IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CRIMINAL NO. 20 OF 2018

ANDY FORBES **APPELLANT**

AND

THE QUEEN **RESPONDENT**

CRIMINAL APPEAL NO. 21 OF 2018

WILLIAM VASQUEZ **APPELLANT**

AND

THE QUEEN **RESPONDENT**

CRIMINAL APPEAL NO. 24 OF 2018

TYRONE FITZGIBBON HARRIS **APPELLANT**
a.k.a CLINTON HARRIS

AND

THE QUEEN **RESPONDENT**

BEFORE:

The Hon Madam Justice Hafiz Bertram	**President (Ag)**
The Hon Madam Justice Minott-Phillips	**Justice of Appeal**
The Hon Mr Justice Foster	**Justice of Appeal**

Appearances
A. Sylvestre for the First and Second Appellants
A. Tillett for the Third Appellant
C Vidal, SC, Director of Public Prosecutions for the Respondent

Hearing: 10 March 2022
Promulgated: 6 September 2022

JUDGMENT

HAFIZ BERTRAM P (Ag.)

Introduction

[1] On 15 June 2012, Joseph Myers (Myers) was shot to death in Belize City. On 30 August 2013, Andy Forbes (Forbes), William Vasquez (Vasquez) and Clinton Tyrone Harris (Harris) (altogether 'the appellants') were indicted jointly with a single count of the offence of murder for the shooting death of Myers. The appellants were tried by Justice Colin Williams (the trial judge) in a judge alone trial, between 25 September 2018 and 22 March 2019. In a judgment delivered on 26 October 2018, the trial judge convicted all of the appellants of the offence of murder. On 22 March 2019, all three appellants were sentenced to life imprisonment with a minimum term of 30 years less the time spent on remand. That is, Forbes and Vasquez were sentenced to life imprisonment with the eligibility for parole after serving 23 years and 8 months. Harris was sentenced to life imprisonment with eligibility for parole after serving 21 years. Harris had been given a further reduction of two years and eight months since his mitigating factors outweighed his aggravating factors. The appellants have appealed their convictions and sentences by notices of appeal filed in 2018 and 2019, respectively.

[2] The three appellants were represented by counsel in the court below. Harris had given a caution statement which was not challenged by his counsel. Harris in his caution statement admitted to being on the scene of the crime but exonerated the other two appellants, Forbes and Vasquez. The treatment of the caution statement by the trial judge is the subject of appeal for both Forbes and Vasquez.

[3] The other issues raised on appeal concern the trial judge's questioning of an alibi witness, the direction given on joint enterprise, the failure to give an adequate good character direction, the weight to be attached to mitigating factors and the failure of the trial judge to direct his mind to counsel's failure to explain the virtues of a possible plea arrangement.

[4] The appeals were heard together on 10 March 2022 and the court reserved its decision. The Court now gives judgment dismissing the appeals and affirming the convictions and sentences of the three appellants. These are our reasons for doing so.

Factual Background

[5] Sometime after 6:00 pm on 15 June 2012, Myers, Elvis Olivera (Olivera), Fenton Maskall (Fenton) and Danny Maskall (Danny) were among a group of persons drinking and socialising on the premises of the Living Hope School ('the School'). They had relocated to a part of the veranda on the lower level of the building, having moved from an abandoned building close by, about 5 minutes after Vasquez had passed by in a taxi. About 10 minutes after moving, two persons dressed in black came from behind the school to where the group were socialising and shot at them. As a result , Myers was killed and Olivera and Fenton received gunshot injuries. The Prosecution's case was that the two shooters who opened fire at the front of the building, where the group was socialising, were Forbes and Harris. Vazquez who was also armed was at the back of the building.

[6] The case for the Prosecution against the three appellants was one of joint enterprise. They relied on the eyewitness testimony of three main witnesses, Olivera, Fenton and Danny and the statement under caution, made voluntarily by Harris, to prove the circumstances surrounding the death of Myers. Fenton and Danny are brothers and will be referred to, where necessary, as 'the Maskall brothers.'

[7] The defence of Forbes and Vasquez was one of alibi. Harris admitted in the caution statement to being on the scene with an unknown friend.

The case for the Prosecution as relevant to the appeal

Olivera's evidence

[8] Olivera testified that he was socializing with Kenya Browne, the Maskall brothers and Myers at the Living Hope School on a veranda. Before that, they were in an old abandoned cement building in the same school yard but moved to the School after he saw Vasquez had passed in a taxi. About 10 minutes later, whilst on the veranda, two persons ran from behind the building, both with guns in their hands. These two persons were nine to ten feet from the group and pointed guns at them. Olivera did not move until he heard the first gunshot. He ran on the veranda, which goes around the building, to the back of the school. Whilst running he heard gunshots. He then jumped over the veranda railing and landed on his back. Olivera further testified that the gunmen were trying to escape and they ran straight into him. Vasquez who was at the back of the School jumped the veranda as well and landed on his (Olivera's)

chest. Vasquez had a gun and hit him on the head. Thereafter, the other two appellants jumped the veranda railing also. Forbes pointed a gun to his head and pulled the trigger but it snapped (no bullet came out). It was then Olivera jumped up and started to fight with Harris. Forbes told Harris "*Shoot ah, shot ah dah ih head."* Olivera punched Harris and he fell down. Olivera then ran under a house that leads to Pen Road.

[9] Olivera who received a gunshot wound to his foot identified all three appellants as being on the scene of the shooting. He grew up with them in the neighbourhood and the identification of them was by recognition. Olivera recognised Forbes and Harris as the persons with guns who approached the group of men who were socialising at the front of the School and opened fire. He saw Vasquez at the back of the School when he ran to the back of the building.

The evidence of the Maskall brothers

[10] Each of the Maskall brothers identified Forbes and Harris as the gunmen who approached the group and opened fire at the front of the building. They were also familiar with the appellants for a long period of time and recognised them on the night of the shooting incident. Fenton Maskall, who was also shot, ran to the back of the school building after the shooting started and recognised Andy Forbes and Tyrone Harris as the persons with guns. He jumped over the veranda railing and rolled under the school building where he waited until he heard the sound of sirens from the police vehicles.

PC Leslie's evidence in relation to detention of Harris

[11] Police Constable George Leslie (PC Leslie) testified that he went in search of Harris in relation to a shooting incident. When he found Harris, he detained him and cautioned him. He then escorted him to the Crimes Investigation Branch (CIB) office. PC Leslie testified that when Harris was in his presence, he did not threaten him in anyway, or use force or promise him anything. Further, he did not beat Harris and he did not complain about anything at all.

ASP Alejandro Cowo's evidence in relation to the Caution Statement from Harris

[12] Assistant Superintendent of Police Alejandro Cowo (ASP Cowo) testified that in 2012, he was a Sergeant of Police at CIB. On 15 June 2012, PC Leslie brought a male person to

the office and informed him that he was Clinton Tyrone Harris. Shortly after that, Corporal Martinez brought two male persons to the CIB office. He identified them as Andy Forbes and William Vasquez. ASP Cowo informed them that they were being detained for the alleged shooting incident of Joseph Myers, Elvis Olivera and Fenton Maskall. He said he cautioned them and informed them of the reason for their detention and none of them said anything during the interviews.

[13] ASP Cowo testified that he continued his investigation and on 17 June 2012, he swore to information and complaint, obtained a warrant in the first instance and arrested and charged jointly, Forbes, Vasquez and Harris, for the crime of murder and attempted murder. On the following day, he took them individually to an office for them to be fingerprinted. He stated that whilst he was dealing with Harris, "*he said he wanted to talk with me and tell me the truth but before that he needs to speak to his two friends."* ASP Cowo took Harris to the cell block after he was finished with the fingerprinting. He informed him that he would be outside by the cell block waiting and he (Harris) should call him whenever he is ready. He testified that there were two other persons in the cell block, that is, Forbes and Vasquez. Harris called him ten minutes later and said he wants to tell the truth about what happened on that date. He cautioned Harris and then took him to the CIB office where he met Jose Zetina (Zetina). He requested Zetina to record the statement under caution from Harris. He did so but at the time of the trial, Zetina was deceased.

[14] ASP Cowo testified that he worked with Zetina and knows his signature. There was no objection for him to identify the statement dated 18 June 2012, from Harris. He testified that he would be able to recognise the caution statement which was recorded by Jose Zetina and signed once. Harris signed it eight times and the Justice of the Peace, Lind signed it nine times.

[15] Thereafter, the Crown made an application for the statement to be marked and tendered as an exhibit in the trial. There was no objection from counsel who represented the appellants. Subsequently, the trial judge admitted the statement as "AC 1." The Crown then made an application for the statement to be read into the record. Once again, there was no objection from counsel for the appellants.

[16] ASP Cowo then read the statement into evidence:

"Name, Clinton Tyrone Harris, age, 25 years. Date of Birth, 29th September, 1986. Raised Belizean. Recorded at Crimes Investigation Branch on 18th June, 2012 at time, 8:39 a.m. Name rank and number of recording officer. Jose Zetina, Sergeant 803.

I, Clinton Tyrone Harris at the time of my arrest was informed that I was arrested for the crime of murder and I was also informed that I can communicate privately with and give instruction to an attorney of my choice. I was also informed that I am entitled to a phone call to a relative, friend or attorney of my choice.

I Clinton Tyrone Fitzgibbon Harris duly cautioned by Jose Zetina, Sergeant 803 at the Crimes Investigation Branch office, Belize City, on the 18th day of June 2012 as follows. "*you do not have to say anything unless you wish to do so but what you say may be taking down in writing and given in evidence*."

Friday I went to hang out with my friend. When I reached there he had a quart and asked me if I want to drink and I replied, "Yes". Whilst drinking a young man arrived and told my friend that all of them bally are at the school right now. Bally that told my friend that then gone. He told me and my friend the direct direction where they were and the clothing they have on. Me and my friend finished drinking our drink that was in our cup and then he got up and went to the direction of the bushes and then he came back with two masks made of stocking and brown color which is designed like a ninja mask with one hole which allowed you to see with the two eyes. He also brought two hand guns. My friend then asked me if I was going by the school on Maskall Street. I then replied to my friend that I will go only if Rebel who is Elvis Olivera is there at the school on Maskall Street. My friend then replied to me and stated, "Yes he is there. That is what the man said." My friend then put the quart on the ground and then I got my bike and my friend get his bike and both of us ride from the bush and ride to the front where I noticed that Billy arrived in a cab. Billy is William Vasquez. Whilst riding on my way I saw Billy walking toward his yard he had his back turn on both of us, So he never saw us riding pass him. Both of us quickly riding in speed and both of us went behind the school from the street before Maskall Street. Upon coming there both of us came off our bicycles and parked the bicycles at the end of the road on the corner of a fence. Both of us walked through William Scott yard, then through the bushes.

Upon reaching the back of school on Maskall Street both of us sat under the veranda. My friend took out the two masks from his pocket and a white and brown cap that he had somewhere behind him. Both of us put on our masks. I then put on the white and brown cap and my friend had on a big blue hat with string all the way down to his neck area. My friend then told me to wait under the veranda and anybody that pass me to shoot to kill. As he finished saying these words he jumped over the veranda. I then peeped and saw him going to the left side of the veranda about seconds after I heard gunshots being fired. After hearing the gunshots I then became alerted and in less than a minute I saw two guys jump the back veranda and head in my direction where I managed to recognize one of them as Rebel who is Elvis Olivera. I then ran behind

Rebel and I fired a single shot at Rebel and I noticed that he fell to the ground. I went to him and after that he got up and I set chase after him. Whilst chasing at Rebel, I looked back and saw my friend coming behind me. I then fired another shot at Rebel which caught him. He then fell between some old stairs which are in the yard of William Scott.

I then walked up to Rebel and aimed my gun to his face. And then Rebel stated to Me, "Please sir, nuh kill mi." I then squeezed the trigger of the hand gun which I had aimed to Rebel face but the hand gun snapped. Rebel then grabbed my feet trying to pull me down so I hit him with the hand gun to his head on two occasions. My friend was about five seconds away of me and Rebel. Rebel managed to put me on the ground and he got up. By this time my friend had reached us. My friend then pointed his hand gun to Rebel and squeezed the trigger for about four times but the gun only snapped. By this time Rebel continued running through and open fence/gate but was caught by a friend.

I also got up and pursued behind Rebel and catch him where I grabbed him and he managed to take off my mask. That is when I got scared since he saw my face and cap. I (sic) put my gun in my pocket since the gun was ham (sic). I then told my friend to leave him and told my friend to let's go. Rebel open the gate and I saw him leave. Both of us then get out bikes and rode. Before that I took off the cap, my checkered shirt and throw it on the ground. Both of us rode back to the bushes where we were drinking. I must say that the reason why I shot at Rebel is because he gave Byron a gun to shoot Frank Vasquez. **I must also mention, while arriving back to the bushes, Andy Forbes, William Vasquez and a couple of other guys were chilling at Billy's house. They had nothing, absolutely nothing to do with this crime and my friend's name is Crashie meaning a crash dummies or someone sent anywhere to kill anyone.** At the time the shooting took place, it was about 6:20 p.m. or 6:30p.m. in the night….." (Emphasis added)

[17] ASP Cowo identified Harris as the person who gave the caution statement. He also testified that Harris was not beaten or forced by him or anyone else to give the statement. Further, Harris was not promised by him or anyone else, anything in exchange for the statement. ASP Cowo also identified Forbes and Vasquez as the two other persons whom he interviewed, arrested and charged. There was no objection from Mr. Sampson who represented two of the appellants. ASP Cowo was cross-examined by Mr. Ebanks who represented Forbes.

[18] The trial judge then asked ASP Cowo some questions, which he stated was for clarification purposes. The following exchange took place which is relevant for the purposes of the appeal:

> "THE COURT: Just some issues I wanted to clarify. ASP right? ASP Cowo.
> THE WITNESS: Yes, My Lord.
> THE COURT: You said during my investigation statements were recorded from Elvis Olivera, Fenton Maskall then Danny Maskall. You are saying those are the persons you recorded statements from?
> THE WITNESS: No. Those persons were not recorded by me. I recorded for one of them.
> THE COURT: Okay, good. Yes.
> THE WITNESS: - ….. Sergeant Cawich recorded from Olivera. Rudy Melendez recorded from Danny Maskall and I recorded from Fenton Maskall.
> THE COURT: Where was this? When and where? You were present when Cawich and Melendez did their recording?
> THE WITNESS: No.
> THE COURT: Right.
> THE WITNESS: I was not present when Sergeant Cawich and officer Melendez did the recording.
> THE COURT: Where did you do the recording?
> THE WITNESS: The one from Fenton Maskall was done at the hospital on the 16th sometime in the morning.
> THE COURT: Ok. The way I have the evidence here it says that, "*I asked them if they understood the charges individually, they replied, yes and I cautioned them once more and they remained silent. I gave them a phone call each which all of them called someone."* Do you remember saying that?
> THE WITNESS: Yes, My Lord.
> THE COURT: This phone call that was given to them, this was after the charge?
> THE WITNESS: Yes, My Lord.
> THE COURT: Did he give you the names of the two friends he wanted to speak to?
> THE WITNESS: He said Andy Forbes and William Vasquez. He needs to consult with them before he says anything.
> THE COURT: He gave you the names of his two friends he was referring to.
> THE WITNESS: Yes, My Lord.
> THE COURT: Now, there is just one other thing I have to clarify with you (sic) stated that you Mr. Clinton, the third Accused, that you cautioned him after he said that he wants to, "*I took him to the cell and these other persons were in the cell block"* You said, "*I immediately cautioned him*" referring to the number three and you gave us the words of the caution that you used. The caution that you gave him, this was after he was charged, correct?
> THE WITNESS: Yes.

THE COURT: When you cautioned him after you took him to the cell block?
THE WITNESS: Yes.
THE COURT: Let me get the sequence right, okay? You said he wanted to speak to his two friends and you said that was your purpose for carrying him to the cell block. About 10 minutes later he called for me and I spoke with him. He told me I want to tell you the truth what happened on that date. The cell I took him to the other two were in the cell block. I immediately cautioned him. "*You do not have to say anything unless you wish to do so but whatever you say will be taken down in writing and given in evidence. Right*?
THE WITNESS: Yes, My Lord.
THE COURT: At this time though he was already charged.
THE WITNESS: Yes, he was already charged, My Lord.
THE COURT: And the caution that was given to him at this time was identical to the caution that was given to him before.
THE WITNESS: The caution that I gave him when he told me that he wanted to tell me the truth is identical to the caution when I informed him of the reason of the arrest. Those are the two identical cautions.
THE COURT: As a consequence of my questions any issues arising from my questions. Wait. Let me take it one at a time.
Mr. Ebanks?
MR. EBANKS: None, My Lord.
THE COURT: Mr. Sampson.
MR. SAMPSON: None, My Lord
THE COURT: Yes, Mr. Awich.
MR. AWICH: None, My Lord.
THE COURT: Thanks a lot officer. You are excused."

Andy Forbes defence

[19] Andy Forbes gave sworn evidence on his own behalf. His defence was one of alibi. He testified that he was working on a construction site and about 5:00 pm after collecting his pay he went home. He watched television with his six children and then he went out on his veranda. He saw his cousin William Vasquez and went over to the other property and sat with him and another person. He had a drink with them. He testified that around 6:30 pm Jason Arnold went to where they were socialising and asked if they heard any shots. Forbes responded "no". The police then came to the yard and asked to conduct a search and then took them to the Queen Street Police Station.

[20] Jason Arnold, Forbes alibi witness, testified that he signed off work at the National Fishermen's Cooperative about 6:30 pm. He was taking his girlfriend home who lives on Neal's Pen Road on a motorcycle and while passing the basketball court heard some gunshots.

Then he took his girlfriend to Vasquez' house but does not know his address, only where he lives. He saw Forbes and Vasquez there but he did not interact with either of them. He got a phone call and went to Karl Huesner Memorial Hospital (KHMH) because his cousin, Kenya Brown got shot, in the same incident where Myers was shot and killed.

During cross-examination, Arnold was questioned by the Crown and the trial judge as to the route he took when he picked up his girlfriend on his motorcycle to take her to Vasquez' home.

William Vasquez Defence

[21] Vasquez gave sworn testimony and provided an alibi. He testified that on 15 of June 2012, he finished work at 5:00 pm. and went home. His common law wife and three children were at home and then his wife left for work. His testimony is that he never left his home from the time he got there and until the police came to his house and took him to the police station. Under cross examination, he denied (i) that he passed in a taxi close to 6:00 o'clock (ii) that he was at the Living Hope School and (iii) that he was responsible for the death of Joseph Myers. Vazquez also testified that up to June 2012, he had never been convicted of any offence.

Tyrone Harris

[22] Harris exercised his right to silence after he was given the three options by the trial judge.

The decision of the trial judge

[23] The trial judge rejected the defence of alibi for both Forbes and Vasquez. Under the heading of '*Verdict'* at paragraphs 51 and 52 of his judgment, the trial judge gave his reasons for finding the appellants guilty. He was satisfied of the guilt of the appellants based on the evidence of Olivera whom he found to be a credible witness. He also considered other supporting evidence from the Crown. The judge said:

> "51. In this matter, I have no difficulty in accepting Elvis Olivera as a reliable witness of the truth. The Prosecution, through his testimony and supporting evidence, has satisfied me, so that I am sure that the two persons whom Elvis Olivera saw with guns drawn approaching the group were Andy Forbes and Clinton Tyrone Harris. I believe his testimony as well that William Vasquez was also armed and present on the scene, towards the back of the school building. I believe his testimony as well that at the back of the building Andy Forbes said to Tyrone Harris to shoot Olivera in his head.

52. The prosecution has satisfied me, so that I am sure, that the three Defendants, Andy Forbes, William Vasquez, and Clinton Tyrone Harris are guilty of the murder of Joseph Myers."

[24] In relation to the Caution Statement of Harris, the judge accepted two things: (a) Harris was at the scene of the crime and (b) Harris statement corroborates Olivera's evidence that a gun was placed to his head and when the trigger was pulled no bullet came out. The trial judge said at paragraphs 39 and 40:

" 39. As part of the prosecution's case, against the third defendant (Harris) a caution statement that he gave to the police after he was charged was tendered. That statement was given by Tyrone Harris after he informed the police that he was willing to give a statement but wanted to speak with his friends first. After having been given an opportunity to speak with the two other defendants, Tyrone Harris putting himself and another person an unnamed friend on the scene.

40. Two of the things which emerged as a consequence of Tyrone Harris' caution statement is affirming the correctness of the identification of him as one of the persons being on the scene. In the body of the statement there is (sic) corroborates the evidence from Elvis Olivera that the gun was placed to his head when attempts was made to fire it, nothing happened."

The appeal of Andy Forbes

[25] There are two grounds of appeal in relation to Forbes. These are:

1. The trial judge erred in failing to give any weight to that portion of the caution statement of Clinton Harris which exonerated Forbes;

2. The judge's questioning of defence witness, Jason Arnold, amounted to a material irregularity.

Ground 1: Whether the trial judge erred in failing to give any weight to that portion of the caution statement of Harris which exonerated Forbes.

The point as to whether a voir dire was held

[26] Firstly, the Court has to determine whether a *voir dire* (trial within a trial) was held to determine the admissibility of the statement given by Harris. Mr. Sylvestre submitted that Harris' caution statement was admitted into evidence after a *voir dire* had been conducted. The Director submitted that the appellant argued from a flawed premise as no *voir dire* was conducted by the trial judge.

[27] In the view of the Court, the misconception that a *voir dire* was held was as a result of the note in the record by the stenographer at page 243 which shows "VOIR DIRE BEGINS." In fact no *voir dire* was held as shown by the exchange between the Prosecutor and the trial judge who at page 232 of the Record gave reasons as to why he would not be conducting a *voir dire* that is, he was sitting alone and the caution statement was unchallenged. The trial judge said:

> "…. in a judge only trial I don't see the need specifically for a separate and distinct *voir dire*. In other words, the matters can be canvassed in the course of the trial itself because you are not going to be reading the evidence in full and ….. I have no objections.

[28] Further, at pages 235 and 236 of the Record, the judge had a discussion with the Prosecutor who enquired about a *voir dire* to determine the admissibility of the statement. The judge then enquired as to whether there was a challenge to the statement and there was none. The judge then stated he was the trier of both fact and law and the admissibility would be dealt with during the substantive trial itself. The judge said:

> "THE COURT: Mr Awich, the Court will proceed with the substantive trial **with reference to the voir dire.**
> MR AWICH: Guided, My Lord. Much obliged.
> THE COURT: Any issues to what ordinarily what the admissibility and so forth can be canvassed in the substantive (sic).

[29] The mistaken belief, in our view, that a *voir dire* was held was further compounded by the words used by the judge to the Prosecutor, " *proceed with the substantive trial with reference to the voir dire."* This understandably could lead to confusion as to whether in fact a *voir dire* was held. However, in our view, it can be seen from the totality of the discussion that the judge did not see the need for a *voir dire* and the admissibility of the statement was dealt with in the main trial.

Discretion of the trial judge not to hold a voir dire

[30] The Court is of the view that it was within the discretion of the trial judge, sitting alone, to opt not to conduct a *voir dire*, depending on the circumstances of the case. In the instant matter there was no challenge to the statement. In the case of **Akeem Thurton v The**

Queen[1] referred to the Court by the Director, this Court opined that in a judge alone trial, it is within the discretion of the trial judge whether to hold a voir dire. The Court said:

> "[41] There is no rule that, in a trial by a judge without jury the judge should not hold a voir dire. It is a matter for the discretion of the judge. It has not been shown to us that, the Chief Justice exercised his discretion wrongly, or that the exercise of the discretion resulted in an unsafe conviction. Given that the judge is both judge of law and fact, there may well be less value in holding a voir dire in a judge alone trial."

[31] Further, although there was no challenge to the caution statement, the trial judge was required by *section 90 of the Evidence Act*[2] to ensure that Harris gave the caution statement freely and voluntarily before its admission into evidence. The Crown was required to prove "*affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.*" (section 90(2)).

[32] The trial judge as shown above was satisfied that there was no objection/challenge to the caution statement and proceeded in the main trial to hear evidence from PC Leslie and ASP Cowo in relation to the voluntariness of the statement and ultimately the admissibility of the statement. The statement was later tendered and admitted as "AC 1" without objection by senior counsel representing Harris and Vasquez. It was then read into evidence by ASP Cowo who gave evidence only once. If a *voir dire* had been held, ASP Cowo would have been called to give evidence at the *voir dire*, but only on the circumstances of the recording of the statement. Thereafter, he would have been recalled at the main trial to put the statement into evidence and if necessary, to give other evidence. That was not the position in the instant case. ASP Cowo testified once in the main trial and the statement was admitted into evidence.

Whether there was a material irregularity as a result of questions asked by the trial judge

[33] Learned counsel, Mr. Sylvestre submitted that for purposes of this ground, the learned trial judge asked ASP Cowo what were the names of the two friends that Harris wished to speak with and indeed spoke with before he gave the caution statement. He referred the Court to pages 275, 276 and 277, where the trial judge questioned the witness. See paragraph 18 above. Counsel contended that from the above inquiry, which he referred to as the *voir dire*, it unfolded that Harris had a conversation with Forbes and Vasquez before giving the caution statement which is favourable to both of them as it exculpates them entirely from any involvement in the commission of the crime. Mr. Sylvestre argued that such evidence (caution statement made after the maker spoke with his co-defendants), could reasonably

[1] Criminal Appeal No. 4 of 2012
[2] Cap. 95 of the Substantive Laws of Belize (Revised Edition) 2020

impact or affect the consequential weight a tribunal of fact gives to such a statement. He submitted that such evidence was not led in the substantive trial. He relied on the case of **Hernan Manzanero v Queen**[3] and submitted that this type of evidence should not find its way in the deliberation of the trial judge when determining the case. He referred the Court to pages 491-492 and 592 of the Record, where the learned trial judge addressed the issue of the caution statement. See para 24 above.

[34] Counsel argued that the above showed that the learned trial judge considered the evidence that emerged on the *voir dire* with regard to when the caution statement was given, that is, that he wanted to speak to his two friends. This therefore, Counsel argued would have constituted a material irregularity in the trial process.

[35] The Court has concluded above that a *voir dire* was not held by the trial judge. Nevertheless, in relation to the fairness of the trial, regardless whether a *voir dire* had been held or not, we will consider whether the questions asked by the trial judge would have influenced him in his deliberation, that is, doubt the veracity of the statement given by Harris.

[36] The trial judge in his deliberations found the appellants guilty on the evidence of Olivera who identified the appellants, including Forbes. The judge having accepted Olivera's evidence found that Harris was along with Forbes at the front of the School building and Vasquez was at the back of the building. Further, the judge specifically referred to two points in Harris statement which corroborated Olivera's evidence. Indeed, the judge stated under the heading of "Caution Statement" that Harris gave the statement after speaking to his two friends but, this did not form part of the deliberation of the trial judge to find the appellants guilty of murder. Olivera's evidence was found to be credible and since the judge accepted his evidence the trial judge could not place any reliance on the exculpatory part of the statement. The judge rejected the evidence of both Forbes and Harris and accepted the evidence for the Crown. The Court is therefore satisfied that no material irregularity occurred as a result of the questions the trial judge asked ASP Cowo after the admission of the caution statement. Further, the questions were unnecessary as the three appellants were jointly charged and were in the cell together. It seems that the trial judge was also focused on the type of caution given to Harris since he was already charged.

[3] [2020] CCJ 17 (AJ) BZ

Whether the trial judge erred in not giving weight to the exculpatory parts of the caution statement.

[37] Mr. Sylvestre further submitted that the questions asked by the trial judge after the caution statement was admitted was further compounded as he failed to consider the exculpatory parts of the caution statement. He argued that the trial judge did not give any weight to those portions of the caution statement which would have been exculpatory to Forbes, that is, where Harris states:

> "I must also mention, while arriving back to the bushes, Andy Forbes, William Vasquez and a couple of other guys were chilling at Billy's (Vasquez) house. They had nothing, absolutely nothing to do with this crime and my friend's name is Crashie meaning a crash dummies (sic) or someone sent anywhere to kill anyone. At the time the shooting took place, it was about 6:20 p.m. or 6:30 p.m. in the night. On Friday the 15th day of June 2012."

[38] Counsel relied on the case of **R v Myers (Melanie)**[4] which explains that a co-accused is entitled to have an exculpatory part of a caution statement of a co-accused be considered on his behalf. Thus, it was incumbent for the trial judge to consider the exculpatory part of the caution statement in relation to Forbes. Counsel referred the court and relied on the CCJ case of **Dionicio Salazar v Queen,**[5] where the CCJ pointed out at paras [25] to [28] of that judgment, the importance and need for the trial judge in a judge alone trial, to ensure the constitutional safeguard of a fair trial is upheld, by providing a reasoned judgment. The CCJ said at paras 27 and 28:

> "[27] In the case of a bench trial conducted before a professional judge, the safeguards are directly to be found in the reasoning in the judgment of the trial judge. In accordance with the European Court of Human Rights, reasoned judgments oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case… While courts are not obliged to give a detailed answer to every argument raised … it must be clear from the decision that the essential issues of the case have been addressed."
>
> [28] The Court of Appeal in Northern Ireland stated in *R v Thompson* with respect to the duty of the judge giving judgment in a bench trial: ...

[4] [1997] UKHL 36
[5] [2019] CCJ 15

> "His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law."

[39] Mr. Sylvestre argued that in the instant matter there is no indication in the trial judge's judgment of how he treated the caution statement from Harris. The Director in response argued that Forbes' argument on this ground resolves itself into a suggestion that even though the judge rejected Harris' account in his statement under caution, he should nonetheless have gone on to say that he considered the parts which exculpated Forbes and his decision on it. The Director also relied on **Salazar's case** and submitted that the trial judge will not err if he does not state every relevant legal proposition and review every fact and argument on either side, so long as it is clear as to how he arrived at the guilty verdict. The Director relied on paras 28 and 29 of the CCJ decision where the Court said:

> "[28] The Court of Appeal in Northern Ireland stated in *R v Thompson* with respect to the duty of the judge giving judgment in a bench trial:
>
> > "He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law."
>
> [29] Equally, a judge sitting alone and without a jury is under no duty to "instruct", "direct" or "remind" him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[40] The Court agrees with the argument by the Director that a judge sitting alone does not have to record everything providing it is clear that the essential issues of the case have been correctly addressed as to how he arrived at the verdict. In the instant matter, the trial judge accepted the evidence for the Crown and clearly showed how he arrived at the guilty verdict. Therefore, a reasonable inference can be drawn that the judge rejected the exculpatory part of

the statement though he not did expressly say so. There was no need to do so, as he found Olivera's evidence credible. As such, the Court is of the view, that no weight could have been given to that part of the statement because of the findings of the trial judge after his assessment of the evidence. As shown above, the trial judge having rejected the *alibi* evidence of Forbes and Vasquez, reminded himself that it was for the Crown to prove its case against the appellants and this was done beyond a reasonable doubt.

[41] As such, the Court is of the view that there was no substantial miscarriage of justice as argued for Forbes. The judge carefully analysed the evidence and found the appellants guilty, including Forbes. This ground is therefore dismissed.

Ground 2: Whether the trial judge's questioning of defence witness (Jason Arnold) amounted to a material irregularity

[42] Forbes called Jason Arnold ('Arnold') to give evidence to support his *alibi*. Mr. Sylvestre submitted that the extensive cross examination of Arnold, by the trial judge amounted to a material irregularity. He urged the Court to quash the conviction for murder, set aside the sentence and order a new trial. Counsel referred the Court to the examination-in-chief of Arnold which starts at page 387 of the record and continues to page 393. The Crown then commenced cross-examination of the witness starting from page 394 and continuing to page 399 of the record. After a brief re-examination of the witness by counsel for Forbes, the trial judge then asked the questions. The judge stated:

> *"... I have some questions, many questions actually. Not that I want to pry into your business but I just need to clarify certain things to myself."*

[43] Counsel's complaint is that the questions were excessive, being six pages of the record and equal to the number of pages of the Crown's cross-examination of the witness. He submitted that in the specific instances, the trial judge took on the role of prosecuting counsel, as is to be gleaned by the protracted cross-examination and the tenor of the cross-examination. Mr. Sylvestre relied on *Archbold*, 2001 Ed. at paragraph 8-249, where it is explained that excessive interventions by the judge is to be deprecated and is commonly advanced as a ground of appeal. The learned authors at para 8-248 stated that the "*whole purpose of the adversarial process is that the judge sit and hold the ring. It was for counsel for each side to conduct examination and cross examination and for the judge to see that they did it fairly*."

[44] Mr. Sylvestre accepted that in trial without a jury regime, the trial judge is also the fact finder. However, he submitted that traditionally, the jury which is the fact-finder, was only permitted to ask questions to a limited extent as shown at para 8-250. He argued that in the instant matter, the trial judge offended this rule of practice and in the circumstances caused a substantial irregularity in the trial of Forbes. Counsel also relied on the cases of **Albino Garcia v The Queen,**[6] and **The Queen v Jacinto Roches**[7] to show that there was excessive questioning by the trial judge.

[45] Section 65(7) of the Evidence Act provides that "*The judge may, of his own motion at any stage of the examination of a witness, put any questions to the witness he thinks fit in the interests of justice."* The Court has considered the questions asked by the trial judge and forms the view that it was necessary in the interest of justice. The questions put to the witness were relevant to assess the reliability of the evidence given by the alibi witness, Arnold. The record shows that the trial judge did not interrupt Arnold during his testimony. The questions were asked by the judge at the conclusion of re-examination for the purpose of clarification. The questions asked by the trial judge (with explanation from the Prosecutor as well) were:

> "Q. Your girlfriend at the time, where she worked? she worked at the time?
> A. At the time she was working at National Fisherman's Cooperative.
> Q. Alright you left work together then?
> A. Yes.
> Q. On that day I am talking about. On the 15 June you left work together?
> A. Yes.
> Q. How long it took you to get from National Fisherman's Cooperative to William Vasquez residence on the motorbike?
> A. 15 to 20 minutes.
> Q. 15 to 20 minutes. You are aware that the school is .. what's the name of the school again?
> Mr. Awich: Living Hope Preparatory School.
> Q: Yes, Living Hope. You know where Living Hope Preparatory School is?
> A: Yes.
> Q: And the route that you took that day on the 15th of June 2012 from the Fisherman's Corp that took you to William Vasquez House? Did you have to pass the Living Hope Preparatory School?
> A: Yes.

[6] Criminal Appeal No. 24 of 2004
[7] Criminal Appeal No. 23 of 2013

Q: The route that you took on that day. I am not asking you about any other time. On that day the 15th of June when you had this lady on your motorbike and you were taking her home did you have to pass the Living Home School?
A: Yes. On Pen Road.
Q: All I am asking you is whether you had to pass it. Did you pass it?
A: Yes.
MR. AWICH: My Lord, may I get the benefit of your note because I have, "*Yes, we passed it on Pen Road."*
THE COURT: On the 15th of June 2012?
MR. AWICH: Yes, My Lord.
THE COURT: I haven't written it in full but he is saying, "*yes, he passed Living Hope Preparatory School on that day on his way to William Vasquez house*."
MR. AWICH: The witness mentioned Pen Road.
THE COURT: I asked him about the School I didn't ask him about Pen Road.
Q: Did you pass the school? Did you pass the school? Yes, or no?
A: Yes.
THE COURT: That is what he said. He said yes he passed the school.
MR. AWICH: My Lord, the reason why I am pressing that is because that is very key. He is saying in his response without prompting he passed the school by Pen Road; that's what the recording will have, My Lord, and that makes a significant difference in his evidence.
THE COURT: It makes a significant difference that he passes the school and which road he passes on you mean.
MR. AWICH: Yes, My Lord.
THE COURT: All right.
Q: So, correct me if I am wrong but the response I have right now. " *Yes, I passed the school on Pen Road that day on my way from the National Fisherman's Cooperative to Vasquez's home."* That is correct. The correct note.
MR. AWICH: Obliged, My Lord.
THE COURT: Mr. Ebanks?
MR. EBANKS: I will try, My Lord.
THE COURT: No, I am just saying if that is my note and I am asking you - -
MR. EBANKS: You are asking me if I have any questions- -
THE COURT: No, no.
MR. EBANKS: That's the note I have.
THE COURT: Right because I still need some further clarification.
Q: And you said that Sherilyn lived at 165 Neal Pen Road, right?
A: Yes.
Q. But you didn't go to 165 Neal Pen Road? You went to which address? What's the address you went to?
A. I don't know the address but I know where William Vasquez live.
Q: All right. You don't know which address you took Sherilyn to but you know where William Vasquez live and it was his home you said that you took - that you took her to?
A: Yes.
Q. On your way to the National Fisherman's Cooperative which of the two residence you meet up first between these two? William Vasquez residence or where Sherilyn live at 165 Neal Pen Road? Which address you meet first when you left the National Fisherman's Cooperative? Which or where you meet first?
A: Sherilyn. 165 Neal's Pen Road.

Q: You would reach Sherilyn before you reach - -
A: Before you reach William.
Q: Okay. When you left work with Sherilyn on the bike that day where were you intending to go?
A: At her home at 165 Neal's Pen Road.
Q: You saw Kenya Brown that evening?
A: When I went to the hospital.
Q: You saw Kenya Brown at the hospital?
A: Yes.
Q: Around what time would that be?
A: (Inaudible) ....
Judge's notes - "I saw Kenya Brown at the hospital after 7:00."
Q: And did you go directly to the hospital after you received the call?
A: Yes.
Q: How long do you recall it taking you to get from William Vasquez home to the hospital that evening?
A: (Inaudible) -....Judge's notes - *"It took me five minutes to from William Vasquez home to the hospital that evening."*
Judge's Notes "NIGEL EBANKS. *That's the case for the accused."*
THE COURT: Mr. Ebanks?
MR. EBANKS: I was saying, My Lord, I will try to clear up that ambiguity which arose.

[46] Mr. Ebanks, representing Forbes was then allowed to re-examine the witness, Jason Arnold. The judge during that re-examination by Mr. Ebanks stated that there was no ambiguity and that the evidence from the witness is that he passed the school on Neal's Pen Road.

[47] The Court is of the view that the questions asked by the trial judge although lengthy, shows that trial judge, in his role as a fact finder, as a jury may have done, required further clarification of the evidence given by Arnold. The judge, the trier of facts, needed to satisfy himself on the reliability of the evidence of the alibi witness, Arnold. We are of the view, that the questions asked by the trial judge, although admittedly lengthy, which ought normally to be avoided, were neither unfair nor improper. Further, the judge allowed counsel for Forbes, Mr. Ebanks to re-examine Arnold, for a second time, after he asked him the questions.

[48] The **Garcia case** and the **Roches case**, as submitted by the Director, are distinguishable from the instant matter, as in those cases the judge elicited inadmissible evidence. In the present case, the judge asked clarification questions in order to assess the evidence to determine its reliability. The trial judge's questions, in our view, did not amount to any unfairness in the trial process. The Court is of the view that Forbes has failed to show that any substantial irregularity occurred which led to an unsafe verdict as a result of the questions asked by the trial judge. This ground of appeal is also without merit.

Disposition

[49] For those reasons, the appeal of Forbes is dismissed and his conviction and sentence affirmed.

The Appeal of William Vasquez

[50] The appellant, Vasquez, filed seven grounds of appeal and sought leave to abandon four of those grounds. He pursued the following grounds:

> (1) the trial judge erred in failing to give any weight to that portion of the caution statement of Harris which exonerated Vasquez;
> (2) the trial judge erred in failing to give a proper direction in relation to joint enterprise; and
> (3) the trial judge erred in failing to give himself an adequate good character direction in light of the sworn evidence by Vasquez.

Ground 1: Whether the trial judge erred in failing to give any weight to that portion of Harris caution statement which exonerated Vasquez

[51] This ground of appeal is the same as in Forbes first ground in relation to the exculpatory part of the statement. We dispose of it likewise. The ground is without merit.

Ground 2: Whether the judge failed to give a proper direction in relation to joint enterprise

[52] Mr. Sylvestre submitted but there was no evidence on the case for the Crown of any preparatory words spoken by Vasquez or actions taken by him or that he discharged his firearm. Yet the trial judge accepted that Vazquez was guilty of murder. Counsel argued that there was no consideration by the trial judge of the *mens rea* of murder in Belize, which is intention to kill. Therefore, the failure of the trial judge to adequately or properly direct his mind on the issue of joint enterprise in relation to Vasquez, resulted in him being denied the opportunity of a manslaughter verdict.

[53] The Court is of the view that the trial judge in fact addressed intention to kill in the instant matter. At paragraphs 12 to 15 of his judgment, the trial judge under the rubric, "*An intention to kill?*" discussed the requisite intention for murder in Belize, the tests of intention

as shown in the Criminal Code and the application of that test to the facts of this case. The trial judge said:

> "12. What was the intention of the person or persons who shot Joseph Myers? Could one say that in stealthily approaching the area where Joseph Myers was, firing several bullets from a gun and shooting Myers in his chest that the person or persons responsible intended to kill him?
>
> 13. The fact that Joseph Myers died having been shot may be indicative of the shooters intention, but it is not conclusive. The assessment of a person's intention is first addressed at section 6 of the Criminal Code, where the standard test of intention has formulated this question:
>
> > "*Did the person whose conduct is in issue either intended to produce the result or have no substantial doubt that his conduct would produce it?"*
>
> 14. Then, at section 9, further statutory guidance is provided with reference to "*Proof of Intention*." The fact that the result was a natural and probable result of a person's conduct is a consideration. But it goes on to note that the court (our jury) "*shall decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."* The co-joined effect of sections 6 and 9 of the Criminal Code has been judicially determined to mean that the tribunal of fact is not entitled to glean intention from the natural and probable result of the conduct of the accused in isolation, but there must be a complete examination of all the evidence to ascertain the inference that flows from it.
>
> 15. In order to prove murder, the prosecution must satisfy the forum of fact, so that the forum feels sure, that there was an intention to kill when the unlawful harm was inflicted. The factors to be considered include: the fact that Joseph Myers is dead; the nature of the attack that resulted in his death; the type of instrument used during the attack; things said and done at the scene by the persons carrying out the attack. If gunmen launch an attack on persons at night; the gunmen are dressed in black clothing; They approached the area other than at the entrance; they pounce upon the unarmed victim with guns drawn, open fire almost immediately and without saying anything, shooting the victim multiple times including a shot to his chest; they pursued the colleagues of the victim who are scattering and running for cover; the gunmen continued to shoot at the other colleagues of the victim, injuring those others; and one of the gunmen exhorts another to shoot one of the persons in that person's head, then it is reasonable to conclude that the attackers had an intention to kill."

[54] The trial judge correctly interpreted sections 6 and 9 of the *Criminal Code* and applied the facts of the instant case to find that the appellants had an intention to kill Myers. The facts

without a doubt shows an intention to kill by the appellants, including Vasquez, and need not be repeated. The Prosecution did not have to prove that Vasquez discharged his firearm or that the bullets from his gun struck Myers and killed him or any words spoken by him. The Prosecution proved that the three appellants had a plan to go to the school with the specific intent to kill Myers or more persons in the group that was socialising at the school. This was a joint enterprise by the appellants with the intention to kill Myers, who was shot multiple times including a shot to the chest.

The point on the 'parasitic accessory liability'

[55] Mr. Sylvestre referred to paragraph 37 of the judgment of the trial judge where he said the following on joint enterprise:

> "37. It is settled law that persons may participate in the Commission of an offence in various ways, whether as principle or accessory. Here, the prosecution in his submissions has relied on the restatement of the law of joint enterprise in ***Regina v Jogee*** [2016] UKSC 8, [2017] AC 387. In particular, the prosecution is relying on the ***'parasitic accessory liability'*** where their lordships said that "*the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal."*

[56] He further submitted that in ***Jogee***, their Lordship's pointed out at paragraph 96 of that judgment, the following:

> "[96] If a person is a party to a violent attack on another, without an intent to assists in the causing of death or really serious harm, but the violence escalates and results in death, he will not be guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carry the risk of some harm (not necessarily serious) to another, and death in fact results …."

[57] It seems from oral submissions before this Court that Mr. Sylvestre accepted that the principle of 'parasitic accessory liability' does not apply to Belize. However, he explained that it formed a ground of appeal because the trial judge raised it, as shown at paras 36 to 38 of the judgment. He argued that the wrong law was applied in the determination of the issue.

[58] The Court is in agreement with the Director that though the trial judge mentioned that the Prosecution relied on ***Jogee*****,** he did not apply the principle to convict the appellants. The judge applied the plain joint enterprise principle and in our view, correctly so. The evidence

as led by the Crown shows that the appellants went to the school with a plan to shoot Myers and other persons who were socialising at the school. This was not a plan by the appellants to do one type of crime, example robbery, and one of the appellants killed in the process. All three appellants in this case had one plan, to go there at the school with one mission, to shoot and kill. As such, the concept of "*parasitic accessory liability*" as discussed in ***Jogee*** was inapplicable to the present case. The evidence of the Crown linked Vasquez to the crime and shows his intent to kill. The trial judge at paragraph 36 under the rubric of "*Joint Enterprise*" addressed the evidence which showed the level of participation of Vasquez. The judge said:

> "36. The prosecution is relying on a series of common sense conclusions to associate the second defendant (Vasquez) with the enterprise. It commences with the fact that the decision to relocate from the abandoned building in the school yard was made immediately after William Vasquez passed by in the taxi. Then, while the shooters were to the front and persons running away to seek safety, he was to the back of the building which was a natural escape route from what was happening in the front. Added to that, he was armed. And further, he engaged one of the persons who sought to flee the shooting, jumping on Olivera's chest and hitting him with a gun."

[59] The Court is satisfied that the trial judge adequately assessed the evidence for the Crown and found that all three appellants, including Vasquez, engaged in a joint enterprise to kill one or more persons socialising at the school. In our view, the issue of the lesser offence of manslaughter does not arise in the instant case. The case of **Ryan Herrera and Linsdale Franklin v The Queen**[8] relied upon by the Director explains joint enterprise and a departure from a joint enterprise. In that case, the Court referred to the dicta of Lord Hoffman in **Brown and Isaac v The State**[9] where the Board explained joint enterprise to commit murder and also a situation where there is no plan to murder and one of the participants commit murder. Lord Hoffmann, delivering the judgment of the Board said at para 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

[8] Criminal Appeal Nos 22 and 23 of 2009
[9] PCA No. 9 of 2002 at paragraph 8

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."

[60] In **Herrera,** there was an agreement to murder although lesser crimes were committed. At paragraph 31 the Court said:

> "[31] In the instant case, the fact that lesser crimes than murder were undoubtedly committed in the house of the deceased on the day in question cannot detract from the fact that, while it is impossible to tell exactly when it was made, there was, by the time the fatal injury was inflicted upon the deceased, an agreement between the appellants to murder her. In the view of this Court, therefore, this was a case, like *Brown,* in which 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."

[61] In the instant matter, the trial judge carefully assessed the role of Vasquez which showed there was a plan to murder. It cannot be said that there was some other plan and not one to shoot and kill. There was no evidence led in the instant matter of some other plan. The facts of this case supports the finding of the trial judge that Vasquez was part of the joint enterprise and intention to kill. It matters not which one of the three appellants fired the fatal shot that killed Myers. Therefore, the Court is of the opinion that Vasquez was not denied the opportunity of a manslaughter verdict. The ground is without merit.

Ground 2: Whether the trial judge erred in failing to give himself an adequate good character direction in light of the sworn evidence by Vasquez.

[62] The complaint under this ground is that Vasquez gave sworn evidence and during his examination in chief, evidence was specifically adduced that he had no previous convictions of any kind. Further, he raised a defence of *alibi.* As such, Vasquez was entitled to a full good character direction. Counsel argued that a miscarriage of justice occurred by the failure of the trial judge to give an adequate good character direction.

[63] The Director in response submitted that the judge acknowledged that Vasquez was entitled to "a full good character direction" but also informed himself that the credibility limb was also important. Further, the trial judge was not obliged to direct himself in the manner argued by Vasquez.

[64] In the CCJ case of **Gregory August v Queen**[10] the CCJ explained that the aim of a good character direction is to ensure fairness of the trial process. At paragraph 49, the CCJ said:

> "[49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence."

[65] It was argued for Vasquez that he was entitled to a full good character direction, a credibility limb and propensity limb good character direction. Mr. Sylvestre relied on **Gregory August (No. 2)**[11] at para 97 (before the case went to the CCJ) for guidance on how the good character directions are to be applied. Para 97 states:

> "[97] The court in Hunter also looked at the categories of good character and the directions that is appropriate in each case. At paragraphs 77 to 80 the court said:
>
> **"(c) Categories**
> *(i) Absolute good character*
> 77. We use the term "absolute good character" to mean a defendant who has no previous convictions or cautions recorded against them and no other reprehensible conduct alleged, admitted or proven. We do not suggest the defendant has to go further and adduce evidence of positive good character. This category of defendant is entitled to both limbs of the good character direction. The law is settled.

[10] [2018] CCJ 7 (AJ)
[11] Criminal Appeal No. 2 of 2012

78. The first credibility limb of good character is a positive feature which should be taken into account. The second propensity limb means that good character may make it less likely that the defendant acted as alleged and so particular attention should be paid to the fact. What weight is to be given to each limb is a matter for the jury. The judge must tailor the terms of the direction to the case before him/her …"

[66] At para 110 of the said judgment, the Court discussed the impact of the failure to give a good character direction. The Court in discussing whether there was a miscarriage of justice said:

"[110] The court must examine whether the lack of propensity direction affected the fairness of the appellant's trial and the safety of his conviction. In the case of **Nigel Brown,** counsel in that case had failed to raise the appellant's good character at the trial. Lord Kerr delivering the judgment of the court said:

"[32] The failure of counsel can therefore bring about an unsafe verdict. But it should not be automatically assumed that the omission to put a defendant's character in issue represents a failure of duty on the part of counsel. ……., there might well be reasons that defence counsel in the present case decided against that course. In the absence of an explanation from counsel, however, as to why he did not raise the issue of the defendant's good character, the Board considers that it is necessary to examine whether the lack of a propensity direction has affected the fairness of the trial and the safety of the appellant's conviction, on the basis that such a direction should have been given.

[33] It is well established that the omission of a good character direction is not necessarily fatal to the fairness of the trial or to the safety of a conviction: Singh v State[2005 UKPC 35, … As Lord Bingham of Cornhill said in Singh v State [2006] 2 LRC 409 at [25] 'Much may turn on the nature of and issues in a case, and on the other available evidence.' Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute …

[35] …There will, of course, be cases where it is simply not possible to conclude with the necessary level of confidence that a good character direction would have made no difference... But there will also be cases where the sheer force of the evidence against the defendant is overwhelming. In those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict. Whether a particular case comes within one category or the other will depend on a close examination of the nature of the issues and the strength of the evidence as well as an assessment of the significance of a good character direction to those issues

> and evidence. It is therefore difficult to forecast whether it will be rarely or frequently possible to conclude that a good character direction would not have affected the outcome of a trial. As Lord Bingham observed in Singh [2006] 2 LRC 409 at [25], hard, inflexible rules are best avoided in this area.
>
> [36] It will be necessary in due course to examine the strength of the evidence against the appellant and the nature of the issues in the trial as they bear on the question of the significance of a good character direction….."

[67] In the view of this Court, it is clear from the judgment that the trial judge considered that Vasquez was entitled to the credibility limb of the good character direction. At paragraph 46, the judge said:

> "46. His (Vasquez) testimony and responses under cross exam sought to deny that he was in a taxi close to 6:00 o'clock; deny that he was at the Living Hope School; deny that he was responsible for the death of Joseph Myers; He provided an alibi. He also established that up to June 2012, he had never been convicted of any offence. The prosecution did not challenge that. **He was therefore entitled to full 'good character' direction, in particular with regard to credibility**." (Emphasis added)

[68] However, the trial judge did not find Vasquez' evidence credible. At paras 45 – 48, the trial judge discussed Vasquez' case. The judge who was sitting alone, did not go on to explain in his judgment, what is a good character direction as to credibility as he would have been required to do if this was a jury trial. That is, by directing the jury that because of Vasquez' good character, he is a person who should be believed. But as shown at paragraph 46 of the judgment, the trial judge was fully apprised that Vasquez was entitled to a full 'good character' direction though he did not expound on it. Nevertheless, we are of the view, that the trial judge would have reached the same conclusion even if he had mentioned in his judgment that Vasquez is a person who should be believed. The trial judge evaluated his evidence and did not find him to be credible. At paragraph 48 the trial judge said:

> "In evaluating the Second Defendant's (Vasquez) evidence, I am unable to believe his evidence about being at home from since in the afternoon and being at home with the children. His alibi is not believed."

[69] The Court notes that this was a strong case of eyewitness testimony based on recognition. We are of the view that Vasquez received a fair trial and there was no miscarriage of justice. The ground is dismissed.

Disposition

[70] Vasquez's appeal is dismissed, and his conviction and sentence are affirmed.

The appeal of Tyrone Fitzgibbon, a.ka. Clinton Harris

[71] The Appellant, Harris filed three grounds of appeal and abandoned one ground. The grounds of appeal pursued are:

(i) The trial judge failed to direct his mind properly as to the weight to be attached to the mitigating factors provided on behalf of the appellant;

(ii) The trial judge failed to direct his mind properly on the effect of counsel for the appellant at trial, failure to explain the virtues of a possible plea arrangement with the Prosecution prior to the commencement of the trial.

Ground 1: Whether the trial judge failed to direct his mind properly as to the weight to be attached to the mitigating factors on behalf of Harris

[72] Harris was found guilty of murder and sentenced to life imprisonment with a minimum term of thirty years. The trial judge then deducted from 30 years, the time spent on remand which is 6 (six) years and four months. The balance being 23 (twenty three) years and 8 (eight months). He then considered the mitigating factors in favour of Harris which outweighed the aggravating factors and stated that Harris ought to be given some credit for his "*acknowledgement of culpability, demonstration of remorse and significant progress in reform as detailed in testimonials from the prison*." The credit given by the trial judge was 2 (two) years and 8 (eight) months which he considered as adequate. As such the sentence imposed was life imprisonment with a minimum term of 21(twenty-one) years with effect from his date of conviction in October 2018. In other words, the sentence passed is life imprisonment with the possibility of parole after 21 years, with effect from the date of conviction in October 2018.

[73] The judge as shown by the judgment on sentencing considered the following before imposing sentence:

(1) Harris Social Inquiry Report from the Community Rehabilitation Department;

(2) Harris antecedent history

(3) The witnesses called on Harris behalf in mitigation;

(4) Address by Harris counsel, who conveyed his remorse and reminded the trial judge of Harris proffer of a plea of manslaughter;

(5) Reports with regard to reform programmes Harris participated in at Kolbe;

(6) Remorse by Harris conveyed through his Social Worker;

(7) The victim impact statement filed on behalf of the Crown;

(8) The principles of sentencing;

(9) The weighing of the aggravating and mitigating factors.

[74] Mr. Tillett for the appellant submitted that the trial judge failed to adequately address his mind as to the strength of the mitigating factors presented by Harris at trial in determining his sentence and therefore his sentence is excessive. Counsel argued that the sentence should have been reduced by a further 5 years.

[75] Counsel relied on the case of **The Queen v Seargeant**[12]**,** where the following considerations for sentencing were laid out:

(i) Retribution - to reflect societies intolerance for criminal conduct;

(ii) Deterrence - which can be general (to restrain against potential criminal activity by others) or specific (to restrain the individual from relapsing into recidivist behaviour);

(iii) Prevention - To protect society from those who persist in high rates of criminality;

(iv) Rehabilitation – to engage the prisoner in activities that would assist him/her in reintegration into society after prison.

[76] Mr. Tillett submitted that while the trial judge directed himself as to the consideration of retribution, deterrence and prevention, he did not specify what factors he considered. Further, that the mitigating factors cumulatively shows the character of Harris to be capable of rehabilitation which is one of the primary considerations of sentencing. That based on the mitigating evidence for Harris the judge failed to reduce the sentence by an appropriate amount.

[77] Madam Director in her submissions referred the Court to **Allen v The DPP,**[13] where the CCJ discussed principles of sentencing, in particular, rehabilitation which is important, but not the only one. At paragraph 45 the CCJ said:

[12] (1974) 60 Cr. App. R. 74
[13] [2019] CCJ 06

> " …. Rehabilitation is one of the aims of sentencing, and a very important aim, but not the only one, and in some circumstances not the overriding one. The classical principles of sentencing reference three orders, retribution, punishment, deterrence and a more modern formulation will be contended only to reference punishment, deterrence and rehabilitation….."

[78] The Director further submitted that the sentence that was imposed by the trial judge was commensurate with the crime committed, properly individualized to take into account the mitigating factors and in fact, on the lower end of the sentencing range for murder. The Director referred the Court to the recent case of **Calvin Ramcharan v DPP**[14], where the CCJ reiterated its dicta in **Linton Pompey v DPP**[15] to show the approach to be taken by an appellate court in relation to sentencing. Barrow JCCJ, delivering the lead judgment of the Court said, at paragraphs 11 and 12:

> "[11] Four opinions from a seven-member bench were delivered in *Pompey*, with the majority opinion being delivered by Saunders PCCJ and Rajnauth-Lee and Jamadar JJCCJ each delivering a concurring opinion and Wit and Anderson JJCCJ delivering a joint dissenting opinion. …..
>
> [12] Saunders PCCJ noted and all opinions were concerned to reaffirm that an appellate court will not alter a sentence merely because the members of the court might have passed a different sentence. Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court must step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law.

[79] Section 30(3) of the Court of Appeal Act[16] gives the Court a discretion to quash a sentence and substitute another sentence if it thinks a different sentence should have been passed. This however, cannot be done without a good reason. As shown in **Ramcharan,** this Court, as the reviewing Court, can only do so "*to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law."* Harris has not shown where the trial judge erred in reaching the sentence imposed upon him. The trial judge in his ruling on sentence stated all of the principles that are applicable in this case.

[14] [2022] CCJ 4 (AJ)
[15] [2020] CCJ 7 (AJ) GY
[16] Chapter 90 of the Laws of Belize

The Court is satisfied that the sentence imposed upon Harris is consistent with the existing sentencing practices in Belize for murder where life imprisonment has been imposed with a minimum term of 30 years. Further, the sentence was properly individualized to take into account the mitigating factors which outweighed the aggravating factors.

[80] The Court is of the view that that trial judge properly directed his mind as to the weight to be attached to the mitigating factors on behalf of Harris and gave him a reduction of 2 years 8 months, (two months short of three years). We consider this to be adequate since there were no mitigating factors in relation to the offence itself. Harris though accepting culpability, did not accept that he fired any shots into the group at the school that night. Several bullets caught Myers and one bullet entered his chest. He died because of gunshot wounds. The additional 5 years reduction requested by counsel for Harris because of the mitigating factors is not warranted in the circumstances of this case.

Fixed term sentence imposed in Gregory August (No. 2) case

[81] The Director had submitted that the sentence imposed upon Harris was at the lower end of the sentencing range for murder. Mr. Tillett disagreed. He relied on **The Queen v Vildo Westby**, Supreme Court of Belize 51/2019, where the trial judge, Williams J stated that sentences for murder "*reasonably could range from 25 to 35 years.*" Williams J in making that statement relied on **Gregory August v The Queen,[17] (No. 2)** but, incorrectly stated that the fixed term sentence was the range of sentence for murder in Belize. As rightly argued by the Director, that was not the range for murder (25 to 35 years) in relation to life imprisonment with a fixed minimum term, as in the instant case. In **August case** (No. 2), this Court concluded that the circumstances of **August's case** did not require the imposition of a life sentence and imposed a fixed term sentence of 30 years imprisonment, less the time he had already served. The **August** case is therefore distinguishable from the instant matter as Harris was not given a fixed determinate sentence. Harris was given a life sentence with a minimum of 30 years to serve before consideration of parole, less the reductions, which the Court views as an appropriate sentence in the circumstances of the case, as discussed above.

[17] Criminal Appeal No. 22 of 2012 , Court of Appeal of Belize

The trial judge failed to direct his mind properly on the effect of the failure of counsel for Harris, to explain the virtues of a possible plea arrangement with the Prosecution prior to the commencement of the trial.

[82] Harris complaint under this ground is that his counsel, in the court below, did not explain to him the virtues or lack of virtues of a plea arrangement. As such the trial judge should have considered the prejudicial effect of that failure by Harris counsel.

[83] At page 237 of the Record line 8, the trial judge brought to the attention of counsel representing Harris that his client seemed a bit agitated in the witness box and adjourned for a few minutes so that counsel could speak to Harris. When court resumed, Mr Sampson, counsel for Harris, indicated to the trial judge that Harris would like to have the indictment re-read to him so that he can plead guilty to the lesser charge of manslaughter. At this point, as shown by the record several witnesses had testified. Mr. Tillett submitted that as a result of Mr. Sampson's failure, Harris put forward the plea late in the trial, when the minds of the Prosecution had been prejudiced by evidence already led and hence the rejection of the plea.

[84] The Director in response submitted that the evidence led by the Crown would have been evidence contained in depositions. Therefore, the testimony of the witnesses were anticipated by the Crown. Further, the Crown can only, ethically accept a plea to an offence that is made out on the facts of the case. As such, the Crown would have been bound to refuse a plea of manslaughter whether it was offered at the arraignment or during the course of trial.

[85] The Court has considered the evidence in this case, which is one of a joint enterprise to kill Myers. There is no evidence to suggest that this is a case of manslaughter and cannot conclude that the Prosecution would have accepted a guilty plea of manslaughter from Harris prior to the commencement of the trial. In our view, since Harris was not offering to plead guilty to murder, there was no prejudice to him.

[86] Further, the Court notes that the trial judge did consider as a mitigating factor, Harris' offer to plead guilty to manslaughter, during the trial, which showed acceptance of culpability. We see no prejudice caused to Harris. The ground is dismissed.

Disposition

[87] Harris' appeal is dismissed and his conviction and sentence affirmed.

Conclusion

[88] For our reasons given in these appeals, there has been no miscarriage of justice and the verdicts of the trial judge are safe. The Court makes the following Order:

> The appeals of the appellants, Andy Forbes, William Vasquez, and Clinton Tyrone Harris, are dismissed and the convictions and sentences affirmed.

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HAFIZ BERTRAM P (Ag.)

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MINOTT-PHILLIPS JA

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FOSTER JA