IN THE COURT OF APPEAL OF BELIZE AD 2014
CRIMINAL APPEALS NOS 14 & 16 OF 2011

PATRICK ROBATEAU
LESLIE PIPERSBURGH Appellants

v

THE QUEEN Respondent

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BEFORE
The Hon Mr Justice Dennis Morrison Justice of Appeal
The Hon Mr Justice Douglas Mendes Justice of Appeal
The Hon Mr Justice Samuel Awich Justice of Appeal

Simeon Sampson SC for the first appellant.
Bryan Neal for the second appellant.
Mrs Cheryl-Lynn Vidal, Director of Public Prosecutions, for the respondent.

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15 June 2013, 14 March 2014.

MORRISON JA

Introduction

[1] These are appeals by the appellants against their convictions and sentences on two counts of murder. The appellants were originally brought before the court on an indictment charging them with four counts of murder and their trial commenced on 4

March 2011 before Lucas J and a jury in the Supreme Court sitting in Belize City. At the end of the Crown's case on 30 March 2011, two of the counts were disposed of, by way of directed verdicts of not guilty returned by the jury in respect of them. However, on 7 April 2011, the jury found the appellants guilty of the remaining two counts and on 15 April 2011 they were both sentenced to imprisonment for life.

[2] On this appeal, the first appellant challenged the judge's decision to allow evidence of an oral statement allegedly made by him to be given before the jury; while the second appellant complained that the judge's directions to the jury on the issue of joint enterprise were erroneous and misleading. At the conclusion of the hearing on 14 June 2013, we announced that, for reasons to be given at a later date, the appeals would be dismissed and the convictions and sentences affirmed. These are the reasons for the court's decision

The prosecution's case

Belize City, 18 June 2002

[3] The charges on which the appellants were convicted arose out of the deaths of two security guards, Messrs Kevin Alvarez and Fidel Mai on 18 June 2002. The men were killed while visiting the premises of the Bowen & Bowen Distribution Centre ('the distribution centre'), Slaughterhouse Road, Belize City. At that time, the appellants were both employed to Bowen & Bowen as driver/salesmen for Crystal Water, one of the products distributed by the company. The appellants had been so employed for about one and five years respectively. Mr Arthur Griffith, who was their direct supervisor, interacted with them on a daily basis.

[4] On the morning of 18 June 2002, both appellants were dispatched by Mr Griffith from the distribution centre in their respective trucks, which were loaded with products for sale. They both returned to the distribution centre late that afternoon, the first appellant at some time after 5:00 p.m., and the second appellant close to 6:00 p.m. In

the usual way, their trucks were checked and reloaded for the next day and their returns were recorded.

[5] Cash from the day's sales, together with the appellants' balance sheets, was then delivered to the cashier for reconciliation, preparation of bank deposit slips, and the placing of the day's cash takings in deposit bags. The cashier was assisted by Mr Griffith in these tasks and they were completed by about 8:45 p.m. As was usual, Mr Griffith then telephoned KBH Security ('KBH'), the distribution centre's security provider, to arrange for the deposit bags to be collected for delivery to the bank's night deposit facility.

[6] While these activities were taking place, the appellants had remained in the front office, which is where the cashier and Mr Griffith were preparing the bank deposits. According to Mr Griffith's evidence, the first appellant had asked him for a lift and he had assumed that the second appellant was also waiting for one. Just as Mr Griffith had completed speaking to KBH on the telephone, the second appellant pressed down the button on the instrument, cutting off the call. The second appellant then said, "Griff, a wa tek the money". At first, Mr Griffith said, he did not "take it serious", but at that point the second appellant raised his shirt, "showing a firearm and saying, 'a serious, a wa tek the money'". In due course, Mr Griffith was escorted by both appellants to the bathroom. There, the first appellant, who was also armed with a gun, then put the gun in his (the first appellant's) waist and taped Mr Griffith's hands in front of him. In the presence of the first appellant, the second appellant asked Mr Griffith if he "was going to say anything", to which Mr Griffith responded that he would not. Mr Griffith was then locked in the bathroom, though he could not say specifically by which of the appellants. But, while there, realising that he was able to access his mobile telephone in his pocket, Mr Griffith immediately called 911 and informed the police that a robbery was underway at the distribution centre. After about another five minutes had passed, during which time he was able to venture briefly out of the bathroom, but turned back when he saw the first appellant at the front door, Mr Griffith heard "loud bangs of shots".

[7] There was no significant challenge to Mr Griffith's evidence in cross-examination, particularly as regards the presence of the appellants in the front office of the distribution centre on the evening in question.

[8] Mr Virgilio Requena, a security guard employed to KBH, had been stationed at the front of the distribution centre from about 5:30 p.m. on the afternoon of 18 June 2002. He was armed with a 'pump 12' shotgun, which had been issued to him by KBH. While there, he saw various trucks enter the premises, including a Crystal truck driven by the first appellant, whom he had known for about seven years before. Mr Requena testified that he and the first appellant had served together in the Belize Defence Force, he as a member of the volunteer force and the appellant as a member of the regular forces. Sometimes when they did guard duty together, they would "always hang together and speak with each other". He saw the first appellant go into the office and, through a glass window, he was also able to see Mr Griffith, "a female person…and another dark skin fellow" inside the office. Sometime afterwards, he saw the "female person", whom he knew to be the cashier, leave the office.

[9] Not long afterwards, the "dark skinned" man who had been in the office with the first appellant left the office and headed towards the gate. This man, who was wearing what Mr Requena described as "a Crystal shirt" (the kind of shirt usually worn by Bowen & Bowen employees), then came over to Mr Requena and demanded his gun from him, at the same time grabbing after the firearm in Mr Requena's hand. Mr Requena then "felt something" in his side, resisted and a struggle ensued, during which Mr Requena was knocked over the head and lost consciousness. But, while the struggle was in progress, Mr Requena, whose evidence was that the area was well lit with fluorescent lighting, was able to recognise his assailant as someone who worked at the distribution centre and whom he had seen before. In court, Mr Requena identified the second appellant as his assailant.

[10] Mr Requena's identification of the first appellant was not challenged in cross-examination; but it was suggested to and denied by him that he did not in fact recognise the second appellant that evening.

[11] Mr John Ventura was also a security guard employed to KBH and, on 18 June 2002, he too was stationed at the distribution centre and armed with a 'pump 12' shotgun. He had been stationed there for eight months before June 2002 and had known the second appellant over that period, but he had known the first appellant for some five years before that time. Mr Ventura said that he and the first appellant had also served together in the Belize Defence Force, where he would from time to time see him for brief periods at Fairweather Camp in Punta Gorda. He identified both appellants in court.

[12] On the evening of 18 June 2002, Mr Ventura observed the first appellant parking a red Coca-Cola truck in front of the office at the distribution centre. About 15 minutes later, he saw the second appellant and Mr Requena engaged in a struggle at the front gate of the premises. He moved towards them, holding his shotgun at the ready in case the second appellant took Mr Requena's gun from him. Just then, Mr Ventura testified, the first appellant came up to him, put a gun to the left side of his head and told him to drop his weapon and the radio which was in his hand. Instead, Mr Ventura ran off, still holding the gun and the radio. Looking back, he saw the first appellant pointing a gun at him, again telling him to drop his gun and the radio. This time he complied, after which he jumped over the fence of the premises and made good his escape. He eventually took a taxi to the Queen Street Police Station, where he made a report. Later still that evening, when Mr Ventura was taken back to the distribution centre by the police, the red Coca-Cola truck was no longer there.

[13] In cross-examination, Mr Ventura denied the suggestions that he did not see the first appellant driving "any coke truck"; put a gun to his head; chase him or order him to drop his own weapon. It was also suggested to him, and also denied, that he did not even know the first appellant. Mr Ventura also denied a suggestion that he did not know

the second appellant; and further, that it was only after he had returned to the distribution centre later that night that he "got the name Leslie Pipersburgh" in his head.

[14] Mr Karl Ventura, who, as it happened, was a brother of John Ventura, was also a security guard employed to KBH and, in June 2002, he had been so employed for three and a half years. He had been performing escort duties in relation to deposit bags collected from the distribution centre for delivery to the bank for eight months.

[15] Shortly after 9:15 pm on the evening of 18 June 2002, a team of KBH employees consisting of Mr Ventura, Mr Kevin Alvarez and Mr Fidel Mai, was dispatched to the distribution centre to collect the Bowen & Bowen deposit bags. They were travelling together in a van driven by Mr Mai, with Mr Alvarez beside him in the front passenger seat and Mr Ventura in the back. Upon their arrival at the distribution centre at about 9:30 pm, the main gate at the front of the premises was open. This was unusual, as normally there would be two KBH security guards, along with a watchman, stationed at the gate. Mr Ventura also noticed what he described initially as "a Bowen & Bowen truck" parked in front of the warehouse facing the gate. That too was unusual. After Mr Mai had parked the van beside the truck, Messrs Ventura and Alvarez got out and went into the office, while Mr Mai remained seated on the driver's side of the van.

[16] No one was seen inside the office, but a deposit bag was seen on a table. Mr Ventura and Mr Alvarez then turned back towards the door through which they had entered the office. As Mr Ventura, who was ahead of Mr Alvarez, opened the door, he was confronted by two men, both armed with guns, who told him to "freeze". He described one of the men as "a clear skin male person", and the other as a "dark skin male person". Mr Ventura and Mr Alvarez both raised their hands in the air and they were then forced back into the building at gunpoint by the two men.

[17] Inside the building, Mr Ventura and Mr Alvarez were then separated, as the "dark skin" man took Mr Ventura to one side and the "clear skin" man took Mr Alvarez to the other. From the witness' demonstration in court, the distance between them was

estimated at 10-15 feet. Mr Ventura then saw the "clear skin" man "put the gun on [Alvarez] and he shot him and Alvarez drop [sic] to the ground". At this point, Mr Ventura started to struggle with the "dark skin" man in an attempt to disarm him, whereupon the "clear skin" man then proceeded to shoot him as well. Though hit in the mouth, Mr Ventura continued to struggle with the "dark skin" man, before being shot a second time, this time in his left shoulder, and falling to the ground. From there, Mr Ventura testified, "I gone blank." He would later regain consciousness in the Karl Heusner Memorial Hospital.

[18] Mr Ventura was unarmed during these exchanges, but his evidence was that Mr Alvarez was armed with a Glock 9mm pistol. He recognised the "clear skin" man as someone whom he was accustomed to seeing on his twice weekly visits to the distribution centre over the previous eight months as well as on occasions in May 2002 when he had actually been stationed there for one week. He pointed him out in court as the first appellant. Mr Ventura had never seen the "dark skin" man before that night.

[19] A team of three police officers arrived at the distribution centre just in time to hear the sound of shots coming from the direction of the building on the premises. They had received information that a robbery was underway inside the compound. Once inside the compound, the three officers got out of the car and ran towards the building, As they did so, the sound of more shots being fired was heard. Shortly after, a man of dark complexion, wearing a striped shirt, was seen emerging from the building. A red Coca-Cola truck was observed parked in front of the building close to the gate and the dark complexioned man then began firing several shots in the direction of the police officers. The fire was returned. Shortly after this, the dark complexioned man got into the Coca-Cola truck, which was by that time moving, on the passenger side. The truck then proceeded through the gate of the distribution centre onto Slaughterhouse Road.

[20] The police officers got back into their vehicle and gave chase to the Coca-Cola truck, but lost it. Other police personnel on patrol, responding to information over the police radio, then took up the chase, during which the police officers responded to what

appeared to be shots being discharged from the truck by firing back at it. The Coca-Cola truck finally came to stop in the University Heights area. Two men alighted from the truck, one of them of dark complexion, wearing a white shirt with vertical green stripes similar to the shirts worn by Crystal Water employees. Ordered by the police stop, this man ran off into the nearby bushes. A second man, of fair complexion, also emerged from the truck, armed with what appeared to be a firearm. When ordered to stop by the police officers, this man continued running, so one of the officers fired a single shot. The man fell to the ground and rolled in front of the parked Coca-Cola truck, but then got up and ran into the nearby bushes.

[21] When the Coca-Cola truck was searched, four firearms - a Glock 9mm pistol, a .38 pistol and two pump action shotguns – were found in the cab. Three white plastic bags marked 'Barclays', containing coins, and a blue and white striped Crystal "uniform shirt" with what appeared to be bloodstains on it were also found. As it turned out, the Glock 9mm pistol had been issued to Mr Mai by KBH earlier that day; the two shotguns were the firearms that had been issued by KBH to Messrs Requena and John Ventura; and the three plastic bags were identified as being among those which Mr Griffith and the cashier had prepared at the distribution centre earlier that evening.

[22] Back at the distribution centre, the motionless bodies of Messrs Alvarez and Mai were found. They had both received gunshot wounds, Mr Alvarez to the left side of the head and the right side of his chest and Mr Mai to the left jaw. In both cases, both men were in due course certified as having died as a result of hypovolaemic shock due to the injuries they had received.

[23] The following morning, 19 June 2002, neither of the appellants reported to work at the distribution centre.

Mexico City, July 2002

[24] In July 2002, Mr Salvador Figueroa was the ambassador of Belize to Mexico City He described his duties and responsibilities as being, "Generally speaking…to represent the interest of Belize and Belizeans, whether it be for economic matters, trade matters, immigration matters, scholarships". When asked to repeat, Mr Figueroa also added to the list representation in commercial matters, "and generally to provide representation for the bilateral relationship between Belize and Mexico". At the trial, Mr Figueroa was allowed to give evidence of a conversation that he had allegedly had with the first appellant on 10 July 2002, after a voir dire had been held to determine the admissibility of this evidence. The circumstances in which the conversation took place were as follows.

[25] As he entered the front door of the Belizean embassy in Mexico City at approximately 10:00 am on 9 July 2002, Mr Figueroa observed two young men in the lobby. They were accompanied by Mexican immigration officials. This was not unusual, as from time to time persons would be brought to the embassy by Mexican immigration officials in order to verify whether they were citizens of Belize or not. After making an enquiry as to what the two young men were there for, Mr Figueroa was advised that travel documents were being prepared for them to enable them to travel to Belize. Shown the documents, Mr Figueroa observed that they were in the names of Lance Gabourel and Rodwell Robateau. His suspicions were aroused by his recollection of news reports from Belize of a quadruple murder a few weeks before, in which one of the alleged perpetrators was said to be someone with the name Robateau. Mr Figueroa then sought to verify the identities of the two men by a comparison with the photographs which had appeared in the Belize Times newspaper of the alleged perpetrators of the murders, but this exercise proved to be inconclusive. Contact was then made, first with an executive of Bowen & Bowen in Belize City who was personally known to Mr Figueroa, and then with a senior police officer, who suggested that Mr Figueroa should take photographs of the men and send them by email to Belize in order to confirm whether these men were indeed the wanted suspects.

[26] The following day, having asked the Mexican immigration officials to delay sending the men back to Belize, Mr Figueroa visited them at the detention centre. After a brief interview with the man who had given his name as Lance Gabourel, Mr Figueroa then spoke to the other man separately. In answer to Mr Figueroa's question whether he went by any other name apart from 'Rodwell Robateau', this man replied, "… yes, my name is Patrick Robateau and I am the person they are looking for in Belize". The man said that he was afraid of returning to Belize, because he would be killed. After a further brief exchange between them, this was Mr Figueroa's account of what happened next:

> "I told him that; 'you're such a polite young man, you're so humble, you're so soft spoken, it's hard for me to believe you did such a terrible thing', and he replied to me something to the effect of, 'I don't know how I did it. It all happened so fast. I did not know what I had done until it was over and then we panicked and just tried to get out of Belize'… I ask [sic] him if he understood the pain that he had brought upon the families of the victims and he replied that he did."

[27] Photographs of both men were taken by Mr Figueroa and sent by email to the police in Belize City. He subsequently received confirmation that these two men, who he identified in court as the appellants, were indeed the two men being sought by the Belizean authorities.

[28] Mr. Figueroa testified that the first appellant had spoken to him of his own volition; that he had not made the first appellant any promise in exchange for supplying information; and that the first appellant had not beaten, threatened or mistreated him in any way. Further no complaint was made to him that the first appellant had been beaten, threatened, or mistreated by the Mexican authorities. For his own part, Mr Figueroa testified, he had not been instructed or asked by anyone to obtain information from the first appellant, nor was he trying at any time to extract or obtain from him any statement or information pertaining to the matters in which he was alleged to have been involved in Belize.

[29] When he was cross-examined in the voir dire, Mr Figueroa was pressed with the suggestion that, in interviewing the appellants, he was "assisting" the police. This was his answer:

> "I may have assisted them in the execution of my job but I was primarily concern [sic] with doing my job. My job was to verify whether these were Belizeans and the only way to assure that they were Belizeans is to find out who they were."

[30] In his evidence in the voir dire, the first appellant said that, after he had told Mr Figueroa that his name was Rodwell Robateau, Mr Figueroa showed him a photograph on the front page of the Belize Times and told him "this is you right here". Mr Figueroa also told him that he "would have to go back and face the music", then said that "if I cooperated with him, he would assist me". According to the first appellant, he made no response to this statement, though he did permit Mr Figueroa to take photographs of him. There was no further conversation between them.

[31] In his ruling, Lucas J considered that there were two issues for his consideration: (i) was Mr Figueroa a person in authority and (ii) whether there was any inducement offered by him to the first appellant which caused him to say what Mr Figueroa alleged that he did. After ruling on the first issue that Mr Figueroa was a person in authority, the learned judge turned to the second, which was, essentially, a question of fact. He accepted Mr Figueroa's evidence as proving beyond reasonable doubt that the first appellant's oral statement was made without any inducement whatsoever.

[32] The judge also rejected a further submission on behalf of the first appellant that Mr Figueroa was also bound to apply the Judges' Rules. This was a case, the judge observed, of "one swallow does not make a summer".

[33] On this basis, Mr Figueroa's evidence of what the first appellant had allegedly said to him was admitted by the judge and rehearsed in front of the jury. The jury were told that the appellants were subsequently returned to Belize where, on 12 July 2002,

they were arrested and charged on four counts of murder. Both appellants remained silent after they were cautioned.

The case for the defence

[34] At the the close of the case for the Crown, after unsuccessful no case submissions were made in respect of the counts of the indictment pertaining to Messrs Alvarez and Mai, both appellants elected to make unsworn statements.

[35] The first appellant said this:

> "I'd like to start off by saying it is a shame to see people of high qualifications and low qualifications throughout the course of this trial took the stand and swore to tell the truth and yet they still tell a whole lot of lies after swearing on the bible.
>
> The evidence given by Mr. Requena stating that he knew from 1995, whilst I was in the Belize Defence Force, I join the Belize Defence Force in the latter part of the year in September of 1995. And anybody that is familiar with that system would know for a fact that no recruit can mingle with any regular force or worst volunteer force. So there is no way possible that he can know me from 1995.
>
> With the statement of John Ventura he said that he knew me from the camp in PG. There is a 120 and more personnel on that compound at any one time. I have never been in the same rifle company with John Ventura at any point and yet he came in the courtroom and refer to me by my full name as if we were friends of that sort. Whereby anybody that is familiar with the military system would know that it is only by rank, last name or nickname that any soldier would refer to each other as. Also in his statement he said that his shotgun was cocked after seeing Requena struggling with somebody.
>
> THE COURT: I'll only ask you one question. Also in his statement, what are you talking about, his police statement, not from here?
> [MR ROBATEAU]: Yes, it's here.
> THE COURT: When he give evidence.
> [MR ROBATEAU]: Yes sir.
> THE COURT: Go ahead, Mr. Robateau.

[MR ROBATEAU]: He said that his gun was cocked already after seeing Requena struggling with somebody and he ran and apparently he said he saw me chase him. There is no way possible that if I had chased him that he would have ever gotten away from me, for at that said time, I am running a mile and a half in seven minutes and thirty-four seconds. And anybody in their right mind would know that person with a shotgun and a person with a handgun, there is no comparison.

In the evidence of Karl Ventura, he said that he saw me and somebody else met him and Kevin Alvarez at the front door. Out of the amount of brown skin drivers for the Crystal company, there is no way specifically he can say that it was definitely me that he saw. And even at that, I am a trained soldier. There is no way that I would have allowed anybody that would have a gun to move from the front door to the warehouse with that gun still on them.

In relation to Mr. Mariano's statement, he said that when I was in his office he read me my rights, which in, in fact, all he did was show me some pictures and ask me a bunch of questions. And I was the one that pointed out to him the poster on his wall that had my rights on it and I read it out loudly for him to hear.

In comparison with his statement is Mr. Figueroa's statement, where he said that I gave him a statement in Mexico. Now, if I didn't give Mr. Mariano any statement, why is it that I would give Mr. Figueroa a statement. The whole courtroom can see when Mr. Figueroa was on the stand his smart comments that was [sic] made to the defence and to think that somebody of less qualifications than he was in a room alone with him and him making a smart comment and getting a smart answer that would definitely would have gotten to his mind. And along with him being friends of a member of Bowen & Bowen and a reward being out that is a reason why you would see somebody of his character being here. That is the reason why I said people of high and low character coming here and swearing on the bible and telling lies.

I don't know nothing about any murders, nor I myself have not committed any murder.

I have three kids, two sons and a daughter and that was my sole purpose of why I was going to the U.S. to better off the family structure and my home. That's all sir."

[36] That was the case for the first appellant, after which the second appellant made his unsworn statement, as follows:

"On 18 June 2002, I Leslie Pipersburgh and other persons, we plan to rob Bowen and take the money. The whole idea was just to take the money and not hurt anyone.

On 18 June 2002, when night set about 7:00 p.m. after Griffith get through with the counting of money, we decided to take the money. So I went to Mr. Griffith, while he was counting money; before I went to Mr. Griffith I went to Mr. Requena outside by the gate. And I wanted to disarm him due to the gun that I had wasn't a real gun. I approach him on the side and told him give me his weapon because if I mi fade ah, ih mi wa know that did gun not real. Then we start to struggle, well I start to struggle with ah to take away the gun, punch him in the jaw and soh ih knock out and I push ah ena di drain.

Soh I went inside back to the distribution centre. When I reach back inside I saw Griffith in the phone. I tell Mr. Griffith, I seh, "Mr. Griffith, a wan work the money from the day sales", and they [sic] time Mr. Griffith noh hang up the phone yet soh I just knock down the phone. Soh a tell ah a wan work the money, he tell me he just mek the call for the truck.

THE COURT: Beg your pardon?

[MR PIPERSBURGH]: I tell ah a wan work di money. He tell me he call fi di truck soh I lift up my shirt and just shown ah the gun handle ena my pants waist. I neva tek out the gun fi show ah because the light back a fi he desk, he mi was recognise da noh wa real gun. Soh I just show ah the handle and I recall he seh ih just call the truck and I know the truck tek like 15 minutes to reach. Soh I tell ah yer weh dig oh on, mek me just hurry get did money and mek I roll out.

Soh he went ena di office, open the chist [sic] and out the money on the table along with some loose cash from Ms. Dawson draw. And then I put him in the bathroom ad tie him up. I stay outside a di bathroom door and the other person tie he up.

I come back, get some loose cash that was on the table in the manager's office and I didn't take the bag of money because I notice it was lone dollar coins and I know den heavy soh I just ker the paper money.

Then I went outside, tek out mi phone and call mi homeboy di wait down the lane for mi ena ih vehicle. When I si fe he vehicle fi approach the compound I just run to the gate, haul open the gate because the gate kinda a stiff soh yu haffu jerk it due to that the gate…

THE COURT: And you haul open the gate you said?

[MR PIPERSBURGH]: Yes sir, I haul open because the end a it touch the ground, soh yu haffu jerk it like. I just swing open the gate, jump ena my vehicle and roll out.

Due to that the idea that when yu done get yu money yu goh yu own way because everybody ova eighteen, see the plan that when we get di money from the robbery mek we split up because everybody ova eighteen.

When I left now, my homebody mi done got my papers fi America, some California papers, birth papers and soh. So the same night we went to Corozal, early the next morning we went to Chetumal. I gave ah wa portion a di money fi di favour weh ih do fi me. I went on my own.

The following day, the mawning I went to Chetumal and the day after, the following day like two days after the robbery I call my homeboy and ask ah if my name di ring up fi anything, the robbery or they did look fi me or what. My idea was just to stay low cause we done know dat by law they seh dat afta six months they noh charge yu fi robbery again, so we mi wa come back afta six months. Then he tell me bout somebody bloody up the spot, like murder, wa murder happen ena di areas.

THE COURT: Your homebody told you so?

[MR PIPERSBURGH]: Yes sir. Soh I just tell ah well Belize noh wa see me again and that's it because I noh wa they charge me fi something I noh know bout. That da it.

You want a continue till we get catch da Tijuana?

THE COURT: That's not for me. I won't ask you any questions, you see.
[MR PIPERSBURGH]: I was continue explain [sic] till when a get catch then.
THE COURT: You want to explain that?
[MR PIPERSBURGH]: Yes sir.
THE COURT: Okay, go ahead.

[MR PIPERSBURGH]: Soh when my homeboy tell me that then, soh I tell ah I noh wa come back da Belize to face no murder weh I noh know bout. Soh I tell ah well, I wa just di continue my journey da America and noh come back afta the six months.

Soh I head to Cancun, buy wa plan [sic] ticket and fly to Tijuana. As I was getting off the plane at Tijuana immigration officer ask mi fi documents and I just show ah my documents. When he check the documents he notice

the seal to the California ID that I mi di carry pan me neva stick down good, and ih notice underneath my picture wa next picture mi deh underneath mines. Soh ih know da mi wa forged.

I just want finish off, Your Honour, just by saying that, yes, a mi do the robbery but I didn't kill anyone.

THE COURT: Yes I do the robbery but I noh?

[MR PIPERSBURGH]: But I noh know nothing bout the murder. When I left, no security or nothing mi deh pan the compound, only the one I left in the drain. That's it right there."

[37] And that was the case for the second appellant.

[38] The learned trial judge then summed up the case to the jury in detail, in terms of which, save as regards the matters raised on this appeal, there is no complaint by the appellants. As already indicated, at the conclusion of the summing-up the jury brought in verdicts of guilty of murder against both appellants and they were sentenced accordingly.

The first appellant's appeal

[39] The ground of appeal filed on behalf of the first appellant challenged the learned trial judge's decision to admit Mr Figueroa's evidence of the alleged oral statement:

> "The Learned Judge's failure to exclude the evidence of the [first] appellant's alleged confession to Salvador Figueroa was a material irregularity amounting to a miscarriage of justice."

[40] In support of this ground, Mr Sampson SC submitted that Mr Figueroa's role was clearly that of someone who was carrying out an investigation into the offence which had been committed. He was aware of the murders and aware that the appellants were potentially suspects; he had spoken to the police; and his intention was to take photographs in order to establish their identities and to send those photographs to the Belizean police.

[41] In these circumstances, Mr Sampson submitted, the ambassador fell within rule 15 of the Judges' Rules, as a person "other than [a police officer] charged with the duty of investigating offences" and, ought accordingly to have (i) cautioned the first appellant; and (ii) informed of his right to consult a lawyer. This requirement having been breached, Mr Sampson submitted finally, the first appellant's statement ought to have been excluded. In addition to the Judges' Rules, Mr Sampson referred us to and relied on the decisions of the English Court of Appeal in **R v Bayliss (1993) 9 Cr App R 235**; and the Privy Council in **Scott & Barnes v R [1989] AC 1242**.

[42] The learned Director's three-pronged response to these submissions was direct. First, the Judges' Rules do not apply to the ambassador. Second, assuming, for the sake of argument, that they did apply, the ambassador would not have been required either to caution or inform the first appellant of his right to an attorney in the specific circumstances of the case. And third, even if the Judges' Rules did apply to the ambassador in this case, his failure to comply did not render his evidence inadmissible and the learned trial judge could properly have exercised his discretion in favour of admitting it.

[43] But in any event, the Director pointed out, Lucas J was called upon to rule on the specific issue now being canvassed on appeal and had concluded against it. In those circumstances, she submitted, this court ought only to be persuaded to overturn the judge's findings on the basis of some fresh material to suggest that that finding was not reasonably open to him on the facts.

[44] In support of these submissions, the Director referred us to the decisions of the Board in **Phillip Tillett v R [2011] UKPC 21** (para 15) and the English Court of Appeal in **R v Seelig and R v Spens [1992] 1 WLR 148**, **R v Gill and Gill [2003] EWCA Crim 2256** and **Doncaster v R [2008] EWCA Crim 5**.

[45] The version of the Judges' Rules currently applicable in Belize ('Judges' Rules: Being Guidelines for the Interviewing of Persons and Obtaining Statements from them

while in Police Custody'), was issued by Conteh CJ on 29 May 2000, pursuant to section 60 of the Supreme Court of Judicature Act. Of relevance to the present discussion are rules 1.2, 3, 15 and 16:

> "1.2: A person whom there are grounds to suspect of an offence must be cautioned before any questions about it (or further questions if it is his answers to previous questions that provide grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution. The person need not be cautioned if questions are put to him for other purposes, for example, to establish his identity, or the ownership of any vehicle or the need to search him in the exercise of powers of stop and search.
>
> Rule 3: Whenever a police officer has arrested or detained a person he should immediately inform that person that he is entitled to speak privately with an [sic] instruct a lawyer or, if the person is a minor, to speak with his parents or guardians.
>
> **Rule 15: Persons other than police officers charged with the duty of investigating offences, or charging offenders shall, so far as may be practicable, comply with these Rules.**
>
> Rule 16: Failure to comply substantially with the provisions of these rules may result in a statement made by an accused person or person who subsequently becomes an accused person not being admitted in evidence." (Emphasis ours.)

[46] In England, some of the ground covered by the Judges' Rules has long been given statutory effect by virtue of the provisions of the Police and Criminal Evidence Act 1984 ('PACE'). Section 66(1)(b) of PACE provides for the issue of codes of practice in connection with "the detention, treatment, questioning and identification of persons by police officers". Then, in terms very similar to rule 15 of the Judges' Rules, section 67(9) provides that "[p]ersons other than police officers who are charged with the duty of investigating offences or charging offenders shall in the discharge of that duty have regard to the relevant provision of such a code".

[47] The question of what categories of persons fall within the phrase "charged with the duty of investigating offences or charging offenders" has attracted a fair amount of judicial attention over the years since section 67(9) was introduced. The earliest of the cases to which we were referred is **R v Seelig, R v Spens**. In that case, the defendants were charged with conspiring to contravene the provisions of the Prevention of Fraud (Investments) Act 1958. The allegation against them was that they had induced shareholders of a company to enter into agreements for disposing of their shares, in consideration for acquiring shares in another company, by dishonestly concealing material facts. At an inquiry into the affairs of that company, the defendants were questioned by inspectors appointed under the Companies Act 1985, but they were not cautioned, nor were the provisions of the relevant code complied with.

[48] On the question whether section 67(9) applied, Henry J at first instance ruled that it did not, on the basis that the inspectors were not persons "charged with the duty of investigating offences" within the meaning of the subsection. His decision was upheld by the Court of Appeal, which held that it was a question of fact which was open to the judge on the evidence (see per Watkins LJ at page 158):

> "Our view is…that whether a body or a person conducting some kind of inquiry is subject to section 67(9) is a question of fact in each case. It is, in our view, quite impossible to give a generalised answer to the question arising out of section 67(9). We take Henry J to have found as a fact that the inspectors in the present case were not investigating offences. Upon all the evidence before him it was a conclusion at which we think he could justifiably arrive. We do not therefore agree that his finding in this respect was wrong."

[49] In **R v Bayliss**, the appellant was stopped by a store detective as he was leaving a store with goods for which he had not paid. He admitted to the store detective that he had taken a video cassette, after which he went with her to her office, where she asked him if he had taken anything else. He then produced six more items, saying, "O.K., let me get them out and get it over with." The police were called and, after the appellant was arrested and cautioned, he made no comment. At his trial, it was sought to exclude part of the store detective's evidence, on the basis that, as soon as she was sure that

an offence had been committed, she should have cautioned the appellant. The trial judge rejected that submission and the appellant was convicted.

[50] The appellant's appeal was dismissed by the Court of Appeal. It was held that while it was possible for a person in the position of a store detective to be a "person charged with the duty of investigating offences", it was a question of fact in each case, although a question of law might also arise if the duty involved the construction of a statute or some other document. The answer to the question therefore turned primarily on the evidence in each case, as the following passage from the judgment of Neill LJ (at page 239) emphasises:

> "There are some indications in the summing-up which suggest that [the store detective] was charged with the duty of investigating offences. She was employed as a security officer and was clearly there to detect possible thefts from her employers. In addition, she made reference in her evidence to the training which she had received. We are quite satisfied, however, that in the absence of clear evidence about the terms of her employment and as to the scope of her duties it would be wrong for this Court to interfere with the decision of the judge. As we have already stated, it will be a question of fact in each case whether or not a particular individual falls within section 67(9)."

[51] But in **R v Gill and Gill**, the Court of Appeal differed from the trial judge on the applicability of section 67(9). The case arose out of allegations against the appellants of tax fraud, during the course of the investigation of which they were interviewed by two officers of the revenue (in what was known as a 'Hansard interview'). It was conceded by counsel for the Crown that, by the time the interview took place, the appellants were already suspected of serious fraud and that it was because of that fact that the interview took place. The judge nevertheless accepted the Crown's further submission that the interview was in fact part of a civil process designed to gather in the money due to the revenue and not a criminal investigation.

[52] The Court of Appeal disagreed. However, it is clear from a reading of the judgment of Clarke LJ (as he then was) that this determination was not arrived at by

way of any disagreement on the facts as found by the judge, but rather on the basis of a different construction of the provisions of the relevant code and the arrangements underpinning the interview process. This was the court's conclusion on the point (at paras 37-40):

> "37. While we fully understand the importance of the Revenue being able to recover the tax owed to it and the value of the Hansard procedure in that regard, we are unable to accept the Revenue's submission. The statement of the Chancellor of the Exchequer made in Parliament on 18 October 1990 makes it quite clear that, while in cases of tax fraud the Revenue will be influenced by a full confession in deciding whether to accept a money settlement (including presumably an appropriate penalty), it gives no undertaking to do so or to refrain from instituting criminal proceedings. Tax fraud involves the commission of a criminal offence or offences, so that it is in our view evidence that the role of the SCO investigating fraud involves the investigation of a criminal offence.
>
> 38. Although we recognise that a caution had not been administered in the past at a Hansard interview because such an interview has not been regarded by the Revenue as subject to Code C, in our judgment, that is to give too narrow an interpretation of the expression 'charged with the duty of investigating offences' in section 67(9) of PACE. The officers of the SCO were charged with investigating serious fraud and, since serious fraud inevitably involves the commission of an offence or offences, it seem to us to follow that they were charged with the duty of investigating offences.
>
> 39. The purpose of Code C is to ensure that interviewees are informed of their rights, one of which is not to answer to questions, and to inform them of the use which might be made of their answers in criminal proceedings. It is clear from the Parliamentary statement that the SCO had the possibility of criminal proceedings in mind in respect of the fraud about which they were asking questions and we can see no reason why the Revenue should not have cautioned taxpayers suspected of fraud before asking them questions in these circumstances. We cannot see why a caution should reduce the chances of a taxpayer making a full confession, which was the purpose of the process. However that may be, since the revenue expressly reserved the right to prosecute for fraud, it appears to us that one of the purposes of asking the questions must have been the 'obtaining of evidence which may be given to a court in a

prosecution', even if the Revenue's main aim was to arrive at a monetary settlement.

40. For these reasons we have reached a different conclusion from the judge and hold that Code C applied to the Hansard interview conducted on 8 March 1995 and that the appellants should have been cautioned and a tape recording made of the interview. The question then arises whether the evidence of what the appellants said at the interview should have been excluded under section 78 of PACE on the ground that its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. We turn to that question."

(But cf. **Doncaster v R**, where, on the facts, the Court of Appeal again declined to disturb the findings of the trial judge, after a voir dire, that the tax inspectors in that case "were not persons charged with the duty of investigating offences who were required to have regard to the PACE Codes" – per Rix LJ at para 34.)

[53] And finally on this point, we must mention **Tillett v R**. In that case, the Privy Council was concerned, on an appeal from a decision of this court, with the question whether a prison officer attached to the Hattieville prison was a person charged with the duty of investigating offences or charging offenders, for the purposes of rule 15 of the Judges' Rules. The trial judge ruled that he was not and, although the point was not taken in this court, his ruling was challenged on his further appeal to the Privy Council. The Board's response (at para 15) was as follows:

> "Whether a person is charged with the duty of investigating offences or charging offenders is a question of fact, although it may involve a question of law if the duty involve the construction of a statute or some other document: *R v Bayliss* (1993) 98 Cr App R 235, 238. No material has been placed before the Board which suggests that the judge's finding was not one that was reasonably open to him."

[54] From this short series of citations, it is possible to state the following conclusions:

1) Whether someone other than a police officer is a person charged with the duty of investigating offences or charging offenders is in

general a question of fact, to be considered on the basis of the evidence before the judge in a particular case. The matter may, however, involve a question of law if the duty falls to be discerned from the construction of a statute or some other document.

2) Where the matter turns entirely on a question of fact, clear evidence as to the terms of employment and scope of the duties of the person involved should normally be placed before the court to enable it to make a determination.

3) Where, on the evidence before the court, the finding of the trial judge was one which was reasonably open to him or her, this court will not interfere in the absence of any material to suggest otherwise.

[55] In this appeal, there can be no doubt, in our view, that the question of whether Mr Figueroa was a person charged with the duty of investigating offences or charging offenders was purely one of fact. The starting point in our consideration must therefore be the evidence that was before the learned trial judge. The only evidence bearing on this matter was the unchallenged evidence of Mr Figueroa himself (see para [27] above) that his duties as ambassador were, generally speaking, to represent the interests of Belize and Belizeans in Mexico with regard to economic, trade, immigration, commercial matters; scholarships; and to provide representation in connection with, the bilateral relationship between the two countries.

[56] The learned Director submitted (at para 13 of her skeleton arguments) that, in the light of this evidence, “it is not arguable that the scope of the duties of the Ambassador, as set out in the evidence, did not include the investigating of offences or the charging of offenders”. We agree entirely. For, even if it could be said that, by seeking to secure photographs of the appellants for the purpose of sending the images back to the police

in Belize, Mr Figueroa was in some way, "assisting" the police, he cannot be regarded, in our view, as having thereby assumed a duty of the kind envisaged by rule 15.

[57] In coming to this conclusion, we have not lost sight of Lord Rodger's observation in **Pipersburgh & Robateau v R [2008] UKPC 11** (at para 28) (the judgment of the Board on the appellants' successful appeal from their previous convictions arising out of these facts), that, in acting as he did, Mr Figueroa "might be seen as acting in support of the police". But that observation was made in the context of Lord Rodger's discussion on whether or not a voir dire ought to have been conducted by the trial judge at the appellants' first trial to determine the admissibility of the statement attributed by Mr Figueroa to the first appellant. At the end of that discussion, Lord Rodger made it clear (at para 29) that the Board was expressing "no concluded view on the admissibility of the evidence of Mr Robateau's conversation with the ambassador…in the circumstances it would be premature to do so". So what the Board did decide in that case was that a voir dire should have been held.

[58] In this case, in faithful compliance with the Board's direction, the trial judge did conduct a voir dire, at the end of which he ruled the evidence of the first appellant's conversation to be admissible. On the rule 15 point, the only one taken against the ruling on appeal, the learned judge ruled that the evidence did not support a finding that Mr Figueroa was a person charged with the duty of investigating offences or charging offenders. In our view, that was a finding that was reasonably open to the judge on the evidence before him and no material has been shown to us to suggest otherwise.

[59] Further, and in any event, it seems to us that the Director is also correct in her submission that, on Mr Figueroa's evidence (which the trial judge accepted as truthful), in his interaction with the appellants he was doing more than what rule 1.2 of the Judges' Rules explicitly entitled him to do without administering the caution. That is, to put questions to the appellants in order to establish their identity, both for the purposes of the travel documents which they required and to ascertain whether they were in any way connected to events in Belize of which he was aware. There is certainly nothing in

the evidence, in our view, to indicate that Mr Figueroa was intending to ask – or did in fact ask – any question of the first appellant that went beyond this.

[60] The learned Director also submitted – again, in our view, correctly – that, even if the trial judge had found that rule 15 applied in this case and that the statement attributed to the first appellant had been made in breach of the Judges' Rules, it would still have been open to the judge to admit the evidence as a matter of discretion. As rule 16 makes clear, a failure to comply substantially with the provisions of the rules will not result in an automatic disqualification of the evidence of any statement made by an accused person. As Lord Steyn observed in **Mohammed v The State [1998] UKPC 49** (para 29), speaking in the context of a confession obtained in breach of an accused person's constitutional rights, "the judge must perform a balancing exercise in the context of all the circumstances of the case" (quoted with approval by Rowe P, delivering the judgment of this court in **Robert Hill v The Queen** (Criminal Appeal No 5 of 2000, judgment delivered 8 March 2001, page 3). The exercise by a judge of his discretion in such circumstances would again not have been open to challenge on appeal unless it could be shown to have been premised on erroneous considerations.

[61] It is for these reasons that we came to the conclusion that the challenge to the learned trial judge's decision to admit Mr Figueroa's evidence had not been made good and that the appeal of the first appellant should accordingly be dismissed.

The second appellant's appeal

[62] The second appellant relied on the following ground of appeal:

> "The Learned trial Judge erred in his directions on secondary party liability in murder to the extent that the jury were directed they could convict second] appellant as a secondary party in the murder of Kevin Alvarez – and by extension – Fidel Mai – without the [second] appellant having the requisite intent."

[63] As the complaint on this ground relates entirely to the judge's directions to the jury on the question of intention, it may be convenient to set them out at this stage. The judge dealt with the issue in a number of places. First, in the main body of the summing-up, he said this:

> "Therefore, Madam Forelady, ladies and gentlemen of the jury, I need to direct you on the legal term of joint enterprise. Recall that the counsel for the Crown is relying on joint enterprise and also circumstantial evidence.
>
> So what is joint enterprise? The simplest form of joint enterprise in the context of murder is when two or more people plan to murder someone and do so. Simplest form of joint enterprise; there is a plan, for example murder and they did the murder. If both participants in carrying out the plan, carry out the plan, both are liable. It does not matter who actually inflicted the fatal injury. Again I'm telling you what the law is, it does not matter. But things become more complicated, I was telling you the simplest form, but things become more complicated when there is no plan to murder but in the course of carrying out a plan to do something else, one of the participants commits murder. The most common example is a planned robbery, in which the participants hope to be able to get what they want without killing anyone, but one of them does in fact kill. In such a case, list [sic] to this properly, the other may still be guilty of murder provided he had the necessary intent. This mean, if the other participant, that means, I'll refer to him as none shooter, realise that in the course of the joint enterprise, the joint enterprise in this case, robbery, that the primary party, that means the shooter, might kill with the intent to do so, that means that intent to kill and with that knowledge or foresight the other participant continue to take part in the joint enterprise, he is liable. So I'm telling you this because we're going to a little bit of evidence for you.
>
> So the clear skin person did the shooting, the dark skin person was present; for him to be liable he must know or realise or foresee that the clear skin person would shoot and kill and with that knowledge he still participated. It may be said that the robbery done or finish and which is true, robbery might complete, hold you up, take away what you have, even drop it because one see police and they run off, the robbery complete because you have deprived the person of his property. But it's a matter for you, you may say that they want to carry their loot. They want to carry the money, with the first accused, I can use first accused now, Griffith said that he told him, 'a wa tek the money'. Wouldn't be useless that he just leave it there. Wouldn't the whole, that means the purpose would be to take and carry away the money. That's a matter for you.

Fifth element, at the time the unlawful harm was inflicted on Kevin Alvarez their specific intention was to cause his death. Now in murder, the only intention is to kill. If the intention, I will just burn him, I will just injure him, even if the person dies that would not be murder because that would not have been intention. So murder is the killer, must intend to kill when he inflicted the injury, that was his specific intention. So don't forget that.

So how will you know a person's intention? I'm directing you Madam Forelady, ladies and gentlemen of the jury that in deciding whether the second accused, if you find that he was the shooter, intended to kill Kevin Alvarez and you are sure and I will repeat this again, that he was the shooter, you are to decide that question by reference to all the evidence then drawing such inferences from the whole of the evidence. Drawing whole of the evidence would include, what type of instrument use, the proximity of the shooter to the person, whether he is going to miss.

Two injuries according to Dr. Sanchez when he read the report, were found on the body of Kevin Alvarez. We're talking about projectile, that means through firearm rounds or bullet. That's what I understood from what he said. So look at the whole of the evidence then from there you're going to infer whether the shooter intended to kill Kevin Alvarez when at the point in time, when he shot him.

For the first accused to be liable as a secondary party for the death of Kevin Alvarez, you the jury must be sure that he realize [sic] that in the course of the robbery the second accused might kill Kevin Alvarez and with that knowledge or foresight he continued to take part in the joint enterprise.

However, if the first accused did not know that the second accused had a firearm or did not foresee the [sic] he the second accused might be carrying one, the second accused action in killing of Kevin Alvarez is to be regarded as fundamentally different from anything foreseeing [sic] by the first accused. Therefore, the first accused, if you find it so must be found not guilty.

What that means? If he did not know or he did not foresee that the second accused would shoot and kill, then the second accused would be diverting, he's on his own, we would say, where the killing is concern because the plan would be, if you accept it as a plan, from the evidence, was to rob, not to kill, where the first accused is concern.

You must bring to mind all that intent to kill. You must remember that there must be an intent to kill. Having given you that direction, I must refer to Mr. Griffith's evidence; each one them had a gun. Leslie Pipersburgh, he knew

him. He knew the second accused, Patrick Robateau. He said, 'each had a gun'. Except that Pipersburgh is saying, he had a toy gun, he did not have a real gun. But Patrick Robateau having a gun, does that mean that the first accused knew about it. Griffith said, if you heard him, if you believe him, when the second accused was duct taping him, he put the gun in his waist. Well it's for you, to properly duct tape this person. Where was the first accused he said? They were side by side, he showed us at the scene. It is for you to say whether the first accused saw the gun, if you believe that the second accused had the gun, whether he saw that. That's a matter for you."

[64] Next, with specific reference to the killing of Mr Mai, the judge said this:

> "So I go to the fourth element, remember we are on the first count with respect to the death of Fidel Mai. The accused number one and two were the persons who jointly caused the death of Fidel Mai, that's the allegation. As I have said earlier, there is no evidence as to who shot Fidel Mai. So listen to this now, legal principle; if two people are jointly indicted for the commission of a crime and the evidence does not point to one, rather than the other and that there is no evidence that they were acting in concert, both ought to be acquitted. What that means, I need to explain that to you. If you don't find because we do not know who shot Fidel Mai, if you don't find from the evidence that accused number one and accused number two were acting together, because we do not know who shot Fidel Mai, you are to find each of them not guilty. The only way you may find them guilty, if you find that they were acting together because I told you, if two persons are acting together it does not matter who fire the shot. But if you don't find, I must repeat that, that you are not sure that they were acting together with respect to Fidel Mai, you are to find each accused not guilty. That is the law. So this is not facts, that is the law."

[65] Then, before turning to the case for the defence, the judge made a last brief reference to the question of intention:

> "I go to the fifth element, at the time the unlawful harm was inflicted on Fidel Mai their specific intention was to cause his death. I tell you again, I am directing you Madam Forelady, ladies and gentlemen of the jury that in deciding whether there was an intention to kill Fidel Mai, you are to decide that question by reference to all the evidence, drawing such inference from the whole of the evidence.

> I think I've told you but let me tell you again, not because a man commit robbery that he means to kill. Robbery and murder, two different crimes, two different elements."

[66] In reminding the jury of the case for the defence, the judge touched briefly on the implication of the second appellant's unsworn statement that he had withdrawn from the joint enterprise: "…if there is a joint plan to kill any person for one of the persons to withdraw from the plan, he must withdraw effectively to escape liability…you are to tell that other person, no, no, remember I am not in this this we came here for robbery… there must be an effective withdrawal". The judge continued:

> "So what you must bear in mind to convict the [second appellant] you must be sure of the evidence with respect to the death of Kevin Alvarez. You must be sure that he was part of the joint enterprise, that he realized, that means he had foresight or he knew that the [first appellant], if you find that it was the [first appellant] who shot Kevin Alvarez. If he did not know, if he did not realize that the [first appellant] would have shot and kill Kevin Alvarez, you are to find him not guilty because he did not do the shooting.
>
> So I have told you about Fidel Mai, there are circumstances, if you accept the piece of evidence, if you are sure from the piece of evidence that both accused jointly shot and kill Fidel Mai, you must be sure to find them guilty. If you are not sure that they were acting jointly because you do not know who kill Fidel Mai, you must find each of them not guilty. If you have a reasonable doubt whether or not they were acting jointly, you are to find each not guilty because you are not sure from the evidence of the prosecution that they were acting jointly."

[67] After the summing-up had ended, an extensive discussion followed between the judge, counsel for both appellants and counsel for the Crown as to what further directions he might helpfully give the jury. The issue of intention in relation to the second appellant featured heavily in the discussion. Thereafter, offering the jury "a clearer direction or instruction where joint enterprise is concern [sic]", the judge told them that –

> "…for the [first appellant] to be convicted of murder, you the jury must be sure that when he shot Kevin Alvarez he did so intending to kill him. I think I've said that but this is just a repetition. In addition to that, you must be sure that he is the shooter, in addition to what I've just told you.

> With respect to the [second appellant], for him to be convicted of murder you the jury must be sure that first, there was an agreed plan to commit robbery, secondly, that the [second appellant] knew from the outset, that means from the start that the [first appellant] had a gun and thirdly, that the [second appellant] took part in the robbery knowing there was at the very least a real possibility that the [first appellant] would use the gun if necessary to effect the common purpose. What is that? To take away the money from Bowen & Bowen compound."

[68] And finally, on the invitation of the second appellant's counsel at trial to clarify the burden of proof on the question of a withdrawal from the joint enterprise, the judge said the following:

> "From the start to the end the burden is on the Crown to prove all the elements to you. The burden is on the Crown to prove that there was a joint enterprise. They must prove to you that each of the accused were [sic] the persons involved in the joint enterprise. You must be sure, prove means that you must be sure, the [second appellant] knew that there was a gun…knew that the [first appellant] had a gun. It is for the prosecution to prove that there was an agreed plan to commit robbery and that the first accused knew from the start, from the outset that the [first appellant] took part in the robbery knowing that there was, at the very least a real possibility that the [first appellant] would use the gun, if necessary to effect their common purpose which is, to take away the money. Because of what the [second appellant] said, he hinted that he had finished, he had withdrawn, it is for the Crown to prove that he did not communicate that withdrawal from the other party. If you find any evidence that there was a communication of the withdrawal, you find the [second appellant] not guilty because he had withdrawn from the joint enterprise with the first count and with the second count, if and only if, that both of them, that there was a joint enterprise which the Crown must prove to you and he was involved in that joint enterprise was [sic] to kill Fidel Mai."

[69] In his submissions on behalf of the second appellant Mr Neal focused attention on these last two directions given by the judge. These were in effect misdirections, it was submitted, in that the judge omitted from them any reference to the requirement that there be an intention to kill. Although in terms they primarily referred to the killing of Mr Alvarez, Mr Neal submitted that the judge's error in that respect "must inevitably mean that the jury could have convicted the second appellant on the same erroneous basis in relation to the count charging him with the killing of Mr Mai". In advancing this

submission, Mr Neal readily accepted that the learned judge had in fact given the correct directions elsewhere in the summing-up. Indeed, he told the court with commendable candour, had the judge not sought to give a "clearer" direction right at the end of the summing-up, he would have had no complaint. But, the misdirections having been among the final directions given to the jury, Mr Neal urged, it could not be said that, without them, the jury would inevitably have come to the same conclusion.

[70] In response, the Director accepted the possibility that the judge's final direction on joint enterprise might have, "strictly speaking", amounted to a misdirection. However, she submitted that, taking the summing-up as a whole, the jury would not at the end of the day been left in any doubt as to the correct approach to be taken to determining the issue of the second appellant's intention. She pointed out that, up to the end of the main body of the summing-up, the judge had, as Mr Neal accepted, given the proper direction. The Director observed that the only complaint about the further directions (at paras [67]-[68] above) was that, in them, the judge did not make any reference to the intention to kill, but she submitted that what the judge said in that passage had to be seen in the context of what he had already told the jury. Thus, the Director submitted, notwithstanding the judge's "truncation" of the correct direction at the very end of the summing-up in relation to the count concerning the death of Mr Alvarez, the jury would, if properly directed throughout, inevitably have come to the same conclusion. In support of this last submission, we were very helpfully taken by the Director through the items of evidence which, it was submitted, would have led the jury "to the inevitable conclusion that both appellants were acting together to commit the robbery and to escape, by whatever means, with the spoils of their robbery". We will return to this evidence in due course.

[71] In support of these submissions, the Director referred us to a number of authorities, upon some of which Mr Neal also placed reliance. In **Brown & Isaac v The State [2003] UKPC 10**, the evidence did not disclose which of the two appellants had fired the fatal shots in a case of murder by shooting or, indeed, whether both or only one of the appellants had been armed with guns. In order to convict them both of murder, it

was therefore necessary for them to be found liable on the basis of joint enterprise. Delivering the judgment of the Board, Lord Hoffmann said this (at para 8):

> "8. The simplest form of joint enterprise, in the context of murder, is when two or more people plan to murder someone and do so. If both participated in carrying out the plan, both are liable. It does not matter who actually inflicted the fatal injury. This might be called the paradigm case of joint enterprise liability. But things become more complicated when there is no plan to murder but, in the course of carrying out a plan to do something else, one of the participants commits a murder. The most common example is a planned robbery, in which the participants hope to be able to get what they want without killing anyone, but one of them does in fact kill. In such a case, the other participants may still be guilty of murder, provided that they had the necessary state of mind. The precise nature of that state of mind was until recently not entirely clear. But in *R v Powell (Anthony) and English* [1999] 1 AC 1 the House of Lords said that it meant that the other participant realised that in the course of the joint enterprise the primary party might kill with intent to do so or with intent to cause grievous bodily harm, i.e. with the intent necessary for murder. Thus the *Powell and English* doctrine extends joint enterprise liability from the paradigm case of a plan to murder to the case of a plan to commit another offence in the course of which the possibility of a murder is foreseen."

[72] In that case, however, the Board upheld a conviction based on a direction in which the trial judge had told the jury that "[t]he essence of joint responsibility for a criminal offence is that each individual shared a common intention to commit the offence and played his part in it, however great or small, so as to achieve that aim". It is clear that this was because the Board considered the case to be, on the evidence, "a paradigm case of joint enterprise liability". Accordingly, a direction based on, as Lord Hoffmann put it (at para 13) – as always, memorably – "the plain vanilla version of joint enterprise: a plan to commit the actual offence charged" was held to be adequate.

[73] In **Jeremy Harris & Deon Slusher v R** (Criminal Appeals Nos 1 & 2 of 2004, judgment delivered 15 October 2004), a decision of this court, reference was made (at para 20) to the guidance given by the Board in the earlier case of **Charles, Carter and Carter v The State (1999) 54 WIR 455**. In that case, Lord Steyn of Hadley had

observed (at page 467) that what was missing from the trial judge's summing-up, in a case in which there were three accused persons jointly charged with murder, was –

> "…a clear direction that it was not enough, for Curtis Charles and Leroy Carter to be convicted as secondary parties, that they knew that Steve Carter might use a weapon or that it was foreseeable that he might use a weapon. What they should have been directed is that the jury must be satisfied that Curtis Charles and Leroy Curtis knew or foresaw that Steve Carter would or might use the weapon with the intention of killing or causing grievous bodily harm, and that with that knowledge or foresight of his intention they continued to take part in the joint enterprise."

[74] In **Harris & Slusher v R**, Mottley P considered (at para 20) that, despite the fact that the judge's initial directions on intention in relation to the secondary party "fell short of what was required", the judge had in fact set it right in the end:

> "However, the judge subsequently gave the jury the correct direction in relation to what was required in order to find Harris guilty as the secondary party.
>
> He told them:
>
> > 'Therefore, before you can convict either of The Accused persons, you must be sure that there was an unlawful plan and that Jeremy Harris agreed to Deon Slusher acting as he did, or foresaw that Slusher might do what he did in carrying out the plan that is, the killing of Phillip Chin and still joining in it, sharing the other's intention to kill Phillip Chin, or contemplated or realized that the other might use the gun, as he did intending to kill Phillip Chin, and indeed, as the evidence shows to kill him if you accept the evidence for the Prosecution."
>
> While it may be said that the direction was less than clear, the summation must be looked at as a whole. In our view, the jury would have been left in no doubt that in order to convict Harris as the secondary party they had to be satisfied beyond a reasonable doubt that Harris knew that Slusher had the gun and he knew or foresaw that Slusher might shoot Chin and with this knowledge and foresight still joined in the plan."

[75] Lastly, we should refer to **Ryan Herrera & Linsdale Franklin v R** (Criminal Appeal No 22 of 2009, judgment delivered 28 March 2013). In that case, the trial judge

had first told the jury that they should not convict the two accused persons unless they were sure that, when they committed the act which had resulted in the deceased's death, "they each intended to kill [her]". Not too long afterwards, continuing the summing-up, the judge then said this:

> "Your approach to the case should therefore be as follows: If looking at the case of Linsdale Franklin and Ryan Herrera, you are sure that with the intention I have mentioned, each took some part or played some role in committing this murder, then they are each guilty."

[76] Speaking for the court (at para 24) Sosa P rejected as "baseless" the suggestion that the trial judge had failed to direct the jury adequately of the need for an intention to kill (as required by section 17 of the Criminal Code) "even in the context of criminal liability for murder under the principle of joint enterprise". The learned President went on to observe (at para [25]) that -

> "No reasonable jury could have been in any doubt that, in speaking of 'the intention I have mentioned', the judge was referring to what she had said, just a few moments earlier…in the following passage:
>
> > 'You must not convict [the appellants] unless you are sure that when they committed this act, they each intended to kill [the deceased].'"

[77] Sosa P concluded (at para [31]) that, this being a case in which the evidence supported an agreement between the appellants to murder the deceased, it was "appropriate for the trial judge to give to the jury no more than the 'plain vanilla version of joint enterprise' in her directions".

[78] The position therefore appears to us to be this. The mens rea required for the offence of murder in Belize is an intention to kill. In the paradigm case of joint enterprise liability, which is a case based on an agreement between two or more persons to murder someone in which it is alleged that they do so, it suffices for the jury to be told that if they are sure that, with the intention to kill, each took some part or played some role, large or small, in committing the murder, then they are both guilty of murder.

However, in a case such as this, in which the secondary party contends that, while he was party to a common design to commit the lesser offence of robbery, he did not intend to kill anyone, the jury must be satisfied that the secondary party knew or foresaw that the principal offender would or might use a weapon with the intention of killing and that, with that knowledge or foresight, he continued to take part in the joint enterprise. In considering whether what the judge told them was sufficient to convey this requirement to the jury, the summing-up must be taken as a whole.

[79] In this case, as the learned Director pointed out, it is clear that Lucas J crafted his directions on joint enterprise in accordance with the Board's guidance in **Brown & Isaac v The State** (compare the directions set out at para [63] with Lord Hoffmann's observations at para [71] above). Thus the jury were plainly told (see para [63] above) that, for the second appellant to be liable for the death of Mr Alvarez, they had to be sure that the second appellant realised that in the course of the robbery the first appellant "might kill Kevin Alvarez and with that knowledge or foresight he continued to take part in the joint enterprise". The jury were also told that, in this regard, "there must be an intent to kill". Again, in relation to the death of Mr Mai, the jury were invited (see para [65] above) to determine whether "at the time the unlawful harm was inflicted on Fidel Mai their specific intention was to cause his death". Finally, in the context of the second appellant's defence, the judge again told the jury (see para [66] above) that "you must be sure that he was part of the joint enterprise, that he realized, that means that he had foresight or he knew" that the first appellant would have shot and killed Mr Alvarez; and, as regards the killing of Mr Mai, that they had to be sure that both appellants "jointly shot and killed Fidel Mai" and, if they were not sure that they were acting jointly, "because you do not know who killed Fidel Mai, you must find each of them not guilty".

[80] It is against this, as Mr Neal conceded, quite unexceptionable background that consideration has to be given to the judge's two final directions on the subject of joint enterprise (paras [67] and [68] above), in which, as the Director accepted, the judge made no mention of the requirement of an intention to kill. It would obviously have been

helpful for the judge in these further directions, the last before the jury would be asked to retire, to have reiterated what he had several times told them; that is, that for the second appellant to be found guilty of the murder of Mr Alvarez, they had to be satisfied that he continued to take part in the joint enterprise with the knowledge or foresight that the first appellant was armed with a gun which he would or might use with the intention of killing. But, given that this is the very message which the learned judge had been at such pains to convey to the jury at so many places, and in so many ways, during the main part of the summing-up, we are satisfied that, when taken as a whole, the jury would at the end of the day have been left in no doubt as to the correct approach to the question of the second appellant's liability for murder on this count. The reference in both passages to the common purpose as being "to take away the money" could only have been taken, in our view, as a reminder of the context in which the killing of Mr Alvarez took place.

[81] As regards Mr Neal's further complaint that, by extension, these misdirections, such as they were, may also have misled the jury in relation to the second appellant's liability for the killing of Mr Mai, it is, in our view, important to bear in mind the basis on which the Crown put up its case against the appellants on this count. That was, as the judge told the jury more than once, and again reminded them right at the end of the second of the two passages complained of (para [68] above), "that there was a joint enterprise which the Crown must prove to you and he was involved in that joint enterprise was [sic] to kill Fidel Mai". This was a "plain vanilla version of joint enterprise" direction, in respect of which there can in our view be no complaint – and we do not understand Mr Neal to suggest any – on this aspect of the case.

[82] On this basis, we therefore came to the conclusion that the second appellant's ground of appeal could not succeed. But we think that it is also right to say that, even if we had taken a different view of the judge's final directions to the jury on the question of joint enterprise, we would have considered this a fit case for the application of the proviso to section 30(1) of the Court of Appeal Act. As Lord Hope of Craighead explained in **Stafford and Others v The State (Trinidad and Tobago) [1998] UKPC**

35, para 9, to which we were referred by the Director, "[t]he test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence".

[83] In this regard, we considered the following items of evidence, to which the Director drew our attention, to be of particular relevance:

(i) It was the second appellant who first made Mr Griffith aware that a robbery was on foot ("Griff, a wa tek the money") and first displayed a firearm in aid of it.

(ii) The question whether the firearm shown to Mr Griffith by the second appellant was "not real", as he asserted in his unsworn statement, was a matter for the jury to determine, bearing in mind that the distribution centre was in fact permanently manned by armed guards.

(iii) The second appellant joined with the first appellant, who was also openly armed, in escorting Mr Griffith to the bathroom and remained with him while he taped Mr Griffith's hands and it is he who sought and obtained an assurance from Mr Griffith that he would not "say anything".

(iv) It was the second appellant who later put "something" in the side of Mr Requena, who was armed, in an effort to disarm him.

(v) Both appellants were together and armed when Messrs Alvarez and Karl Ventura were held at the door of the front office of the distribution centre and the second appellant held Mr Ventura when the first appellant shot Mr Alvarez.

(vi) The second appellant's only response at this point was to struggle with Mr Ventura, who attempted to disarm him, continuing to do so even as Mr Ventura was also shot – twice – by the first appellant.

(vii) One or both of the appellants would then have participated in the killing of Mr Mai, putting the stolen deposit bags and the firearms of the KBH security guards in the Coca-Cola truck and firing at the police officers who had by then come onto the distribution centre premises, before the second appellant was the last person to be seen stepping onto the moving truck as it left the premises.

(viii) One or both of the appellants later fired at the police again, before it finally came to a stop in the University Heights area and both appellants made good their escape into the bushes.

(ix) After making their way from Belize City to and through the Mexican border, both appellants were next seen some three weeks later in Mexico City, where the second appellant gave an assumed name to embassy officials.

[84] In these circumstances, we are clearly of the view that, on the assumption that there was a misdirection as to the second appellant's intention, this was a case in which, even if the jury had been properly directed, they would inevitably have come to the conclusion. Upon a review of all the evidence, there was in our view ample evidence upon which the jury could find that the appellants acted together, with the intention of committing armed robbery and to escape by whatever means. Further, that the second appellant, who was himself armed with a gun, knew that the first appellant was armed with a gun which he would or might use with the intention of killing.

Conclusion

[85] These are our reasons for the decision given on 14 June 2013, dismissing the appellants' appeals and affirming their convictions and sentences.

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MORRISON JA

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MENDES JA

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AWICH JA