IN THE COURT OF APPEAL OF BELIZE AD 2012
CRIMINAL APPEAL NO 22 OF 2009

RYAN HERRERA Appellant

v

THE QUEEN Respondent

AND

CRIMINAL APPEAL NO 23 OF 2009

LINSDALE FRANKLIN Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Brian Alleyne	Justice of Appeal

H E Elrington SC for the appellant Ryan Herrera.
A Sylvestre for the appellant Linsdale Franklin.
C Vidal, Director of Public Prosecutions, for the respondent.

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6 June 2011 and 28 March 2013.

SOSA P

Introduction

[1] At about 4.30 or some minutes before 5.00 on the afternoon of the Ides of March 2007, on arriving at the house in the village of Lord's Bank, Belize District,

which he shared with Eldon (formerly Victor) Chiac and the latter's common law wife, Cruz Sho, aged 20 ('the deceased'), Alton Flores was greeted by an unlocked front door, the gruesome sight, in the hallway, of a bloody towel and floor and what to him was the sound, coming from one of the rooms, of a young woman gasping for breath. Mr Flores retraced his steps out of the house and called the police, who accompanied him back to the house, where together they found the lifeless body of the deceased in one of the rooms. In due course of time, the police arrested and charged Ervin Franklin ('Ervin'), Ryan Herrera (Ervin's 19-year-old cousin) and Linsdale Franklin (Ervin's uncle, who was 21 at the time of trial), in that order, with the murder of the deceased but this charge was subsequently withdrawn as regards Ervin. Herrera and Linsdale Franklin ('the appellants') went on trial on an indictment for murder on 17 November 2009 and were, on 7 December 2009, both convicted of murder. On 11 December 2009, both were sentenced by the trial judge, Arana J, to imprisonment for life. The appellants appealed to this Court against their convictions and their appeals were dismissed on 6 June 2011, when the reasons for judgment given below were promised.

The Crown evidence

[2] The only evidence implicating the appellants adduced by the Crown was that of Ervin, who was about 17 years old on the day of the killing and against whom the charge of murder had previously been withdrawn under an immunity-for-testimony agreement entered into between him and the Director of Public Prosecutions on 11 December 2007, more than eight months after he was first remanded in custody ('the immunity agreement'). He gave evidence that the appellants (with whom he had grown up) met him and walked with him to his home in Lord's Bank (the home of his mother, as was to become clear in cross-examination) at about 11 pm on 14 March 2007, when they told him of a 'money move' they had for him. His reply to them was, however, that he did not need any 'money move' as he had a job. They went from his house to the house of the appellant Herrera's sister, on the back verandah of which he again told the appellants that he did not wish to go on the 'move'.

[3] Ervin further testified that at about 7.30 am on 15 March 2007 the appellants returned to his house, while he was watching television and eating, and invited him to go fishing with them, as a result of which he accompanied them to a 'sand pit', called Jacuzzi Pond, on the way to which they stopped at an abandoned house and smoked 'weed', ie marijuana.

[4] After they had all been fishing for about half an hour, the appellants left saying that they would be back. He saw them walking through the pine ridge towards a green concrete bungalow. They returned after an hour had elapsed, saying they wanted to show him something. He went with them to the green bungalow, where, upon entering, he saw a girl on the floor of the hall with duct tape over her mouth and her hands tied together behind her with what he referred to as both white string and wire.

[5] Ervin claimed in his evidence to have 'slip [the duct tape over the deceased's mouth] a little bit' and asked her what had happened. He went on to say, without objection on the part of defence counsel, that she told him that 'the fat one', whom he took to be the appellant Franklin, had tied her up, whereupon the appellant Franklin 'boxed' her. It was also the testimony of Ervin that at this time the appellant Herrera was hitting the deceased on the back with an orange handled 'hag' saw. (The evidence of other witnesses is to the effect that they saw an orange handled machete on a table in the house on arriving there later that day.)

[6] There followed, according to Ervin's evidence, a search of the house by the appellants which yielded 'a couple bags' which 'we … gather in the hall'. The appellant Franklin thereafter locked both the front and back doors of the house and took the deceased to 'the bedroom on the left', where, according to the evidence of Ervin to which no objection was raised, the deceased agreed to engage in sexual intercourse with the appellant Franklin (but begged that her life be spared) and there was, in fact, sexual intercourse between the two. Ervin's evidence was that he stood at the door and saw 'everything', including a further act of sexual intercourse, this time between the appellant Herrera and the deceased.

[7] The deceased was then, according to the testimony of Ervin, taken by the appellant Herrera to have a bath. Once she had (having first been untied) bathed, the appellant Franklin took her to 'another room' which was 'at the right hand side' and in which all the curtains had been previously 'burst open'. After Ervin and the appellant Herrera joined them in the well-lit room, the appellant Franklin told the appellant Herrera 'that he was the last one with the woman' and further told him 'to go for a knife or a fork'. It is a necessary inference from the evidence of Ervin that the appellant Herrera then left the room, given the further testimony that the latter returned with both a knife and a fork, and, after turning over the deceased, who was by this time tied up again and on a bed, proceeded to stab her in the neck with the fork, and then, using the knife, to stab her in the belly and slit her throat. The deceased coughed once or twice and then 'just laid on the bed'.

[8] The appellant Franklin thereupon instructed the other two as to which of the bags each was to carry and all three left the bungalow through the back door.

[9] The evidence-in-chief of Ervin as to what was said by the appellant Franklin to the appellant Herrera just before the infliction of injuries by the latter upon the deceased came in two parts. The first part, in which Ervin attributed to the appellant Franklin the statement already referred to above, ended when Ervin said that the appellant Herrera came back with a knife and a fork and prosecuting counsel asked him to say '<u>what happened</u> after he brought the knife and the fork'. [Emphasis added.] In reply to that question, Ervin proceeded to describe only <u>the actions</u> taken by the appellant Herrera using the knife and the fork. Later in the evidence-in-chief, however, prosecuting counsel took Ervin back to the topic of what the appellant Franklin had <u>said</u> to the appellant Herrera before the infliction of injuries, reminding him specifically that the appellant Franklin had told the appellant Herrera that he had been the last one with the deceased. Thereupon, without any prodding, Ervin attributed, by necessary implication, the following words to the appellant Franklin:

> 'So then do weh you have fuh do …'.

Ervin then went on to volunteer his own interpretation of that instruction of the appellant Franklin. The whole relevant exchange, including, for the sake of clarity, the words just quoted, was as follows:

> 'A. So then do weh you have fuh do which in other words means that eh told ah to gone get the knife and the fork.
> Q.. Linsdale told Ryan what?
> A. To go and get the knife and the fork.
> Q. You said something else.
> A. Linsdale told him do weh you have to do. Weh that means just kill the lady. You done have the knife and the fork.'
> (Emphasis added.)

[10] According to Ervin's evidence, he and the appellants were passed by a cousin of his in a red truck as they walked along on their way back from the green bungalow to an area where a coco plum tree stood. They left three of the stolen bags, which were about six in number, under that tree and proceeded to his mother's house in Lord's Bank, where he left the appellants on his verandah and went in to take a bath. On his return to the verandah after having bathed, the appellants were gone, and so were all but one of the three bags. He went to the home of the appellant Herrera's sister with the bag intending to leave it there; but he decided not to do so when, on his arrival there, he did not find her. With this bag, which contained clothing and a pair of boots, he later left for the home of his girlfriend in Orange Walk Town.

[11] Ervin said that he was arrested and charged for murder after the police found him with the bag in an abandoned house in Orange Walk Town.

[12] Mr Arnold SC, experienced counsel for the appellant Herrera, subjected Ervin to thorough and rigid cross-examination. Counsel wasted no time getting to the matter of the immunity agreement. He suggested to Ervin that the reason he had accepted an offer of immunity was that he 'wanted to be released from jail', the answer to which suggestion was that that was only one reason, the other being that he, Ervin, 'didn't do the crime', a reflection no doubt of his position that he inflicted no injuries on the deceased. (As he was to say later in cross-examination, he wanted to

make it known that 'I never do no murder'.) He admitted that he had given a statement under caution to the police before being remanded in custody (on 17 March 2007, as it later emerged), a copy of which statement he had received from Crown counsel on the day before he was called into the witness-box. While under remand and awaiting trial in prison, he had given a second statement (on 5 October 2007, as it later transpired) as part of the immunity arrangement which was later formalised in the immunity agreement.

[13] Mr Arnold was evidently content with availing himself only of the opportunity to cross-examine Ervin on the statement given under caution to the police. He certainly took no steps to put it in evidence. In the pertinent portion of his cross-examination, there was a general admission on the part of Ervin that he did not in the statement under caution tell the police 'everything'. In particular, he admitted, that that statement did not say (a) that he entered a green bungalow; (b) that he saw two persons raping a female in that bungalow; (c) that he saw someone cutting that female's throat and (d) that he saw someone stabbing a woman with a fork.

[14] On the other hand, Ervin maintained, despite counsel's suggestions to the contrary, (a) that his second statement to the police was not a concoction produced to get himself off the murder charge; (b) that the reason he had to take a bath on returning home from the scene of the killing was not that it was important to wash away blood on his clothes and body; (c) that he had seen the appellant Herrera enter a green bungalow; (d) that he had seen the appellant Herrera stab a female person with a fork and (e) that he had seen the appellant Herrera cut the throat of the female person.

[15] Under cross-examination by Mrs McSweaney McKoy, counsel for the appellant Franklin, Ervin maintained, notwithstanding the suggestions of counsel to the contrary, (a) that he and the appellant Franklin did have a close relationship at the material times; (b) that he did see the appellant Franklin enter a green bungalow on the day of the killing and (c) that he did hear the appellant Franklin tell the appellant Herrera to go for a knife or a fork.

[16] The Crown further adduced the evidence of Inspector of Police Hilberto Romero, who testified to having taken Ervin on 5 October 2007 to the Belize City office of the Crimes Investigation Branch of the Police Department and to having proceeded thereafter to Lord's Bank Road, Belize District, taking Ervin with him. They continued as far as Lord's Bank, where, near a tree in a pine ridge, he found three bags, viz two knapsacks and a carry-on bag. He took possession of these bags and carried them to the Queen Street Police Station, where he labelled them and handed them over to the investigating officer, a Corporal Neal. Three bags were produced and shown to Inspector Romero in court and identified by him as the three bags which he found at the relevant time and place. Of these three bags, one was a grey and red knapsack, another a grey and black knapsack and the other a green carry-on.

[17] Inspector Romero gave further evidence-in-chief to the effect, that after doing the different things mentioned in his evidence, he recorded a statement made by Ervin in the presence of his mother and a Justice of the Peace. (This statement, he explained in cross-examination, was an open witness statement).

[18] Eldon Chiac, who (as indicated above) had been the common law husband of the deceased, also testified as a Crown witness at trial, touching on, amongst other things, the items missing from the house he was sharing with Mr Flores and the deceased on the day of the killing. His evidence in this regard was that 'two black pair jungle boots' and a grey and red knapsack were missing. He further said in evidence that on 19 March 2007 he attended at the Queen Street Police Station in Belize City, where the police showed him two black bags which he was able to identify as items that had been in his house prior to the date of the killing. One of the bags contained clothing that he had placed in it.

[19] Mr Flores was recalled by the Crown to give further evidence after Inspector Romero had testified. He was shown a grey and black 'kit bag' which he identified as his property.

The appellants' unsworn statements from the dock

[20] Each appellant gave an unsworn statement from the dock and refrained from calling witnesses. In his statement, the appellant Herrera advanced a defence of denial, claiming to know nothing about 'this incident'. The appellant Franklin, for his part, placed himself at his grandfather's house, his own home and an unspecified location on Police Street (smoking marijuana and drinking Guinness stout at the last of these places) at different times between about 10 am and about 5.30 pm on 15 March.

The grounds of appeal

[21] Mr Elrington SC, on behalf of the appellant Herrera, was content to adopt and rely upon the second of the following two grounds of appeal argued by Mr Sylvestre on behalf of the appellant Franklin:

> '(a) The learned trial judge failed to properly and satisfactorily direct the jury on joint enterprise.
>
> (b) The conviction is unsafe as the sole evidence against the appellant was that of an accomplice given as a consequence of an immunity agreement with the Director of Public Prosecution (*sic*).'

The arguments on behalf of the appellant Franklin

(a) <u>Joint Enterprise</u>

[22] Mr Sylvestre directed the attention of the Court to the following passage in the summing up:

> 'Also on the point of specific intention, I must tell you a word about joint enterprise. The prosecution's case is based on what Ervin Franklin is saying to you that these two defendants Linsdale Franklin and Ryan

> Herrera acting together committed the offence of murder. Where a criminal offence is committed by two or more persons, members of the jury, each of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit this crime, they are each guilty.
>
> The words "plan" and "agreement" do not mean that there has to be any formality about it. 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 or a wink or a knowing look. An agreement can be inferred from the behaviour of the parties. The essence of joint responsibility for a criminal offence is that each defendant shared the intention to commit the crime and took some part in it however great or small so as to achieve that aim.'

He sought to highlight what he considered to be its shortcomings by juxtaposing it in his Skeleton Argument with the following extract from the 2001 edition of Archbold, Criminal Pleading Evidence and Practice, §19 – 24:

> 'A secondary party is guilty of murder if he participates in a joint venture realising that in the course thereof the principal might use force with intent to kill or to cause grievous bodily harm, and the principal does kill with such intent; but if he goes beyond the scope of the joint venture (ie does an act not foreseen as a possibility), the secondary party is not guilty or murder or manslaughter …'

[23] He reminded the Court by reference to section 17 of the Criminal Code, that the mens rea of murder in Belize is an intention to kill and went on to submit that what was necessary at trial was for it to be proved that the appellant Franklin acted in concert with the appellant Herrera with the specific intention to cause death.

[24] There is discernible here a suggestion that the trial judge omitted adequately to direct the jury as to the need, even in the context of criminal liability for murder under the principle of joint enterprise, for mens rea, in the form of an intention to kill,

to be established on the evidence. This need is a real one as the Court (Rowe P, Mottley and Sosa JJA) was at pains to point out in *Sho and Cal v R*, Criminal Appeals Nos 19 and 20 of 2000, at page 9 of the judgment. The suggestion of counsel is, however, baseless and must emphatically be rejected. The relevant need was, in the view of the Court, fully brought to the attention of the jury in the following passage (to be found at page 504 of the record):

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

[25] No reasonable jury could have been in any doubt that, in speaking of 'the intention I have mentioned', the judge was referring to what she had said, just moments earlier (page 502 of the record), in the following passage:

> 'You must not convict Linsdale Franklin and Ryan Herrera unless you are sure that when they committed this act, they each intended to kill Cruz Sho.'

[26] Mr Sylvestre's suggestion of inadequacy in the direction of the trial judge with respect to the issue of intention to kill was linked, in his submissions, to what he perceived to be a material discrepancy in the evidence of Ervin as to the role of the appellant Franklin in the events which unfolded in the house of the deceased on the fateful afternoon of 15 March 2007. Counsel argued that Ervin's evidence resulted in two versions of the role of the appellant Franklin which were at variance with one another. One the one hand, so went the contention of Mr Sylvestre, there is the version according to which the appellant Franklin told the appellant Herrera to go for a knife or fork and the latter appellant, having complied with that instruction, turned over the deceased on the bed and proceeded, without further instruction or prompting on the part of the former appellant, to stab the deceased on the neck with the fork and in the belly with the knife, and, finally, to slit her throat (also with the knife). On the other hand, said counsel, there is the version according to which the appellant Franklin's sole instruction to the appellant Herrera was to 'do weh you have

to do'. Expressing regret that counsel for the appellant Franklin at trial did not object to Ervin's offer to the jury of his own interpretation of that instruction, Mr Sylvestre said that the interpretation so offered by Ervin was 'just kill the lady'.

[27] The Court is unable to accept Mr Sylvestre's efforts artificially to compartmentalise relevant portions of the evidence of Ervin in this way. Such evidence should, and can only, be viewed as one whole; and, so viewed, it gives a single unconfusing version of the role of the appellant Franklin in the events that took place in the home of the deceased immediately before she was fatally injured. That version has already been given above in the Court's description of the evidence adduced by the prosecution at trial. To repeat it for the sake of convenience, however, the appellant Franklin first of all said to the appellant Herrera, as if by way of reminder, 'that he was the last one with the woman'. Then came the instruction 'to go for a knife or fork'. The appellant Herrera having returned with a knife and a fork, the further instruction of the appellant Franklin was, 'So then do weh you have fuh do …' The Court sees no reason whatever to treat this latter portion of the evidence of Ervin as constituting a separate version of what the appellant Franklin had to say before the alleged stabbing of the deceased. It seems abundantly clear to the Court that the reason why this portion of the evidence was given at the point when it was given is simply that Ervin, when asked to say 'what <u>happened</u> after he [the appellant Herrera] brought the knife and the fork' [emphasis added], thought he was being asked what action, if any (rather than what words), followed.

[28] The Court would here emphasise that, while it agrees that it is regrettable that Ervin's proferred interpretation of the instruction 'do weh you have fuh do' gave rise to no objection, it needs to be noted that 'just kill the lady' was not the sole interpretation put forward by him. As the Court has already highlighted above in describing the evidence at trial, moments earlier he had said:

> 'So then do weh you have fu do which in other words mean that eh told ah to gone get the knife and the fork.'

This alternative interpretation, which the Court finds difficult to understand, is certainly not as adverse to the appellant Franklin as the one that was given a little

later. Be that as it may, however, the instruction to do what you have to do, could hardly, given the context, have been understood by a reasonable jury to mean anything but what the trial judge herself obviously took it to mean, ie that the deceased was to be killed with the knife or the fork or both. In *Gilroy Wade Jr and others v The Queen*, Criminal Appeals Nos 28, 29 and 30 of 2001 (judgment delivered on 28 June 2002), one of the appellants, Baptist, was part of a group of three young men who rode up (on bicycles) to another group of young persons, amongst which was one White, gathered together by a gate. After some words had been exchanged between the members of one group and those of the other, Baptist was asked by a member of his group to hand over a gun which he (Baptist) was holding. Complying with the request, Baptist said, 'Do what you have to do and mek we roll', whereupon the recipient of the gun used it to shoot White dead. Rejecting the contention of counsel for Baptist that his handing over of his gun to a companion could be construed as a withdrawal from the joint enterprise, this Court said, at para 31 of its judgment:

> 'We would note that when Baptist handed over the weapon, his parting words were - "Do what [you] have to do and mek we roll". We would suggest that far from withdrawing from the enterprise, he was on the contrary very much involving himself in its successful completion.'

In the present case, the Court is similarly of the view that the instruction in question was a straightforward and unambiguous direction to kill the deceased, which would stand to be construed as such by any reasonable and properly directed jury.

[29] Since the Court does not for a moment accept Mr Sylvestre's contention that there was this alleged 'discrepancy' or 'variance' in the evidence of Ervin, it is, strictly speaking, not essential to go on to consider his submission that such 'discrepancy' or 'variance' rendered it necessary for the judge to direct the jury on joint enterprise in the manner suggested by him. Suffice it to say that, in the opinion of this Court, the judge properly directed the jury on joint enterprise, paying due regard to the particular circumstances of the case before her. The evidence adduced by the Crown indicated that there was a joint enterprise and that, once the deceased had been forced to bathe and taken into the 'room on the right hand side' (at the latest),

its purpose, whatever it may originally have been, was none other than to kill the deceased. The appellant Franklin instructed the appellant Herrera to go for a knife or a fork. The appellant Herrera went for both. The appellant Franklin next told him to do what he had to do. The appellant Herrera stabbed the deceased and slit her throat. The appellants and Ervin gathered up the crime fruits and went merrily on their way.

[30] The judge directed the jury on joint enterprise in a manner similar to that approved of by the Privy Council in *Brown and Isaac v The State*, Privy Council Appeal No 9 of 2002, an appeal from the Court of Appeal of Trinidad and Tobago. That was a case in which the main issue as regards joint enterprise was as to whether or not there had been a plan to commit murder, plain and simple. It thus stood in sharp contrast to the class of case in which the purpose of the joint enterprise is to commit a particular type of crime but one of the parties to the enterprise goes on to commit another, more serious, type of crime. Delivering the judgment of the Board, Lord Hoffmann said, at para 8:

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

extends joint enterprise liability from the paradigm case of a plan to murder to the case of a plan to commit another offence in the course of which the possibility of a murder is foreseen.'

At para 13, Lord Hoffmann, having quoted from the directions of the trial judge, further said:

'[Counsel for Isaac] says that the direction was insufficient because it did not explain that if there was no common intention to murder, foresight that a murder might be committed was needed to convict the party who did not kill. Instead, the judge gave the jury only the plain vanilla version of joint enterprise: a plan to commit the actual offence charged. Thus the jury were not invited to consider what might have been the position if, as was possible, the plan had been only to frighten or assault the victims and one of the accused had then unexpectedly shot them.'

The learned Law Lord went on to say, at para 14:

'In their Lordships' opinion, the judge was well advised not to invite the jury to speculate upon what might have been the common intention of the accused if they had not planned to kill. It was sufficient to tell them that, in order to convict, there had to have been such a plan. That might have been favourable to the accused in the sense that it did not allow the jury to convict on the basis of some other plan accompanied by foresight of the possibility of murder. It excluded the *Powell and English* extension. But there was no evidential basis for the existence of some other plan. Of course it was possible that the accused had come pursuant to a plan to frighten or beat up. But these were theoretical possibilities. On the facts as the jury must have found them, there was no reason to suppose that both accused had not intended to do what they actually did. The facts were quite different from the common case in which the object of the expedition appears to have been to commit robbery, burglary, rape or some other crime. In such

> cases, there is no compelling inference that there must also have been a plan to kill. The question therefore becomes one of foresight that one of them might kill. But in this case, while it is of course possible that there may have been some other plan, the evidence does not suggest any other than murder. In such circumstances, their Lordships think it is right to instruct the jury simply that they must be satisfied that there was indeed a common intention to murder. It would only have confused them to add that in some cases such an intention may be unnecessary. Their Lordships do not therefore accept that the direction on joint enterprise was inadequate.'

[31] In the instant case, the fact that lesser crimes than murder were undoubtedly committed in the house of the deceased on the day in question cannot detract from the fact that, while it is impossible to tell exactly when it was made, there was, by the time the fatal injury was inflicted upon the deceased, an agreement between the appellants to murder her. In the view of this Court, therefore, this was a case, like *Brown*, in which it was appropriate for the trial judge to give to the jury no more than the 'plain vanilla version of joint enterprise' in her directions.

[32] Counsel for the appellant Franklin submitted that the judge did not relate the law of joint enterprise to the evidence. For the reasons just given, the Court does not agree with counsel. The direction on joint enterprise was well tailored to suit the evidence adduced at trial. Counsel commended as more apposite, in view of the suggested 'discrepancy' or 'variance', certain directions reproduced by him from the judgment of the Privy Council in *Sookram v The Queen* [2011] UKPC 5 (23 February 2011). As already stated above, the Court does not agree that there was in this case any such 'discrepancy' or 'variance' as is suggested by counsel. The Court would further state that, having read that judgment, it respectfully echoes the remark of Lord Brown, at para 25, that 'one could hardly imagine a set of directions more favourable to the defence' than those commended by Mr Sylvestre. That said, however, the Court does not consider that directions along the lines of those in *Sookram* would have been appropriate in the present case. *Sookram*, after all, was a case where the position of Mr Sookram was that he was present at the scene of the robbery and murder but took no part in the commission of those crimes. In the

instant case, on the other hand, the important difference is that both appellants flatly denied having been at the scene or, indeed, having had anything at all to do with Ervin on the day in question. Therefore there was not in the instant case, as there most certainly was in *Sookram*, an issue as to possible degrees of participation.

[33] In the circumstances, the Court was of the opinion that the trial judge did not fail properly to direct the jury on joint enterprise and concluded that there was no substance in this ground of appeal.

(b) Safety of conviction

[34] Counsel placed at the forefront of his argument in support of this ground the proposition that the appellant Franklin was convicted on the evidence of Ervin given 'as a consequence of an immunity agreement'. The Court does not question the soundness of that proposition.

[35] The relevant evidence has been described above and need not be recapitulated.

[36] Counsel pointed to the differences in the content of the two statements given by Ervin to the police. And he emphasised that Ervin was an accomplice in 'the enterprise', whatever he may have meant by that term. The argument does not sit well with a defence of alibi which asserts that the appellant Franklin was at a location other than the home of the deceased at all material times.

[37] In any event, the trial judge gave detailed directions as to the circumstance that the only evidence capable of connecting the appellants to the crime was that of Ervin. She went further and, in the exercise of her discretion under section 92(3)(b) of the Evidence Act, directed them as to the special need for caution before acting on Ervin's evidence and as to the reasons for such special need for caution in the particular circumstances of the instant case.

[38] Counsel nevertheless placed heavy reliance on the decision of the Privy Council in *Eiley and others v The Queen* [2009] UKPC 40 (4 November 2009), an

appeal from this Court, as support for his submission that the verdict of the jury against the appellant Franklin was unsafe. The Court does not disagree with the Board's statement at para 50 of its judgment that in determining the safety of the convictions in that case the critical question was 'whether, having regard to the nature of the evidence given by Mr Vasquez, the circumstances in which it was given and the terms in which the judge summed up the evidence to the jury', those convictions were safe. There is not, however, any indication in the judgment in *Eiley* that the Board was there laying down a test of universal application in all future cases in which the sole evidence adduced against two or more accused persons jointly charged with murder is that of an accomplice induced to testify for the Crown by an offer of immunity from prosecution.

[39] More importantly, as the Board noted in the paragraph just referred to above,

> 'None of the defence counsel applied to have the trial stopped at the end of the prosecution case under the principle in *R v Galbraith* [1981] 1 WLR 1039. Had such an application been made the Board considers that it would have had merit.'

Two sentences later in the paragraph, the Board identified the critical question in the appeal in the terms set out in the immediately preceding paragraph. It is difficult to avoid the conclusion that, in speaking of the nature of the evidence given by Mr Vásquez and the circumstances in which it was given, the Board was bearing firmly in mind that, given the nature of the evidence and the circumstances under reference, a no case submission, if made, would have succeeded. But the same cannot be said in the instant case. A submission of no case was unsuccessfully made on behalf of each appellant at the close of the Crown evidence at trial. The ruling of the trial judge left no doubt (a) that, in her opinion, the Crown evidence was not tenuous in nature and (b) that she had been unable to conclude that such evidence, taken at its highest, was such that a jury properly directed could not properly convict upon it. That much followed from her rejection of the specific submissions of the appellants' counsel. And, from her acceptance of the specific submissions of the Crown, it followed that she had concluded (a) that the Crown evidence was such that its strength or weakness depended on the view to be taken

of Ervin's reliability and (b) that on one possible view of the facts (as contained in Ervin's testimony) there was evidence on which the jury could properly conclude that the appellants were guilty of murder. That ruling has not been challenged in this appeal.

[40] In the light of what, as has just been noted above, follows from the ruling of the trial judge which, as also noted above, was unchallenged on the present appeal and, as well, of the exercise by the judge of her discretion to warn the jury in accordance with section 92(3)(b) of the Evidence Act, the Court was of the opinion that the conviction of the appellant Franklin was not unsafe.

[41] Counsel for the appellant Franklin sought to reinforce his argument under this second ground of appeal by reference to some parts of his submissions under the first ground (paras 26, 27 and 28 of his Skeleton Argument). But, in view of the failure of the first ground, no such reinforcement was possible by reference to (a) a 'discrepancy' in Ervin's evidence, which, in the considered view of this Court, simply did not exist; (b) a direction required by the supposed existence of that discrepancy and (c) a direction with respect to joint enterprise which, in the view of this Court, as expressed in full above, was not necessary.

[42] For these reasons, the Court was also led to the conclusion that there was no merit in the second ground of appeal of the appellant Franklin.

The arguments on behalf of the appellant Herrera

Safety of Conviction

[43] Having determined that there was no merit in the second ground of appeal of the appellant Franklin, the Court was unable to appreciate how it could avail the appellant Herrera and therefore his appeal, as well, was dismissed.

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SOSA P

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MORRISON JA

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ALLEYNE JA