

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

CRIMINAL JURISDICTION

CENTRAL DISTRICT

INDICTMENT NO: C103/2020

THE KING

v.

EMMERSON GARNETT AND LEROY HAULZE

BEFORE: The Hon. Mr. Justice Nigel Pilgrim

APPEARANCES: Ms. Sheiniza Smith, Senior Crown Counsel,
for the Crown

Mr. Leeroy Banner for the Defence

DATES OF HEARING: 3rd, 4th, 8th, and 9th May 2023; 7th July 2023

DATE OF DELIVERY: 14th July 2023

JUDGE ALONE TRIAL
DECISION

HISTORY OF THE MATTER

1. Emmerson Garnett and Leroy Haulze (hereinafter “Accused #1 and #2 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 the death of Jose Hilario Diaz (hereinafter “the deceased”) on the 16th day of July 2019. The trial began with the arraignment of both Accused on 3rd May 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.*

THE EVIDENCE

2. The Crown's case is that at # 42 Cemetery Road on Tuesday 16th July 2019 at about 5:43 pm the deceased was killed because of a single gunshot wound inflicted by Accused #1 with the assistance and/or encouragement of Accused #2. Dr. Mario Estradaban opined that the cause of death of the deceased was exsanguination due to external bleeding from injuries to the left carotid vein due to a gunshot wound to the face.
3. The Crown read the agreed evidence from 5 witness statements into evidence at trial pursuant to section 106 of the *Evidence Act, Cap. 95 of the Substantive Laws of Belize (Revised Edition) 2020.* This was the evidence of Lourdes Paz, who identified the body of the deceased; Jason Reneau, who photographed the body of the deceased at the postmortem; Daniel Daniels, who photographed the scene of the shooting; Golda Reynolds, who photographed the identification parade involving Accused #1; and Pedro Teck, who detained Accused #2 in relation to this offence.
4. The Crown first called Emiliano Ack, the son-in-law of the deceased. He testified in evidence in chief that on 16th July 2019 around 5:40 p.m. he had received a call from his wife and was 50 yards away from where the incident had occurred. When he arrived at the shop "New 2 U", (hereinafter "the shop") which he owned, he then witnessed the body of the deceased. He contacted the police. He stated that after the police arrived on the scene, he was asked to review his DVR camera system (hereinafter "the DVR") and reviewed it in the presence of Corporal Wilbert Cob (hereinafter "the Investigator"). He testified that a technician was called to retrieve footage from the DVR and arrived on the same day at around 6-6:30 pm. That technician, Corporal Edward Ciau (hereinafter "Cpl. Ciau"), retrieved the footage. Mr. Ack testified about the functionality of his DVR, including that it only captured picture and not sound. He also indicated that it was password protected, that password known only to him and his wife. He also indicated that the camera was in perfect working condition. The latter evidence regarding the functionality of the DVR and its protections were received over the objection of the Defence, on the basis that it

was amplification of evidence already extant on the deposition on the authority of the English Queen's Bench Division *Filmer v DPP [2007] R.T.R. 28¹*.

5. Mr. Ack was cross-examined. He denied the suggestion that the time stamp was incorrect when he viewed the footage with the Investigator. He denied the suggestion that his DVR was not functioning properly.
6. The Crown's next witness was Dr. Mario Estradaban. Dr. Estradaban stated that he had performed a post-mortem on the deceased on 17th July 2019 at 1:30 p.m. He opined that the cause of death of the deceased was exsanguination due to external bleeding from injuries to the left carotid vein caused by a gunshot wound to the face. Dr. Estradaban observed tattooing on the wound which was indicative of the gun being fired at close range to the face with approximately "32 inches distance from the muzzle of the gun toward the target".
7. Cpl. Ciau was the third live witness. He testified that on 16th July 2019, he had visited #42 Cemetery Road at around 6:30 pm and had spoken with Mr. Ack, the owner of the premises who gave him permission to view and extract video footage. He retrieved the footage after Mr. Ack provided his password for the DVR, and the former testified that he could not have done so without it. Cpl. Ciau testified that the footage was not tampered with because otherwise the file containing it would have been corrupted. He indicated that the time on the DVR footage was 13 minutes fast. He testified that he saved the footage on a thumb drive and saved it onto a DVD which was admitted into evidence without objection as EC 1.
8. Cpl. Ciau was cross-examined. He testified that though the time was incorrect on the DVR footage the DVR itself was working properly and recording. The witness testified that the image from the footage is low quality but not poor. Cpl. Ciau also indicated that it is possible to identify the individuals from the footage.
9. Constable Tricia Palacio was next to testify, that on 16th July 2019 at 5:45 p.m. she and Constable Coc were conducting a foot patrol at Taylor's Alley in Belize City on Cemetery Road. While on patrol Constable Palacio and Constable Cob left the police booth on Cemetery Road and headed towards Mosul Street. Upon walking towards Mosul Steet, Constable Palacio stated that her attention was drawn for about 2 seconds to a male person on the right-hand side of the road,

¹ Para. 33

10 feet away from her, who had a stocking over his head, and was wearing a grey in colour t-shirt and a grey in colour three quarter cargo pants. She stated she was able to observe their face and it was the second time she saw that person. Upon reaching closer to Mosul Street, she observed the deceased lying on the ground in a pool of blood and began to secure the scene until further assistance from the police arrived.

10. The witness in cross-examination testified that it was not common for persons in the area to dress in baggy $\frac{3}{4}$ pants and durags. The witness also indicated that Cemetery Street is usually busy.
11. Sergeant Brian Miller (hereinafter "Sgt. Miller") testified that on 17th July 2019, he was at the Crimes Investigation support office when Cpl. Ciau showed him the video footage for the incident that took place on 16th of July 2019. He stated that he had begun watching the video footage and noticed a male person walking from Cemetery Road from the direction of Euphrates Avenue and recognized the person to be Accused #1, entering the building on Cemetery Road wearing a red colour T-shirt. He stated a few seconds after he observed Accused #1 exit the same building with a black in colour firearm in his right hand, running across Cemetery Road in the direction of Mosul Street. Sgt. Miller testified that he had known Accused #1 for about 10 years, due to his routine police duties in Belize City. He would see him in the Lake Independence Area and also at an address on Freetown Road in Belize City. Sgt. Miller testified that he would see Accused #1 every other day whilst doing patrols across Belize City. He stated that he spoke with Accused #1 on numerous occasions, between 15-25 times. Before the video Sgt. Miller last saw Accused #1 on 3rd July 2019. He identified Accused #1 in EC 1 as the person seen in the footage in the red t-shirt.
12. Sgt. Miller was cross-examined. He accepted that he had not given his witness statement until almost 4 months after he had viewed the video footage. He denied that he gave that statement that far after viewing the footage because he was unsure of who the person in the red t-shirt was. He denied the suggestion that he told the Investigator that the man in the t-shirt merely resembled Accused #1. It was suggested to Sgt. Miller that he did not see Accused #1 every other day for 10 years. Sgt. Miller denied this. It was put to Sgt. Miller that Accused #1 was remanded in prison from 16th January 2013 to 29th November 2017, so he could not have been seeing Accused #1 for every

other day for 10 years. Sgt. Miller testified that he was unaware if that was true or not.

13. Sgt. Miller further testified in cross-examination that Accused #1 lived in his neighbourhood with a Rosalyn Flowers. He accepted that he did not mention that in his statement nor in his evidence in chief. Sgt. Miller testified that in EC 1 he was not sure what was on Accused #1's head, nor its colour but that he could make out his face.
14. Sgt. Miller was re-examined and testified that he viewed EC 1 on a big flat screen television when he made his identification, of better quality than the screen used at trial.
15. Inspector Isais Sanchez testified that he was contacted on 29th July 2019 by the Investigator to conduct an identification parade in respect of Accused # 1. He further testified that he had explained to Accused #1 that he intended to place him in an identification parade and explained its purpose and that he had a right to refuse to take part. Inspector Sanchez also testified that he informed Accused #1 that he could have someone on his behalf witness the process and Accused #1 requested that his sister Lorna Garnett be the witness on his behalf. He further testified that 8 male persons close to Accused #1 in age, height, complexion, and class of life were gathered for the identification parade. During the identification parade the witness, Police Constable Sherilee Sankey (hereinafter "PC Sankey"), after being guided as to the procedure, without hesitation, stated the person she saw in EC 1 running from the scene was in the line-up and called out the number card of Accused #1. She indicated that she was sure that that person was Accused #1. Inspector Sanchez testified that he informed Accused #1 that he was identified and asked him if he was satisfied with the manner the identification parade was conducted, to which his response was yes, he was satisfied and he placed his signature on the identification parade form stating this.
16. Inspector Sanchez was cross-examined. He accepted that most of the persons on the parade were older than Accused #1, some of them 16 years older. He indicated that he was not aware that a picture of Accused #1 was shared on a police WhatsApp blog. Inspector Sanchez denied that he pulled the curtain for PC Sankey to see Accused #1 before she identified anyone. He accepted that he told Lorna Garnett to remain quiet during the identification process.

17. The seventh live witness was PC Sankey who testified in examination in chief that on 16th July 2019 at about 4:45 pm she was doing covert surveillance and was walking on Cemetery Road, from the direction of Albert Street along with Detective Constable Erica Zuniga. She further testified that on reaching the corner of Cemetery Road and Euphrates Avenue, she noticed two male persons 20 feet away from her on the left-hand side of Cemetery Road. PC Sankey testified that her attention was drawn to the two male persons because they were looking around anxiously and suspiciously at the different businesses in the area. She further testified that she recognized one of the male persons who was wearing a grey t-shirt, grey $\frac{3}{4}$ cargo pants, red, white, and blue tennis shoes, and a black stocking to cover their dreaded hairstyle. She further testified that she identified the person as Accused # 2. She testified that she knew Accused #2 for 7 years prior to that date. She knew him from performing her official duties in the St. Martin's and Taylor's Alley area, where he would be hanging out. She said that she saw him almost daily. She said that she would be present while searches were being conducted on him and would be within 3 feet of him. She said that he frequented a "PIV base" in the area which was in front of her house. She said that she would speak to him about once per week. PC Sankey also testified that the last time she saw him was on 9th July 2019. This reference to the "PIV base" in detailing the witness's recognition evidence was admitted by the Court on the authority of the English Criminal Court of Appeal decision of *R v Caldwell (1994) 99 Cr App R 73*². This case held that even if recognition evidence comes from the police knowing a suspect from unsavoury connections, and there is no evidence that either Accused in this case has been involved in any gang related criminal activity, the Court has a discretion to admit it. In the Court's view its probative value far outweighed its prejudicial effect.

18. PC Sankey testified that the second male person wore a red t-shirt, camouflage $\frac{3}{4}$ pants and had a blue t-shirt covering his head, however, she could not recall his name but knew his face. She said that she had known him for about 15-20 years from the area where she lived. PC Sankey testified that she would see him for hours hanging out at the base in front of her home. She did not know where he lived but that his family lived in the St. Martins area.

19. The witness testified that on the day of the incident, she remembered Accused # 2 because he has a narrow face and a short beard, however, he had gained

² P. 77

weight after the last time she had seen him. She further testified that on 16th July, she had stopped at the corner of the street to play with her phone for a moment to get a better view of the two male persons and observed them for about 2 minutes. The witness further testified that she was able to observe both persons' entire faces and bodies with nothing obstructing her view, and further stated that traffic was low and that it was a sunny, hot day with clear skies. She further stated that the second person with a blue shirt over his head was suspicious because only persons engaged in construction work use that attire and there were no construction sites nearby.

20. Detective Constable Sankey further testified that on 17th July 2019 she went to the Crime Investigations Office and viewed the video footage of the incident on a desktop computer, and saw Accused #2 dressed in the same attire she had previously seen him in, walking past the establishment and immediately after the second male person, whom she knew by face entered the establishment and left running towards Mosul Street with what she thought to be a firearm in his right hand. She further testified that she could see clearly in the footage, Accused #2's face and clothing.

21. The witness testified that on the 29th of July 2019, she was informed by Inspector Sanchez that she needed to participate in an identification parade, in relation to the persons she saw on 16th July, and proceeded to inform the Inspector she had recognised Accused #2 but did not know the name of the other male person but would be able to identify him. She further testified that during the identification parade, she had indicated to Inspector Sanchez that the person holding card #4 was the person she had seen and confirmed it. The witness further identified the person in court as Accused #1.

22. In cross-examination PC Sankey testified that Cemetery Road at the time had minimal traffic. The witness further testified that in her report she mentioned she saw two brown complexion persons but agreed that Accused #2 was dark in complexion. She further testified that she did not place in any of her 3 statements that she had stopped to play with her phone to observe the two Accused. She accepted that she did not say in her statements that she observed both Accused for two minutes, but it was recorded that she said she saw them for one minute, and in her first statement she had not given a time at all. PC Sankey accepted that she gave her first statement 12 days after the incident and explained the delay because she was on holiday at that time. PC Sankey admitted that it is not recorded in her statement that Accused #1 frequented a

base next to her home. She accepted that in her statements that she had indicated that she had seen Accused #1 "several times". She accepted that though she knew Accused #1 for 15-20 years she could not say whether he had a scar or tattoo on his face, but he had a mark. PC Sankey also accepted that the last time she said that she saw Accused #1 in her statement was in June 2015. It was put to PC Sankey that Accused #1 was in prison during 2013 to 2017 and she indicated that she was unaware. She was asked if the same person she saw in June 2015 was the same person she saw on 16th July 2019, and she replied, "I cannot say for sure." PC Sankey when asked if she could see the red shirted person in EC 1' s face clearly, her response was, "somewhat".

23. The Investigator was the eighth and final witness for the Crown. He testified in evidence in chief that on 16th July 2019 at around 5:50 pm, he had received a report and proceeded to 42 Cemetery Road at the zinc attachment to the shop. He testified that he had observed the body of the deceased and he commenced inquiries. He remained at the scene to further canvas the area and noticed the surveillance cameras at the shop which were 10 feet away from the attachment. He further testified that he reviewed the surveillance camera and then requested the assistance of Cpl. Ciau to download the video footage. He had observed on the footage two male persons coming from the direction of Albert Street on Cemetery Road, where upon arrival in front of the attachment, one male person was observed as entering the building while the other stayed outside watching all directions. He testified that the second person he recognised as Accused # 2. The Investigator said that he knew Accused #2 for 2 years before the date of the incident from his routine patrols in the area. He testified that he had last seen him one week prior to the incident. The Investigator stated that most of the time he would see Accused # 2 on Cemetery Road either on Taylor's Alley, Pregnant Alley or the corner of West Street and Cemetery Road. He said that he would see him once every two weeks, he had previously searched and spoken with him.

24. The Investigator further testified that amongst his enquiries he put the report of murder to Accused #2 and cautioned him and he remained silent. He also indicated that he posted a picture of Accused #1 in a police WhatsApp blog. Accused #1 was later detained and told of the report and cautioned and he refused to give an interview.

25. The Investigator was cross-examined. The witness admitted that he gave his written statement more than four months after the incident. The witness

further accepted that he had used the police rogues gallery when there was no need to since he claimed to know Accused # 2, but that he checked the gallery to confirm the date of birth of Accused #2. The Investigator accepted that he indicated for the first time that there was a camera inside of the shop but it was blocked. He also stated that Sgt. Miller told him that the person in the video resembled Accused #1. The Investigator testified that the picture was posted before PC Sankey or Sgt. Miller gave their statements.

26. Mr. Banner firstly indicated that he wished time to make a no-case submission but later resiled from that position.
27. The both Accused after being given their 3 options chose to make an unsworn statement from the dock, but called no witnesses.
28. Accused #1 stated that he had no knowledge of this offence and was at his home at #89 Freetown Road with family members throughout the whole evening. He also stated that he does not know Accused #2 or PC Sankey. He further stated that he “was in prison from 2013 until 2017 November 29th.”
29. Accused #2 stated that he had no knowledge of this offence and at the time it was committed he was in Taylor’s Alley with his family members at about 3-8 p.m. He stated that he told the police of his alibi and witnesses in support, but they ignored him and beat him. He said that he did not know Accused #1 nor P.C. Sankey.
30. The parties gave closing addresses which were carefully considered by the Court.

THE LAW

31. The Court has derived great assistance from a decision of our Court of Appeal in ***Peter Augustine v R, Crim. App. 8/01*** in defining the crime of murder, 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)

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

- i. Jose Hilario Diaz is dead.
- ii. His death was caused by the acts of both Accused.
- iii. That the both Accused specifically intended to kill the deceased.
- iv. There was no legal justification for the killing of the deceased.
- v. That the both Accused were not legally provoked into killing the deceased.

33. This case involves consideration of the issue of joint enterprise as the evidence establishes only one principal and the Crown is saying that Accused #2 assisted and/or encouraged him. The Court finds helpful a recent decision of our Court of Appeal in *Eli Avilia Lopez and Anor. v R Crim. App. 22-23/18* which carefully considered the 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)*

34. The Court takes from this authority that the Crown must establish beyond a reasonable doubt to convict Accused #2 on the principle of joint enterprise the following:
- i. Jose Hilario Diaz is dead.
 - ii. The death of the deceased was caused by the principal without justification or provocation.
 - iii. Accused #2 provided some assistance or encouragement to the principal.

- iv. Accused #2 specifically intended to assist or encourage the unjustified and unprovoked killing of the deceased.
- v. There need not have been any formal plan and the fact of an agreement can be inferred from the circumstances.

ANALYSIS

35. The Court has directed itself that both 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 both Accused, and if there is any reasonable doubt the Court is duty-bound to acquit them.
36. 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.
37. The Court begins firstly with analysing 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)**³.

Case against Accused #1

i. Evidence that he is the shooter

38. The Court considers the case against each Accused separately.
39. The Crown has established that Jose Hilario Diaz is dead on the agreed evidence of Ms. Paz who identified his body and the evidence of Dr. Estradaban that he died from a gunshot wound to the face.

³ Para. 35

40. The case against Accused #1 is circumstantial in that no-one has given direct evidence that he shot the deceased. There is evidence, on the conjoint effect of P.C. Palacio and Mr. Ack's evidence, that the deceased's body was found sometime around 5:40-5:45 p.m. at the shop on Cemetery Road. The video footage in EC 1 shows a red-shirted person running out of the shop on Cemetery Road with an object in his hand at 5:30 p.m., taking into account the evidence of Cpl. Ciau that the timer on the footage was 13 minutes fast. The Court in this context considers the second question, did he cause the death of the deceased, or put more simply, is there evidence upon which the Court could be sure that he was the shooter. This resolves itself by a series of sub-questions.

A. Can the Court make its own identification from EC 1?

41. The Court would firstly wish to clarify the basis upon which it admitted EC 1. This was done on the conjoint effect of the common law and the provisions of the ***Electronic Evidence Act 2021*** (hereinafter "the EEA"). The Court accepts the common law test for the admissibility of video evidence as set out in the decision of the Supreme Court of Canada in ***R v Alexander Nikolovski [1996] 3 SCR 1197***, per Cory J for the majority:

"28 Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused." (emphasis added)

42. This jurisprudence has been adopted in the Caribbean in the Jamaican Court of Appeal decision of ***Randeano Allen v R [2021] JMCA Crim 8***⁴.

43. The *EEA* reads, where relevant:

"2... "electronic record" means a record ... stored by electronic means in an information system ...

"information" includes data, text, images, sound, codes, telephone communications, computer programs, software and databases; and

⁴ Paras. 38-40

“information system” means a system for generating, sending, receiving, storing or otherwise processing electronic records.

4. Unless evidence sufficient to raise doubt about the presumption is adduced, where a device or process is one that, or is of a kind that, ordinarily produces or accurately communicates an electronic record, the court shall presume that in producing or communicating that electronic record on the occasion in question, the device or process produced or accurately communicated the electronic record.” (emphasis added)

44. The Court in interpreting this section presumes that the National Assembly knows the common law when it is legislating⁵. In the Court’s view the intention of the National Assembly when passing section 4 of the *EEA* was to make electronic evidence more easily admissible and provide assistance by way of a presumption to overcome the accuracy requirement, the first step in *Nikolovski*, with regard to the adducing of electronic evidence. It is the Court’s view that by virtue of the definition section video footage on a DVR would be an electronic record stored in an information system, namely the DVR. Section 4 provides that for a device that **“is of a kind”** that ordinarily produces an accurate record the Court shall presume it produced an accurate record on the occasion in question unless there is sufficient evidence to cast doubt on that presumption.
45. In the Court’s view, it is a notorious fact of which it takes judicial notice, as defined in **Commonwealth Shipping Representative v Peninsular and Oriental Branch Service [1923] AC 191**⁶ that DVRs, which are a commonplace technological advancement, are devices which ordinarily produce an accurate record.
46. The evidence of Cpl. Ciau and Mr. Ack are that its video capacities were functioning normally, although the timing on the recording feature was off by 13 minutes. There was unchallenged evidence that the DVR was password protected and that Cpl. Ciau carefully retrieved the footage and reproduced it onto a copy, the best evidence rule having no applicability to film recordings on the authority of the English Divisional Court decision of **Kajala v Noble (1982) 75 Cr App R 149**. This is evidence, which in addition to the oral evidence of Cpl. Ciau that the device was not tampered with, or the file would have been corrupted, support the presumption that EC 1 is an accurate record of what the DVR recorded on 16th July 2019 on Cemetery Road.
47. There is the discrepancy between Cpl. Ciau and Mr. Ack regarding the time stamp when they viewed the footage together at the shop. The Court however

⁵ **Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591** at 649

⁶ At p. 212

prefers the evidence of Cpl. Ciau that the footage had the wrong time at the time of viewing at the shop as he is likely to have paid more attention to those details as he was specifically tasked to retrieve that footage and by his training would have been more likely to have an accurate recollection. The Court having considered the above, as well as its obvious relevance, admitted EC 1 into evidence, with no objection by the Accused.

48. To return to the question of whether the Court can use EC 1 to determine whether the man in the red shirt shown in it is Accused #1. *Nikolovski* has held that the Court is permitted to look at EC 1 and compare it with Accused #1 whom it has seen over 5 days of trial and determine after appropriate warning, and reminding itself that certainty to the standard of proof beyond reasonable doubt is required, whether they are one and the same person.
49. The Court is not satisfied on its own viewing of the footage that it is sure that the man in the red shirt is Accused #1. The man in the footage appears too far from the camera for this Court in EC 1 to make out his facial features to be sure that that person is Accused #1.
50. How then does the Court proceed to analyse the rest of the case against Accused #1? The Court has derived considerable assistance from the English Court of Appeal decision of ***AG's Reference (No. 2/02), [2003] 1 Cr.App.R. 21***. Though the decision spoke to photographs, the Court believes that it is equally appropriate to videos, per Rose LJ:

*"19. In our judgment, on the authorities, there are, as it seems to us at least four circumstances in which, subject to the judicial discretion to exclude, evidence is admissible to show and, **subject to appropriate directions in the summing-up**, a jury can be invited to conclude that the defendant committed the offence on the basis of a photographic image from the scene of the crime:*

*(i) **where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock (Dodson and Williams);***

*(ii) **where a witness knows the defendant sufficiently well to recognise him as the offender depicted in the photographic image, he can give evidence of this (Fowden and White, Kajala v Noble, Grimer, Caldwell and Dixon and Blenkinsop); and this may be so even if the photographic image is no longer available for the jury (Taylor v Chief Constable of Chester);***

(iii) where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene, thereby acquiring special knowledge which the jury does not have, he can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury (Clare and Peach);

(iv) a suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene, (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury...” (emphasis added)

51. The Court having already found that the image is insufficiently clear and not having the evidence available at (iii) and (iv) immediately above will then consider the evidence of Sgt. Miller and P.C. Sankey in the context of (ii), namely, if the witnesses know Accused #1 sufficiently well to recognise him as the man in the red shirt seen in EC 1.

B. Can the Court rely on Sgt. Miller’s identification of Accused #1 in EC 1?

52. The first step of this analysis requires the Court to determine whether Sgt. Miller 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***⁷, 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)

53. The Court found Sgt. Miller to be an unreliable witness whose credibility was very much in doubt. The Court came to this finding on the basis of several material inconsistencies and discrepancies in his evidence.

54. One of the largest was the discrepancy between his evidence and that of the Investigator, as to whether the former had said that the red shirted man in EC 1 was Accused #1 or resembled him. Sgt. Miller strongly refuted the suggestion that he said to the Investigator, “the person resembled Emmerson Garnett”. The Investigator gave this evidence in cross-examination:

“Q. And he told you and it is in your statement whereby “he recognized the second male person coming out of the attachment holding the firearm on his hand as **the resemblance of Emmerson Garnett**”

A. Yes.

Q. **Witness based on what Miller told you the second person resembled Emmerson Garnett?**

A. **Yes.** (emphasis added)

⁷ P. 298

55. This evidence raises the question of whether Sgt. Miller's is a qualified identification which poses serious dangers on the authority of the English Criminal Court of Appeal decision of *R v George [2002] EWCA Crim 1923*⁸.
56. There is next the inconsistency by omission where Sgt. Miller raised for the first time in cross-examination that there was a period where Accused #1 lived in his neighbourhood with a lady named Rosalyn Flowers who was a relative. This was obviously significant evidence where the point of his entire testimony was to ascertain whether he knew Accused #1 sufficiently well to identify him in EC 1. This evidence was not in his much-delayed statement given almost 4 months after he viewed the footage. There was no reference to that at all in his evidence in chief. The Court finds that if this evidence was true Sgt. Miller would have referenced it in his statement owing to its obvious relevance. This evidence raises serious doubts in the Court's mind as to the credibility of Sgt. Miller.
57. Then there is the issue of how long he knew Accused #1 for and the possibility that the latter was incarcerated for a significant period of that time. Sgt. Miller testified that he knew the Accused for 10 years and saw him every other day. Mr. Banner for the Accused early and up front put to the witness that he could not have seen him for that period because he was incarcerated for a number of years. Specific dates were given to the witness in cross-examination, and the most the witness could muster was that he was not sure if that was true or not, and that he did not know Accused #1's personal business. Now what is put in cross-examination is not evidence unless it is accepted but Accused #1 has mentioned this issue in his dock statement which the Court must consider, on the authority of a decision of our Court of Appeal in *Elmer Ax v R, Crim. App. 5/17*⁹.
58. The Crown did not make any attempt to rebut this suggestion which it could easily have done because specific dates of incarceration had been given, and a criminal record check could have been done. The question then must be whether there was no rebuttal because it could not have been rebutted. In this circumstance if there are doubts the Court must resolve it in favour of Accused #1. The Court accepts the dock statement that Accused #1 had been incarcerated from 2013 to 2017. In that regard this places a cloud over the credit of Sgt. Miller.
59. In these premises, and looking at these inconsistencies and discrepancies cumulatively, the Court having found that it is not satisfied so that it is sure Sgt. Miller is an honest and reliable witness, the Court goes no further to consider whether he is mistaken in his identification, as the Board said in

⁸ Paras. 34-35

⁹ Paras. 50-63

Beckford that question is only dealt with **if** the Court is satisfied so that it is sure that the witness is honest.

60. The Court answers the question under this rubric in the negative, that it cannot rely on the identification of Sgt. Miller.

C. Can the Court rely on P.C. Sankey's identification in EC 1 and/or her identification at the scene?

61. The Court similarly begins its analysis of P.C. Sankey's evidence by asking itself the question whether she is an honest and reliable witness.

62. The Court has found as with Sgt. Miller that her credit and reliability are highly questionable owing to the material inconsistencies and discrepancies in her evidence. The Court also found bits of her evidence implausible and at times raised more questions than answers.

63. The Court found it difficult to accept that this witness, who was a police officer saw two suspicious-looking individuals near business places and was so troubled by their presence that she played with her phone to observe them better, simply left them there without alerting any other police officer, using said phone, to a possible crime that may be about to be committed and got on her bus and went home. The Court found this evidence, in the sequence given by this witness, as wholly implausible.

64. The first material inconsistency by omission in the witness's evidence was the evidence of her playing with the phone. This was crucial evidence supportive of a positive identification. It established that the witness did not merely pass Accused #1 in the street but bought time to study his face with the artifice of the phone. The witness gave 3 statements and mentioned this fact in none. This evidence has the flavour of a recent fabrication.

65. Another material inconsistency was with regard to how she knew Accused #1. She testified at trial that she knew Accused #1 for 15-20 years. She said for a period of that time he frequented a PIV base opposite her home for hours. This is obviously vital recognition evidence which would significantly bolster her claim of knowing Accused #1. P.C. Sankey omitted this evidence from her 3 statements, and in fact, accepted that in her statement she had merely said that she saw Accused #1 "several times". This evidence again has the flavour of a recent fabrication. This is particularly when combined with her acceptance of the fact that she did not know whether Accused #1 had a tattoo or a scar on his face and that if she had known him for 15-20 years she would have known.

66. There is the similar issue with the incarceration of the Accused between 2013-2017 and her claim to have searched him in 2015 which was the last time she allegedly saw him. The Court having accepted the Accused #1's dock statement does not accept her evidence of searching him in 2015.
67. There are other material inconsistencies dealing with the length of time that P.C. Sankey had Accused #1 under observation on 16th July 2019. She would have given no estimate in her first statement and later given the estimate of one minute in one of her other statements, and at trial in examination in chief she said two minutes and in re-examination went back to one minute. The Court notes in this regard that P.C. Sankey is not a lay witness, but a police officer from whom more precision in her evidence would be reasonably expected.
68. The Court finds that it is not satisfied so that it is sure that P.C. Sankey is an honest or reliable witness. In that regard, there is no need to go on to determine if the witness is mistaken.
69. The Court answers the question in this rubric in the negative that it cannot rely on the identification evidence of P.C. Sankey either of EC 1 or on the day of 16th July 2019.

DISPOSITION

70. The Court is unable to rely on EC 1 in relation to Accused #1, the evidence of Sgt. Miller and P.C. Sankey to identify Accused #1 so that it is sure that he was the shooter at the shop. There is no other evidence implicating Accused #1. The Crown's case fails at the second element of the offence of murder on the issue of identity. There is no evidence sufficient to consider a conviction, following the reasoning process of *Salazar*, and there is consequently no need to go to the case for the Accused. The duty of the Court is to find Accused #1 not guilty of the charge of murder in the indictment. The Accused is discharged.

Case against Accused #2

71. The case against Accused #2, as indicated above, is based on the principle of joint enterprise. The question the Court must ask itself in these circumstances is whether there is evidence to satisfy it so that it is sure that Accused #2 was part of a joint venture which had as its specific intention the murder of the deceased and that he did acts which assisted and/or encouraged the completion of that objective.
72. This resolves itself into a series of sub-questions.

A. Can the Court make its own identification from EC 1 to determine whether Accused #2 was in a joint enterprise to kill?

i. The joint enterprise

73. The Court is of the view that on the basis of the circumstantial evidence of Mr. Ack and P.C. Palacio finding the body of the deceased with a gunshot wound at around 5:40 p.m. on Cemetery Road at the shop, which was not challenged, and EC 1 showing at around 5:30 p.m. a red-shirted man running from the shop with an object that looked like a gun, it is satisfied so that it is sure that the man in the red shirt in EC 1 shot and killed the deceased.
74. There is a person in grey who appears on the scene in EC 1. That person walks down and then up Cemetery Road looking in nearby shops and nods his head and points his finger. The red-shirted man then emerges into the frame and the grey-shirted man points again towards the red-shirted man. The grey-shirted man appears to nod again towards the man in the red shirt as the latter enters the shop. The grey-shirted man stands outside of the shop smoking a cigarette and circles back to look inside of the shop. When the red-shirted man runs outside of the shop the man in grey nods towards him. They both walk off in the same direction, close together, while other persons around are scampering from the scene. The man in grey then walks calmly and deliberately in another direction.
75. The Court finds that the grey-shirted man was in a joint enterprise with the red-shirted man that had as its specific intention the killing of the deceased, and the grey-shirted man assisted this enterprise by acting as a lookout.
76. 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*¹⁰ and *Jeremy Harris and Anor. v R, Crim. Apps. 1-2/04*¹¹ :

“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.”

¹⁰ Para. 22

¹¹ Para. 14

77. The Court finds, using its knowledge of human experience and on a consideration of all the evidence in EC 1, that the act of looking into the nearby business places at the shop was in fact scouting being done by the grey-shirted man for the red-shirted man. The Court also finds that the acts of pointing and nodding towards the red-shirted man entering the shop were acts referable to the grey-shirted man directing the red-shirted man to the target within the shop. The standing outside to the corner by the grey-shirted man while the red-shirted man is in the shop, the Court finds is the former acting as sentinel. The Court finds that the non-reaction by the man in the grey shirt while all other persons were scampering in the footage, which the Court finds on all the circumstantial evidence is when the fatal shot is fired, is referable to the fact that things seemingly went to plan. This finding is reinforced by the final nod that the grey-shirted man gives to the red-shirted man as the latter is escaping the shop. The Court finds that this final nod is evidence of approval of what was done in the shop by the red-shirted gunman. The interaction between them after the shooting and the slow deliberate walking away by the grey-shirted man strikes the Court as the movement of a person who just had everything go according to plan, there was no panic or frenzy shown by him leaving the scene, which the Court took as that there was no withdrawal by him from the enterprise.

ii. Intention to kill

78. The Court finds that the principal, the red-shirted man specifically intended to kill, and the grey shirted man assisted or encouraged that with the intention to kill.

79. 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)*

80. The Court has looked at all the evidence and divines the specific intention of the principal to kill from the following:

- i. There was one shot fired into the deceased and it was fired into the head of the deceased. This shot was fired at such close range that tattooing was observed. The Court finds this is some, though not conclusive, evidence of intention to kill.
- ii. The very brief time which the red-shirted man spends in the shop, 16 seconds, was suggestive of a targeted hit considered in conjunction with the other evidence. The Court finds that with the brief time, it concludes that the red-shirted came to shoot the deceased and leave.
- iii. The Court finds that robbery was not the motive as the photos show, DD 4 and 9 show the pouch of the deceased, where as a matter of human experience vendors would usually keep their money, appears unopened on his waist.

81. The Court finds that the very brief period of 16 seconds that the red-shirted man remained in the shop negated any realistic possibility of self-defence or provocation arising. In any event, no weapon was found on the deceased or in his vicinity when his body was found which can raise the spectre of self-defence.

82. The Court finds the specific intention of the grey-shirted man to kill was his approving nod as the red-shirted man was running out of the shop, after the former was looking into the shop and was seeing what was transpiring, and his calm exit from the scene while passersby seemed to have been scrambling for their lives.

83. This then leads to the next question for the Court’s consideration. Is the man in the grey shirt Accused #2?

iii. Identification from EC 1

84. The Court first asks itself, following the guidance in *AG's Reference*, can it look at Accused #2 whom it has seen over 5 days of trial and compare it against the footage in EC 1 and make its determination that he is the grey-shirted man.
85. 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.”¹²
86. The Court reminds itself that another reason for special caution is that experience shows that it is easy to be convinced but mistaken about the identification of others. This applies to the Court as it does to any witness making an identification. The identification of a person in the course of daily life can be difficult. The Court may be convinced that it has seen someone it knows well in the street, or passing in a car, but it turns out it was misled by the similarity in appearance between two completely different people. The Court notes that it is not being asked to recognise someone it knows. The Court is being asked to make a comparison between images and the physical features of someone who was until this trial a stranger. The Court notes that it does not have the advantage of having a line-up of men of similar description.
87. The first question the Court needs to consider is whether these images are of sufficient quality to make any comparison with Accused #2. The Court is of the view that they are. The footage is in daylight, the grey-shirted person comes close enough to the camera that his facial features can be clearly made out, and there is nothing obstructing a view of his face at several points in the video. The grey-shirted person is on the video for approximately 38 seconds which in the Court's view provides ample time for a proper identification to be made.
88. The Court is satisfied so that it is sure that the grey-shirted person in EC 1 is in fact Accused #2. The Court does so on the facial similarities between the grey-shirted man and the Accused, as both have bulging eyes and the contours of their face are the same. They are both of the same complexion and appear to be the same height and build. The video shows a full clear view of the face of the grey-shirted person at two points in the video as opposed to the various side views at other points. The closeness of the grey-shirted person to the

¹² Para. 149

camera, and the lighting and lack of obstruction, allow a proper facial comparison to be made, and the Court having seen Accused #2 over 5 days of trial is sure that it is him.

89. The Court having found that Accused #2 is the grey-shirted person who was in the joint enterprise to kill the deceased with the red-shirted shooter there is no need to consider the evidence of P.C. Sankey whose evidence the Court has found to be unreliable. Nor does it need to consider the evidence of the Investigator and his purported identification of Accused #2 from EC 1 because as *Nikolovski* referenced the Court places its reliance on the unbiased, untainted medium of the video camera.
90. The Court having found evidence that may result in a conviction then, following the guidance in *Salazar*, considers the case for the Accused as set out in the unsworn statement of the dock. He stated that he had an alibi in that he was with his family at Taylor's Alley at the time of the murder. Mr. Banner for Accused #2 expressly indicated that he was not raising the issue of good character, so the Court did not consider the issue. The Court rejects the dock statement on the basis of the strength of the evidence in EC 1 on the Crown's case, on the authority of a decision of the Privy Council in the Dominican case of *Bally Sheng Balson v The State [2005] 4 LRC 147*¹³.

DISPOSITION

91. The Court having considered all the evidence and the cases for the Crown and the Accused is satisfied so that it is sure of the guilt of Accused #2. Accused #2 is found guilty of murder as charged in the indictment and the matter is adjourned for a separate sentencing hearing as advised by the CCJ in *Linton Pompey v DPP [2020] CCJ 7 (AJ) GY*¹⁴.

DATED 14th JULY 2023

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

¹³ Para. 38

¹⁴ Para. 32