued. The agreement specified that in consideration of Vasquez providing completely truthful testimony the Director guaranteed immunity from the institution of a charge of murdering Perez. The judge cautioned the jury that that did not mean because Vasquez had the agreement with the Director he must be considered to be speaking the truth. The jury had to assess his evidence and decide whether he was in fact speaking the truth having regard to the fact that he was an accomplice or a person with an interest to serve.

48. The judge brought to the attention of the jury the issues which arose on the evidence of Vasquez. The main issue which they had to consider was whether Vasquez was a witness of the truth and

worthy of belief. In doing this, they had to bear in mind that he was an accomplice and a witness with an interest to serve and that his evidence was uncorroborated. They had, in the circumstances, to approach the evidence of Vasquez with caution and be aware of the dangers involved in acting on his uncorroborated evidence. They also had to keep in mind that the burden of proof was on the prosecution and, in discharging this burden, the jury had to be satisfied beyond reasonable doubt of the guilt of the appellant. These matters were in our opinion adequately and correctly left for the consideration of the jury having regard to the warning given to them by the judge.

49. It was alleged by counsel for Polonio that the visit to the locus disclosed two serious inconsistencies. Contrary to what Vasquez had said in his evidence, no lights were seen in the corridor where the body was found. It was submitted that this meant that Vasquez identification was made “inside a completely dark building at night without even moonlight to see by”. In dealing with this visit to the locus, the judge reminded the jury that Vasquez had pointed out two lights; one light was situated behind the house or any rate away from the scene where the offence was committed; the other was a street light on a street behind the scene. The judge went on to say:

> “None of those lights were in the immediate area, so that the light on the house was being blocked from the building itself, and so was the street light. So it is for you now to determine what type of light was there. There is no evidence, except for what he had said that he had saw them from those lights that he was able to recognize those persons. But if you place these, one behind the building, and one the street, Members of the jury, then the place cannot be all that lighted, but it is a matter entirely for you.”

The judge correctly pointed this out to the jury as a deficiency in the evidence of recognition and left it to them to decide what weight they would attach to it.

50. The second inconsistency about which complaint is made dealt with area where the deceased was lying when he was being attacked by the appellants. Counsel submitted that Vasquez stated that he had seen Polonio kick Perez while he was lying on the verandah which was at the top of the stairs which were at the back of the house. He also stated that to the right of the stairs there was a preschool and to his left a corridor. Counsel stated that Vasquez had identified the verandah by reference to photographs. On visiting the locus, the area pointed out by Vasquez bore no relation to the area described in his evidence.

51. The judge reminded the jury that it was for them to decide whether the witness was a witness of the truth. They had to consider the manner in which the witness gave his evidence. He had earlier pointed out to them how they should deal with discrepancies and inconsistencies. He told them:

> "Those discrepancies, and inconsistencies may have been slight, or serious, material or immaterial. If they are slight, you'll probably think they do not really affect the credit of the witness or witnesses. On the other hand, you might say that they are serious, and because of the seriousness of it, or of the inconsistencies, or discrepancies, it will not be safe to believe the witness, or witnesses on a particular point, or none at all, or not at all. It is for you the jury to say on examining the evidence whether there are any such inconsistencies, and discrepancies, and is so whether they are slight or serious."

> "If you find, Madam forelady, and members of the jury, that a witness has made any previous statement, and that has happened here, inconsistent with his or her testimony, in this trial, I must tell you that previous statement, or statements whether sworn or unsworn do not constitute evidence which you can act. Okay? What is the evidence, is what you

heard herein this court. These consistency, of course, may affect the witness' credibility, and you would recall that the key witness, Frank Vasquez, in came out in cross examination that his testimony was inconsistent with what he has said to the police. But the inconsistencies, as I said before, may, of course, affect his credibility, and this is cause for you not to believe him, or if you find any other witness in that situation. Members of the jury, in many cases differences in evidence of witnesses are to be expected."

52. The judge correctly stated that it was it was for the jury to decide whether the witness was mistaken or deliberately lying and that they had to decide whether the inconsistency or discrepancy was serious and inexplicable or whether any reason given for the discrepancy and inconsistency was satisfactory.

53. Subject to the responsibility of a judge in respect of evidence of identification where the quality is considered by him to be poor, this Court has, on many occasions, made it abundantly clear that issues of fact such as whether a witness is worthy of belief or, what weight is to be given to evidence of a witness are all matters that fall within the province of the jury. These are not issues which fall for an assessment of the trial judge. It is certainly not for the Court of Appeal to say what weight should be attached to the evidence of

the witnesses. This Court is concerned to ensure that the jury was given the correct directions as to how they should approach their responsibility having regard to the evidence in the particular case and to ensure that the appellant had a fair trial.

54. In ground 5, the complaint was that the judge had misdirected the jury when he told them that the killers had hit him with such force that his head was split or the brain was split. He also complained about he judge concluding that the deceased was mauled. The gravamen of the complaint under this ground was that there was no evidence that the deceased head or brain was split. Counsel is correct that there was no evidence that the head or brain was split. The judge may have used excessive language in describing the injury which the deceased sustained as a result of what was, without any doubt, a vicious and savage attack. The characterization of the attack as mauling may have been misplaced but having regard the instruments used and the manner in which they were used, in our view, it would not have affected the jury's verdict that the appellants intended to kill Perez.

55. In ground 4, Polonio complained that, even if the jury believed the evidence of Vasquez that Polonio did in fact kick Perez in his stomach there was no evidence that Polonio was part of any plan or any pre-arrangement. He submitted that there was no evidence

that Polonio was involved in the preparation when the crowbars and duct tape were being placed in the bag; also that there was no evidence that he knew that the knapsack had in the crowbars. In short, counsel was submitting that, in the absence of any evidence of common design, in the absence of any agreed plan to kill Perez, even if the jury accepted that Polonio did kick Perez in his stomach, whatever he may be guilty of, he was not guilty of murder.

56. The judge told the jury:

> "Your approach to this case should be as follows: If looking at the case of either of the three accused persons, you are sure that with the intention I have just mentioned, either of the three accused persons committed the offence of murder on his own, or that each took come part in committing it, with the other two persons; and even if unusual consequence arose from the execution of the plan, each person is responsible for the consequences. However, if one of them went beyond what had been agreed, expressly or impliedly, as part of the joint plan, the others are not responsible for the consequences of the unauthorized act. Before you can convict any of these three accused persons, you must be sure that there was an unlawful joint plan to murder Jario Justo Perez by the three accused persons. If you find on the

evidence that anyone of the accused persons agreed to the act, or acts done to Perez, but did not do the actual killing, then you must find that at the time of the doing of the act, or acts, namely, the hitting of Perez to death, that person knew that the others knew that the others were going to kill Justo Jario Perez. The law used to be a little different, should have foreseen, but now, the law, I would say is more a little bit for the benefit of the accused, and it says, the person must have known that the other person was going to be killed, and still joined in it."

57. The Director submitted that the law is that where the secondary party foresees that the killing might result out of the joint enterprise, foresees it as a possible incident of the joint criminal enterprise that murder might be committed and nonetheless joined or continued in the enterprise, the secondary party could nevertheless be found guilty of murder. The Director submitted that it was open to the jury to convict Polonio on the basis that he had lent his assistance to Eiley and Savery whom he knew intended to kill Perez and, knowing, this he nonetheless lent his assistance.

58. Polonio was kicking Perez in his stomach at the same time that Eiley and Savery were beating him about his head with the crowbars. The "dark skin guy" was binding his hand with the shoe

lace that had been taken to the scene along with the crowbars and duct tape. The “dark skin guy” and Polonio then turned over Perez who was still on the ground and tied his hands to his foot. Polonio was thus actively participating in the commission of the crime. In kicking Perez in his stomach, he was assisting in ensuring that he was not able to defend himself. His conduct in assisting in turning over Perez while he was still on the ground and tying his hands to his feet while Eiley and Savery were bludgeoning him was clearly intended to render him incapable of defending himself and to prevent him from escaping his attackers. He obviously intended that Perez should have remained on the ground, unable to defend himself or to escape, in order that Eiley and Savery could continue to beat him with their crowbars. His conduct was clearly intended to prevent Perez from escaping or defending himself. This was not the conduct of a person who merely kicked Perez in his stomach and did nothing else.

59. In our view, acts of encouragement may provide evidence of common purpose. The conduct by Polonio amounted to acts of encouragement of Eiley and Savery in the commission of the offence of murder. It was open to the jury to find, on the evidence, that the conduct of Polonio in kicking Perez in his stomach and assisting in turning him over and tying his hands to his feet at the time when he was being struck in his head by Eiley and Savery with

crowbars, showed that he must have foreseen that the death of Perez would have occurred if he was rendered defenseless and must have appreciated that, by continuing to bludgeon him with crowbars, Eiley and Savery intended to kill him. It was open to the jury to find that Polonio in these circumstances shared the intent of Eiley and Savery to kill Perez.

60. For these reasons, we dismissed the appeals against conviction and affirmed the convictions and sentences.

MOTTLEY P

SOSA JA

CAREY JA