

**IN THE SUPREME COURT OF BELIZE, A.D. 2022
CRIMINAL JURISDICTION**

CENTRAL DISTRICT

INDICTMENT NO. C95 of 2019

THE QUEEN

v.

**ANDREW CLARKE
EDMOND PASCASCIO**

**FIRST ACCUSED
SECOND ACCUSED**

- **Murder**

BEFORE The Honourable Justice Mr. Francis M Cumberbatch

APPEARANCES Ms. Natasha Mohamed, Counsel for the Crown
Mr. Arthur Saldivar, Counsel for the Accused

DATES February 14th and 21st, 2022; March 2nd, 8th, 9th, 14th, 17th,
21st, 22nd, 28th, 29th, and 30th of 2022; April 5th, 6th, 7th,
and 28th of 2022; May 3rd, 5th, 9th, 12th, and 25th of 2022;
June 9th, of 2022; September 20th of 2022.

DECISION

{1} The Accused were indicted by the Director of Public Prosecutions for the offence of the murder of Richard Foster ('the Deceased') on the 6th of December 2018 at Belmopan, in the Cayo District. At their arraignment they entered pleas of not guilty, hence, a judge alone trial was conducted pursuant to the provisions of section 65A of the *Indictable Procedure Code*.

The Facts

- {2} I will for ease of reference summarise the evidence adduced by the Crown and the Defence in this case. However, in arriving at my verdict I will do so after having considered all of the evidence adduced by both the Crown and the Defence.
- {3} **BENYAHTI BRANDON** testified. He stated that during the afternoon of the 6th of August 2018 the Accused came to his home and invited him to go on a job. They later met with one Der and went to an area where there was a pond and that the Deceased was swimming in the pond. He was taken from the pond and restrained. The First Accused who at that time was armed with a shotgun told Der to knock him out. Der inflicted several blows to his body but the Deceased remained conscious. They then went to the home of the Deceased which is the Savannah Guest House.
- {4} At the house they took the Deceased guns: a 9 mm, and a 12 gauge pump action shotgun, and cash in the sum of BZ\$600.00. The place was searched and ransacked and they consumed some rum. They later took the Deceased's vehicle and drove to a spot where the guns were hidden. They then went to Belmopan by the Rivera area where the Second Accused and the Deceased walked to the river. The Second Accused asked him if he has light and he took out his cell phone light and shone it at the Deceased and

the Second Accused. At that time, the Deceased was telling the Second Accused to leave him alone, he won't go to the police or tell anybody about anything that had happened. Then the Second Accused pulled out a bone handle knife and started stabbing the Deceased in the neck. When he had finished stabbing the Deceased they returned to the vehicle. The First Accused asked if the man was dead and the Second Accused said he is just fighting for his last breath. When they drove off the Second Accused said let us keep this between us.

- {5} When they returned to Mahogany Heights the First Accused drove the vehicle in some bush and told them to wipe off the door handles. Everyone wiped down everything they touched. He said, the Second Accused stabbed the man. He pulled out a knife, a bone handled knife, but he did not see it before he pulled it out. After the man was stabbed he was left in the water.
- {6} **UNDER CROSS-EXAMINATION** this witness stated that he and Tyreike lived in the same house in the yard where another house occupied by INSP Louis Castellanos and one Tyreike Smith's mother is situated. He described Tyreike Smith as his friend but said he doesn't know that Tyreike worked at the home of the Deceased. He denied that it was him together with one, Oswin Clarke and Tyreike Smith, who went to the home of the Deceased on 6th of August and not the Two Accused. He denied that the Two Accused do

not hang out with him and did not hang out with him on the 6th of August 2018.

{7} This witness admitted that he did not tell the police in any of his statements that he and the Accused stopped at Danny Mason's farm on the way to Belmopan and again on their return from Belmopan after the Deceased had been killed. He said he knows one Marvin Smith from La Democracia. He agreed that Marvin Smith lived in the area where he lived with Tyreike Smith and where INSP Castellanos lived. He denied knowledge of a fight between the First Accused, the Second Accused, and Marvin Smith in June of 2016 and that INSP Castellanos testified at the trial.

{8} This witness was not re-examined.

{9} **ROBERT HENRY JNR.** testified that in August of 2018 he was an advanced Crime Scene Technician. On the 7th of August 2018 he processed the scene of an alleged burglary at the Savannah Guest House which was the residence of the Deceased. The inside of the two storey building was ransacked. After taking photos of the building which were tendered into evidence he dusted several items inside various parts of the building for latent prints. He collected several latent prints from the bedroom and kitchen of the upper flat which were labelled, packaged, and transported to the AFIX system for comparison. He also collected one camouflaged ¾

pants and a bath towel which were packaged, sealed, and later transported to the National Forensics Science Services.

{10} After he completed processing the house, he went to a scene at a bushy area in Mahogany Heights where he was shown a silver Toyota pick-up parked in some bushes bearing registration number C27961. Whilst processing the area he collected a set of latent prints from the steering wheel. He also observed a pink towel on the ground. He tendered a number of photographs into evidence.

{11} **UNDER CROSS-EXAMINATION** the witness stated that he was the primary person collecting fingerprints and that he collected latent fingerprints. He does not know if the prints he collected matched anybody because that information would be sent to the Investigating Officer.

{12} **KAHDIJAH THIMBRIEL** testified. She said in August of 2018 she was a Crime Scene Technician. On Tuesday 7th of August 2018 she visited a homicide scene at the Rivera area where she saw a body of a light skinned male person partially submerged under the water. She took photos of the body and injuries thereon. The body was transported to the Western Regional Hospital morgue. On the following day, she took photos of the post-mortem examination conducted by Dr. Estrada Bran. On the 10th of August she visited a scene at the Rivera area on an unnamed road at the

request of then INSP Aban. At that scene in some bushes she photographed a blue towel found on a tree and a black Aeropostale shirt with markings. These items were left to dry in a drying area and were later folded and packaged in separate brown paper bags then sent to the National Forensics Science Services. The photos she took were tendered into evidence.

{13} **UNDER CROSS-EXAMINATION** the witness said she is familiar with the Belmopan Rivera area but she is not aware that people from Belmopan and Roaring Creek go there to swim. She said she visited the area on three occasions. She does not recall seeing Belkin bottles and condom wrappers there.

{14} **DR. MARIO ESTRADA BRAN** testified. He was deemed an expert in the field of forensic medicine. He stated that on the 8th of August 2018 at the Karl Huesner Memorial Hospital autopsy room he conducted a post-mortem examination on the body of the Deceased. The external examination revealed some 10 stab wounds with smooth edges located in different areas of the body but specifically on the right upper lateral neck area. There were also abrasions caused by dragging to the right chest and back area.

{15} The doctor opined that the direct cause of death was traumatic asphyxiation due to multiple stab wounds to the left lung and multiple trauma of a blunt force type. There was one defensive wound located on the right palm. The

stab wounds to the chest area were caused by heavy force and the wounds could have been caused by a knife.

{16} This witness was not cross-examined.

{17} **JASON HYDE** testified. This witness is a Forensic Analyst at the National Forensic Science Services. He was deemed an expert in Serology. He stated that on the 26th of October 2018 he conducted an analysis on certain items in this matter and his report was tendered into evidence. As regards item #6 he said he received a brown paper bag containing a light blue towel. Human blood stains were observed on the front and back and hairs were collected.

{18} **UNDER CROSS-EXAMINATION** the witness said his conclusions on page 3 of his report did not point to any specific person. He said he did not have any hair samples from an independent source and nothing was sent for DNA analysis.

{19} **ASP ALFONSO ABAN** testified. He stated that on the 7th of August 2018 whilst he was an INSP of police he proceeded to the Savannah Guest House where he met WCPL Kerr who gave him a briefing on the incident and Crime Scene Technician Robert Henry Jnr. who was processing the scene. He conducted searches for the Deceased but he was not found. He later proceeded to a feeder road in some bushes where he found a grey pick-up. Crime Scene Technician Robert Henry Jnr. obtained fingerprints from the

steering wheel, blood swabs from inside the vehicle, and a towel on the ground.

{20} On the 9th of August 2018 the witness said he detained the First Accused.

Thereafter, he detained Brandon Benyathi. On the next day a third suspect Derwin Jones was detained. He went on to say that Brandon Benyathi took him to the Rivera area where searches were conducted and a black T-shirt was found. On the 11th of August 2018 after seeing the caution statement from Brandon Benyathi he decided to charge him for the offence of burglary. Based on the evidence he had, he stated that he decided to charge Andrew Clarke and Derwin Jones with murder. On the 13th of August 2018 the Third Accused turned himself into the police. He decided to charge him jointly with the First Accused and Derwin Jones for murder. However, on the 18th of August based on advice from the Director of Public Prosecution's chambers he amended the charges and charged Andrew Clarke jointly with the Second Accused for murder and excluded Derwin Jones.

{21} **UNDER CROSS-EXAMINATION** this witness said that he does not recall seeing an injury to the right thumb of the Second Accused nor does he recall taking him to the Cleopatra White Health Centre or authorising anyone to do so. He did not investigate whether the First Accused had a drivers licence and that he didn't see it important to ascertain if the First Accused knew how

to drive. The First Accused was detained at his home and a search of his home did not result in the discovery of anything connected with this offence. The First Accused told him he knew nothing about this murder, however, in this case he believed that the statement given by Brandon Benyathi was sufficient. He would not say that no other element was considered.

{22} The witness went on to state that La Democracia is not a large community and that he did ask people about the relationship between Brandon Benyathi and the Second Accused but that is not recorded in his statement. He said he was not aware that the Second Accused could not stand for long periods of time because he had warts under his feet. Based on what Brandon Benyathi said and the other evidence at the scene he did not obtain samples of Brandon Benyathi's blood to be tested to exclude him. He was not sure if fingernail clippings were submitted. The witness said he did not recover a knife. The towel and shirt were connected to what Brandon Benyathi told him. Blood was found in the vehicle and on the towel but it was not determined if the blood found came from the same person. He agreed with Counsel's suggestion that this was not the best of investigations.

{23} This witness was not re-examined and that was the case for the Crown.

{24} The following witness statements were read into the record with the joint agreement of the Crown Counsels and Defence Counsel:

1. Carol Foster
2. Jose Velasquez
3. Christian Velasquez
4. SGT Mateo Carrillo
5. WPC Lydia Kerr
6. Bill Arana

The Defence

{25} At the close of the Crown's case, the Court gave each Accused his three choices and both Accused chose to give sworn testimony and called witnesses.

{26} **ANDREW CLARKE** sworn. This Accused person said at 5:00 p.m. on the 6th of August 2018 he was smoking marijuana and at around 5:30 p.m. he went to his sister's home which is about 100 yds. from his home to watch TV. He played dominoes with his sisters until around 10:00 to 10:30 pm after which he left for his home.

{27} He said he knows Brandon Benyathi who is his cousin and that he did not see him on the 6th of August 2018. He said he won't go to his home because of an incident which occurred between him and Mr. Castellanos who pulled a gun on him and told him not to come back to that part of the street. There was a fight between him, the Second Accused and his nephew

and as a result he got charged for wounding. There was a trial at which he pleaded guilty to wounding. He was also convicted for handling stolen goods and possession of controlled drugs.

{28} Clarke said he does not know how to drive and has never held a driver's licence and he did not drive a pick-up truck on the 6th of August 2018.

{29} **UNDER CROSS-EXAMINATION** he said that his sister Philippa has 3 sons and a daughter. Kenisha lives at Roaring Creek but she spends the summer holidays at La Democracia. On the 6th of August 2018 he did not return home from his sister's house until around 10:30 p.m. When he left home that afternoon to go to his sister, his common-law-wife was at home. He goes to his sister's home to play dominoes 3 to 4 times a week. His father, Frank Clarke, lives nearby and he could see inside of his home from Philippa's house.

{30} The Accused says he hangs out with the Second Accused and would call him a friend and in August of 2018 they were friends for about 6 months to a year. He denies driving the Deceased's vehicle to the Rivera area carrying Brandon Benyathi, the Deceased, and the Second Accused after the Second Accused stabbed the Deceased.

{31} **EDMUND PASCASCIO** testified that in August of 2018 he lived at Belmopan. On the 6th of August at around 5:30 p.m. he was at home with

his common-law-wife Riva Jones, his daughter Darcy, stepdaughter, and stepson. His mother Karen Pascascio came to his house around 5:10 p.m. together with her friend, Lucelle Requeña. His mother came to pick up his daughter and stepdaughter. His common-law-wife took them to her. She was in her car on the street with her friend Lucelle. At that time, his right thumb was amputated and he was taking a lot of medication and he could not do anything with his right hand. His mother left at around 5:45 p.m. and at around 7:00 p.m. his Landlord came over to check on him. At around 7:50 p.m. he was at his aunt's house where he sat and had a conversation with her and her husband Paul and their two children.

{32} He said his right thumb was amputated in the second week of July 2018 and he had to take treatment every day and was on a lot of medication. On the 6th of August 2018 his hand was still tender and he had a bandage on his right hand and right thumb. He turned himself in to the police on the 13th of August 2018 when he learned he was wanted for questioning in this matter. He was in Belize City at the time and when he went to the station his hand was still bandaged. INSP Aban and 2 officers took him to the Cleopatra White Clinic to dress his hand. He said he does not know the Deceased. He said he was not in the company of Brandon Benyathi and a Caucasian on the 6th of August 2018. He used to see Brandon Benyathi around 2016 when he

used to go see his common-law-wife. He stopped when he got into an altercation with one, Marlon Smith. He was charged with wounding and INSP Castellanos was a witness against him. He was found guilty of wounding. At no time on the 6th of August 2018 did he have a knife. He did not leave Belmopan or visit Brandon Benyathi on the 6th of August 2018 nor did he see the First Accused on that day.

{33} **UNDER CROSS EXAMINATION** this Accused said he stopped visiting La Democracia in 2016. The injury to his thumb was caused when he cut it in Belize City whilst dealing with zinc sheet. He's not sure of the exact date but it happened on a Saturday in July. He said he went on a Sunday in July to the hospital in Belmopan and was treated by Dr Gillett. They had to cut off an inch of his finger. Various people treated him. He did not have any further surgery but was returning for treatment up to when he went to jail. He doesn't recall telling the doctor his finger was crushed with a cinderblock. He received dressing on his finger whilst in prison.

{34} The warts on his feet are about ½ inch. In 2004, he took them out and they returned. His daughter was at home until his mother came. She remained in the vehicle with his mother outside. He denied knowledge of stabbing the Deceased with a knife on the 6th of August 2018. This Accused was not re-examined.

{35} **DR. NOVELLO** testified on behalf of the Second Accused. He was deemed an expert by the Court in the field of medicine as a general practitioner. He stated that on the 13th of August 2018 he was attached to the Belize Central Prison. He did not examine the Second Accused on his admission to the prison. He first saw the Second Accused on the 14th of April 2020 for complaints of planters' warts or fish eye under his feet. On examination he observed 3 warts under his left foot. The treatment was surgical removal and that was done. It has a 90% chance of ending the condition. However, in very few cases they return. He would not be surprised if this was not the first time the Accused suffered from warts.

{36} **UNDER CROSS-EXAMINATION** the witness said he received complaints from the Accused for warts on his right foot. No complaints were made for warts under his left foot.

{37} **TANISHA CLARKE** testified on behalf of the First Accused. She said that at around 6:00 p.m. on the 6th of August 2018 she was at the home of her sister, Philippa watching news on the TV. The First Accused and Philippa's children were also there. They then played dominoes until around 10:00 p.m. after which the First Accused left for his home.

{38} She said she knows Brandon Benyathi and he is her cousin. He lived at the first street and they lived at the end of the village. On the 6th of August 2018

she did not see him. They went swimming during the day from around 10:00 a.m. and returned at around 4:00 p.m. Apart from Brandon Benyathi being her cousin, she had no relationship with him.

{39} **UNDER CROSS-EXAMINATION** the witness said she had four kids. In August of 2018 they were staying at Philippa's house. On the 6th of August it was she, Andrew, Philippa, and her kids who were at the river from around 10:00 a.m. and returned at around 4:00 p.m. Between 10:00 a.m. and 10:30 p.m. the First Accused was always in their company. On the night of the 6th of August 2018 her father and brothers were drinking at the bar which is about 20 to 25 feet away from where she was. At that time, she, Andrew and Philippa were playing dominoes. Andrew was in her presence from around 5:00 p.m. to 10:00 p.m. He was in her presence at 10:00 a.m. that day.

{40} Re-examination was declined.

{41} **KAREN PASCASCIO** testified. She said, she is the mother of the Second Accused and on the 6th of August 2018 she left work at about 5:00 p.m. and went to see her son Edmund at the place where he was staying in Belmopan. She went for her granddaughter and arrived at the house at about 5:10 p.m. She waited for about 25 minutes for the child to be brought to her. Her co-

worker, one Lucelle Requeña, was with her and she was driving her common-law-husband's car.

{42} When Edmund came out of the house she saw him with a bandage over his right hand and thumb. He had told her it was a construction injury. She saw him on the 13th of August 2018 when she went to pick him up because she heard he was wanted by the police for murder. On that day he had a bandage on his right hand and thumb.

{43} **UNDER CROSS-EXAMINATION** she said it was her and her youngest granddaughter in the vehicle. She was at work with her from lunch time and she picked her up from her sister's house sometime between 12 noon and 1:00 p.m. She picked up the other grandchild from Edmunds and left his house some minutes to six. About 15 minutes after she was brought to the car she left the Second Accused's house.

{44} She said she learned of the injury on Edmund's thumb on the 8th of July 2018. After she left his house on the 6th of August 2018 she saw him the following morning. She saw him between 5:00 p.m. and minutes to 6:00 p.m. on the 6th of August 2018. Darcy was with her from lunch.

{45} There was no re-examination.

{46} **LUCELLE REQUEÑA** testified. She said that on the 6th of August 2018 at around 5:00 p.m. she left work with Karen Pascascio and went to an area in

Belmopan at a huge 2 storey building where she saw the Second Accused who she knew from before that day. The Second Accused came out of the building and asked them to wait for a few minutes. They waited for about 20 to 25 minutes before he came out of the building. He had a female child walking in front of him and he was accompanied by a female and a male child. She said she saw his right hand with a bandage on the thumb and palm of his hand. They left minutes to six.

{47} **UNDER CROSS-EXAMINATION** the witness said it was only Ms.

Pascascio and a baby girl who went to Edmund. Her name was Darcy. She first saw Darcy about 1:00 p.m. when her grandmother entered the Archives building. In August of 2018, she knew Ms. Pascascio for about three years and they were friends. In 2018, Edmund was a friend of the father of her children and she cannot remember how long she has known him. After the 6th of August 2018 she guess that she next saw the Second Accused a few days later. They left about 15 minutes after he brought out the child.

{48} This witness was not re-examined.

{49} **DARLENE FLOWERS** testified that the Second Accused is her nephew.

On the 6th of August 2018 at about 9:06 a.m. she was at his house. She picked up Darcy after which she and the baby drove home in a car. She lived not far away from the Second Accused. She saw him again just a little

before 8:00 p.m. when he visited her which was not unusual. He left a little after 9:00 p.m. It was just herself and the Second Accused on the verandah and she saw a bandage on his right hand and it was intact.

{50} The witness went on to say that sometime between 12:00 noon to 1:00 p.m. the Second Accused's mother Karen Pascascio came to get Darcy from her. Her husband, Paul Flowers, was at home when the Accused visited her that night.

{51} **UNDER CROSS-EXAMINATION** the witness stated that she saw the Accused the day before 6th of August 2018. In the evening of the 6th of August 2018 it was only her and her husband Paul Flowers at home. The Second Accused only spoke to her that night and she did see the injury on his hand. She did not see Riva Jones that night and the Second Accused spent about an hour at her home. After the baby was picked up she did not see her again that day. When she was on the verandah with Edmund her husband was at his desk on his computer about 20 feet away. She has 2 children, Paul Jnr. and Misha, who were 15 and 10 years old at that time respectively. At that time, the children were not at home. The Second Accused was at her home from a little before 8:00 p.m. and left after 9.00 p.m.

{52} There was no re-examination.

{53} **PAUL FLOWERS** testified. He said on the 6th of August 2018 he saw the Second Accused at his home around 8:00 p.m. He came into the living room and proceeded to go to the bathroom. He observed he was carrying his injured arm a little high. His arm was wrapped in white gauze. After he left the bathroom the Second Accused went to the verandah where he spoke with his wife for about 45 minutes.

{54} **UNDER CROSS-EXAMINATION** he said that when the Accused was at his home that night his wife was on the verandah and his sons were at the basketball court. The Accused and his wife were about 20 feet away from him. The children returned home a little bit after 10:00 p.m. that night. This was after the Accused had left. The Accused said “Good night” to him on his way to and from the bathroom.

{55} There was no re-examination.

{56} That was the case for both Accused persons.

Closing Addresses

{57} At the close of the case for the Defence, both the Crown and the Defence made closing addresses to the Court.

{58} Crown Counsel addressed the Court on the law and the evidence of Brandon Benyathi upon which the Crown’s case lies. It is common ground that there

is no forensic evidence adduced by the Crown which implicates the Two Accused in the commission of this offence.

{59} Defence Counsel, whose clients relied on the defence of an alibi urged the Court to accept the alibis of his client notwithstanding the inconsistencies therein which arose from cross-examination.

{60} I will refer to the evidence and the law in greater detail during my analysis of the law and the evidence on both sides.

Analysis of Law and Evidence

The Law

{61} As stated aforesaid, the Accused were indicted for the offence of murder contrary to section 106 (1) of the *Criminal Code*. That section provides thus:

“106 (1) - *Every person who commits murder shall suffer death*”.

{62} Section 117 of the *Criminal Code* provides:

“117 - *Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned*”.

{63} The Crown must prove the following beyond reasonable doubt:

1. That the Deceased is dead.
2. That he died from unlawful harm.

3. That the unlawful harm was inflicted by the Accused acting together in a joint enterprise to cause his death.
4. That both Accused intended to kill the Deceased when the Second Accused inflicted several stab wounds to his body and unlawfully caused harm to him.

{64} There is no doubt that the Deceased is dead. The Crown tendered into evidence photographs from Crime Scene Technician Khadijah Thimbriel showing the body of the Deceased at the Creek at the Rivera area. She also testified to having attended the post-mortem examination conducted by Dr. Estrada Bran at the Karl Huesner Memorial Hospital.

{65} The doctor opined that the direct cause of death of the Deceased was traumatic asphyxiation due to multiple stab wounds with multiple trauma of blunt force type. The stab wounds to the chest area were caused by heavy force and could have been caused by a knife. He also found one defensive wound located on the palm of the right hand.

{66} Throughout the entirety of this trial issues of self-defence, provocation, or accident did not arise either expressly or by implication. Therefore, it would be reasonable to conclude that the death of the Deceased which was caused, as opined by Dr. Estrada Bran, occurred as a result of unlawful harm.

{67} It is common ground that both Accused are relying on the defence of alibi. They gave sworn testimony and called witnesses to support their cases that they were someplace else on the date and time when the Deceased was killed. Thus, the issue to be determined from the outset is whether it was the two Accused who acted together in a joint enterprise to kill the Deceased as alleged in the testimony of Brandon Benyathi. Thus, the evidence of Brandon Benyathi which constitutes the body and soul of the Crown's case must be carefully and critically examined.

{68} As is hereinbefore stated, the Crown's case rests exclusively on the evidence of Brandon Benyathi. There is no forensic evidence to implicate either Brandon Benyathi or the Two Accused herein. In determining the manner in which the Court will treat the evidence of Brandon Benyathi, I must bear in mind the provisions of section 92(3) (b) of the *Evidence Act* which provides thus:

“(3) Where at a trial on indictment—

(b) an alleged accomplice of the Accused gives evidence for the prosecution, the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person

and he shall also explain the reasons for the need for such caution.”

{69} So, the question as to whether or not Brandon Benyathi is an accomplice of the persons he said were with him on that fateful night arises.

{70} Crown Counsel submitted that Brandon Benyathi was not an accomplice in the act of the killing of the Deceased. In this regard, a consideration of the evidence by this witness for the Crown reveals the following to *wit*:

- Brandon Benyathi said he was approached by the Two Accused on the 6th of August to do a ‘job’.
- He alleges that Andrew Clarke was armed with a gun and other instruments quite capable of causing serious harm or death to a person when they approached the area where the Deceased was swimming in a pond.
- At the pond Andrew Clarke allegedly told one Der to ‘knock out the white man’ meaning the Deceased which Der tried to do by inflicting several blows to his body.
- When Edmund Pascascio allegedly took the Deceased to the river that night at which time he was armed with a knife and the Deceased was begging for his life he, Brandon Benyathi, provided light from his phone to enable Edmund Pascascio to

see the Deceased whilst he inflicted about 5 to 6 stab wounds to his body with the said knife.

- At no time did Brandon Benyathi either orally or physically separate or disassociate himself from the killing of the Deceased. He was together with the persons who allegedly were also part of the group of men who participated in the robbing and murder of the Deceased. Indeed, when he allegedly saw the Accused Edmund Pascascio armed with a knife taking the Deceased to the river he could not be in any doubt as to what was about to take place and rather than disassociating himself from the activity he produced his cell phone and provided light to facilitate the stabbing of the Deceased.

{71} The Privy Council in *Chan Wing-Sui* [1985] AC 168 held that “... *if a secondary party contemplated the act causing death as a possible incident of the joint venture, he is liable unless the risk was so remote that the jury take the view that the secondary party genuinely dismissed it as altogether negligible...*”.

{72} I do not find in all of the circumstances that the witness Brandon Benyathi whilst at the river did or could have genuinely felt that that activity and the

conduct of the Second Accused was innocuous and harmless enough to be dismissed as being negligible. On the contrary, I find that in all the circumstances of this case there is an abundance of evidence to cause me to find that Brandon Benyathi was an accomplice in the murder of the Deceased. Indeed, I am astonished in light of the evidence aforesaid that the investigators came to a different conclusion on Brandon Benyathi's involvement in this matter. That being so, I must go on to consider how the Court must and will treat the evidence from this witness and the Crown's case as a whole.

Corroboration

{73} Whilst corroboration is not a statutory requirement for the acceptance of the evidence of an accomplice against his *particeps criminis*, the law aforesaid provides that I must warn myself of the special need for caution before acting on the evidence of Brandon Benyathi to convict the Two Accused. The reasons for doing so are obvious. The witness Brandon Benyathi in his statements to the police and in his testimony, places himself on the scene of the attack on the Deceased at the pond, the search and ransacking of the Savannah Guest House, and finally at the Rivera area where the Deceased was brutally killed. That being so I find that it would be in his best interest to place the blame on someone else for the heinous murder of the Deceased for which if convicted he would be liable to a lengthy sentence of imprisonment.

Therefore, I cannot ignore the likelihood that Brandon Benyathi in exchange for the lesser offence of robbery would be ready and willing to involve an innocent party as the person responsible for the killing to which he held himself out as just a mere observer.

{74} I must also take into consideration the suggestion of bad blood between Brandon Benyathi's family and the family of the First Accused. I must also consider the testimony of the Second Accused that he was threatened and banned from being in that part of La Democracia where Brandon Benyathi lived and his assertion that since 2016 he stopped going there to visit his common-law-wife.

{75} **UNDER CROSS-EXAMINATION** Brandon Benyathi stated that in that area of La Democracia where he lived, INSP Castellanos, Marvin Smith, and Tyreike Smith also resided in that area. Brandon Benyathi also stated that he and Tyreike Smith were friends.

{76} The obvious question which arises is why would the Accused seek to include, Brandon Benyathi, in such a heinous act having regard to his connection to INSP. Castellanos a senior police officer who was allegedly involved in the conviction of the Second Accused for wounding Marvin Smith in 2016, the brother of his friend Tyreike Smith who is the friend of Brandon Benyathi.

Moreover, Brandon Benyathi, INSP Castellanos and Marvin and Tyreike Smith all resided in the same yard at that time.

{77} Thus, in light of the foregoing the truth of this evidence of Brandon Benyathi that he was approached by the Second Accused on the 6th of August 2018 ‘to go on a job’ is doubtful and questionable. The evidence of the Second Accused that INSP Castellanos testified against him at his trial for wounding and later banned him from being in that part of La Democracia where Marvin Smith resided was neither challenged nor rebutted by the Crown.

Defence of Alibi

{78} The Accused’s are relying on the defence of alibi *inter alia*. In that regard, both Accused gave sworn testimony and called witnesses in support thereof. Therefore, the Court must determine whether or not the Two Accused were with Brandon Benyathi at the Rivera area on the night of the 6th of August 2018 acting together to kill the Deceased.

{79} Crown Counsel has identified certain discrepancies and inconsistencies in the evidence of the witnesses called to testify for the Accused persons. She submits that in light thereof the Court ought to find both Accused and their witnesses to be dishonest and lacking credibility and dismiss the defence of alibi raised by both Accused.

{80} It is not disputed that the Accused's have raised the alibi of defence. However, because the burden of proof of the Accused's guilt rests with the Crown the Accused do not have to prove that they were at the home of his sister in the case of the First Accused and at home in the case of the Second Accused. It is for the Crown to prove that they were not where they said they were and that they were at the Rivera area in Belmopan on the night in question, acting together to kill the Deceased. I must further direct myself that even though the alibi might be false that does not mean that the Accused are guilty. It is something which I may take into account, but, I must bear in mind that an innocent person who fears that the truth will not be believed may instead invent an alibi.

{81} Thus, though I accept Crown Counsel's submission of the inconsistencies of the evidence of the alibi witnesses that is not the end of the matter. I must nevertheless return to the Crown's case and carefully and cautiously examine the evidence as a whole before arriving at a verdict. The Court could only convict on the strength of the Crown's case and not solely on the weaknesses of the Defence.

{82} Whilst giving her testimony for the Defence of her son, Edmund Pascascio, Karen Pascascio stated that she had given a statement to the police. A perusal of this statement reveals that it was given to the police on the 13th of August

2018 and the contents therein raised the defence of an alibi. It also raises the issue of an injury to the thumb/finger on the right hand of her son, the Second Accused and that he was at that time being treated for the injury to his finger at the Western Regional Hospital.

{83} Thus, having regard to the foregoing I have concluded that quite early in this investigation the defence of alibi and that he had an injury to one of his fingers was raised in respect of the Second Accused. Hence, the Crown was well aware what the defence is expected to be if this Accused person was charged with the murder of the Deceased. Moreover, the record reveals that in response to the alibi warning given to the Accused at the committal proceedings the Second Accused gave several names to the committing Magistrate of witnesses he intends to call at his trial. Two of those witnesses who were named were called as defence witnesses.

{84} The Court received and has had sight of a document dated the 28th of September 2018 emanating from the Western Regional Hospital and purportedly signed by the Ag. Chief of Staff of that institution. Though the document was not formally tendered into evidence the Court examined same *de bene esse* and found that it refers to the injury to the right thumb of the Second Accused. The document states that there was a removal of non-viable tissue and a piece of protruding bone. A stump was refashioned and the

wound was closed. This document supports the case for the Second Accused that he was physically incapacitated by an injury to his right hand which resulted in his hand being bandaged at that time.

{85} The document also contained a list of dates on which he visited the outpatient department for dressing to be done to the injury. Those dates were from the 9th of July 2018 until the 7th of August 2018. It is contended by Defence Counsel that his client would be unable to inflict stab wounds to the Deceased with his right hand because of the injury aforesaid. It is to be noted as well that Dr. Estrada Bran testified that the stab wounds to the body of the Deceased were inflicted with heavy force.

{86} However, notwithstanding this evidence the Crown did not call evidence in rebuttal from a duly qualified medical professional to testify as to whether the injury to the right thumb of the Second Accused would disable him from inflicting the injuries to the body of the Deceased as seen by Dr. Estrada Bran and in the manner described by him.

{87} One Valentina Bolón who was mentioned by the First Accused in his testimony as his common-law-wife at that time also gave a statement to the police on the 10th of August 2018 in which she disassociated the First Accused from being in the company of Brandon Benyathi at around 5:30 p.m. on the

afternoon of the 6th of August 2018. She also stated therein that she has no knowledge that the First Accused could drive a car.

- {88} It is against that background that I find it astonishing, that the Crown did not adduce evidence of the results of the processing of the latent prints allegedly found on the steering wheel of the vehicle, in which the First Accused was alleged to have driven the Deceased to the Rivera area in Belmopan where he was killed. Indeed in his sworn testimony, the First Accused stated that he does not hold a driver's licence and that he does not know how to drive a motor vehicle. I find that having regard to the testimony that this Accused was the driver I expected that in the normal course of events that his prints would be on the steering wheel of that vehicle amongst the prints allegedly found thereon. However, the Crown did not adduce any evidence on the question of the ownership of the prints found on the steering wheel of the vehicle. On a further note the alleged bloodstains found in the said vehicle which were swabbed and submitted to the National Forensics Science Services by the Crime Scene Technician Henry were not processed though the forensic analyst recommended that DNA tests should be conducted thereon. So, did the bloodstains belong to the Deceased or Brandon Benyathi or someone else?
- {89} Thus, the unanswered question which arises is to whom those finger prints belonged? If the First Accused was indeed the driver of that vehicle it's most

likely the prints would be his, but for unknown reasons no evidence was adduced by the Crown as to the results of the processing of those prints. Were they compared with those of the First or the Second Accused or Brandon Benyathi whose fingerprints would be in the possession of the police after they were charged and as part of their criminal records after they were convicted in the Magistrate's Court as they testified during their defence.

{90} The Crown's case further revealed fingerprints were found at the home of the Deceased but once again no results were revealed as to the ownership of those prints. The Crime Scene Technician Robert Henry Jnr. testified that he had submitted those prints to be processed using the AFIX system. He went on to state under cross-examination that the results of any examination or comparison of fingerprint tests would be sent to the investigator. At the end of the day, it appears that these prints have not been processed or that the results have not been disclosed. Here again the unanswered question arises, could those prints have belonged to someone else other than the Two Accused?

{91} The witness Brandon Benyathi testified that he saw the Second Accused throw what he described as the evidence namely, the knife used to kill the Deceased, a blue towel, and his shirt with writing on it at a place in the Rivera area. He said he showed the place where the evidence was thrown away to the scenes of crime technician who found the knife, the shirt, and the towel all of

which were placed in a brown paper bag in an envelope. He said police officers were there at the time.

{92} However, as stated aforesaid ASP Aban testified that no knife was recovered during the investigation. Indeed the Crime Scene Technician Khadijah Thimbriel testified that on the 10th of August 2018 at the request of then INSP Aban she visited the Rivera area where she photographed a blue towel in a tree and a black Aeropostale shirt with markings on it. She took them to a drying area where they were left to dry after which she packaged them in separate brown paper bags which were sealed and labelled and sent to the National Forensic Science Services lab for analysis. The photographs of the towel and the shirt were tendered into evidence but there was no photograph of the knife. Moreover, she made no mention of finding a knife that day or at all.

{93} I find the absence of the knife to be another significant issue. Brandon Benyathi testified that he saw the Second Accused throw 'the evidence' in a certain area and that evidence comprised of a towel, the knife, and shirt belonging to the Second Accused. He further testified that when he visited the scene on the 10th of August all three items were found. They were packaged by the scenes of crime. No explanation has been offered by the Crown for this inconsistency surrounding the disappearance of the alleged murder weapon. The unanswered questions arising includes the following:

i). Did Brandon Benyathi lie about the Second Accused stabbing the Deceased with a knife which he threw away in the bush together with his shirt and towel?

ii). Was the knife found by the police and the Crime Scene Technician but did they conceal it and are now denying its existence?

{94} I find that the knife being the alleged murder weapon could have been tested for bloodstains bearing the same DNA as the blood samples of the Deceased given to the police at the post-mortem examination by Dr. Estrada Bran. It could have also been tested for the fingerprints of the Second Accused. This would have strengthened the evidence of Brandon Benyathi if such tests were positive or exculpatory evidence in the case of the Defence.

{95} However, the unexplained absence of the knife purported to be the murder weapon is a matter to be carefully considered by the Court. Similarly the processing of the latent prints found on the steering wheel of the Deceased's vehicle and at the Guest House could also be equally exculpatory.

{96} Jason Hyde, who was deemed an expert in Serology tendered his report on his examination of exhibits submitted to the National Forensics Science Services by the Crime Scene Technician's in this matter. His findings included human blood on the front and back of a light blue towel. Hairs were also collected from that towel. Human blood was also discovered on swabs examined. He

also retained the test tube obtained from Dr. Estrada Bran and fingernail clippings for DNA testing. However, nothing was sent for DNA testing and as such this witness stated under cross-examination that his findings of blood and hair on the light blue towel did not point to any person. I find that the absence of DNA testing on the exhibits stated in the report of this witness which was tendered into evidence left this case bereft of any forensic evidence in support of the assertions of Brandon Benyathi who I consider to be an accomplice.

{97} Thus, at the end of the day the Crown has not adduced any evidence from the exhibits sent to the National Forensic Science Services lab to be analysed. Nor have any findings from the latent fingerprints found on the steering wheel of the Deceased's vehicle or at his home connecting the Second Accused to this offence have been presented. Indeed, no forensic evidence has been adduced by the Crown on the results of any tests conducted on the fingerprints collected during the investigation of this matter on the towels found at the scene, on the vehicle at the Savannah Guest House, and the bushy area in the Rivera area to connect the Accused to this offence. Again no reasons have been proffered by the Crown for these omissions not dissimilar to the conundrum of the missing alleged murder weapon.

{98} It is clear from the evidence of ASP Aban and the evidence as a whole that the Crown was satisfied to rely exclusively on the evidence of Brandon Benyathi

who I have for reasons aforesaid deemed to be an accomplice in the killing of the Deceased and ignore or neglect the possibility of adducing forensic evidence from findings of the Crime Scene Technician's Henry and Thimbriel aforesaid. Thus, notwithstanding the exhibits discovered and submitted for analysis by the Crime Scene Technician's no forensic evidence was adduced to implicate or excuse the Accused from liability for this heinous offence. Moreover, no intimate samples were taken from Brandon Benyathi to exclude him as a suspect in the commission of this homicide. It is against that background that I consider my finding that it is astonishing and difficult to accept that the Accused would engage in an offence as heinous as this with Brandon Benyathi who has connections to Marvin Smith and INSP Castellanos aforesaid.

{99} Thus, after carefully and critically considering the evidence of the Crown I find that notwithstanding the inconsistencies and discrepancies of the evidence of the Accused and their witnesses, the Crown's case has not satisfied me to the extent that I feel sure that the Accused together with Brandon Benyathi on the 6th of August 2018 were engaged in the homicide of the Deceased.

{100} Accordingly, the Court finds them not guilty of the offence of murder.

Dated this **20th day of September 2022.**

Honourable Justice Mr. F M Cumberbatch
Justice of the Supreme Court
Central Jurisdiction
Belize, CA