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

CRIMINAL APPEAL NO. 7 OF 2004

BETWEEN

PATRICK ROBATEAU	**Appellant**
v.	
THE QUEEN	**Respondent**

CRIMINAL APPEAL NO. 8 OF 2004

LESLIE PIPERSBURGH	**Appellant**
v.	
THE QUEEN	**Respondent**

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BEFORE:

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

Mr. Dean Lindo, S.C. with Mr. Michael Peyrefitte for Pipersburgh.
Mr. Orlando Fernandez with Mr. Hubert Elrington for Robateau.
Mr. Kirk Anderson, Director of Public Prosecution for Crown.

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6, 7 October 2004 and 9 March & 24 June 2005.

CAREY, JA

1. On 9 March 2005, a majority of this court dismissed these appeals against convictions for murder (counts 1 – 4) and attempted murder

(count 5). There were also appeals against the sentence of death as regards the murder convictions and twenty years imprisonment which was imposed on count 5. When we promised on 7 October 2004 that we would take time to consider and would give our reasons at a later date, we had hoped that would have taken place on 9 March and we very much regret it is only now possible to provide them. What follows represents the reasons of the majority.

2. These appellants were convicted for the murder on 18 June 2002 of Fidel Mai (count 1), of Kevin Alvarez (count 2), of Cherry Tucker (count 3), of David Flores (count 4) and of attempted murder in respect of Karl Ventura (count 5) after a trial which lasted from 9 February to 24 March 2004 before Gonzalez J and a jury.

THE PROSECUTION CASE - THE DETAILS

3. Two of the victims, Fidel Mai and Kevin Alvarez, were security guards employed to KBH Ltd. which is a company providing security services, including the escorting of cash from one location to another. On 18 June 2002, Karl Ventura, a security guard with this organization went in the company of Mai and Alvarez, who were armed with 9 mm Glock firearms to Bowen and Bowen Distributors, on Slaughterhouse Road, Belize City. Leaving Mai, the driver in the vehicle, Ventura and Alvarez passed through an

office which was lit by fluorescent lighting into the warehouse where there was a table with three sealed Barclays Bank bags. On their way back to their vehicle, they were confronted by two men armed with guns which were being pointed at them. They were made to walk backwards to the warehouse. While one of these men held Ventura, the other man shot Alvarez who fell. Ventura struggled with the other man, trying to get his gun. This man instructed the man who had shot Alvarez to shoot Ventura. That man came close to him and shot him in his shoulder. He lost consciousness and came to, in hospital. He described the shooter as a "red-skin male person" whom he had seen before, in May 2002 (which would have been shortly before the incident) at Bowen & Bowen where he had then been posted. He had seen him every day for a one week period drive through the gate at Bowen & Bowen. Before the judge and jury, he identified the appellant Patrick Robateau as the person who shot Alvarez and himself.

4. John Ventura, also a witness for the prosecution, was a security guard employed at KBH and posted at Bowen & Bowen Distributors Centre, at Slaughterhouse Road. On 18 June at 7:45 p.m. he saw Robateau park a red-coloured Coca Cola truck near a door at the side of an office on the compound of Bowen & Bowen. Mr. Ventura was then at the back gate. Another guard, Virgilio Requena, was at the entrance. Mr. Ventura observed Pipersburgh walk from the

office towards the main gate where a struggle ensued between them. This prompted him to approach them, in the meantime charging his shotgun, but he was afraid to fire because both men were close together. Immediately, he felt something pressing in his left side. When he looked, he saw it was Patrick Robateau who ordered him to drop his weapon. He reacted by taking to his heels and jumped over a fence. Eventually he stopped a passing car and made a report to the police. When he returned with the police, the Coca Cola truck was no longer there.

5. This witness spoke to his knowledge of both appellants. He met Robateau while both served in the Belize Defence Force (BDF) during 1997 over a period of six months. He would see him twice a month in that period. Thereafter he saw him almost daily for over an eight month period while he was posted at Bowen & Bowen where Robateau was a driver of a “Crystal” truck that Robateau used, to deliver a brand of drinking water. On the occasion he saw this appellant dismount from the Coca Cola truck, he saw his right-hand side for fifteen seconds from a distance of forty to forty-five feet with the aid of street lights around the perimeter of the premises. At the time when he felt something pressed in his side and looked, he saw Robateau’s face for about fifteen seconds.

6. With respect to Pipersburgh, he has known this appellant for the eight months he has been posted at Bowen & Bowen and saw him quite often on a daily basis in the evenings at about 6:00 p.m. The struggle between Pipersburgh and Requena, while he stood five metres off, lasted about thirty seconds, and there were lights around the entrance at the gate where they were.

7. Virgilio Requena was another KBH security guard at Bowen & Bowen who came into contact with these appellants. On 18 June 2002 at 5:00 p.m., he reported at Bowen & Bowen where he had been assigned for three months. At 6:00 p.m. when he was on guard at the entrance gate, he saw a 'Crystal' truck driven by Robateau enter through the main gate and make its way to a shed where empties are discharged. After the driver loaded the truck, he went into the office. Sometime after that, by which time night had fallen, he made his way some twenty-five yards from the main gate where he could see into the office. He saw Robateau in the office, and indicated to him that he wanted to go to sleep. Robateau showed him nine fingers which he understood to mean that Robateau wanted nine minutes more.

8. There came a time when the cashier left. Shortly after that, he saw a person whom he described as a "dark skin male person" leaving through the office door. That person, he later identified as

Pipersburgh. He believed that Pipersburgh would go through the gate but instead he came up to him and pressed something in his side, telling him to hand over his gun. His reply was - “stop playing”. When Pipersburgh grabbed at his gun, a 12 gauge shot-gun, he realized that Pipersburgh was serious. A struggle for the gun ensued and both ended on the ground. Requena was hit on his head causing him to release the gun. He lost consciousness and came to, in a drain by the main gate.

9. He also testified to his prior knowledge of Pipersburgh. For a three month period before the incident, he would see Pipersburgh driving his truck through the gate of Bowen & Bowen on the occasions he was posted there. This would occur about three days per week. The reason why, in reference to Pipersburgh, he said dark complexion person or the like, was that he did not know his name.

10. Another prosecution witness Albert Zelaya, describing himself as a “side clerk”, spoke to Robateau’s presence at Bowen & Bowen on the relevant date. His duties were to go out with the driver to deliver water to customers. Robateau was his driver on that date. He left the premises at 5:45 p.m. while Robateau was in the main office.

11. At about the time of the incident, Corporal Jorge Ayala and other police officers were on mobile patrol in the area. They received a report from a security guard at the gate of Bowen & Bowen. As an internal gate was being opened, Corporal Ayala heard gun shots coming from the direction of the distribution office. They went in the direction of the gun shots. Nearing the office, he saw a dark complexion man about six feet tall approaching. That man fired at them. An officer, Constable Salam, returned fire but he missed. At the same time, he noticed a red Coca Cola truck drive out from the compound onto Slaughterhouse Road, stopping just before reaching the gate and the man who had fired at them, got into the passenger side of the truck which then sped off. The police went in pursuit but lost sight of the truck. A radio transmission caused them to go to an area called Coral Grove and there the Coca Cola truck was seen parked in a cul-de-sac.

12. From the cab of this truck, the police recovered a 9 mm gun, a .38 pistol, three “white bags with blue markings” – the Barclay’s Bank money bags, and two 12 gauge shot-guns. The windshield of the truck showed a bullet hole. The police officer who fired at the truck was Constable Garay. He observed the vehicle stop in the cul-de-sac and two men, one of whom was armed, leave the vehicle and run off. He challenged them, ordering them to stop, one made off into the bushes, the other at whom he fired, fell. He waited for

assistance. That presumably allowed that person to escape. He confirmed the finding of a Glock 9 mm handgun and a .38 pistol. There was a search of the immediate area. He found a Toyota Camry and a brown station wagon taxi. Next to the Camry, he found the body of a woman, Cherry Tucker. Inside the car on the passenger side, he saw the body of David Flores. Cherry Tucker had picked up Flores at his home the evening of 18 June 2002.

13. Essentially, that represented the direct evidence of the shooting in the Bowen & Bowen compound. The remainder of the evidence comprises the circumstantial evidence linking the appellants with the charges against them.

14. It is convenient to deal first with the medical evidence. It is enough to say that all the victims save Karl Ventura were shot to death. Post mortem reports were tendered. In respect of Fidel Mai, the cause of death was given as (a) hypovolemic shock due to cerebral internal haemorrhage, (b) internal haemorrhage due to fracture of the base of the skull and left eye, (c) gunshot:

in respect of Kevin Alvarez, (a) hypovolemic shock due to internal haemorrhage due to rupture of the right lung, (b) fracture of the skull (c) gunshot:

in respect of David Flores, (a) hypovolemic shock due to (b) internal and external haemorrhage due to vascular and cerebral haemorrhage, (c) gunshot:

in respect of Cherry Tucker (a) hypovolemic shock due to (b) internal haemorrhage due to injuries of vital organs, (c) by gunshot:

Dr. Fidel Cuellar examined Karl Ventura. He found him suffering from two gunshot injuries, one to the left shoulder and the other to the left side of the mouth. There was extensive face swelling, teeth were crushed and missing on the left side. His tongue was swollen. Damage was done to the back of the throat which involved blood and nerve structures.

15. Before we turn to the ballistic evidence which was adduced in this case, we should mention evidence of Jorge Aguilar who was the security supervisor at KBH Security, and as such responsible for, among other duties, the safety and issue of company firearms. On 18 June 2002, Fidel Mai, a driver and Kevin Alvarez arrived at work, and he issued the former a Glock 9 mm pistol serial number DMB572 and 25 rounds of ammunition. Mr. Alvarez also received a 9 mm Glock pistol, serial number DZW438 and 25 rounds of ammunition. John Ventura also reported for work and was issued a 12 gauge, Remington shotgun model number 870 which had a broken pistol grip. Later that day Virgilio Requena reported and

was provided with a 12 gauge Morsberg shotgun, serial number L-747187 and ammunition. He explained that Fidel Mai and Kevin Alvarez comprised a team whose duty that day was to collect cash from Bowen & Bowen for deposit at the bank.

16. We now deal with what we earlier referred to as the ballistic side of the prosecution case. This evidence was adduced from Albert Ciego, the police firearms examiner, whose training and experience we note, is as an armourer. Mr. Ciego received two 12 gauge shotguns, a Glock pistol and .380 Lorch pistol, 10 shells, 4 live rounds and 4 slugs. All these firearms were retrieved from the truck in which Pipersburgh and Robateau fled the compound after the shooting. His examination of the 10 shells received from the police showed they had been fired by the Glock pistol. He based this conclusion on the fact that his examination showed that a box-like indentation around the primer of the test fired shell was similar to that on the 10 shells recovered. So far as the other pistol was concerned his opinion was that it was defective. With respect to slugs he received from the police, he gave a qualified response. He said that he found “scratch that is similar to the scratch that is similar to my test fired slug” which allowed him to conclude that they may have been fired from the 9mm Glock pistol. Three of the slugs about which the firearms examiner spoke were extracted from

the bodies of Fidel Mai, Kevin Alvarez and David Flores, the fourth was discovered by the police photographer, Constable August, near the body of Kevin Alvarez in the office of Bowen & Bowen.

17. The evidence of the photographer is also of significance as this officer disclosed that the Coco Cola truck which was abandoned in a cul-de-sac in the Coral Grove area, was about .3 kilometers from the cars, that is, the Toyota Camry and the Station Wagon. From that evidence, the jury could draw the inference that the lovers must have been surprised at their rendezvous by the appellants who were making their escape after the shooting. No motive was however suggested for these killings, nor was the significance of the presence of the Station Wagon explained.

18. The appellants fled to Mexico and were picked up by the Immigration Authorities there sometime in July 2002. On 9 July 2002, the appellants were brought to the Belizean Embassy in Mexico City. Mr. Salvador Figueroa is the Ambassador of Belize to Mexico. Part of his duties is to deal with persons being deported from Mexico. He is required to verify with "clear certainty" that such persons are Belizean Citizens and then to prepare travel documents to enable them to travel. When he arrived on the morning of 9 July 2002 he saw the appellants in the custody of three immigration officers. He checked with the consul and

examined documents she provided in relation to the appellants. He noticed the name Robateau which immediately attracted his attention because of newspaper reports he had seen, and also the fact that both men gave the same year of birth, although different months - one stated 1 January 1974 and the other 1 December 1974. He decided to speak to them. Having done so, he examined a copy of the Belize Times which had photographs of two fugitives who had allegedly committed a crime there. His examination of the photographs led him to suspect that they were the persons being sought. Eventually travel documents were prepared in the name of Lance Gabourel and Rodwell Robateau, Jr. On 10 July 2002, while at the Immigration Detention Centre he requested permission to interview the appellants. At that time he had not yet determined their identity. When he interviewed Pipersburgh and asked him how he had ended up in Tijuana all the way at the northern border with Mexico, he said his name was Lance Gabourel and had gone drinking in Chetumal where he met another Belizean and a Mexican gentleman who took them to Cancun. While in Cancun, “they” decided to go to the United States. During the ensuing conversation between them, he asked if Pipersburgh had heard of a murder involving two people who were then fugitives, named Pipersburgh and Robateau. He replied that he had heard of it but did not know anything about it. The other appellant was led into the

room. The purpose of the interview was to verify if he was whom he said he was: "…I asked him his name. He said it was Rodwell Robateau Jr. I asked if he had any other name. His reply "My name is Patrick Robateau and I am the person they are looking for in Belize". The Ambassador said that he found this appellant Robateau very polite and respectful and said as much to him, adding, "…I don't understand how you could do such a terrible thing". This appellant replied: "I don't understand how I did it either. Things just got out of control and it happen so fast that when it was over - it wasn't until it was over that I realized what we have done". He also said that he understood how much pain he had caused families - when it was all over they had panicked and all they could think of, was getting out of Belize.

19. Eventually it was confirmed by the police that the pictures which he had taken of the appellant, with their consent, and e-mailed to the police in Belize, were indeed Pipersburgh and Robateau. The police of both countries coordinated arrangements for their deportation and reception. On 12 July, 2002 they left Mexico for Belize by TACA Flight 410. On the same day, the appellants arrived by air in Belize and were taken into police custody. As a postscript, we add the evidence that the only two drivers absent from work the day after the shootings, were these appellants.

20. As part of the surrounding circumstances, there is, we think, an aspect which is of importance. There was no question that the murders attracted a deal of media attention in Belize. There were pictures of the fugitives all over the papers. The Ambassador himself was aware of the crime and had seen the photographs. The trial judge bemoaned the fact that no identification parades were held. No such parades were held because the police were advised by counsel from the Attorney General's Office not to have any. It is plain, in our opinion, that any parade in such circumstances, would have been a farce.

THE DEFENCE

21. LESLIE PIPERSBURGH

This appellant made an unsworn statement. Having planned to travel to USA, he left in June 2002. He reached as far as Tijuana when he was turned back by Immigration Officer because his papers were not genuine. He gave his name as Lance Gabourel. He was not at Bowen & Bowen at the time of the murder nor was he at University Heights (where the murder of David Flores and Cheryl Tucker took place). He had nothing to do with any Coke truck. He worked at Bowen & Bowen for three years. He was not a friend of Robateau because he had only just started work there.

PATRICK ROBATEAU

Patrick Robateau also made an unsworn statement. He decided to enter the United States illegally. He also denied committing the charges against him. He denied making any statement to the Ambassador or suggesting to Virgilio Requena that they should join together to rob Bowen & Bowen.

THE APPEAL OF LESLIE PIPERSBURGH

22. Grounds of appeal were filed and argued by Mr. Dean Lindo, S.C. For the most part, there were criticisms with respect to alleged mis-directions and misstatements of facts on the part of the trial judge. We turn then to consider each of the specific complaints advanced.

MISDIRECTIONS

23. The complaint was stated thus: “The first misdirection is you must only decide this case on evidence as adduced by the Prosecution is highly prejudicial and unjust and militates against a constitutional call for a fair trial”.

The danger of extracting one sentence from a summing up and endeavoring to construct an argument is well illustrated in this ground. This statement is set in a context where the judge is giving

general directions to the jury as to the relevant material on which they can act and also factors that must not be used. At line 13, he had said - “Now members of the jury, it is important that you decide this case only on the evidence placed before you, there is no more evidence”. In the impugned sentence, he has added “… as adduced by the prosecution”. The judge repeated this statement later, it should be said. In that context, the jury were being told not to have regard to anything they may have heard from sources outside the court room, such as news or television, radios or newspaper reports.

At this juncture of his summing up the trial judge was seeming to exclude from the jury’s consideration the unsworn statements of the appellants, albeit not evidence, but to which the jury are required to hearken. But the summing up must be lookout at as a whole for that is what the jury hears. The judge did at p. 884 deal correctly with their approach to the unsworn statements of the appellants. So that at the end of the day, the jury would have been directed appropriately. We think it preferable however for the trial judge to be both accurate and complete in his directions, a truncation of which is not guaranteed to assist the jury in their task of determining the guilt or innocence of accused persons put into their charge. Such an approach, we suggest, would tend to inhibit gratuitous grounds of appeal. A reasonable jury could not at the

end of the summing up be left in any doubt that: (i) they should in no way be influenced by facts learnt other than from the witness box; (ii) the facts came from the prosecution witnesses and the statements made by the appellants, depending on the weight they choose to accord them. In the result, we do not think there was much substance in this attack.

GROUND 4

24. "The learned judge erred in directing the jury that in deciding on the facts of the case, the jury was to take into account a witness' level of intelligence or his or her ability to put words into effect. This is discrimination, unjust and prejudicial. It has nothing to do with the capacity or inclination to tell the truth. It sets a lower standard of truth telling for a person of lesser education".

This direction to which counsel referred to as a direction to the jury in deciding on the facts of the case, is concerned with the jury's consideration of inconsistencies and discrepancies. What the judge meant to say was in this regard the jury should take into account the witness' level of intelligence, his ability to put accurately into words what he has seen, his powers of observation and any defects, such as deafness that he may have,. Plainly this can only apply where inconsistencies or discrepancies occur

between witnesses. This recognizes the simple fact that in observation, recollection and expression the abilities of individuals vary. There can therefore be nothing discriminatory or unjust or prejudicial in so far as the direction goes. The trial judge, we fear, clearly misunderstood the pith of the directions he gave. There was no inconsistencies or discrepancies between the evidence of John Ventura and Ambassador Figueroa who testified to events occurring in different places. The judge's unfortunate misapprehension of the import of the directions led him to apply it to circumstances which did not allow it.

25. The result is that there occurred a regrettable misapplication of a common sense principle and not a misdirection. In the circumstances, the question is really, did it, in effect, render the trial unfair. We think not, the trial judge specifically said he was dealing with discrepancies. In the context in which he spoke, there were none and he did not suggest any such. We think this is a mere *fulmen brutum*.

26. There were two grounds (grounds 2 and 3) which dealt with joint enterprise:

"Ground 2 - Judge failed to point out to the jury that upon leaving the Bowen & Bowen compound the prosecution had to establish a

new ground for a joint enterprise". It is to be inferred that the trial judge failed to give a direction in this regard."

Ground 3 - with robbery having been taken away, the alleged joint enterprise ended and defendants were to be handled separately and judgment passed individually".

With respect to ground 2, there was no factual basis for this ground. There was evidence that the joint enterprise in the instant case was robbery and there was evidence that the two Barclay's Bank plastic bags taken from Bowen & Bowen were retrieved from the truck in which the appellants fled the scene. In the course of removing the cash from Bowen & Bowen, they killed Fidel Mai and Kevin Alvarez, and wounded Karl Ventura. The joint enterprise is to be inferred form the acts of these appellants. The plan to rob accordingly included the use of extreme force. As we understood the sense of Mr. Lindo's submissions, the moment the appellant's left the compound, the plan to rob was complete and any further actions on the part of the appellants, would be outwith the scope of the plan. The killing of David Flores and Cherry Tucker would require a new plan. The trial judge had told the jury not to consider robbery apparently because, as he said, there was no such charge.

27. It was true that there was no count for robbery, but with respect to the learned judge, that did not prevent the prosecution leading evidence that the plan was to rob Bowen & Bowen. But of course, the plan which involved the use of extreme force to the extent of killing, included necessarily avoiding capture, and to make a clean getaway. A killing shown to be part of efforts to escape would be well within the joint enterprise to rob. Mr. Lindo, S.C. did not present any strong argument in support of his ground. We are not persuaded that it has any merit.

28. As to Ground 3, we are quite unable to see why there was a need for some direction along the lines suggested. At all events, where there is a joint charge, a judge in summing up is required to direct the jury to consider the case against each of the accused separately. The jury should see what evidence has been adduced against each accused and decide, whether in relation to each, there was evidence which satisfied them so they felt sure that the accused is guilty. The learned judge was careful in this case to give such directions (see pp 804 - 805). As we have previously stated, we are satisfied for the above reasons that the alleged joint enterprise did not end notwithstanding the judge withdrew robbery as an issue from the jury's consideration.

29. Ground 11 appears to have been the substantive ground in relation to joint enterprise. The complaint was - “The learned trial judge erred by failing to adequately provide the jury with instructions on the scope and extent of the joint enterprise in this case and the implications of the scope and extent of the joint enterprise as it relates to Appellant Leslie Pipersburgh”.

The learned judge gave directions on joint enterprise at pp 802 - 804:

> “…Now the Prosecution in presenting their case to you, Madam Forelady and Members of the Jury, are relying on a principle of law which the Criminal Code has basically codified under section 11(3); The principle is called “joint enterprise”, some people refer to it as “joint plan” or “joint venture”. It has several names but it simply means that two persons are acting together to commit an illegal act with a common intention, two persons set about to hurt somebody with the intention to kill them. Now, section 11(3) states among other things if a criminal event is caused by the acts of several persons acting either jointly or independently, each of these person who intentionally contributed to cause the event shall be deemed to have caused the event but any

matter of exemption, justification, extenuating or aggravation which exists in the case of anyone of these person shall have effect in this case whether it exists or not in the case of any of the other persons. Members of the jury, case law has been built up, in fact, section 11(3) is basically coming from the case law; and indeed the case law on joint enterprise tells you exactly how you are to apply this principle. And it is of almost importance that you remember this guidance am going to give you on this point. Now, the law says, the case law which is also the law of Belize. The law says that where the Prosecution case is that the two Accused persons committed these, in this case, these two offences together each may play a different part, but if they are in it together, as part of the joint plan or agreement to commit it, then each is guilty. The word “plan” and “agreement” do not mean or does not mean that there has to be any formality about it. Nothing need be said at all. It can be made with a nod, a wink, or a knowing look. It is different from what you’ll be doing in a couple of hours from now where you have to enter the jury room and fully deliberate whether or not you think these Accused persons are guilty or not. All is required of you to find in a joint enterprise is whether there has been agreement, and this could be by way of a nod, a wink or a

knowing look. So the agreement can be inferred from the behaviour of the parties…..The essence of joint responsibility for a criminal offence is that each Accused persons shared the intention to commit the offence and took some part in it whether be it to a large or small extent so as to achieve that aim. You should approach this case, Madam Forelady and Members of the Jury, therefore as follows: You should look at the case for the two Accused as disclosed by the evidence as adduced by the Prosecution and ensure that with that requisite intention in respect to the five respective charges, the Accused persons or either of them committed the offences on his own or that one took some part in committing it with the other person. It that is so, the two Accused persons are said to be guilty. You must be sure that the two Accused persons were part and parcel of the crimes which the Prosecution alleges they have committed and both had the intention to do these acts. And even if unusual consequences arose form the execution of the plan, each is responsible for these consequences. However, if one of the two went beyond what had been agreed, expressly or impliedly, as part of the joint plan, the other person is not responsible for the consequences of that unauthorized act. Therefore, before you can convict either

> of the two Accused persons, you must be sure that there was an unlawful plan, namely, to murder the four deceased persons and that they attempted to murder Karl Ventura with intention to do so. If you find that one of the Accused persons agreed to do these acts but did not do the actual shooting, you must find that at the time of the doing of the act, of the other, the other person either foresaw, contemplated, or realized that the other might kill the victims as I have mentioned in this case, namely, Kevin Alvarez, Fidel Mai, David Flores, Cherry Tucker , and of course Karl Ventura…"

Mr. Lindo, S.C. did not argue that the directions were in any way incorrect, but he submitted that, the judge did not tell the jury from what facts, the agreement should be inferred. He did not accept that the statement - "so the agreement can be inferred form the behaviour of the parties" could be appreciated by the jury. He said the judge did not say it could be inferred from the fact that the appellants shot the guards. He acknowledged that there was material on which the jury could find a joint enterprise and its scope and extent. We do not think that such an argument can be regarded as seriously intended. From the lengthy quotation we have made, we are of the opinion that the directions were adequate to bring home to the jury, the scope and extent of the joint

enterprise. The jury could have been in no doubt at the end of the day, what the prosecution was required to prove with respect to each of the counts. Such deficiencies which might exist do not impact on the fairness of the trial.

MISSTATEMENT OF FACTS

30. Ground 5 - “there is no evidence that Leslie Pipersburgh shot Karl Ventura. The evidence clearly shows that Patrick Robateau shot both Kevin Alvarez and Kevin Ventura. Both Prosecution and Defence counsel joined in telling this to the judge. There is no evidence of joint venture of any kind and the statement by the learned judge that, “when Pipersburgh and Robateau shot Karl Ventura”, is extremely prejudicial to Leslie Pipersburgh and should not have been put to the jury. The judge should have specifically directed the jury on this point”.

We understood counsel to be arguing that the repeated misstatement of the same evidence by trial judge in relation to Pipersburgh was prejudicial to Leslie Pipersburgh because the danger lay in the accumulation of errors against this appellant.

31. With respect, there was no accumulation of errors, the repetition of the same error does not become an accumulation. The jury heard the same error repeated. That error was corrected. In the

circumstances of this case, the connection of Pipersburgh to the crimes, was on the basis of joint enterprise, both men were acting together in the commission of the crime. The imprecision of the language could not alter the fact that the legal consequence of the joint implication of the appellants, was joint responsibility for the offences charged. Seen from that perspective, we do not agree there could be any prejudice in these circumstances.

32. This is not to condone imprecision of language but the duty of the court is to be satisfied that there was prejudice which made the trial unfair. We are satisfied that there was no prejudice to this appellant in the circumstances.

MISCELLANY

33. Ground 10 - “In summing up the evidence, the learned judge, in addition to presenting the case (to) the jury, undoubtedly put to the jury that the testimony of Virgilio Requena was to be accepted by them. He stated that Requena’s evidence was not shaken in his view and indicated in no uncertain terms that Virgilio Requena’s evidence was to be accepted. This is a matter which should have been left to the jury”.

34. In essence, the gravamen of the complaint is that the trial judge, who was perfectly entitled to comment on the evidence, did not say

afterwards that nevertheless, the matter was for them. It is traditional for judges to add the formula, “but it is a matter for you” where they express their personal view on the facts, and it is, as we would recommend, a sound practice. But there is of course no legal requirement that this be done provided there are clear directions as to how the jury should deal with comments, whether by the trial judge or counsel. In the prefatory stage of this summing up, the trial judge said this (at p. 786):

> “In the course of my summing up, in a case especially of this nature, I will evaluate and analyze the evidence and if in the course of my doing so, it appears to you that I have a view of the evidence and you agree with my view, Madam Forelady and Members of the jury, then you can adopt it, adopt my view, make it your own, and act on it. On the other hand, if you don’t agree with my view of the evidence, I ask you to feel free to disregard it. Throw it through the window. My view of the case is not important. What is important is you views because you are the judges of the facts. Similarly, if in the course of my summing up of the evidence in this case, I make reference or emphasize evidence which you regard to be unimportant, you are at liberty to disregard my reference or my emphasis of that evidence. And if I do not make reference or emphasize evidence which you

consider to be important, I direct you to take that evidence into account. It is not because you might find that I left out a portion of the evidence that you will say that's not important. No. Remember that I am summing up the evidence in this case. You have heard the whole of the evidence and it is on that evidence for you to decide whether or not these two accused persons are guilty. And I am telling you all this, Madam Forelady and Members of the Jury because the facts and the evidence is (sic) for your sole consideration in determining the guilt or innocence of the two accused persons, namely Leslie Pipersburgh and Patrick Robateau".

We think that these directions were entirely clear and thorough. In our opinion, they would have put the jury in the appropriate frame of mind to enable them to deal with any comments he might thereafter make. Moreover, we see no good reason why they should have forgotten these directions nor choose to ignore them.

35. Ground 14: - "if the photographs or finger prints were taken and that was shown to you that would more conclusively prove who indeed were in the truck on that night and whose fingerprints were on the guns and the other items, and then you'd be able to conclusively say who were these persons". In my view of this statement the judge should have strongly directed that this doubt should have

been resolved in favour of the two accused".

There is no question that the trial judge was troubled by a great many things which he identified as weaknesses in the case. In our respectful view, the extract above was an invitation to the jury to speculate, a trap into which the judge had warned the jury to avoid falling. This was unfair to the prosecution because the police officer had given evidence that the reason for the absence of fingerprint proof lay in the fact that the items concerned were compromised by handling by a number of people after recovery. The reason for the absence of identification parades was the extensive media publicity. This was to impute incompetence to the investigating officers in the case. That, we do not think, was a live issue in the case. Having said that, we do not think, there was any need for directions, highlighting the absence of fingerprints on the guns or in the truck. The absence of evidence shows nothing. The jury is required to focus on the evidence actually adduced to see if it satisfies them so they feel sure of the guilt of the accused. Proof beyond reasonable doubt is not the same thing as certainty. Be that as it may, there was no certainty that the photographs for fingerprints, would have revealed usable fingerprints. Speculation along these lines is not, we suggest equivalent to doubt. The trial judge if he erred, erred in being overly kind to the appellant. We have no doubt that it was a sincere desire to be more than fair to

the appellant. He could not be any kinder but that is not a basis for requiring him to go beyond what is allowed by the law.

THE APPEAL OF PATRICK ROBATEAU

36. Ground 1: "The trial judge erred when he failed to hold a *voir dire* to determine the admissibility of the evidence of prosecution witness Salvador Figueroa who was a person in authority".

Ground 2: "The trial judge erred when he failed to rule that Prosecution witness Salvador Figueroa was a person charged with investigating a crime under section 15 of the judge (sic) rule and consequently the conversation between (Patrick Robateau) and Salvador Figueroa was inadmissible because no caution was administered to (Patrick Robateau) by Salvador Figueroa".

These two grounds will be dealt with together for convenience. It is right, we think, to point out that Mr. Fernandez who now appears on behalf of Patrick Robateau did not appear below. Counsel who appeared below in the course of the examination in chief of the Belizean Ambassador to Mexico objected at that point to any evidence being adduced from this witness on the ground that he was conducting an enquiry and consequently was a person in authority. He made no application for the holding of a *voir dire*. Crown Counsel rose to suggest that if the defence were challenging

the admissibility of a particular statement made by the accused Patrick Robateau, she would have thought it was on the basis of voluntariness and a *voir dire* should therefore be held. The trial judge was of the view that if he ruled that the Ambassador was not a person in authority, that was an end of the matter and there would be no need for a *voir dire*. Defence counsel then said that was not his "direction" which he said explained his reason for not relying on the argument based on persons in authority. Counsel then stated that he was relying on Rule 15 of the Judges' Rules. To put the matter beyond any doubt, counsel then said he was not speaking about "force or pressure or those things". Time was given to counsel to research the matter and make his submissions next morning. On the resumption counsel said that he was relying on the Judge's Rules and the court's inherent jurisdiction to disallow evidence that was unfairly obtained. The judge held that Rule 15 did not apply to Ambassador Figueroa as he was not a person charged with investigating or charging persons who may have committed crimes. With respect to his discretion to disallow anything Robateau might have said to the Ambassador, he did not think "it applied in this situation".

37. It is accepted practice in circumstances where the Crown intends to lead evidence of a confession, that the defence intimates to counsel for the Crown that he proposes to challenge the

confession. No mention of it is accordingly made in opening the Crown's case and at the appropriate time, a *voir dire* is held in which evidence is called, cross-examination takes place and the accused gives evidence. In a great may cases, the defence allege police third-degree methods. At all events, some impropriety is imputed to the police in extracting a confession. Where however, the accused denies providing the confession, no *voir dire* is held in those circumstances (see *Adjodha v. State 1982 [A.C.] 204*) and the trial proceeds normally.

38. In the instant case, the challenge was that the admission was made to a person in authority viz., the Ambassador. Assuming for the moment that the Ambassador could be regarded as a person in authority, it was never suggested that Robateau had been induced by any impropriety on the part of the Ambassador to make a confession. Of course, there was an onus on this appellant to show that as a matter of fact, the Ambassador was a person in authority. He endeavoured to do so by contending that the nature of his conversation with the appellant showed that it was not confined to dealing with identity, and "went a step further". The Ambassador, he said, made enquiries of the police and executives of Bowen & Bowen. But that argument rests on a misapprehension of the evidence. The evidence (pp 512 - 513) shows that it was after Robateau had made the admission that the Ambassador went to

his office and e-mailed pictures to Bowen & Bowen where the men worked and to the police. When asked his reason for that action, he replied:-

> "Well, again am not a police nor a detective and before I would ask Mexican authorities to transport them to Belize, I wanted, in my mind to be absolutely sure that somebody else took a decision that it would not be me. It is my work".

The Court: So that someone could make the decision to what you said?

Witness: "Number one, to say for sure who these people are because you have to understand the context of it, in that only one of them admitted who he was. The other one never did admit to me".

Plainly, it is incorrect to say that the Ambassador had abandoned his role of diplomatic representative concerned with verifying the identity of persons in the custody of the Mexican authority and assumed the character of "(a person) other than police officer(s) charged with the duty of investigating offences, or charging offenders…"

Such persons by virtue of the Judge's Rules, are enjoined to administer a caution. Rule 8.1 forbids questions being asked of persons in custody without the usual caution being administered. In *Deokinan v. R [1969] A.C. 83*, the Privy Council cited with approval a definition of person in authority articulated by Bain J in a Canadian case of *Todd (1901) Manitoba L.R. 364* as - "anyone who has authority or control over the accused or over the proceedings or the prosecution against him. And the reason that it is a rule of law that confessions made as a result of inducements held out by persons in authority are inadmissible is clearly this, that the authority that the accused knows such persons to possess may well be supposed in the majority of instances both to animate his hopes of favour on the one hand and on the other to inspire him with awe".

In the event there were no facts nor basis in law on which it could be held that the Ambassador was a person in authority and the trial judge was, we think, right to rule that he was not such a person.

39. We stated, earlier relying on Ajodha (supra) that it was our opinion that a *voir dire* should not be held to determine the voluntariness of the admission because objection was not being taken on the ground of any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.

"(Section 90 (2) of the Evidence Act, Cap 95 of the Law of Belize, Revised Edition 2000). In reality the defence were denying that any admission was made to the Ambassador. It thus became a question of fact for the jury to resolve that conflict. There was no suggestion on the part of the defence that, apart form the questions put by the Ambassador in endeavoring to check the identity of the appellants, that there was any impropriety in the conduct of the Ambassador; no inducement was suggested. Accordingly, there was no need for the judge to exercise his discretion to exclude the admission on the footing that its prejudicial effect outweighed its probative value. A confession proved to be voluntary may be admitted in evidence against an accused as to the facts stated or suggested therein. Section 90(1) of the Evidence Act, cap 95.

40. Ground 3: "That the trial judge erred when he allowed the dock identification of (Robateau) by prosecuting witness Karl Ventura, John Ventura and Vergilio Requena despite unreliable, unsound and contradictory evidence by the witnesses and the clear absence of identification parades".

There is no rule of law rendering evidence of a dock identification inadmissible: the rule is that such evidence is undesirable. *Aurelio Pop v. The Queen P.C. (unreported) 22 May 2003*. Where it occurs, the jury should be directed that the proper practice is to

hold an identification parade and the evidence should be approached with great care. *Williams v. R [1997] 1 WLR 548*. In *Aurelio Pop* (supra) the Board added to its advice tendered in *Williams* (supra), Lord Rodger stating that the judge should go on to explain" the potential advantage of an inconclusive parade to a defendant". So far as this ground went, it had little substance. Howsoever that may be, we thought it necessary to consider how the trial judge dealt with the matter, absent any complaint of counsel in that regard. So much so, that we thought it right to call upon the Director of Public Prosecutions to deal with that aspect of the matter. It was conceded by the Director that none of the prosecution witnesses who identified the appellants in the dock, knew their names, and that the first time they were identifying them was in court. It is therefore accepted on all hands that the identification of the appellants was a dock identification. What course of action did the judge take in giving his directions? He did bemoan the fact that no parade was held at p. 852, he said - "…in a situation like this, the proper course of action, I would say to you, where you have witnesses not giving you names of the persons they are seeking to identify, the proper course was for the police, as Mr. Willis said, was to hold an ID parade or an identification parade. The purpose of the identification parade is to ensure that the accused persons identified by witnesses in a line-up of over nine -

sorry. The purpose of the identification parade is to ensure that the person identified by a witness is identified from a line-up of say nine or twelve persons of similar height, size, complexion and preferable race. This serves to make the identification a fair one, and one from which the jury can more actually say that this was in fact the person that was identified. It is unfortunate, therefore, that the identification parade was never held".

Shortly thereafter, he continued - "Now, these witnesses, Madam Forelady and Members of the jury, you would recall based their identification of the accused persons on recognition because they say they had known the person before, they worked with them at the same place. But although that is so, Madam Forelady, and perhaps that's the reason why the ID parade was never held, I need to tell you that or I need to remind you that mistakes in recognition even of close friends and relatives are sometimes made. For there to be some certainty as to who accused persons are, it comes back to the ID parade. There ought to have been an ID parade to ensure that those were the persons that the witnesses say they saw…"

The judge seems to have forgotten that the police did say why parades were not held. In the course of re-examination of Inspector Mariano, he had explained that parades were not held on

the advice of Crown Counsel. We note, in passing, that there was evidence of widespread publicity in the media regarding the crime with the police publishing wanted notices. The judge did not mention this fact in his review of the evidence to the jury, but it is evidence which the jury would have heard.

It is patent that the trial judge did not follow *Pop* to the full extent, and that much was conceded by the Director. We think that the jury would have appreciated from what he had said that there was a danger of accepting the identification evidence where a parade had not been held. It is not disputed that he did not explain the potential advantage of an inconclusive parade to the accused persons. The argument has not been advanced before us that the full Turnbull guidelines were not followed by the trial judge in this case. The importance of exercising special caution in a case depending on identification evidence was amply stressed in our opinion. But this case did not depend wholly on visual identification by a sole witness. This was not a case of a fleeting glance or identification in difficult services, albeit at night. The lighting was generally described as bright, distances were not significant and opportunity, was adequate. The witnesses were not strangers to the appellants; they were security guards at the workplace of the appellants and prior to the incident were acquainted with them over various periods although they did not know their names. The appellant Robateau

did not challenge in his statement from the dock the witnesses' knowledge of him. The identification was by recognition and as to this, the trial judge gave proper directions. We would add that there was supporting evidence connecting this appellant with the crime. This would incline us to apply the proviso as we are of opinion, that no substantial miscarriage of justice would have occurred.

41. Ground 4:- "That the trial judge misdirected the jury when he failed to direct the jury that if they came to the conclusion that the alibi raised by (Robateau) was false, that this in itself should not be used to support the identification evidence given by the prosecution witnesses"

The trial judge at p. 883 in this regard stated as follows:

> "Now in this case, if you were to conclude that the alibis was (sic) false that does not of itself entitle you to convict the accused persons. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence. Members of the jury, because these two accused persons have raised this defence of alibi, it is most important that you take much care in respect to the evidence relative to identification coming from the prosecution's witnesses…"

We do not see wherein lies the misdirection nor was counsel able to assist us. It is enough to say that the directions were correct in point of law. It is also true to say that there was no need to have given the directions which the judge *ex abudante cautela* chose to give. Both appellants raised alibi in defence of the charges against them and did so from the dock. It was held in *Mills, Mills, Mills, and Mills v. R. (1995) 46 WIR* that in a case where an accused relies on an alibi as a defence and makes an unsworn statement from the dock, no directions as to impact of the rejection of the alibi can or should be given. The jury should merely be told to accord to such statement such weight as they consider it deserves. That ground must be rejected.

42. Ground 5:- "That the trial judge erred in law when despite insufficient direct or circumstantial evidence, he left the murder charges as regards Fidel Mai, Cherry Tucker and David Flores for consideration by the jury". Counsel made it clear that his "no case point" did not apply to count 2 which related to the murder of Kevin Alvarez. This ground also did not affect the count charging attempted murder.

In our analysis of the evidence implicating the appellants, we set out at some length, the evidence in that regard and do not propose to repeat what we have already said. We would only observe that

the evidence we identified, showed that these appellants planned to rob their workplace and succeeded in doing so, the money bags were removed from the office and later recovered from the Coco Cola truck which the appellants used to flee the compound. The circumstantial evidence was capable of showing that one of the appellants did the shooting, in that all the victims were shot in the head. The identification evidence was strong, having regard to previous knowledge of the appellants by the several witnesses who spoke on that issue and the circumstances of the identification, viz. lighting, distance and opportunity for observation. The coincidence of both appellants absenting themselves from work and turning up in Mexico and giving spurious information relating to themselves. Then the admission of Robateau to the Ambassador also formed part of the circumstantial evidence. The conclusion was inevitable that the shooting of four innocent persons were carried out by the robbers of Bowen & Bowen, the appellants. In our view, with all respect to the sedulousness of Mr. Fernandez, the evidence adduced by the prosecution was sufficient to raise a prima facie against the appellants. The judge was accordingly entitled to call upon them to answer.

43. We are satisfied that despite the duration of the trial and its complexity, we could find no irregularities which could have the effect of making the trial unfair and we are of opinion that the jury

arrived at a true verdict in the light of the evidence. These then are our reasons for the decision of a majority of the court.

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MOTTLEY P

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CAREY JA