

IN THE HIGH COURT OF BELIZE, A.D. 2023

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C55/2020

THE KING

v.

DELSON PAGUADA

TIONNE PAGUADA

TIMOTHY CARCAMO

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

APPEARANCES: Ms. Romey Wade for the Crown

Mr. Leeroy Banner for the Defence

DATES OF HEARING: 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 13<sup>th</sup> June, 2023

DATE OF DELIVERY: 24<sup>th</sup> July, 2023

JUDGE ALONE TRIAL

DECISION

1. Delson Paguada, Tionne Paguada and Timothy Carcamo (hereinafter “Accused #1, Accused #2 and Accused #3 respectively”) were indicted for the offence of murder, contrary to section 117 read along with section 106(1) of the ***Criminal Code, Cap. 101 of the Substantive Laws of Belize (Revised Edition) 2020***, (hereinafter “the Code”) arising out of a shooting involving the death of Jimell Paul Jex (hereinafter “the deceased”) on 23<sup>rd</sup> January 2018.
2. The trial began with the arraignment of Accused #1-3 on 6<sup>th</sup> June 2023 before this Court by judge alone pursuant to section 65A(2)(a) of the ***Indictable Procedure Act, Cap. 96 of the Substantive Laws of Belize (Revised Edition) 2020***. They each pleaded not guilty, and the Court proceeded to try the indictment.

## **THE EVIDENCE**

### ***The Crown's case***

3. The Crown's case is that on 23<sup>rd</sup> January 2018 at 5:00 p.m. in San Pedrito, the deceased was killed as a result of gunshot wounds inflicted by Accused #2 and #3 with the assistance and/or encouragement of Accused #1. Dr. Loyden Ken, a licensed pathologist, opined that the cause of death of the deceased was acute cranio encephalic traumatic injuries due to multiple perforating gunshot wounds to the head.
4. The Crown read the agreed evidence of 12 witness statements and was entered into evidence in accordance with Rule 10 of the **Criminal Procedure Rules 2016**, (hereinafter "the CPR") along with section 106 of the **Evidence Act, Cap. 95 of the Substantive Laws of Belize R.E. 2020**. The Court wishes to record its thanks to both parties for acting in the spirit of the CPR and focusing on what is truly in dispute and saving precious judicial time, which caused a trial where the evidence was completed in days when if all the live witnesses had been called on the back of the indictment this may have been completed in months.
5. The agreed evidence was the evidence of Deon Neal, who was with the deceased when he was shot; Adrian Barreto, who was passing at the time of the shooting; David Henkis, who identified the body of the deceased; Adan Uh, who was the first officer on the scene; Maria Eiley, who was the Justice of the Peace that witnessed the interview with Accused #3; Brian Miller, who was the officer that detained Accused #1 and #2 in relation to this offence; Zebediah Moore, who was the coastguard officer that also detained Accused #1 and #2; Jiro Sosa, who processed the scene of the shooting and photographed it; Adhir Perez, who was the officer that arrested Accused #3; and William Wade, who photographed the post mortem done on the deceased.
6. The Crown called the evidence of 3 live witnesses. The Crown first called the main eyewitness, Ms. Phillipa Pamela Zetina, who gave her evidence virtually pursuant to section 186 of the **Senior Courts Act 2022** with agreement of both parties.
7. Ms. Zetina testified in her evidence in chief that on the 23<sup>rd</sup> January 2018 at 5:00 p.m., she was exiting San Pedrito by the boatyard when she noticed a brown complexion guy, wearing a green shirt on his bicycle heading towards San Pedrito. She then noticed three men come out from the lagoon side of the street by the boatyard area. Accused #2, with Accused #1 standing right next to him, fired two shots at the deceased. Accused #1 and #2 then headed in the

direction of the lagoon. When the deceased fell to the ground, Accused #3 fired shots at his head, then looked around, walked towards the corner of the boatyard and then ran towards the lagoon. At the time that the first two shots were fired, Accused #1 was standing in the presence of Accused #2 and Accused #3.

8. Ms. Zetina further testified in evidence in chief that Accused #1 and #2 were 30 feet away from her and were in her line of sight for about 40-50 seconds, when the first two shots were fired. At the time, she was able to recognize Accused #1 and #2 because there was nothing obstructing her view, and she was able to see their whole body including their face. There was also good lighting conditions, as it was very bright at 5:30 p.m. She then referred to Accused #3 as a tall skinny person with curly hair, who was 30 feet away from her and was in her line of sight for 2 minutes when the first two shots were fired. When Accused #3 approached the body of the deceased and fired the final three shots, he was then 20 feet away from her. She was able to identify Accused #3 because there was nothing obstructing her view and was able to see his whole body including his face. There was also similarly good lighting.
9. She continued testifying in chief that she had known Accused #1 and #2 since they were kids as they used to live in town and Accused #2 went to school with her daughter. At the time of the incident, she had known them for 15 years and had seen them two weeks prior to the shooting incident at a close proximity. They briefly spoke to her on that day and were in her line of sight for 20-30 seconds with good lighting conditions and no obstruction of her view. Ms. Zetina also testified that she was not acquainted with Accused #3 prior to the shooting incident.
10. Ms. Zetina was cross examined. She denied the suggestion that her view was obstructed because there were several people exiting and entering San Pedrito at the time of the shooting. Defence Counsel also suggested that because she was focused driving her golf cart at the time, she was unable to see the shooting incident but this suggestion was denied. The suggestion that because she was driving her golf cart, she would not have been able to see Accused #1 and Accused #2 within 30 to 40 seconds because she would have covered 30 feet in less than 2 seconds, was also denied. She further denied the suggestion that she was being untruthful, because she was inconsistent with her evidence in chief of knowing Accused #1 and #2 for 15 years while in her statement to the police she claimed to know them for 20 years. Ms. Zetina failed to give evidence in chief that on the day of the shooting incident, Accused #1 and #2 tried pulling the deceased off the bicycle. In cross examination, she explained that she did omit this evidence in chief but that it was mentioned in her statement given to the police. It was suggested that she did not see Accused #1 and #2 at the scene on the day of the shooting incident but she denied it.

11. Mr. Banner, for the Accused, suggested to her in cross examination that she was being inconsistent with her evidence in chief as she mentioned that Accused #3 was wearing a khaki pants and shirt, when in her statement she said he was wearing a blue jeans. Her response was that even though she mentioned another colour of pants in in her evidence in chief which was different from what was contained in her statement it did not affect the fact that she saw his face. It was also suggested to her that she told the police officer who conducted the group identification that Accused #3 was 5 feet. She denied this suggestion because she was unable to specify the height of the person but that he was approximately 5 feet and some inches tall. Defence Counsel questioned her on whether she gave a description of Accused #3's face when giving her statement to the police. Her response was that she did not give a description of his face but that after giving her statement she was given pictures to identify him and denied the suggestion that the police indicated to her who was Accused #3 from the array of pictures.
12. The Crown then called its next witness, Dr. Loyden Ken, a forensic pathologist. The Court deemed him an expert in pathology without objection by the Accused. Dr. Ken testified in evidence in chief that on 25<sup>th</sup> January 2018 at 9:15 a.m., he was ordered to perform the autopsy on the body of the deceased. His findings were that the body of the deceased was that of an adult creole male who had 5 gunshot wounds, 2 to the head, 1 to the chest, 1 to shoulder and 1 to the thigh.
13. Dr. Ken then concluded his evidence in chief by stating to the court that the direct cause of death was acute cranio encephalic traumatic injuries, due to multiple perforating gunshot wounds to the head. He also indicated that death would occur rapidly after sustaining these injuries. Dr. Ken was not cross-examined.
14. The Crown then called its last witness, Allan Woods, a Sergeant attached to the Crime Investigations Branch at the San Pedro Police Station. He testified in evidence in chief that on Wednesday 24<sup>th</sup> January 2018 at about 11:30 a.m., he visited the San Pedro Police Station. When he arrived at the station, he was briefed by Sergeant Henry Thomas, with respect to the shooting death of the deceased. He then began inquiries. He received certain information in respect of a witness. This led to him visiting the residence of the Justice of the Peace Murlene Spain where he met a female, Ms. Phillipa Pamela Zetina, who relayed certain information with respect to the shooting incident. She was asked if she would be willing to give a statement in respect to the information, she had but she hesitated to do so and said she would think about it and that she was afraid. On that date at about 6 p.m., he visited the residence of Murlene Spain at the request of Ms. Zetina, who informed that she had decided

to give a written statement. He then proceeded to record the written statement in the presence of Ms. Spain.

15. He continued testifying in chief that upon receiving this information, he requested assistance of personnel to locate and detain the three Accused for investigation in the shooting death of the deceased. On Thursday 25<sup>th</sup> January 2018 Sergeant Woods went to the San Pedro Police Station. He then visited the cell block area where he met Accused #3 and informed him of the reason for his detention, which was that he was being detained for investigation in the shooting death of the deceased. Accused #3 was informed of his constitutional rights and cautioned. Accused #3 did not utilize any of his rights and was issued an acknowledgement form to which he signed.
16. On Friday 26<sup>th</sup> January 2018 at about 8:30 a.m., Sergeant Woods requested the assistance of Justice of the Peace, Maria Susan Eiley, in witnessing the interview conducted with Accused #3, which she accepted. Accused #3 was escorted to the Crime Investigations Branch office where he was informed that an interview would be conducted with him in the presence of Ms. Eiley. He was informed once more of the reason of his detention, of his constitutional rights and was also cautioned. A total of 50 questions were documented along with the answers given by Accused #3 in the interview. Accused #3 denied any involvement in the murder in that interview. At the conclusion of the interview, the questions and answers were read over and all persons present signed to it.
17. Sergeant Woods further testified in chief that the interview with Accused #3 was not video recorded because the San Pedro Police Station was not equipped with an interview room or recording device. He also admitted to being aware of a Schedule 2 form with regards to the video recording of the interview but that he forgot to include it in the file. He also affirmed that neither himself nor anyone in his presence threatened, pressured, or promised a favour to Accused #3 for giving the interview.
18. At about 2 p.m. on that date, Sergeant Woods contacted the mother of Accused #1 and Accused #2 and requested her presence whilst dealing with Accused #2 as he was a minor at the time. The mother refused to attend as she feared for her life. At about 3:30 p.m., he submitted the documents and statement to Assistant Superintendent Alejandro Cowo for further directives and advice. He received directives at about 4:30 p.m. and proceeded to charge the three Accused for murder. He left San Pedro Town en route to Belize City, escorting Accused #3. At about 6:20 p.m., he arrived at the Queens Street Police Station where he met attorney-at-law Bryan Neal, who was the attorney for Accused #1 and #2. The attorney was informed that he received directives to proceed with a murder charge against the two Accused persons. The attorney was

asked if he would be present when Accused #1 and #2 would be charged which he responded in the affirmative but at that time walked out of the station. Sergeant Woods also tried contacting a social worker but was unable to locate one. However, he still proceeded to deal with Accused #2 as his older brother Accused #1 was there.

19. Sergeant Woods then proceeded to a room in the station where both Accused #1 and #2 were informed of the reason for their detention with reference to the shooting death of the deceased. They were also informed of their constitutional rights to communicate without delay and in private with a legal practitioner of their choice. They were then cautioned that they did not have to say anything unless they wished to do so but that anything said will be taken down in writing and may be used as evidence. Their response to this was that they had nothing to say, that they did not know anything concerning the murder of the deceased and that they had already retained an attorney. Sergeant Woods then issued them both with an acknowledgement form to which they refused to accept and sign.
20. On even date at about 6:40 p.m., he swore to an information and complaint and obtained a warrant. He then formally arrested and charged the three Accused with the crime of murder. Accused #1 and Accused #2 were read the charges without their attorney being present because he stepped out of the station and did not return within the 10 minute waiting period. After having the charges read, the three Accused persons were cautioned. Accused #1 and Accused #2 began behaving in a boisterous manner and refused to accept the charge sheet and walked away towards the cell block area.
21. Sergeant Woods further testified in evidence in chief that at the time of the shooting incident, he had known Accused #3 for 4 years whilst working in San Pedro Town. He also knew that Accused #3 was an associate of Accused #1. Prior to the shooting incident, he had seen Accused #3 in the company of Accused #1 on two separate occasions at the residence of Accused #1's father in San Mateo.
22. To conclude his evidence in chief, Sergeant Woods testified on the identification procedure followed for Accused #3. He testified that Ms. Zetina did not know the name of the third assailant but only could give a description of him. Based on the description given by her, to assist in identifying the third assailant, a photo array was shown to her in which she picked out the photo of Accused #3. These photos were shown to her after she had given her statement, in which she made reference to the description of the third assailant.
23. Sergeant Woods was cross examined. He agreed with Defence Counsel that a witness statement should include all the important steps taken during an

investigation and if any information is not included, then a further statement can be given. He admitted to having knowledge about a Schedule 2 form during the investigation but had failed to include it in his statement and failed to provide a further statement. The explanation as to why the form was not included in the file was that it should have been prepared by the senior officer which he forgot to do. It was suggested that he did not obtain permission from the senior officer to conduct the interview without it being recorded but he denied this suggestion. He denied the suggestion that he cannot conduct the interview without the Schedule 2 form being signed. He admitted that he did not include in his statement that he was given permission to conduct the interview without it being recorded. It was then suggested that he conducted the interview in violation of the rules and did not follow correct police procedures but he disagreed.

24. Sergeant Woods further admitted in cross examination that he did not include in his statement that an array of photos were shown to Ms. Zetina, because he did not see the relevance in doing so. He continued testifying that he did not mention how many photographs were shown to her and did not mention the description and ethnicity of the persons in the array. He then explained that the pictures were not on file because it was not signed by the Justice of Peace as it was not an identification parade. The group identification followed after Ms. Zetina had established the identity of the third assailant by picking out Accused #3 from the array of photos. Sergeant Woods's reason for showing her the pictures was that he had an idea as to who the third assailant was based on the description given by Ms. Zetina, as a name was not provided by her, he showed them to her to establish the identity of the third person.
25. Sergeant Woods continued testifying in cross examination that Accused #3 had told him about his whereabouts at the material time. He then admitted that he did not include in his statement that he spoke to Accused #3's alibi witness. Defence Counsel suggested to him that he did not conduct a proper investigation of Accused #3's alibi as he did not interview that alibi witness. He denied this suggestion testifying that he went to the yard and there were several persons who were unwilling to assist the police. When he continued with his explanation, he admitted to not going there to confirm the alibi but to confirm if Accused #3 resides in the area. He slightly agreed with the suggestion that everything an officer does in relation to an alibi is important. It was then suggested that because of his position and length of time at the Branch office, he could have easily investigated who the alibi witness was. He accepted this suggestion that he could have found out who the person was but that it would have taken some time.
26. He admitted in cross examination that the mother of Accused #2 or a social worker should have been present when he dealt with Accused #2, but the

mother refused to be present and he was unable to contact a social worker. He further explained that he had already received directives to charge the three Accused and proceeded to do so because of security reasons. It was then suggested that Accused #2's brother could not act on his behalf as he was a co-accused, to which Segreant Woods responded that he had waited for his attorney for 10 minutes but he failed to return to the station. He denied the suggestion that Accused #1 and #2 had informed him that they were at Martine Reyes's residence doing some work at the material time of the shooting incident.

27. Mr. Banner, on behalf of all three Accused, made a no case submission which was overruled in a separate written judgment by the Court.
28. The three Accused after being given their 3 options chose to each make an unsworn statement from the dock and called the same witness.

### *The Defence case*

29. Accused #1 stated that on 23<sup>rd</sup> January 2018, he was at Mr. Martin Reyes's residence along with his little brother, Accused #2, working on some landfilling and house painting. He also stated that they were working there for the whole day until 6:00 p.m. and that at no time did they leave the residence. He further stated that at 6:00 p.m., they both left and headed home. He concluded by stating that he had no knowledge of this offence and was innocent.
30. Accused #2 stated that on 23<sup>rd</sup> January 2018, he was at Mr. Martin Reyes's residence working on some landfilling and house painting, with Accused #1. He also stated that they were working there all day until 6-6:15 p.m. and that at no time did they leave the residence. He further stated that at 6:00 p.m., they both left and headed home. He concluded by stating that his hands were clean, he had no knowledge of this offence and was innocent.
31. Accused #3 stated that on the 23<sup>rd</sup> January 2018, he was at home with his common law wife as he was sick that evening and at no time did he leave his home. He concluded by stating that he was charged wrongfully for a crime he did not commit and was innocent of these charges.
32. The three Accused relied on the same witness, Frank Caliz. He testified that on 23<sup>rd</sup> January 2018 at about 5 p.m., he was at his worksite which was the boatyard in San Pedro. He had just finished his work for the day when he noticed two male persons, one red skinned bald headed and tall person wearing a blue three-quarter jeans pants and a khaki shirt whilst the other person was of dark complexion with a hat on his head and long hair to his shoulder. When he got down from the boat, he walked towards their direction as he had to pass

there to reach home, when he noticed that the red skinned person had a pistol in his hand. This person was approximately 5 feet away from where Mr. Caliz was standing and told him to move as something devious was about to happen. When Mr. Caliz looked in front of him, he noticed the deceased was riding his bicycle in his direction. He then testified that he made two steps forward when he heard gunshots. By the time he turned around he saw the deceased stand on his feet, let go of the bicycle and then fell to the ground when he was shot 2 more times in the head. Approximately 10 minutes after was when Ms. Zetina called the police. It took the police approximately 45 minutes to arrive at the scene. He tried making a report of what he had witnessed at the Police Station but was turned away by Sergeant Sanchez and Mr. Jemmott. He testified that he did not know the individuals involved in the shooting of the deceased and that it was the first time he had seen them, so he affirmed to the court that the three Accused persons were not the assailants to this crime.

33. Mr. Caliz was cross-examined. It was suggested by Ms. Wade for the Crown that he did not go to any other police station, the media, the Director of Public Prosecutions office nor the Magistrate Court with this valuable information, about the identity of the true killers of the deceased. He accepted this suggestion. It was put to him that he fabricated the evidence of seeing two random men shoot and kill the deceased, which he denied. He also denied the suggestion that he would say anything to help his buddies from going to jail. It was suggested that he and the accused persons concocted this story whilst they were in the prison together. He denied this suggestion and explained that he lived in Tango 7 whilst they lived in Tango 9, two different locations. There was also no sort of communication between them because convicted prisoners are unable to communicate with remanded prisoners.

34. The parties gave closing addresses which were carefully considered by the Court.

## **THE LAW**

35. The Court is assisted in establishing the elements of the offence of murder by a decision of our Court of Appeal in *Peter Augustine v R, Crim App 8/01*, per Carey JA:

**“11. Murder is defined in the Criminal Code as intentionally causing the death of another without justification or provocation (section 117 Cap. 101). It was essential to emphasize to the jury that the specific intent which the prosecution must establish on the charge against him was an intent to kill.”**

(emphasis added)

36. The Court understands from this authority that to convict the Accused of murder the Crown must prove to the satisfaction of the Court so that it is sure that:

- i. Jimell Paul Jex is dead.
- ii. His death was caused by the acts of the three Accused.
- iii. The three Accused intended to kill the deceased.
- iv. There was no legal justification for the killing of the deceased.
- v. The three Accused were not provoked into killing the deceased.

37. This case involves the consideration of the issue of joint enterprise as the evidence establishes only two principals and the Crown is saying that Accused #1 assisted or encouraged the principals to commit the acts. The court finds of great assistance the recent decision of the Court of Appeal in ***Eli Avilia Lopez and Anor. v R Crim. App. 22-23/18*** which carefully considered this issue, per Bulkan JA:

*[40] ... **In this jurisdiction the mens rea for murder is an intention to kill, nothing less. Whereas at common law an intention to cause grievous bodily harm also suffices, in Belize a higher, more exacting standard, applies.** Similarly, in cases where there is a deviation from the common plan leading to an undesired (or unusual) consequence, the mens rea required for accessory liability is that of intention. Section 21 of the Criminal Code of Belize stipulates (inter alia):*

*“(1) Where a person abets a particular crime, or abets a crime against or in respect of a particular person or thing, and the person abetted actually commits a different crime, or commits the crime against or in respect of a different person or thing, or in a manner different from that which was intended by the abettor, the following provisions shall have effect, namely-*

*(a) If it appears that the crime actually committed was not a probable consequence of the endeavour to commit, nor was substantially the same as the crime which the abettor intended to abet, nor within the scope of the abetment, the abettor shall be punishable for his abetment of the crime which he intended to abet in the manner provided by this Title for the punishment of crimes which are not actually committed.*

*(b) **In any other case the abettor shall be deemed to have abetted the crime which was actually committed, and shall be liable to punishment accordingly.**”*

*[41] This provision governs the situation where, in the course of carrying out a common plan, there is an escalation by one of the parties and another (undesired) crime is committed. Three scenarios are envisaged – where the crime committed was not a probable consequence or substantially the same as the crime planned nor within the scope of the common plan. In any of those situations, section 21(1)(a) explicitly stipulates that the accomplice is only liable for such crime as s/he intended to abet. In any other scenario, presumably in cases of minor variations, the accessory would be liable for the crime actually committed. However, the accessory can only be held liable for the*

*different crime where s/he intended to assist in its commission. **The threshold set here is not foresight but intention. Thus the “wider principle” asserted in Chan Wing-Siu, by which “a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend”, is at odds with the legislative framework governing criminal liability in this jurisdiction. ...***

*[44] Having acknowledged the reality that plans can change, but that an agreement is still needed, **the trial judge then notes that there is no need for a pre-arranged plan if the actors are there taking part in its execution.** In his words: **“A plan or agreement does not require any formality, since an agreement to commit an offence may arise on the spur of the moment.”** Here again, **the trial judge was perfectly correct, merely re-stating a longstanding principle for which there is copious authority. ...***

*[46] Another critical point made by the learned trial judge in the passage quoted above is that **“An agreement can be inferred from the behaviour of the parties.”** Once again, **there is nothing objectionable about this, which merely reflects an evidential approach common to criminal practice and procedure. Since persons do not usually announce or explain their reasons for acting, there is no choice but to deduce their intention from the surrounding circumstances.** What is important, however, is that at all times the trial judge remained mindful that in order to establish guilt, the prosecution had to prove the existence of an agreement between the perpetrators. Further, as to the required mental element, he ended this passage by asserting that “essence of joint responsibility is that each defendant shared the intention to commit the offence”. Intention, not foresight, was the threshold he deemed necessary.” (emphasis added)*

38. The Court is guided by this authority that the Crown must prove beyond a reasonable doubt to convict Accused #1 on the principle of joint enterprise the following:
- i. Jimell Paul Jex is dead.
  - ii. The death of the deceased was caused by the principals without justification or provocation.
  - iii. Accused #1 provided some assistance or encouragement to the principals.
  - iv. Accused #1 intended to assist or encourage the unjustified and unprovoked killing of the deceased.
  - v. The fact of an agreement can be inferred from the circumstances.

## **ANALYSIS**

39. The Court has directed itself that the three Accused are presumed innocent and have absolutely nothing to prove. The Court has directed itself that the obligation is on the Crown to satisfy it so that it is sure of the guilt of the three

Accused, and if there is any reasonable doubt the Court is duty-bound to acquit them.

40. The Court has considered all the evidence with the intention of reaching a fair and dispassionate assessment of that evidence. The Court notes that in assessing credit and reliability it must examine inconsistencies, discrepancies, and any implausibility in the evidence of witnesses. The Court notes that if there are inconsistencies and discrepancies the Court must look to see if they are material and if they can be resolved on the evidence. Unresolved inconsistencies or discrepancies would lead the Court to reject that bit of evidence or all of the witness's evidence entirely. The Court must also consider the cumulative effect of those inconsistencies or discrepancies on a witness's credit and reliability. If the Court finds the evidence of a witness implausible it will reject either that witness's evidence entirely or that particular bit.
41. The Court begins firstly with analyzing the evidence on the Crown's case and **if** the evidence seems strong enough to consider a conviction it would consider the case for the Accused, as is the required reasoning process noted by our apex court, the Caribbean Court of Justice (hereinafter "the CCJ"), in **Dioncicio Salazar v R, [2019] CCJ 15 (AJ)**<sup>1</sup>.
42. The Court will also consider the case against each Accused separately.

### **1. Accused #1**

43. The Crown has established that Jimell Paul Jex is dead on the agreed evidence of his brother, Mr. Henkis, who identified his body and the evidence of Dr. Ken that he died as a consequence of several gunshot wounds to the head and his body.
44. Ms. Zetina testified to seeing a man on a bicycle in a green shirt being shot several times at San Pedrito sometime after 5 p.m. on 23<sup>rd</sup> January 2018. Jiro Sosa, the crime scene technician, in his agreed evidence testified to photographing the body of a man with apparent gunshot wounds in a green shirt near to a bicycle at some time after 5:15 p.m. on the same day in San Pedrito. Sergeant Henry Thomas who was at the scene with Mr. Sosa recognised that body to be Jimell Paul Jex, in his agreed evidence. Consequently, on a combination of all of this evidence the Court concludes that the man Ms. Zetina saw shot was in fact Jimell Paul Jex.

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<sup>1</sup> Para. 35

45. The case against Accused #1 is based solely on the direct recognition evidence of Ms. Zetina. Her evidence must be carefully and closely analysed.
46. The first step of this analysis requires the Court to determine whether Ms. Zetina is an honest and reliable witness, on the authority of the Jamaican Privy Council decision of *Beckford and Anor. v R (1993) 42 WIR 291*<sup>2</sup>, per Lord Lowry:

*“The first question for the jury is whether the witness is honest. If the answer to that question is ‘Yes’, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could be mistaken?”* (emphasis added)

**Is Ms. Zetina an honest and reliable witness?**

47. The Court found Ms. Zetina to be an honest and reliable witness. Her evidence was plausible and coherent.
48. There were several material inconsistencies in the evidence of Ms. Zetina which the Court was able to resolve and there were discrepancies between her evidence and the evidence of Mr. Neal and Ms. Baretto which the Court was also able to resolve.

**The inconsistencies**

49. The Court will consider the material inconsistencies in no particular order.
50. There was one regarding the colour pants that Accused #3 was wearing at the time Ms. Zetina observed him. In her statement she said that he was wearing a blue jeans while at trial she said that he was wearing a khaki pants. When challenged on this inconsistency she accepted that it was an inconsistency but that it did not change the face she saw. This was an inconsistency which the Court finds can be innocently explained by the fact that the witness may not have thought it a material fact to recall with exactitude the pants the assailant was wearing as opposed to recording the facial features of the persons she was observing.
51. The second inconsistency was the inconsistency by omission that the witness did not say in her statement that she stopped her golf cart to observe the incident when the shooting started. The witness explained this inconsistency by saying that the police did not ask her that. The Court finds that as a matter of human experience that it is not unusual in the statement taking process

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<sup>2</sup> P. 298

with the police that the fine details about sequence and clarifying whether the witness stopped the golf cart to observe the event may be less important to the recording officer than getting in writing what the witness actually observed with regard to the shooting. The Court also notes that, as the witness said plainly in her evidence, she was in fear for her life, which would have affected her pacing and sequencing in giving her statement. After witnessing a public execution, that is understandable. The Court notes that there was some hesitation, on the evidence of Sergeant Woods, with regard to the provision of the statement by Ms. Zetina and the Court finds that that is consistent with the fear expressed by the witness at trial. The Court finds that that fear would have affected the clear exposition of the narrative in the statement in terms of the sequence of events and clarifying that she stopped her golf cart. This factual reality was noted by the Guyanese Court of Appeal in *Anand Mohan Kissoon and Anor. v The State (1994) 50 WIR 266*<sup>3</sup> where that Court indicated that the circumstances in which a witness gives a statement ought to be considered in resolving inconsistencies. The Court does not find that this inconsistency lowers the credit or overall reliability of Ms. Zetina's evidence.

52. The third inconsistency is with regard to Ms. Zetina's evidence at trial that she saw the whole bodies of Accused #1 and #2 and in her statement she said, "I was able to see Delson and Tionne face but did not see their full body as they were more to the side of the street as the male person was riding on the left side of the street closer to the fence of the boat yard." The witness explained this inconsistency as a matter of sequence in that she may not have seen their whole body before the deceased came off of the bicycle, but when he did, and the shooting started then she saw their whole body. The Court understands and accepts her explanation and notes the impact fear may have had in laying out a crisp narrative. In any event the witness was consistent with regard to being able to see the face of the Accused, which is the more valuable marker for visual identification.

53. The fourth inconsistency was the length of her knowledge of Accused #1 and #2. The witness accepted that she said in her statement that she knew them for 20 years but said at trial she knew them for 15 years. She also accepted that when she saw them at the time of the incident they were not in fact 20 years old. The Court is of the view that this inconsistency arose not out of any nefarious intent to mislead but the oftentimes inexact way we in the Caribbean speak. The witness was clear that she knew Accused #1 and #2 since birth. It was not challenged that the daughter of the witness attended school with Accused #2. Though it was suggested to the witness that she did not know Accused #1 and #2 for 15 years, it was not suggested to her that she did not know them. The Court considers that in the statement taking process, one where as the Court found she must have been in fear, the witness may not have

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<sup>3</sup> Ps. 272-273

been too focussed on how long she knows Accused #1 and #2, and taken out a calculator to check the number of years, but on the undisputed fact that she knows them. The Court finds that that error in the estimate of length of time is satisfactorily accounted for by inexactitude in speaking and her state of fear. The Court notes that loose estimates of time, or even age, by honest witnesses are not unusual in the criminal courts as was noted, quite colourfully, in a decision of our Court of Appeal in ***Chadrick Debride v R, Crim. App. 13/07***, per Sosa P:

*“[69]...This Court cannot, however, sit in an ivory tower and ignore the often-very-loose habits of speech of Belizeans in the streets of our cities and towns...”<sup>4</sup>*

54. The fifth inconsistency is in relation to the omission of the mention in her statement that the third man she saw involved in the shooting had curly hair and a billy goat beard, while she testified to that at trial. The witness accepted this inconsistency by omission. While she did not explicitly provide an explanation for this omission the Court, as a matter of human experience, the Court notes that the detail a witness gives in her police statement is often times related to how much detail is sought by the questioner. The Court also notes that witnesses when recounting a narrative for the first time in a courtroom more than 5 years after the incident may recall the finer details of hairstyle that she may have overlooked when giving her initial statement. The Court does not find that this inconsistency undermines the credit of Ms. Zetina.
55. The sixth inconsistency is with regard to the height of the third man she saw in that she estimated at trial that he was 5 feet 7 inches, but she had later said she did not know about heights and accepted that she told the police he was approximately 5 feet tall. The Court first notes that assessments of height by lay witnesses, as a matter of human experience, are highly subjective as was noted by the Eastern Caribbean Court of Appeal (hereinafter “the ECCA”) in the matter of ***Maynard v R (2022) 101 WIR 243***, per Pereira CJ:

*“[65]... Evidence relating to the duration of one’s observation and height are matters of subjective estimation.”*

56. The witness was frank about not knowing how to estimate height but was consistent that her assessment of the third man was that he was in her estimation tall. The Court again does not see this inconsistency as undermining Ms. Zetina’s credibility.
57. The seventh inconsistency is that Ms. Zetina spoke about Accused #1 and #2 pulling the deceased off of his bicycle in her police statement but did not

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<sup>4</sup> See also para. 71

mention it in her evidence in chief. The witness accepted in her cross-examination that what she said in her statement was correct. The Court again finds that in recounting her evidence 5 years after the incident for the first time the witness may omit in her mind the “smaller” evidence of the deceased being pulled off of his bike but focus on the more impactful evidence of the actual shooting. The Court does not find that this inconsistency undermines the credit of Ms. Zetina.

58. Allegations of theft were put to Ms. Zetina which she did not accept, and what is put is not evidence. Since no evidence was led to substantiate those allegations the Court ignored them. There were also suggestions put to the witness with regard to a video which she accepted existed but was not entered into evidence. The witness did not accept any inconsistency between what was in that video and her testimony, and again what is put is not evidence. The Court found that this cross-examination on this video issue did not affect the credit of Ms. Zetina.

**The discrepancies among Ms. Zetina, Mr. Neal and Ms. Barreto**

59. In considering the discrepancies between these three witnesses the Court is assisted by the dicta of the ECCA in *Maynard*, again per Pereira CJ:

*“[60] ... **It is not at all unusual for different witnesses seeing and recalling a scene to which their attention is drawn differently.**”*  
(emphasis added)

60. These witnesses would have been in different vantage points, under differing pressures and with different powers of observation and recall.

61. Deon Neal’s account was that he was walking with the deceased when two men shot at the deceased and a third shot at him. He indicated that the matter happened quickly and much of his time was spent escaping the gunmen. He indicated that he had been shot and that he could not have identified anyone.

62. He contradicts Ms. Zetina’s evidence in three material ways in that (i) he does not speak to anyone pulling the deceased off his bicycle; (ii) he described one of the shooters as baldhead, and neither Accused #1 and #2 had a baldhead at the material time; and (iii) Ms. Zetina does not mention Neal’s shooting.

63. The Court finds that these three discrepancies can be resolved. The Court notes Neal’s evidence was, “I was able to see their backs and was not able to see their faces when they turned around and fired the shots because as I said before, the incident occurred very quick and I was running away.” The Court finds that Neal’s sequence of events, with regard to the pulling of the bicycle would be less reliable than Ms. Zetina as she was not in the line of fire, and Neal’s

narrative was that once the men started firing, which was a startling event in itself, he then ran away in a panic.

64. In relation to the physical description of baldhead the Court finds that before the shooting took place Neal would have had no reason to pay attention to the two men with their backs turned, therefore it is doubtful that he would have spent the limited time before he quickly ran to register properly any features of the men.
65. With regard to the third discrepancy, the shooting of Neal, this may be a combination of Neal's running away very quickly and Ms. Zetina's focus on the more startling public execution of the deceased.
66. In summary, the Court does not find that any of the discrepancies between the evidence of Mr. Neal and Ms. Zetina lower the latter's credibility. The account of Mr. Neal is supportive to Ms. Zetina in that they both identify three men acting in concert but only two doing the shooting. This in the Court's view is a significant coincidence.
67. In terms of the evidence of Ms. Barreto she stated was that she was passing on her golf cart when she saw one male person in company with another shoot at the deceased. After the shooting began she then ducked and covered her daughter. She, like Ms. Zetina, also did not see the shooting of Mr. Neal. She, like Mr. Neal did not speak of the deceased being pulled off of the bicycle. She only speaks of one shooter and someone with him, and she said the shooter had curly hair and a cap.
68. The Court found Ms. Barreto's evidence understandably unreliable. This witness was clearly at the centre of an event where both herself and her child were at risk. The Court finds her evidence incredible that she passed the shooter and his companion within 10 feet and she did not see their faces. It seems clear to the Court, on this and other evidence, that this witness did not want to identify anyone and consequently cannot regard her evidence as being more reliable than that of Ms. Zetina who was not like both her and Mr. Neal in the "blast radius" of the shooting.
69. In summary again, the Court does not find that the evidence of Ms. Barreto negatively affects the credit or reliability of Ms. Zetina.
70. The Court does not find looking at the inconsistencies and discrepancies singly or cumulatively that it shakes the Court's view that Ms. Zetina is an honest and reliable witness. The Court found the witness to be truthful, sincere and trying to recall the events as best as she could. Her evidence was clear, cogent and compelling.

**Is Ms. Zetina mistaken in her identification of Accused #1**

71. The Court having found that Ms. Zetina is an honest and reliable witness, the next step of the analysis requires the Court to examine closely the circumstances in which her identification was made and consider its specific weaknesses to determine if she is mistaken.
72. The Court first reminds itself of the need for caution in accepting identification evidence because mistaken identification has led to miscarriages of justice in the past. Indeed, the Court specifically reminds itself of the fact that the CCJ has opined recently in the Barbadian decision of ***R v Hall (2020) 95 WIR 201***, that, per Jamadar JCCJ, “this special need for caution is corroborated by current cognitive scientific research on the subject, which compellingly demonstrates the potentially perilous unreliability of such singular reliance on visual identification as the basis for conviction.”<sup>5</sup>
73. The Court first reminds itself of the need for caution in accepting identification evidence, owing to miscarriages of justice that have their root in mistaken identification by seemingly sure witnesses. The Court notes that an honest witness may be mistaken, in that Ms. Zetina may have conscientiously convinced herself that the person she saw with the shooter was Accused #1 without intending to make a mistaken identification but is in fact in error. The Court also notes that mistaken witnesses may nonetheless be convincing. The Court notes that recognition evidence is more reliable than identification by persons unknown to the suspect. The Court however also reminds itself that errors can be made even in the recognition of close friends or relatives. The Court warns itself that several identifying witnesses may be all mistaken, however in this case there is only one.
74. The circumstances of the identification, and the Court’s view thereon, are as follows:
- i. **Recognition**: Ms. Zetina testified that she knew Accused #1 since birth. Though it was suggested to her that she did not know him for 15 years and she did not know him “like that”, it was never put to her that she did not know him. She stated that she saw them almost every day because they lived in town. This was not challenged. She said that she last saw him and spoke to him two weeks before the shooting. This was not challenged. She said that her daughter went to school with Accused

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<sup>5</sup> Para. 149

#1's brother. This was not challenged. Mr. Banner for the Accused complained that Ms. Zetina did not give a physical description of Accused #1 but the Court resolves this issue by noting that the witness identified Accused #1 by full name in her statement to the police and in that regard the failure to obtain that description may be more a lack of the search for necessary detail by the recorder than the fact that Ms. Zetina does not know Accused #1. Indeed this issue was addressed by our Court of Appeal in *Debride*, per Sosa P:

*"[73] The seventh of the alleged weaknesses was that Mr Méndez gave no description of the gunman to the police. Though it is no answer to the complaint of counsel, the Court will observe that this, curiously, is a situation more often than not encountered in criminal cases in this jurisdiction. In dealing with the appellant's complaint on this particular score, the Court finds itself unable to differ from the approach of the Judicial Committee in Rose, cited above, where six alleged weaknesses in the identification evidence of the sole eyewitness, a brother of the murdered man, included the following (see p 215): '(5) The witness does not appear to have given a description of [the gunman in question there] in his statement to the police, if indeed he gave a statement.' In the course of dismissing the appeal of Mr Rose, the Board pithily stated, as regards the alleged weaknesses numbered (4) and (5) (at p 217): 'Their lordships do not regard the omission of any reference to (4) and (5) as crucial.'" (emphasis added)*

The Court has already indicated its position on the inconsistency with regard to the 15-20 years issue and how it has resolved it. The Court finds that this is a case of strong recognition evidence against Accused #1.

- ii. **Lighting:** The Court is helped considerably on this issue by the evidence of JS 2, the CD of photographs by Mr. Sosa, the crime scene technician. The photographs DSC\_1904 to DSC\_1918, contained therein, demonstrate clear bright natural lighting at the scene where the body of the deceased is seen. This supports the evidence of Ms. Zetina that at the time of the shooting, not too long before the photos, that the area was "very bright". The Court also notes that this evidence was not challenged. The Court consequently accepts the evidence of Ms. Zetina that the area was very bright when she made her observation. This is a strong factor in support of the correctness of her identification.
- iii. **The period of observation:** The witness was consistent that she observed Accused #1 for 40-50 seconds and that she saw his face. In that

time period she would have seen him leave the lagoon area, pull the deceased off of his bike, stand next to Accused #2 while he shot the deceased twice and then run away to the lagoon. With regard to that activity, 40-50 seconds, in the Court's mind is a fair estimate and not an exaggeration. The Court notes that our Court of Appeal in *Allen James v R, Crim. App. 7/09* where they dismissed an appeal against conviction with a 3-4 second period of observation in a case of recognition<sup>6</sup>. The Court finds that this is a sufficient period of time for Ms. Zetina to register the features of the person she identifies as Accused #1.

- iv. **Distance and obstruction:** Ms. Zetina was consistent that she saw Accused #1 from 30 feet away. This is a distance where a proper observation could be made, in the Court's view. She was also consistent that nothing obstructed her view. The Court notes again in support of her having a clear observation that she like Mr. Neal talks about three persons but two shooters.

75. The Court found the specific weaknesses in Ms. Zetina's evidence to be as follows:

- i. **Fear:** The first and most obvious specific weakness would be the state of fear that she would have been in at the time of making this observation which the Court has attributed as the cause of several inconsistencies and discrepancies in her evidence. This has the potential to warp the identification process. However, the Court notes the very good objective circumstances in which the observation was made and the strong evidence of recognition. Also, though the witness may have been in fear she was not in the line of fire of the shooting.
- ii. **Divided attention:** The Court notes that the witness in the time period the witness is observing not one but three persons and her attention would be divided amongst them. However, having regard to the strength of the recognition evidence, the lighting and other conditions, the Court finds that despite this weakness there was sufficient opportunity for Ms. Zetina to make a correct identification.

76. The Court is of the view that the strengths of the identification evidence far outweigh its weaknesses even cumulatively considered. The Court is of the opinion that the witness had the opportunity to make a correct identification of the person she pointed out as Accused #1. The Court is of the provisional view, subject to its review of the case for the Accused, that Ms. Zetina has correctly identified Accused #1.

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<sup>6</sup> Para. 14

### **Joint enterprise**

77. The Court notes firstly that as our Court of Appeal indicated in *Lopez* an agreement between principal and secondary party can be inferred from the behaviour of the parties and persons do not usually verbally announce or explain their reasons for action. The Court also notes that it is permitted to use winks, nods and knowing looks to infer the existence of an agreement as has been the standard approved direction in cases from our Court of Appeal in ***Ryan Herrera and Anor. v R, Crim. Apps. 22 and 23/09***<sup>7</sup> and ***Jeremy Harris and Anor. v R, Crim. Apps. 1-2/04***<sup>8</sup> :

*“An agreement to commit an offence may arise on the spur of the moment. Nothing needs to be said at all. It can be made with a nod and a wink, or a knowing look. Indeed, an agreement can be inferred from the behaviour of the parties to the crime.”*

78. The evidence of Ms. Zetina is that Accused #1 pulled the deceased off of his bike with the assistance of the first shooter. This is an act, the Court finds, would have destabilised the deceased and made it easier for the first shooter to shoot the deceased and cause his death. This was an act of assistance for the purpose of the laws of joint enterprise. The Court also infers from all the circumstances that he was there to provide force of numbers in a hostile confrontation, a usual form of encouragement for the purposes of the law of joint enterprise as noted by the Privy Council in ***R v Jogee and Anor. (2016) 87 WIR 439***<sup>9</sup>, per Lord Hughes and Lord Toulson:

***“[89] In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.”*** (emphasis added)

79. The principal shooters, on the evidence of Ms. Zetina, were not provoked by the deceased, nor is there any evidence that the shooting was lawful, there was no evidence to raise self-defence or any other defence.

80. The next question is whether Accused #1 had the specific intention to kill the deceased.

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<sup>7</sup> Para. 22

<sup>8</sup> Para. 14

<sup>9</sup> Para. 89

81. The Court has derived great assistance from a judgment of our Court of Appeal in **Gareth Hemmans v R, Crim. App. 12/16** on the question of intent, per Hafiz-Bertram JA, as she then was:

*“[51] Section 6 of the Criminal Code provides for the standard test of intention, that is, **whether the person, (the appellant in this case) intended to produce the result, that is, to kill Mr. Zaiden when he chopped him with the machete.***

*[52] Section 9 of the Criminal Code sets out the approach to be adopted in relation to proof of intention to kill. Section 9 of the Criminal Code provides that:*

*“9. A court or jury, in determining whether a person has committed an offence-*

***(a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but***

***(b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.***

*[53] The relevant question and factor in this case as shown in the table being **whether the person charged with the offence intended to produce a particular result by his conduct (question) by the “fact that the result was a natural and probable result of such conduct.” (appropriate factor).***

*[54] Mr. Sylvester contended that there is nothing on the record to show that the trial judge considered sections 6 and 9 of the Criminal Code, which sets out the statutory matters which should be taken into account in relation to proof of intention to kill. In the view of the Court, **the judge was not required to set out sections 6 and 9 in his judgment or use the formula as set out therein, provided that he makes it clear that the appellant intended to kill Mr. Zaiden. The question to be asked is whether the trial judge arrived at the conclusion of intent to kill by looking at all the facts and circumstances which were disclosed in the evidence.**” (emphasis added)*

82. The Court has found that Accused #1 had the specific intent to kill based on the fact that: (i) he was aware his confederates were armed with deadly weapons which is evidence from which intention to kill can be inferred; (ii) Accused #1 stood by the first shooter as he shot the deceased; (iii) and they both came together and left together. He did not separate or distance himself from the actions of the shooters at any time, from which this Court’s draws the inference that the shooting and killing of the deceased was what Accused #1 both desired and intended.

83. The Court consequently finds that Accused #1 was in a joint enterprise with the shooters who unlawfully killed the deceased without provocation and that he specifically intended to kill the deceased.
84. The Court having found evidence which may lead to a conviction now considers the case for Accused #1.

### *Defence case*

85. The Court reminds itself again that the Accused has nothing to prove and has a right to remain silent and it is for the Crown to prove guilt beyond all reasonable doubt. The Court reminds itself that if it accepts the evidence on the case for Accused #1 or is in doubt about it, it is bound to acquit the Accused. It can only convict if it has rejected the case for Accused #1.
86. The Accused indicated in his unsworn statement that he had an alibi in that at the material date and time he was working at the residence of one Martin Reyes. He indicated that he was 19 years old at the time. He notably did not challenge the claim of Ms. Zetina that she knew him.
87. The Court has considered the unsworn statement and finds that the weight it attaches to the strong recognition evidence in overall good conditions of Ms. Zetina results in the rejection of the claim of alibi therein. In this regard the Court relies on the decision of our Court of Appeal in *Apolonio Kiow v R, Crim. App. 10/20*<sup>10</sup>.
88. The Court also rejected the evidence of his witness Mr. Frank Caliz as it found him not to be a credible witness. Mr. Caliz's evidence was that he knew Accused #1 and he saw the killing of the deceased and Accused #1 was not there. He gives a detailed account of what transpired and the clothing of the assailants. One of the issues that would naturally arise would be how after 5 years without a contemporaneous memory refreshing statement would this witness be able to testify in this detail. The witness appeared to plug that gap for himself by testifying that he records all of the activities he sees and hears in his phone where he keeps an inventory. The Court is puzzled as to why a boatman in fibreglass repair would need to do this daily archiving. The Court found this evidence wholly implausible and designed to bolster his evidence and mislead the Court.
89. The Court also had difficulty with his claim about attempting to give his information to the police, officers Jemmott and Sanchez. If the contention is

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<sup>10</sup> Para. 52

that the police did not want to hear different descriptions of the suspects, that is not consistent with the evidence of the police taking statements from Mr. Neal and Ms. Baretto which contained discrepancies with the evidence of Ms. Zetina, who identified Accused #1 and #2. Also the Court notes that if Mr. Caliz was put off by the San Pedro police as he claims it is puzzled why he did not attempt to bring it to any other police station or to the office of the Director of Public Prosecutions, in the time before his incarceration.

90. The Court also noted that the witness admitted that he is friends with all three Accused. He is also a witness of bad character with convictions for drug trafficking and burglary which diminishes his evidence on the scale against Ms. Zetina.
91. The Court has carefully considered the unsworn statement and evidence of the case for Accused #1 and rejects it.
92. The Court has considered carefully all of the evidence and is satisfied so that it is sure that Phillipa Pamela Zetina is an honest and reliable witness. The Court is satisfied so that it is sure that Ms. Zetina correctly identified Accused #1. The Court is satisfied so that it is sure that Accused #1 was in a joint enterprise with the persons who shot and killed the deceased without provocation or justification, in that he provided assistance and encouragement to the shooters with the specific intention of killing the deceased without justification or provocation.

## **DISPOSITION**

93. The Court finds Accused #1 guilty of the murder of the deceased as charged in the indictment. The matter is adjourned for a separate sentencing hearing as advised by the CCJ in *Linton Pompey v DPP [2020] CCJ 7 (AJ) GY*<sup>11</sup>.

### **2. Accused #2**

94. The Court warns itself similarly as in the case against Accused #1 that the Crown is to prove its case beyond reasonable doubt and that Accused #2 has nothing to prove. The Court will also consider the case against Accused #2 on the *Salazar* principles.
95. The case against Accused #2 is that he shot the deceased alongside another principal thereby causing his death. The evidence against him is that of the recognition evidence of Ms. Zetina.

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<sup>11</sup> Para. 32

96. The analysis to be conducted under the case of *Beckford* is a consideration of her honesty and reliability and then whether she may be mistaken.
97. The Court, for the reasons given in the analysis of the evidence against Accused #1, has found that Ms. Zetina is an honest and reliable witness.
98. The next question is whether Ms. Zetina in relation to Accused #2 could be mistaken.
99. The Court warns itself of the dangers of acting on identification evidence in the exact terms as it did in considering the case against Accused #1.
100. The circumstances of the identification, and the Court's view thereon, are as follows:
- i. **Recognition**: Ms. Zetina testified that she knew Accused #2 since birth. Though it was suggested to her that she did not know him for 15 years and she did not know him "like that", it was never put to her that she did not know him. She stated that she saw him almost every day because they lived in town. This was not challenged. She said that she last saw him and spoke to him two weeks before the shooting. This was not challenged. She said that her daughter went to school with him. This was not challenged. Mr. Banner for the Accused complained that Ms. Zetina did not give a physical description of Accused #2 but the Court resolves this issue in the same way it did in relation to Accused #1 and with reliance on *Debride*. The Court has already indicated its position on the inconsistency with regard to the 15-20 years issue and how it has resolved it. The Court finds that this is a case of strong recognition evidence against Accused #2.
  - ii. **Lighting**: The Court accepts the evidence of Ms. Zetina that the area was very bright when she made her observation on the basis as outlined with regard to the case against Accused #1 with the assistance of the photographs from Mr. Sosa. Again the Court finds that this is a strong factor in support of the correctness of her identification.
  - iii. **The period of observation**: The witness was consistent that she observed Accused #2 for 40-50 seconds and that she saw his face. In that time period she would have seen him leave the lagoon area, shoot the deceased twice, then run away to the lagoon. With regard to that activity, 40-50 seconds, in the Court's mind is a fair estimate and not an exaggeration. The Court finds that this is a sufficient period of time, bearing in mind the findings of the Court of Appeal in *James*, for Ms. Zetina to register the features of the person she identifies as Accused #2.

- iv. **Distance and obstruction:** Ms. Zetina was consistent that she saw Accused #2 from 30 feet away. This is a distance where a proper observation could be made, in the Court's view. She was also consistent that nothing obstructed her view. The Court notes again in support of her having a clear observation that she like Mr. Neal talks about three persons but two shooters.
101. The Court found the specific weaknesses in Ms. Zetina's evidence in relation to Accused #2, as in the case of Accused #1, to be fear and divided observation and resolves it in the same way for Accused #2 it does for Accused #1.
102. The Court is of the view that the strengths of the identification evidence far outweigh its weaknesses even cumulatively considered. The Court is of the opinion that the witness had the opportunity to make a correct identification of the person she pointed out as Accused #2. The Court is of the provisional view, subject to its review of the case for the Accused, that Ms. Zetina has correctly identified Accused #2.
103. The Court is of the view that the shooting of the deceased by Accused #2 was unlawful, as there is simply no evidence which raises the faintest trace of self-defence or any other defence, and there is no evidence of provocation.
104. The Court is of the view, considering the law in *Hemmans*, that Accused #2 had the specific intention to kill the deceased on all of the evidence on the basis that: (i) he pulled the deceased off of his bicycle to stop his progress; and (ii) after the deceased fell he fired not one but two shots at the deceased with a deadly weapon.
105. The Court finds that there is sufficient evidence which could lead to a conviction so it considers the case for Accused #2.
106. Accused #2 in his unsworn statement raises an alibi and says that he was working at the home of Martin Reyes at the material date and time. The Court rejects this evidence as in the case with Accused #1 on the strength of the evidence of Ms. Zetina.
107. The Court also rejects the evidence of his witness Mr. Caliz on the same basis as it did in its analysis in the case of Accused #1.
108. The Court has carefully considered the unsworn statement and evidence of the case for Accused #2 and rejects it.

109. The Court has carefully considered all of the evidence and is satisfied so that it is sure that Phillipa Pamela Zetina is an honest and reliable witness. The Court is satisfied so that it is sure that Ms. Zetina correctly identified Accused #2. The Court is satisfied so that it is sure that Accused #2 unlawfully, and without provocation, shot and killed the deceased with the intention to kill.

### DISPOSITION

110. The Court finds Accused #2 guilty of murder of the deceased as charged in the indictment. His case is adjourned for a sentencing hearing.

### 3. Accused #3

111. The Court warns itself similarly as in the case against Accused #1 and #2 that the Crown is to prove its case beyond reasonable doubt and that Accused #3 has nothing to prove. The Court will also consider the case against Accused #3 on the *Salazar* principles.

112. The case against Accused #3 is that he was a joint principal shooter of the deceased. The case against him stands and falls on the pure identification evidence of Ms. Zetina. The case against Accused #3 is significantly different from that of the other Accused in that she did not know him before the shooting.

113. In terms of the *Beckford* analysis the Court maintains its findings that Ms. Zetina is an honest witness. The next question relates to whether she is mistaken.

114. The Court is troubled with regard to the identification process adopted with regard to Accused #3, in particular in relation to the use of photographs and how that evidence emerged.

115. The Court has found assistance in a decision of the Privy Council from St. Vincent and the Grenadines in *Ken Charles v R, (2007) 70 WIR 158* on this issue, per Lord Carswell:

*“[12] Their lordships consider that some care has to be taken when identification from photographs is carried out, although it is not in itself an improper practice. The rules applicable in England and Wales under Code of Practice D, although not binding, form a reliable basis for good practice. Two basic rules are set out in *May & Powles, op cit*, para 14-35:*

**‘(1) The police may show a witness photographs in order to identify a suspect.**

*‘(2) Once a man has been arrested, and there is therefore an opportunity that he can be identified in person, photographs should not be shown to witnesses before an identification parade.’*

*As the authors point out, **when the police are looking for a culprit, the showing of photographs to witnesses may be essential; indeed, it may be the only way in which the culprit can be identified.** Once he has been picked out and is available to take part in an identification parade, photographs should not be shown to witnesses. They should instead be asked to attend an identification parade, as should also the witness or witnesses who picked the suspect out from photographs. **In relation to the latter, the procedure set out in the headnote to Lamb should be followed, viz the defendant’s advisers should be informed of the showing of the photographs and the decision left to them whether to refer to that at trial. If they do so decide, the photographs should not be shown to the jury, and they should be warned of the consequence that the reliability of the identification is likely to be decreased.**”  
(emphasis added)*

116. This authority was referred to with approval by our Court of Appeal in **Alberto Ical v R, Crim. App. 3/16**<sup>12</sup>.

117. This legal position is seemingly reflected in Belize’s police procedure in the **Police Standing Orders, Crime and Criminal Investigation Ch. 55 Standing Order 119:**

*“119. Witnesses may be shown the Witness Albums of photographs to assist in identifying a suspect who is not known to the witness. **Under no circumstances will officers use these photographs for the purpose of establishing the identity of a known suspected criminal whom the witness(es) state they can identify. Identification in such cases must be by formal identification parade.**” (emphasis added)*

118. The evidence in this case from Ms. Zetina, as indicated above, is that she did not know the “third man” on the scene of the shooting. In that circumstance the form of identification process which Sergeant Woods should have had in his mind was an identification parade as is clear in the decision of the Privy Council from Jamaica in **Goldson and Anor. v R (2000) 56 WIR 444**. In this trial Sergeant Woods testified in cross-examination in relation to the third man Ms. Zetina said she saw, “based on the description that she gave in her statement, I already had an idea that the suspect was Timothy Carcamo.” He testified that he had known Accused #3 for 4 years while working in San Pedro Town and knew that he was associating with Accused #1.

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<sup>12</sup> Paras. 10-12

Sergeant Woods testified that he showed Ms. Zetina an array of photos from which she picked out Accused #3, because she did not know his name. He accepted that that array is not on file, nor was it shown in Court. He could not say how many photographs were shown to the witness, nor the racial composition of the people in the array.

119. The Court is of the view that this procedure followed above was improper. *Charles* speaks to photographs being permissibly shown to establish the identity of a suspect. Sergeant Woods's own testimony was that he had known Accused #3 for 4 years and had known him as a known associate of Accused #1. He testified that he had an "idea" that Ms. Zetina was describing him, therefore he did not, in the Court's view, need to establish identity by photograph. It was unreasonable and unfair in the Court's view to taint any future identification parade by showing the witness a photograph. This is in the Court's view not only a violation of the law in *Charles* but also the *Standing Orders* which provide that if a suspect is known and the witness says that they can identify them an identification parade should be held, and "under no circumstances" should photographs be shown.

120. The Court is also concerned about how this evidence emerged. The first time the Court heard about the use of photos to aid in the identification was when Ms. Zetina volunteered that information out of the blue in cross-examination, which was in the Court's view a testament to her honesty. It had not been disclosed to Mr. Banner nor the Court before trial that this witness's identification of Accused #3 was aided by photographs. Sergeant Woods mentioned this fact nowhere in his witness statement, meekly offering the explanation that he, "did not see it relevant to put it in my statement." The Court finds that that last bit of evidence is simply not credible.

121. Having regard to the state of the evidence, namely, the absence of the array, no details of how many photographs were shown to Ms. Zetina or who was shown in them, to use Mr. Banner's colourful suggestion the Court does not know if they were "black, Caucasian or Garifuna". The "care" that was supposed to be taken with the use of photographs in this case which *Charles* spoke of clearly was not shown. The Court is unsure what effect the showing of this photograph of Accused #3 had on the mind of Ms. Zetina, who had never seen the third man before the day of the shooting. The Court cannot say for sure if she is pointing out Accused #3 because of the observations she made on the afternoon of the shooting, or she is picking out the man she saw in the photograph, which was alongside an uncertain number of photos who may or may not have been similar or dissimilar to Accused #3's actual appearance.

122. What exacerbates the concern of the Court is that in the context of this case there was no other test of identification as the Crown indicated it was not

relying on evidence of a group identification, though incomplete reference was made to it is cross-examination.

123. The Court wishes to make clear that it is not making any finding that Ms. Zetina had any intention to wrongly inculcate Accused #3, or that she is a dishonest witness, but rather she was the unknowing participant in a flawed identification procedure. In fact as the Court noted above, she volunteered the information that photographs were shown.

124. What then is the Court left with regarding Accused #3? Though the conditions of identification were good, it was an untested two-minute observation of someone Ms. Zetina had never seen before, and whose mind may be improperly influenced by photographs shown to her in an uncontrolled scenario.

125. The Court again pauses to note the case against Accused #3 is fundamentally different from Accused #1 and #2 in that she knew them for years and saw them often, while the former not at all. The Crown's case stands and falls on the identification of Ms. Zetina. The Court cannot be satisfied so that it is sure having regard to this photograph issue that Ms. Zetina has correctly identified Accused #3. In that regard there is no need to go further in the evidence on the Crown's case nor to the case for Accused #3.

### **DISPOSITION**

126. The Court is not satisfied so that it is sure of the guilt of Accused #3 of the charge of murder in the indictment. The Court finds him not guilty and discharges him.

DATED 24<sup>th</sup> JULY 2023

NIGEL C. PILGRIM  
JUDGE OF THE HIGH COURT  
CENTRAL DISTRICT  
SENIOR COURTS OF BELIZE