In The Court Of Appeal For Bermuda

113 Front Street
Hamilton HM 12
Bermuda

CRIMINAL APPEAL NO. 4 & 5 OF 2006

Between:

KENNETH JERMAINE BURGESS

First Appellant

DENNIS ALMA ROBINSON

Second Appellant

and

THE QUEEN

Respondent

Before: Hon Justice Zacca, President
Hon Justice Nazareth, J.A.
Hon Justice Evans, J.A.

Date of Hearing: 5th - 8th November 2007
Date of Judgment: 19th March 2008

Judgment

Nazareth, JA

1. On 2 February, 2006, following a nineteen day trial before the Chief Justice, the first

defendant Kenneth Jermaine Burgess, ("Burgess") also known as Shoddy, and the second defendant, Dennis Alma Robinson ("Robinson"), referred to as "the yellow skinned guy" in the context of this case, were each convicted of two counts of murder. The first was the murder of Jahmil Cooper ("Jahmil") on 13 March 2005; and the second of the murder of his twin brother Jahmal Cooper ("Jahmal") on the same day. The jury's verdicts against Burgess were unanimous and those against Robinson were by a majority of eleven to one. Both of them received the mandatory sentence of life imprisonment and have appealed to this court against their convictions and sentences.

<u>THE FACTS</u>

2. On the night of 12 March 2005, Jahmil and Jahmal ("the twins") were at the Swinging Doors Night Club from about midnight. One Gladwin Cann ("Cann") was with them. They stayed at the Swinging Doors until it closed at 3:00 am. The three of them then went round the corner to the gambling den which was owned and operated by Burgess at 26 Elliot Street. The twins went inside while Cann remained outside. About twenty-five minutes later they emerged and told Cann they wanted to go to the Ambassadors Night Club. Burgess and Robinson then joined them and three others, Jovan Schraders, also known as "Popeye", Lindon Bartrum, also known as "Springer", and Whitter, all of whom apparently wanted to go to Ambassadors. They set off in Burgess' and Robinson's vehicles. Almost immediately Burgess, in the lead, turned away from the route to Ambassadors and speeded up. He told his passengers they were going to his house to get some weed. He was followed by Robinson, who

did not increase his speed and at least for a time, lost sight of Burgess' vehicle. Only Cann and Jahmal travelled in Robinson's van. Cann asked Robinson why they were going in that direction. He answered, "I don't know, maybe we are going to Shoddy's to get something." Both vehicles eventually arrived at 7 Crown Hill Lane, a house that was owned or controlled by Burgess. The house consisted of two floors, the upper apartment being accessed from an outside staircase. Burgess went upstairs; there was evidence that Robinson went through a door downstairs and stood inside the doorway. The others stood outside by the vehicles.

3. Burgess returned, approached the group and then joined Robinson who was standing inside and both began moving things around. There was a light on in the room, like a construction light. After a while, Burgess came out and put one arm around Jahmil's shoulders and called Jahmal over to him. He placed his other arm around Jahmal's, so that he had his arms around both the twins' shoulders. At this point Burgess' demeanour changed, he gripped the twins in a headlock, tightened his arms and managed to manoeuvre the twins inside the downstairs room that he had exited. The others followed him into the room. It looked as if it was under construction. The cement walls appeared to have been just finished and they were unpainted. The floor was dusty and there were tools on a table, everything was all over the place.

4. Once inside Burgess with one blow of his fist knocked down Jahmil, who remained on the floor semi-conscious or unconscious. Burgess then turned upon Jahmal accusing him of beating and robbing his father. He attacked Jahmal with his fists.

Jahmal fought back while denying the accusation. None of the others intervened except Cann who asked Burgess why he was doing that. But he stepped back when Burgess turned on him telling him that it was nothing to do with him and to go away. Robinson, who was standing by Cann, then forced him out and closed the door. Cann remained outside for a little while and could hear Burgess beating Jahmal, and the latter denying Burgess's accusations. He then went to the side of the building and was able to look in through a side window. He could see Jahmil still slumped in the corner with his eyes closed, and Burgess still punching Jahmal. Cann remained at the window for about two minutes, when he heard Burgess tell Robinson to see where he (Cann) had gone. Upon hearing this Cann ran away from the house to ask for help. He hid for some time and then ran back to the house, but found it in darkness and the vehicles no longer there. He then ran away. When he got to the junction of Robert's Avenue and Palmetto Road, he saw Robinson's van drive across towards town. He continued to run and later he saw Robinson's van again, heading back in the direction of 7 Crown Hill Lane. This time he was able to see that Robinson was driving the van. Robinson made eye contact with him, applied the brakes and slowed to a stop. Cann then ran away and, as he could hear the van behind him, kept running until he got to his home in Euclid Avenue.

5. Whitter, the only other eyewitness of the attack to give evidence, saw Burgess continue punching Jahmal in the face after Cann's departure. He then pulled out an aluminium baseball bat from a pile of building work junk that was in the room and started to hit Jahmal with it. He hit Jahmal a couple of times on the head with the bat.

As he was being hit Jahmal crouched down with both of his arms in front of his face with clenched fists, palms towards his forehead. Jahmal also received several blows to his arms and legs with the baseball bat when he was in that position. Burgess swung the bat with such force that a "tinging" from the bat could be heard. During the beating, Burgess removed his shirt. There was blood on the floor and on a wall. At some point when Burgess was hitting Jahmal with the bat, Jahmil opened his eyes and was himself hit a couple of times on his legs with the baseball bat. Jahmal had visible injuries to his face and head and was bleeding from his nose, cheek and eye. Whitter told the group that he couldn't handle it anymore and moved towards the door. Burgess then gave money to Popeye (Schraders) and told the group he would meet them at Ambassadors. He told Robinson to give Whitter and the others, Schraders and Bartrum, a lift to Ambassadors. The Appellant Robinson opened the door and drove Whitter and the two others to Ambassadors in his van. Upon arriving there Robinson told Whitter and the others he was returning to Burgess.

6. Whitter accepted that he did nothing to intervene. He was too scared he said. Also Popeye and Springer did not intervene or participate. The yellow-skinned guy he said stood at the door the whole time. The door he said was closed and Robinson was right in front of it. He could not recall if it was open or closed before Cann left, he just saw him walk out. Robinson stayed at the door when Cann left.

7. The twins were never seen alive again.

8. About 9 p.m. that Sunday, 13 March, Cann accompanied by the twins' mother made a report to the police. Cann's report of what he saw triggered a police investigation of the missing twins. Burgess was asked to attend the Hamilton Police Station, and he attended the Police Station at some time after 11:00 p.m. Upon arrival at the police station, Burgess made several attempts to contact different lawyers. He gave a statement to the Police about his movements on the prior evening. At the conclusion of that statement the Appellant Burgess was arrested for causing grievous bodily harm. Later police seized a Tissot watch from the Appellant's property at the police station.

9. At 2:25 a.m. the following morning, Monday 14 March, the residence at 7 Crown Hill Lane was searched by a team of police officers. To gain entry to the lower apartment, the officers had to move a concrete block placed in front of the door. Upon entering the room, the officers noticed a mound of white stone material in the immediate front area and a lot of rubble and furnishings on top of the white stone material. There was also about a quarter inch of water settled on the floor. One of the walls appeared freshly plastered, and was still wet. Masonry work had been done on the wall on Friday 11 March by Mr. Clifton Burt, but no masonry work had been done by that mason, or anyone else to his knowledge, from the 11th March. DI Neblett noted that once in the apartment, the only way that the door could have been closed would have been if someone held it. Outside the door, on the concrete landing, a dark stain tested positive for the presence of blood. There was also a large number of dark stains within the apartment, on a large mallet, on a table, and on a ladder. All of the stains

tested positive for the presence of blood.

10. On the 15 March 2005, the upper apartment of 7 Crown Hill Lane was also searched. From the bathroom, in a white hamper, a Fubu sports shirt with a dark stain was seized and it later tested positive for the presence of blood, not in respect of the dark stain, but a different stain on the inside of the shirt. On the 17 March 2005, police personnel again attended the lower apartment of 7 Crown Hill Lane, and found that there had been a fire, and the walls were covered with soot. On the 18 March a search warrant was executed on Robinson's residence; a white van registration number L3156 was seized and the Appellant Robinson was arrested. A forensic examination was completed on the white van. One stain was found on the interior of the rear offside sliding door of the van. The stain tested positive for blood; later this was found to match Jahmal's DNA.-

11. The bodies of the twins were discovered a month later on 13th April at a location known as Abbott's Cliff. Forensic including pathological, blood splatter, and bone experts, and even an entomologist expert in post mortem insect colonization dating, were deployed. DNA was extracted from the remains of Jahmal's body. Information obtained from the twins' mother indicated that the two victims were identical twins, which the experts confirmed meant their DNA was identical. It was found in swabs taken from the downstairs apartment, the stain on the Fubu shirt found in the upper apartment; the DNA was also discovered in a blood stain on the strap of a Tissot watch being worn by Burgess, and found in the stain on the inside panel of the rear

compartment of Robinson's van in a position that was only visible when the sliding side door was shut.

12. Jahmil's remains were identified. The forensic pathology and bone experts' evidence revealed that Jahmil had serious cervical fractures in the areas of the neck, unlikely to have been sustained in being dropped down Abbot's Cliff, but likely to have been sustained during life, and caused by a blow more likely from an instrument. Also found was a fracture of the right metacarpal, a bone in the right palm. A tear or laceration in the left lobe of the Jahmil's liver, and the covering of his intestines showed signs of bleeding. This would not have been caused by one blow but several blows with a significant degree of force. Also found was evidence of bleeding along the right chest wall and the abdomen extending over the liver; this would have been caused by multiple blows or possibly a single blow from a large object. Also found were fractures to the nose and cheekbone. Around the nasal opening, one side had been broken clean off and the other side that projects had been cracked through but had not broken off. The sutures of the cheekbone had slightly opened. Also the joints at the base of the skull of Jahmil were spread apart more than normal. This was caused by blunt force trauma which could have been applied to the back of the neck or the front of the face or possibly the front of the head. The two experts who provided the foregoing information concluded that the cause of death was multiple blunt force traumas, and that all the injuries occurred during life. The injury to the spine, the cervical injury, would have been lethal and would have killed Jahmil whatever happened because of its high location in the spine. That part of the spine

controls the pericardial functions, the heart and breathing. The abdominal injuries were survivable but only if the victim had received good and immediate care.

13. Turning to Jahmal's remains, pink discoloration to his skull was revealed extending from the front right across to the back and also the cheekbone. This indicated trauma to the soft tissue which once overlaid those bones which had bled thus causing staining to the bone. It would have been caused by blunt force trauma both on the head and on the cheek. Jahmal's chin bone was broken right through and up into the tooth which was missing. A crack went right through the chin; that bone was in fact separated and it came apart. To fracture the bone in that way would require severe force, blunt force trauma compatible with a baseball bat or a significant blow with a fist. The impact would be so tremendous to do that as to cause bleeding inside the brain or at least in the tissues that covered the brain. This injury was more likely to be caused by a weapon than a fist, but a kick would be a possibility; the use of a weapon was the most probable of all scenarios because of the extreme force required to cause bony injury of that sort.

14. The bones in Jahmal's forearms, the ulna, were broken completely through at the same level on each side. The way they were sustained indicated a defensive posture at a time a blow was struck across both those arms with a linear object. This and other forensic evidence was consistent with Whitter's evidence of the beatings with the bat. The cause of death was multiple blunt force traumas. The head injury would cause tremendous brain trauma, bleeding and swelling of the brain from which Jahmal

would die. He would only have survived a short period after such injuries. He could have lingered on for about an hour as the outside limit; but he could have died in a few minutes. There was a very good probability that the use of a weapon was the predominant, indeed the over-riding mechanism for the injuries which caused Jahmal's death. The entomologist's evidence was that the twins' death had occurred between the afternoon of 13th March and 15th March 2005.

BURGESS' DEFENCE

15. This was from the outset one of alibi. In his statement to DI Neblett on the night of Sunday 13th March as to his whereabouts between 3 and 6 a.m. that morning, he said he was at Swinging Doors on Court Street until 3:15 or 3:30 a.m. He then stood around speaking to a few people outside and then about fifteen to twenty minutes later went to his business, referred to by others as a 'gambling den', at 26 Elliot Street. He got a call from his wife about 4:30 a.m. telling him that his son's temperature was 103 and that as he had the car, could he come and pick her up. He told her he would meet her at the hospital. He left some minutes later to find she was already there and had obtained some medication. He did not know the exact time and about fifteen to twenty minutes later they were home and that's where he remained until five that afternoon.

16. When Burgess came to give evidence, he testified that he left Swinging Doors shortly after it closed, about 3:15 or 3:20 a.m. He then went into the times of the several phone calls he and his wife exchanged. He left Elliott Street sometime after 4:45 a.m. He needed money because he had lost in gambling and needed it to refuel his car. He

was intending to go to Crown Hill Lane to get some money. When he came out he saw the twins, Schraders, Bartrum, and Cann, five or six of them. He told them he was leaving to go home quickly and come back and they asked him if he could give them a lift over to Fat Man's Café because they wanted to get something to eat. He didn't know which twin got into his vehicle and thought Bartrum, Schraders and Whitter did so too. He took them to Fat Man's Café and dropped them off and then proceeded to his house, collected the money and went back to 26 Elliott Street to see if he could get his money back that he had lost gambling. He stayed there till about six thirty, quarter to seven. He then headed for the hospital, picked up his wife and son and went home to 29 Cottage Hill Road where he resided with his wife.

APPLICATION FOR FRESH EVIDENCE

17. In support of the second ground of appeal (nondisclosure of alleged discussions between the police, Whitter, and Evans about a deal for Whitter) application was made for leave to adduce the following additional evidence being -

(a) the affidavit of Whitter dated 18 October 2007

(b) the affidavit of Steven Evans dated the 21 October 2007.

Having heard the Applicants and the Respondents submissions we refused the application and now briefly give our reasons. The matter arose in the following way. Mr. Courtenay Griffiths, Q.C., who represented Burgess not only before this Court but also below, saw a press report that Whitter had received credit for having given evidence in the Burgess trial. This prompted enquiries which culminated in affidavits procured from Whitter and Steven Evans.

18. In his affidavit, Evans stated that he is a cousin of Whitter, and that on Monday, 14 March 2005 the police came to his house looking for Whitter. They searched the house and found heroin. He was arrested and on the following day after being interviewed he was called into Police Officer Jerome Laws' office and told that if he could bring in Whitter they would not prosecute him for the drugs. He was released shortly after that. After he got home one of the officers involved came to the house and told him to go to Bull's Head parking lot. He went there, a white car pulled up and he got into the back seat. The officer confirmed that if he got Whitter to come in they would not prosecute him for the drugs. He got in touch with Whitter on the Wednesday, explained to him what had happened and he agreed. Evans then called Jerome Laws and arranged to meet him at 6 p.m. that evening. He collected Whitter on his bike and took him to the parking lot where he got into the police car.

19. In his affidavit Whitter stated that Evans had spoken to him and said that he would not be prosecuted if Whitter agreed to speak to the police. He agreed to assist in this way. Evans took him to the Bull's Head car park where he was handed over to the police, arrested, and taken in for questioning. He spoke with DC DeSilva and was promised a place in a witness protection programme as well as the deal that was struck with his cousin Steven not to be prosecuted for possession of heroin. Sometime prior to giving his witness statements to the police, he was told what was supposed to have been told to them by others who had been questioned. He was questioned about the disappearance of the Cooper twins. He followed the instructions to say what was told to him in conversations with the police before interviews and gave evidence at

the trial in accordance with what the police had previously told him; he said that he never gave the police any information of his own accord. He concluded,

> *"At the end of the day my evidence at the trial was not what I witnessed myself but what I agreed to say in order for my cousin to benefit by not being prosecuted. I also had hoped to benefit from a placement in a witness protection programme. Instead, I am here at Westgate in the same facility that holds the Appellant. My regime is restricted as there is great effort to keep me separated from Kenneth Burgess for my safety for obvious reasons".*

20. The Respondent produced affidavits from Detective Inspector Jerome Laws, DC DeSilva and Detective Inspector Terrence Maxwell to rebut the allegations made in the affidavit attributed to Whitter. The three affidavits were to the following effect:

(i) That no deal was struck with Steven Evans with a view to him assisting in the apprehension of Whitter in exchange for charges against Evans in relation to the drugs to be dropped.

(ii) That Whitter when first interviewed by the police was a suspect and treated in line with the requirements set out in the Judges' Rules with respect to his interview.

(iii) That the police never discussed with Whitter any deal between the police and Steven Evans.

(iv) That the police never discussed with Wither the possibility of him being placed in any witness protection programme.

(v) That outside specific questions put to him during tape-recorded caution interviews that police never discussed with Whitter the details of any

interviews or statements given by other persons.

21. The Respondent challenged as incredible and therefore unreliable the particular assertions made by Steven Evans that even after Whitter's tape recorded caution interviews Detective Inspector Laws told him that if he could get Whitter to come in they would not prosecute him for drugs; and the assertion also made by Steven Evans that his parents also received similar assurance from Detective Inspector Laws.

22. In relation to the affidavit of Whitter, the Respondent challenges as incredible and unreliable the following averments for the reasons specified in relation to each:

(a) (That DC DeSilva has discussions with Whitter concerning his being put in a witness protection programme.) Not only was there no witness protection programme in existence but Whitter was at the time a suspect; moreover at that very early stage of the investigations there would have been no reason to be discussing the issue of his being a witness for the crown.

(b) (That on the day Whitter was arrested DC DeSilva discussed with him a deal that had been made with Steven Evans for the latter not to be prosecuted for possession of heroin.) Whitter's version of the alleged deal is inconsistent with Evans version, but if Evans version is correct, there would have been no need for DC DeSilva to even raise the issue with Whitter once Whitter was already in custody.

(c) (That before his witness statement was recorded, the police told Whitter what others had told them and presumably given him instructions on what to say in

his statement.) The witness statement was recorded two full days after Whitter had been arrested and after he had been interviewed on tape on three separate occasions. Transcripts of those statements and interviews were exhibited. The details given in these statements can be seen to be consistent with what Whitter told the police in his taped interviews.

(d) (That at the trial Whitter gave evidence in accordance with what the police told him to say in order for his cousin to benefit by not being prosecuted.) At the time Whitter gave evidence Evans had already been serving for the previous three weeks a prison sentence in relation to the same drugs case as well as for others. Both Whitter and Evans would have been incarcerated at the same time at Westgate Prison, as at the time of trial Whitter himself was serving a term of imprisonment at Westgate for unpaid fines. Furthermore, in response to specific questions by counsel for Burgess, Whitter denied that he had anything to gain from giving evidence and asserted that the twins were his boys. In addition, as was pointed by counsel for the Respondent, the evidence given by Whitter replete with demonstrations and vivid descriptions of his observations was supported by the forensic evidence, the details given in his testimony range outside the narrow confines of his statements, and his presence at the location at the crime was supported by the evidence of Cann.

23. As recognized by counsel, the principles applicable to the admission of fresh evidence on appeal are those laid down by Lord Parker CJ in R v Parks (1961) 46 Cr. App. Rep. 29. The third principle is as follows: "Thirdly, the fresh evidence must be evidence that is credible evidence that it must be well capable of belief; it is not for

[the Court of Appeal] to decide whether it is to be believed or not, but it must be evidence capable of belief" (page 32).

24. The evidence sought to be introduced is plainly the result of Whitter's blatant attempt to procure a place in a witness protection scheme he imagined was in place. We had no difficulty in concluding that the evidence in the affidavits was incredible i.e. simply not capable of belief, and that the application had to be refused.

BURGESS' APPEAL

Grounds of Appeal

25. Burgess' appeal comprises two grounds: –

I (a) that the judge erred in his conduct of the trial and his summing up in that he displayed bias against the way the defence was put. In particular regarding an allegation made of Police malpractice. This is reflected in his interruption of defence counsel's closing address to the jury.

(b) The general tone of his summing up was unfair to the case put forward by the Appellant and

(c) further, in this regard and in the context of an unfair approach to the Appellants case, the judge told the jury the Appellant was clearly seized of information at a time he could not have been. The effect of this misdirection it is contended was clearly to suggest to the jury that the Appellant was aware of the allegation being made against him and effectively contradicted his defence of alibi. The nature of the gravity of this misdirection, it is contended, was effectively incurable by further directions.

II The Prosecution failed to disclose to the defence details of discussions which had taken place between officers involved in the investigation and Whitter and a cousin of his, Steven Evans, and thereby

(a) failed to observe their continuing duty to disclose to the defence any material which might support the defence case;

(b) failed properly or at all to monitor this continuing duty;

(c) denied the Appellant a fair trial;

Factual Background

26. Mr. Griffiths in making his submission referred to six grounds upon which the Prosecution case depended, and shortly explained the Appellant's position as to each. The Appellant's defence, he said, was one of alibi. It followed that he disputed the evidence of the eyewitnesses and distanced himself from the forensic findings relating to the ground floor of 7 Crown Hill Lane. In relation to the finding of blood on the Fubu top he asserted that it had been planted by the police. Finally in relation to the blood found on the watch he explained that by reference to a previous occasion in which he had been involved in a violent incident with the deceased in which blood had been shed. He then referred to the following factual background. Burgess was arrested on Sunday 13th March 2005, the day on which the Crown alleged the murders had occurred. He was arrested by DI Neblett. Following Cann's report to the Police, Detective Inspector Boyce issued an instruction that Burgess be arrested as a suspect. Cann's complaint was timed at 9:19 on the night of 13th March. DI Boyce's evidence was that he issued the order to arrest by about 9:30 p.m. It was after this that DI Neblett telephoned the Appellant and asked him to attend at the police station

nevertheless the Appellant was not immediately arrested when he appeared at Hamilton Police Station in response to DI Neblett's call. A statement was first obtained from him. He was not informed he was a suspect neither had he been cautioned.

27. In his evidence at his trial Burgess asserted he was not given an opportunity to consult a lawyer before making this statement. However telephone records procured by the Crown demonstrated that Burgess's assertion was false. The records showed that he had made several attempts to contact lawyers prior to the taking of the statement. There were major discrepancies between the details of his alibi in the statement and the evidence he subsequently gave before the jury. About ten minutes after his statement was recorded he was arrested and following further interviews eventually charged with murder.

Appeal Ground 1

28. The first ground of appeal, Mr. Griffiths explained, relates to the attitude displayed by the Judge to the Appellant's defence. He submitted that, in general terms, the Judge's summing up was hostile towards the Appellants defence. Such hostility it is said had been prefaced by the learned judge interrupting counsel for the Appellant in his closing speech on a contentious part of the defence case. The hostility continued during the summing up in which the Judge sought to undermine every aspect of the defence put forward by the Appellant to the six essential aspects of the Prosecution's case.

29. Turning then to paragraphs (a) and (b) of the first ground of appeal, these aver that the judge displayed bias against the way in which the defence was put, in particular regarding allegations made of police malpractice. This, it was said is reflected in his interruption of the defence counsel's closing address to the jury. The general tone of his summing-up, it is submitted, was unfair to the case put forward by Burgess. In addition to the oral submission incorporating passages from the 15 volume trial transcript, the Court was provided with references to numerous additional passages, some of them of considerable length, from which to discern the bias, hostility and general tone that was said to be unfair to the Appellant's case. We have to say that we were unable to discern bias or hostility against the way in which the defence was put. This, in any event, was not seriously pursued, at any rate as a separate aspect of the claim of bias. We are unable to accept that that the Judge displayed hostility, which we observe, appears to have been equated to bias; nor have we detected bias in regard to allegations made of police malpractice. Likewise we are unable to accept that the general tone of the summing up was unfair to the Appellant's case presented. True it was that the Judge did point out deficiencies and weaknesses in the Appellant's case. But the prosecution case was not exempt from a similar critical appraisal. That the summing up may have appeared more critical of the Appellant's case appears to be an accurate reflection of the strength and extent of the prosecution case. It is in the nature of a judge's role to critically examine the case of each party in order to give directions that are tailored to the particular case. A "direction to the Jury should be custom-built to make the jury understand their task in relation to a particular case.....it

should also include.... a statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts" per Lord Hailsham LC, R v Lawrence [1981] All E. R. 974, 977.

30. Finally as to the single intervention of Counsel's closing address, the context of the interruption is illuminating. Counsel was in his closing address dealing with the Fubu shirt on which Jahmal's DNA was detected and which on the police evidence was recovered in a room in the upper apartment of 7 Crown Hill Lane which Burgess used and which he claimed was planted. The relevant passage was in the following terms:

> *"Now let's go to the Fubu top, shall we? This is a highly controversial piece of evidence. We submit quite boldly that it was planted by the police. I can fully understand a jury's reluctance to accept such an assertion. The police have great powers over us as citizens and it goes against the grain of our up-bringing that they might stoop to such levels of misconduct to commit an act of blatant and as criminal as this. We want to believe that police officers would not behave in this way. To accept the opposite is to question some of our most fundamental notions about law and order and the role of the police in maintaining our security. Yet experience has shown that police officers, not only in Bermuda, are indeed capable of such wicked acts, often in situations where they feel that their case is not strong enough."*

At this point the judge intervened, pointing out that there was no evidence about this and that the jury could not be asked to assume it at this point. We have to say that it appears to us, that far from indicating bias or unfairness, the interruption was fully justified; and moreover, it does not appear to us to have disrupted the flow of counsel's submission, not least because the Judge kept the interruption as short as

possible, as is apparent. We therefore find no merit in paragraphs (a) and (b) of the first ground of appeal.

31. Turning to paragraph (c) of the first ground, this rests upon the following passage in the Judge's summing up:

> "*Because as I said..... the real thrust of this comment, the real thrust of him calling all these lawyers, is that if he was calling lawyers he must have known that things were serious enough to warrant him calling lawyers. If he knew that; why not mention going to Crown Hill Lane, why not mention the twins and so on, if it really happened? Or does the fact that he omitted it show or suggest that he is making up this bit now*".

32. It is pointed out that Burgess had not been informed why he was being questioned, specifically that it was in relation to the disappearance of the twins, until after he had given a statement to the police. It is submitted that the clear inference from the judge's unqualified comments was that prior to being charged, Burgess must have known about the offences, and that could only be because he was involved in the commission of them. This, it was said, was a particularly prejudicial comment which clearly undermined the Appellant's alibi, the core of the defence case. It flew in the face of the undisputed evidence, and indicated to the jury that the Appellant should not be believed on the most central aspect of his defence, that he was not there. It was clearly being suggested, the submission continued, that he had prior knowledge of the incident before the allegation was put to him by the police. Such knowledge could, given the facts and particularly the timing of events, only have been acquired through his involvement in the commission of the offence. It was submitted that the

foregoing passage in the summing up was a misdirection, and one that was incurable once made, and that further comment on the topic would only have served to underline that that was the judge's view, and highlight the highly prejudicial deduction bearing the imprimatur of the Judge.

33. We do not think the latter conclusion necessarily follows. The Judge went through the factors and considerations bearing upon the alibi and did not in any way suggest that the phone calls to lawyers had anything to do with knowledge of the offences. On the contrary he pointed to the conclusion that Burgess was making up his version of the events. We think that the Jury were unlikely to have adopted the tangential reasoning process suggested when they were furnished with reasons directly demonstrating that the alibi was totally untenable.

34. It may be added that the consequence that Burgess complained about was that the core defence of alibi was seriously undermined. But in truth it can be seen that the potential for an alibi was destroyed by Burgess' plainly misleading statement to the police omitting any mention of going to Crown Hill Lane with the twins. Burgess' version in his evidence would therefore have been rejected out of hand by the Jury given that evidence and those circumstances. We accordingly find no merit in the foregoing submissions upon Ground 1(c).

35. Accordingly, Ground 1 fails.

Appeal Ground 2

36. Ground 2 is that the Prosecution failed to disclose to the Defence details of discussions which had taken place between investigating officers and Whitter and his cousin Steven Evans and thereby failed in their duty of disclosure. This must be addressed in the light of the refusal of Burgess' application to adduce fresh evidence. As a result, it is difficult to see what evidence there was that should have been disclosed of discussions between Whitter, Evans and the investigation officers. The evidence on record is that at the conclusion of Steven Evan's interview following his arrest, DI Jerome Laws informed him that the police were seeking the whereabouts of his cousin Whitter and asked whether he had any information about that or about "the yellow-skinned male". Evans was unable to give any information but suggested he could assist in locating his cousin Whitter if he was bailed and his cell phone returned to him. Evans also during the conversation raised the possibility of the police giving him a break on the charges against him if he were able to assist in obtaining information of the yellow-skinned male and in locating Whitter.

37. DI Laws made it clear that a decision like this would be a decision for the "big bosses" but he would let them know about any assistance Evans gave. DI Laws then agreed to have his cell phone returned to him and gave instructions for him to be bailed as he would have had to in any event pending the results of analysis of the item seized. This is not evidence of discussions between

Whitter, Evans and the investigating officers.

38. It should be added that the affidavits of the three police officers in the context of the Appellant's application to adduce fresh evidence demonstrated that no deal was struck with Steven Evans with a view to him assisting in the apprehension of Whitter in exchange for charges against Evans in relation to the drugs be dropped; and that the police never discussed with Whitter any deal between the police and Steven Evans.

39. Moreover the outcome of Evans' conversation with DI Laws was disclosed in that Whitter was stated to have met the police by arrangement. This evidence has nothing to do with the case against Burgess. It could neither advance Burgess' defence nor undermine the prosecution's case. In the result it has not been shown that any information that ought to have been disclosed was not disclosed; *a fortiori* that this denied the Appellant a fair trial. We add, this having been mentioned, that we have no lurking doubts about this conclusion, or indeed the results.

40. Burgess' appeal against conviction accordingly fails and is dismissed.

ROBINSON'S APPEAL

The Prosecution Case

41. In addressing the six grounds of appeal, it is of assistance to outline the Prosecution case. Robinson was charged with the murders of the twins under section 287 of the

Criminal Code (which defines the offence of murder) read with s27(1)(c) (which extends liability to persons who aid the commission of an offence by another person with knowledge of that person's intention to commit the offence). Robinson sought particulars of the "aid" relied upon, and the following were provided by the Prosecution:

> "(a) That the Appellant intentionally encouraged Burgess by his presence or behaviour to commit the offences; or
> (b) Intentionally conveyed to Burgess by his presence and behaviour that he was assenting to and concurring in the commission of the offences; or
> (c) Intentionally helped Burgess to commit the offences as read with Section 287 of the Criminal Code"

42. The basic premise of the case was that Robinson knowingly aided Burgess in committing the two offences of murder of each of the twins. The requisite knowledge was that he knew that Burgess intended to kill or inflict grievous bodily harm. To establish such aid and knowledge the Prosecution relied upon the evidence of the eyewitnesses Cann and Whitter in respect of the following matters:

i. That Robinson transported one of the twins to 7 Crown Hill Lane.

ii. That he was seen helping Burgess to move things around in the lower apartment before the twins were taken inside.

iii. That in response to Burgess moving towards Cann, telling him it was none of his business and to get out, Robinson forced Cann out of the room and shut the door.

iv. That Robinson was present from the commencement of the assaults until he left to transport Whitter and the other two to Ambassadors, until after the production of the aluminium baseball bat and its use in continuing the assaults. He would therefore have been aware of the nature of the serious injuries being inflicted and that could be inflicted particularly with the metal bat.

v. That Robinson stayed by the door and must have been responsible for keeping it shut, given the evidence that the door would swing open if not held in place from the inside.

vi. That on the instructions of Burgess, Robinson transported the witnesses, Whitter, Bartrum and Schraders, away from 7 Crown Hill Lane to Ambassadors, thereby removing the remaining potential witnesses from the scene.

vii. That when he dropped off the three at Ambassadors he said he was returning to Burgess.

viii. That Cann saw Robinson's van as it headed into town.

ix. That when Robinson was on the return trip from town and passed near Cann, his van slowed down as if to stop, they made eye contact, he ran off and could hear the van follow him.

43. In addition, the prosecution relied on the blood smear in Robinson's van, which matched the DNA of [one of] the twins, and "the CCTV footage and, to put these things in a sort of general context, the friendship that existed between Mr. Burgess and Mr. Robinson" (Summation p. 2214).

Defence at Trial

44. Robinson did not give evidence. His defence emerged in cross-examination of the prosecution witnesses, as his counsel Mr. Perry QC submitted. At the end of the summing up, the judge gave the jury the following direction in the terms Mr. Perry sought:

> *"And in cross-examination of [the witnesses, particularly of Cann and Whitter] Mr. Perry put to them what is Robinson's case i.e. that he did not aid, assist or encourage Mr. Burgess in any way, that he said or*

did nothing to encourage or support him, and that he did not hold the door shut or guard it."

That Robinson was present at the scene up to the point he left to drive Whitter, Bartrum and Schraders to Ambassadors was not disputed.

Grounds of Appeal

45. (1) That the learned judge erred in ruling that there was a case to answer in respect of either or both Counts.

(2) a) That the learned Judge erred in his direction on "aiding".

b) That the learned Judge erred in that he failed to direct the Jury adequately or properly as to the legal consequences of the liability of a secondary party (which role was attributed to the Appellant) when the conduct of the principal is or may have been outside the scope of the alleged enterprise, whether by reason of the latter's act or intent.

(3) That the verdicts of the Jury, in respect of both Counts 1 and 2 and/or either of them are unreasonable and cannot be properly supported by the evidence.

(4) Without prejudice to the general contention that the convictions of the Appellant cannot be supported by the evidence and are consequently unreasonable, the Appellant specifically contends that in the light of the evidence of Cann and Whitter and the forensic evidence he could not properly be considered in any event as having aided in the commission of murder in respect of Jahmil (Count 1) as it is plain that the injuries which caused death must have occurred when the Appellant was not in the presence of Burgess whom the Prosecution contends inflicted the injuries.

(5) That the learned Judge erred in admitting evidence in relation to a van which was relied on by the Crown as suggesting that the Appellant had assisted in the transportation of the bodies of the victims to Abbots Cliff from the place of the alleged killing.

(6) Allied to (5) above that the learned Judge failed to properly direct the Jury in relation to the evidence led by the Prosecution in respect of the van as aforesaid.

The Appellant's Submissions

46. Mr. John Perry QC for Robinson began his submissions with a review of what he described as the factual matrix of the offences approximating the entirety of the material evidence. He identified features supportive of the Defence case and perceived weaknesses in the Prosecution case particularly with reference to the ten items of evidence relied upon. What emerged in relation to those ten items of evidence can be set out quite briefly.

Review of Prosecution items of evidence

47. In the course of his review of the factual matrix, Mr. Perry also addressed the nine items of evidence upon which the Prosecution relied. What emerged can be set out quite briefly:

i. (That Robinson transported one of the twins to 7 Crown Hill Lane). It was the evidence incidental to that event that was important. For Robinson it was submitted that there was no evidence of a pre-existing agreement, nor was this contended in the respondent's opening submission; it came in the closing address. Moreover that it

was Cann who asked for the lift.

The Prosecution did not deny there was no direct evidence of a pre-existing agreement; their case was that an understanding or arrangement could be inferred from the circumstances. The transportation was to have been to Ambassadors but Robinson simply followed Burgess when he turned right away from the route towards Ambassadors. He said he did not know where Burgess was going; possibly he wanted to collect something. Nevertheless he allowed Burgess to speed away out of sight and yet drove directly to 7 Crown Hill Lane. Moreover that on arrival Robinson did not drop off his passengers and continue to Ambassadors as might have been expected but according to Cann went into the lower apartment. This was in the process of being re-plastered and was cluttered with building work items and junk, hardly a place one would want to resort to, particularly at about 3:30am, without good reason. Burgess who had arrived earlier went upstairs.

ii. (That Robinson was seen by Cann to be helping Burgess to move things around the lower apartment before the twins were dragged in by Burgess). This and the next item are matters of the credibility of Cann's evidence and are subsumed in the separate consideration of that matter.

iii. (That on Burgess telling Cann to get out when he protested about the twins being assaulted, it was Robinson he said who forced him out).

iv. (That Robinson stood near the door and must have been responsible for keeping it shut). D.I. Laws testified that when he visited the scene in the early hours of the morning following the assaults upon the twins, he saw a concrete block in front of the door. On its removal the door swung open and to keep it closed it had to be held. In his evidence in chief Burgess agreed that the block was there to keep the door shut; in

his cross-examination he confirmed this. But in his re-examination he stated that the hinges on the door did not work and that the door would stay shut if closed. It suffices to say that the jury would have been entitled to disbelieve him and to accept the contrary evidence that the door would have swung open if not held from the inside. That, it may be added here, raised the question of who must have held the door shut for it is unthinkable that, with what was going on inside, the door would have been left open with the doorway fronting right upon the road with dwellings along it. The evidence points to only Cann and Robinson being near the door. Cann referred to Robinson being by his side at one stage and between him and the others at another. Also, that it was Robinson who shut the door after he forced him out. Whitter said that Robinson was at the door throughout. The jury would have been entitled to conclude that it must have been Robinson who held the door shut.

v. (That Robinson was present from the commencement of the assaults until after the production of the aluminium baseball bat and its use in continuing the assaults). This was not disputed. He would therefore have been aware of the very serious nature of the injuries being inflicted by Burgess with the metal bat from the first blow to Jahmal's head delivered with such force that it produced a "ting", and **of** his intention to inflict such injuries.

vi. (That with the foregoing knowledge of that intention Robinson continued aiding Burgess by his continuing presence near the door and by complying with his request to take the remaining three persons to Ambassadors, thereby removing from the scene the three potential witnesses to whatever was to follow).

vii. (That when dropping off the three at Ambassadors according to Whitter, Robinson said he was going back to Burgess). This was disputed in Robinson's submissions on

the basis that Whitter had earlier stated that he never heard Robinson talk from his arrival at Crown Hill Lane onwards. This was put to Whitter in cross-examination. He did not dispute that it must have been what he had said, and added "but me personally I can tell you that I did hear him talk." Questioned further he added "it's just something I can remember now." The questioning ended with Whitter being pressed to acknowledge that the earlier statement put to him could be true and ultimately his stating that it could. It has to be said that the impression one is left with is that the remark attributed to Robinson was far more likely to have been right than that Robinson was silent throughout. The jury were, here too, in our view, entitled to conclude that Robinson had made the parting remark.

viii. (That Cann saw Robinson's van as it headed towards town). There was no positive identification by Cann of any feature that would have enabled him to do so and this could only have been regarded as evidence consistent with the return of the vehicle later.

ix. (Cann's second sighting would have been in much better light; and he testified that the van came to a stop, that he recognised Robinson and made eye contact, and that when he ran off he could hear it following behind). The Judge regarded the two sightings as fleeting glances and gave a *Turnbull* direction and emphasised his caution to the jury that they should consider carefully whether they could be sure it was Robinson that in fact Cann saw.

Credibility of Cann's and Whitter's evidence

48. In his review of the factual matrix of the two counts, with which he commenced his submissions, Mr. Perry challenged the general credibility of the evidence of Cann and

Whitter, listing the following matters as inconsistencies and discrepancies:

49. Cann deposed that Burgess went to the upstairs apartment and Robinson to the downstairs apartment where he later saw the two of them moving things around. Then, he said, Burgess emerged, got hold of the twins and dragged them inside. Whitter's version was that Burgess came out of the apartment and invited all who had arrived inside for a drink.

50. Cann's evidence on the positions taken up on entry in to the apartment was that he was just by the door, Robinson was next to him, and the other three, Schraders, Bartrum and Whitter, were close to Burgess. Whitter's version was that Robinson was by the door the whole time and that the door remained closed.

51. Cann's evidence was that Robinson pushed him out of the door. Whitter said Cann just walked out. Cann also maintained that after he was pushed out he could see Burgess attacking Jahmal with his fists through an open space intended for an air-conditioner. This, Mr Perry submitted, was substantially undermined by the later evidence that the air-conditioner was already in situ at the time of the assaults. Mr. Perry also submitted that the conflict between Cann's version that the twins were grabbed and dragged in is irreconcilable with Whitter's version that all were invited in for a drink and entered and that this shows that the related evidence is unreliable. However the matter is not as simple as that. There is evidence that Robinson may have moved his position. Cann said as mentioned, that Robinson took up a position

next to him. He also later said that Robinson was between him and the others. Whitter also explained that he was shocked by what was going on and would not have noticed all that happened. It is also apparent that he does not seem to have been as observant as Cann. However his evidence as to the blows delivered by Burgess with the baseball bat was confirmed by the pathological evidence to a remarkable degree.

52. As to Cann's evidence that he could see through the air-conditioner opening, he obviously had seen the air-conditioner in situ the following morning when the police took him back to the scene; he thought it had been installed since the assaults. That he did not modify his evidence suggests that rather than lying, he was probably confused in that respect, particularly as he said he had also watched the beating continue through a side window.

53. The previous convictions of both Cann and Whitter and the pending criminal proceedings against the latter were mentioned. It is not necessary to say more than that we do not regard them as a significant factor in assessing the credibility of these two witnesses. In our view the jury would have been entitled to address and accept the evidence of Cann and Whitter or of one or the other of them where they differed, on its merits without any assumption that it was unreliable for the foregoing reasons. In reaching that conclusion we have taken account of the further matters dealt with in this judgement.

First Ground of Appeal

54. (That the judge erred in ruling that there was a case to answer in respect of either or both Counts)

The thrust of the Appellant's case here was that the factual evidence the Prosecution relied upon does not provide the legal basis of its case.

It has also to be mentioned that no material evidence was adduced after the Judge gave his ruling.

Aiding and requisite knowledge

55. What the evidence had to establish has already been noted. It was that Robinson first, had knowledge of Burgess' intention to kill or to cause grievous bodily harm and second, having that knowledge aided Burgess in committing the offences charged.

56. Taking knowledge first, Mr. Perry's submission was that there was no pre-existing agreement. The usual evidence presented as proof of knowledge might well be a pre-existing agreement, but it is neither essential (**R v Sherrington & Kuchler** [2001] QCA 105, para.16) nor the only form of proof. Here the Prosecution relied on both an understanding, or arrangement, and also Burgess' production of the metal bat and the first tremendous blows with it to Jahmal's head in Robinson's presence, which would clearly have provided Robinson with the knowledge that serious injury was being inflicted. Even if the pre-existing agreement did not extend to the infliction of such injury, or indeed, there was no pre-existing agreement, such knowledge would suffice if Robinson after acquiring it continued to aid Burgess with his presence, help and assistance as the Judge directed.

57. The Judge directed the Jury on "aid" and the requisite knowledge in the following way:

> *"Aid"; what does that mean? Well, common speaking it means assists. For the purposes of the Criminal law, however, aiding means doing one or more of three things, while being aware that a crime is being committed. The three things are: Intentionally helping the person actually committing the crime to commit it; or, intentionally encouraging him by one's presence or behaviour to commit the crime; or, intentionally conveying to him by words or presence and behaviour that one is assenting to and concurring in the commission of the crime. And you will see that those three categories of aiding are mirrored in the prosecution particulars.*
>
> *Mere presence is not enough to amount to aiding. As Mr. Perry says, being present at the commission of a crime and failing to intervene is not enough to make a person an aider for the purposes of the Criminal law. Nor is a bystander guilty simply because he's present and enjoying the crime, nor even if he harbours a secret intention to assist should the occasion arise. In order to make the bystander guilty, he must do something positive, intending to help or to encourage.*
>
> *A person can only be convicted as an aider if he has knowledge of the essential circumstances constituting the offence, and with that knowledge he must have intended to help or encourage the person committing the offence to bring about the forbidden results.*
>
> *As to the intention that must be proved against the aider, it's not necessary to prove that he himself intended to kill or to do grievous bodily harm for the crime of murder to be made out against him. It is enough it he knew that the other person, the*

person committing the offence, which is often referred to as the principal, it's enough if he knew that that other person had that intention and that, knowing that, the aider then intentionally did an act or acts to enable that other person to kill or to do grievous bodily harm.

The aider's liability may depend upon what he understood to be going on. If, for instance, he didn't know that the principal intended to kill or to do serious bodily harm but merely though that the principal intended an unlawful attack, an unlawful assault, and then death [end of p 2126] resulted, the aider would not be guilty of murder, even if the principal was; but the aider then could be guilty of manslaughter.

On the other hand, if the principal, that is the person actually committing the offence, went completely beyond what was contemplated by the aider at the outset and did an act of a completely different type from what the aider contemplated, then the aider would not be liable for it at all, unless he continued his aid after the principal had embarked upon his new course and with full knowledge of what the principal was doing.

Thus in this case, if you thought that Robinson did not know that Burgess was going to produce and use a baseball bat, then he's not a party to anything done with that bat, even if he had been aiding up to that point, and so would not be responsible for death or injury which resulted from its use.

However, if once he knew that a bat was being used, he then continued to lend himself to the enterprise by continuing to aid Burgess, in full knowledge of what was going on, then he would be liable, in other words criminally responsible, for any consequences caused by the use of the bat."

58. It is thus made clear that, particularly in the last paragraph quoted, that the requisite knowledge can be met by a pre-existing agreement or, significantly, by continued aiding in full knowledge of what was going on. The latter was not questioned and appears to be well established in Code jurisdictions: per McPherson JA para 13, **R v Lowrie and Ross** Q.CA No. 77&92 of 1999. Returning then to Mr Perry's submission that no pre-existing agreement was established, as mentioned earlier we are of the view that there was evidence upon which the jury could infer the existence of a pre-existing agreement extending to the beating of the twins, which on the evidence would be the only purpose or object of the twins being taken to the uninviting scene in the dark, early hours of the morning. However there is no evidence of that agreement extending to the use of the metal bat, particularly with such brutal force. But Robinson's undisputed presence while Burgess produced the bat and used it with the tremendous force necessary to cause the lethal injuries testified to, gave him full knowledge of what was going on. Far from thereafter disassociating himself from aiding Burgess, he continued his presence near the door and at Burgess' request transported the three potential witnesses to Ambassadors from the scene thereby ensuring there would be no witnesses to whatever ensued. This, in the situation that had developed, was of actual assistance to Burgess.

59. The aid provided after the bat was produced by Burgess was, first, Robinson's strategic presence near the door, which was in the particular circumstances positive help to Burgess in committing the offences. It is difficult to see how Burgess would have managed on his own, in the presence of four or even two persons upon whom he

may not have been able to rely. One way in which Robinson's presence assisted Burgess was tellingly illustrated by Cann when he was being cross-examined as to why he had not intervened. He responded that none of the others did so, he was scared, and if the yellow-skinned guy (Robinson) gripped him it would have been bad for him. In that regard on the evidence Robinson appeared to have the most powerful build, apart from Burgess. It is also significant that when Burgess must have realised the danger of Cann running loose outside, significantly it was Robinson whom he asked to look for him.

60. Different and more problematic issues arise with regard to two other parts of the evidence on which the Prosecution relied to establish Robinson's guilt. As summarised by the judge (paragraph 43 above) these were the blood smear in Robinson's van, and the CCTV footage.

61. The Prosecution contended that the blood smear on the inside of the van which matched the DNA of one of the twins was evidence that Robinson was party to disposing of the bodies at Abbott's Cliff after the murders. The Appellant's case was that the stain or smear could have been blood that got onto the clothing of one of the three whom Robinson conveyed to Ambassador's, after Jahmal was attacked and his blood was said to have been "flying around", as Mr. Perry was at pains to establish during the trial. That appears to have been counsel's rather than the witnesses` description of the bleeding. The emphasis on blood going everywhere stemmed from counsel's questions intended to provide the foundations of the submission here. The jury would have been aware that it was Schraders who travelled in the back of the van, the distance Schraders was from Jahmal when he was assaulted, the location in the van of the bloodstain or smear, and how likely it was for the blood to have got onto Schraders` clothing and thence on to the particular location on the door. It was for the jury to decide whether the suggested explanation for the presence of the bloodstain was a real possibility, or not. They were certainly entitled to reject it and

conclude that Jahmal's body was conveyed in the van after his death.

62. At this point, however, it must be noted that Robinson was charged with being an accessory to the murder, not with the separate offence of being an accessory after the fact. The judge explained carefully to the jury, correctly in our view (and this part of his direction was not challenged on appeal), that "acts done after the conclusion of the offence may be evidence of the person concerned`s state of mind and his degree of participation at an earlier stage, and in particular it may be evidence whether he was or was not at that time, the earlier time, consciously and knowingly assisting the principal in the commission of the offence" (Summation page 2129). He continued –

> *"In other words, if you are sure that he in fact went back, knowing what had happened earlier, then that may be evidence from which you can infer that he was a party to what had happened earlier.*
> *Similarly, the Crown point to the blood found in Mr. Robinson's van to suggest that he had at least one of the twins in his van after the attack; the inference you're invited to draw being that he participated in the disposal of the bodies. Similarly, the footage from the CCTV footage from the Flatts Four Star Pizza"* (page 2130).

63. In regard to the first ground of appeal (no case to answer), therefore, the judge was entitled to take account of the fact that potentially, depending on the jury's assessment of it, the evidence of the bloodstain in the van and of the CCTV footage was capable of supporting the prosecution's case that Robinson was an accessory to the offence of murder. Undoubtedly, however, the judge relied primarily on the eye-witness evidence of Cann and Whitter in support of his ruling.

64. The CCTV evidence is the subject of the fifth and sixth grounds of appeal, and we

will consider it in greater detail below.

65. It is clear, in our judgment, that there was evidence upon which it was open to the Jury to find that Robinson with knowledge that Burgess intended to kill or cause grievous bodily harm, aided Burgess in committing the murders of the twins. It follows that there was a case to answer. Moreover the Crown's evidence was such that its strength depended on the view to be taken of Cann's and Whitter's evidence, and that thus it was appropriate that the matter be allowed to be tried by the Jury: per Lord Lane CJ (**R v Galbraith** [1981] 2 All E R 1060 at 1062g). We accordingly reject the first ground of appeal.

The Second Ground of Appeal

66. 2(a) That the Judge erred in his direction on "aiding"

The Submissions

67. Toward the end of his submissions on this ground, Mr. Perry, in response to the Court's request helpfully identified the following propositions to which his submissions were directed: -

1. That it was wrong to go back to the Common Law

2. That "aid" is a straightforward word and the furthest a summing up should go is to relate it to the matrix.

3. That the three categories of "aid" the Prosecution provided as particulars and which were adopted in the Judge's directions, came from Common Law, and from a different factual matrix.

68. Mr. Perry went on to agree that wherever they came from, if they were relevant and the appropriate way of putting it in the factual matrix that would be acceptable; and further that the only question was whether they were appropriate in the particular case. He explained that it was not appropriate to direct the Jury to consider whether Robinson encouraged or helped, because at its highest the case against Robinson was that he was present in the room while the twins were being attacked. But all he did, on the Prosecution case, was stand by the door.

69. Turning then to address the first proposition:

1. (That it was wrong to go back to the Common Law)

This ground is concerned with the Judge's direction on "aid" which it is helpful to repeat here:

> *"Aid"; what does that mean? Well, common speaking it means assists. For the purposes of the Criminal law, however, aiding means doing one or more of three things, while being aware that a crime is being committed. The three things are: Intentionally helping the person actually committing the crime to commit it; or, intentionally encouraging him by one's presence or behaviour to commit the crime; or, intentionally conveying to him by words or presence and behaviour that one is assenting to and concurring in the commission of the crime. And you will see that those three categories of aiding are mirrored in the prosecution particulars.*

70. What was meant by the somewhat vague phrase "went back to the Common Law" was not very clear. To start with, and well into his submissions, Mr Perry, having

established that the particulars of "aid" provided by the Prosecution to the Appellant and adopted by the Judge in his summing up originated in **Lowrie and King** (2) [1972] VR560, a Common Law case, appeared to be contending that this constituted the going back to the Common Law. However, in the context of his three propositions, he explained that this was only to show that the particulars were formulated not for the circumstances of this case but some other. Also relied upon was the use of the word "encouraged," which it was said was Common Law language. For the legal basis of these contentions reliance was placed upon the following passage in the judgement of the Privy Council on appeal from this court in **Franks and Furbert** [2000] UK PC 12 at para 28:

> *"The Criminal code of Queensland contains provisions which for all practical purposes are identical to the relevant provision of the Criminal Code of Bermuda. In Stuart –v- The Queen (1974) 134 C.L.R. 426 the High Court of Australia considered Sections 8, 23 and 302(2) of the Criminal Code of Queensland which correspond to Sections 28, 36(1) and 287(1)(c) of the Bermuda Code. Gibbs J stated at page 437:*
>
> *"…the correct approach to the interpretation of a section of the Code is that stated by Dixon and Evatt J. in Brenan –v- The Queen (1936) 55 C.L.R. 253 at p263 as follows:*
>
> *"…it forms part of the code intended to replace the common law and its language shall be construed according to its natural meaning and without any presumption that it was intended to do no more than restate the existing law. It is not the proper course to begin by finding how the law stood before the code and then to see if the code will bear an interpretation which will leave the law unaltered."*
>
> *This passage does not mean that it is never necessary to resort to*

the common law for the purpose of aiding in the construction of the Code – it may be justifiable to turn back to the common law where the Code contains provisions of doubtful import, or uses language which had previously acquired a technical meaning, or on some such special ground: See Robinson –v- Canadian Pacific Railway Company [1892] A.C. 481 at p487 cited in R –v- Scarth [1945] ST.R.Qd 38 at p44. If the Code is to be thought of as 'written on a palimpsest, with the old writing still desirable behind' (to use the expressive metaphor of Winbeger J in Vallance –v- The Queen (1961) 108 C.L.R. 56 at p76) it should be remembered that the first duty of the interpreter of these provisions is to look at the current text rather than at the old writing which has been erased; if the former is clear, the latter is of no relevance"

71. Precisely how this provides the legal foundation is not spelt out. Mr Perry stressed the exclusion of resort to the Common Law and remarked that it was in the nature of heresy to rely upon the Common Law in applying the Code. The reference to heresy appears to have been derived from the judgement of McPherson JA in **Sherrington** at para 11. His actual words were: "For my part I would prefer to avoid importing into the Code words that do not appear there. Incorporating the expression 'in concert' in s 7 (1)(a) [Bermuda s27(1)(a)] involved a reversion to the Common Law which (unless all else fails) is considered a form of heresy." If it is not proper to begin by finding how the former Common Law stood before the Code and then to see if the Code would bear an interpretation that will leave the Law unaltered, as propounded in **Brenan** and followed in **Furbert**, to then go as far as reverting to the former Common Law might well justifiably attract the characterisation of heresy. However

Mr. Perry rightly did not seek to rely upon those words of McPherson JA in **Sherrington**. Nevertheless it should be noted that the incorporation of "in concert" would have been actual application of the former law which would be plainly wrong.

72. What **Furbert** was about was the interpretation and construction of the Code, and in that context, displacement of the presumption ordinarily applicable to codification of existing law, i.e. that it preserved the former law. But Mr Perry's submission was not concerned with interpretation or construction of the Code. Thus **Furbert** does not support the contention in that respect. Likewise "encouragement" which can be seen similarly not to be concerned with the interpretation or construction of the Code, in which it does not appear. It can accordingly be seen that **Furbert** does not support the foregoing submissions. The inclusion of a word said to be in the language of the former Common Law cannot be equated with reliance upon or reversion to the Common Law.

73. Moreover in the submissions made the three categories of aiding originally provided by the Prosecution were referred to as principles and regarded as defective definitions, thereby betraying a misconception of the Judge's directions. They originated from Robinson's request for further and better particulars of the "aiding" relied upon. Plainly what was sought and provided were the particulars of the nature or form of the aid sought and provided. Moreover whether "encourage" could be regarded as Common Law language is doubtful. This can be seen from the judgement of Derrington J in **Beck** [1989] 43A CRIM. L. R. 135 in which he discusses

"encouragement" at pages 140- 153 and demonstrates its not infrequent use in both Common Law in Code Jurisdictions and significantly, as a form of aid. The submission here does not assist the Appellant's case.

74. Proceeding to the second proposition, (that "aid" is a straightforward word and the furthest a summing up should go is to relate it to the matrix), Mr. Perry submitted that in a Code jurisdiction, (i.e. non-Common Law), the approach is to look at the word "aid". For the former contention he relied upon the judgement in **Brutus and Cozens** [1973] AC 854 specifically the speech of Lord Reid to the effect that an ordinary word in the English language is intended to have its ordinary meaning. No authority was cited for the latter. However these submissions do not assist him. As we have already explained, the particulars of aiding given did not define aiding but were originally intended to provide information of the different forms the aid took. This misconception is the basis of the submissions directed against the three categories of aid, which therefore fail.

75. The third proposition was that the three categories of "aiding" the Prosecution provided as particulars and which were adopted in the Judge's directions, came from Common Law, and from a different factual matrix.

76. The first point Mr. Perry made that it was wrong to go back to the Common Law. The reliance on going back to the Common Law has already been discussed in the context of the first proposition. As has been pointed out, **Furbert** does not provide support to

such matters which would have nothing to do with the interpretation and construction of the Code. These are outside the limited scope of the principles identified there.

77. As to why it was thought inappropriate to direct the Jury in the case to consider whether Robinson encouraged or helped, presumably in going beyond the matrix, Mr. Perry submitted that the high water mark of the case against Robinson was that he was in the room, merely present when the “attacking” occurred. For that, the word used was “present”. So he was “present” when the “attacking” occurred. All he did was stand by the door. As already pointed out, there was evidence upon which it was open to the Jury to conclude that such presence was positive assistance.

78. It was also a misdirection, Mr. Perry submitted, notwithstanding the attempt to direct the Jury that mere presence is not enough; it gave authority to presence, encouragement and assent which the facts did not warrant. Mr. Perry conceded that mere presence could be “aid,” depending on the facts or circumstances. Moreover as we have already said, in the same context, in our view the Jury were entitled to find that it was not mere presence but active aid that was provided to Burgess in the manner described.

79. In support of his submission Mr. Perry referred to the judgement of the Queensland Court of Criminal Appeal in **Beck** [1989] 43A CRIM. L. R. 135. It is only necessary to refer to the following passage in the judgement of Macrossan CJ at p141 upon which he particularly relied:

"It is not possible to be an aider through an act which unwittingly provides some assistance to the offender in the commission of the offence and it is not possible to be an aider, whatever the intention, unless support for the commission of the offence is actually provided. In some cases (see Wylie Payne and Harper; Kenniff [1903] St R Qd 17 at 43 and Clarkson (1971) 35 Cr App R 445) where positive intervening acts in support of the commission of the offence by the principal offender may not have occurred it has been natural to speak of encouragement and this will often be an appropriate word to convey, in the absence of direct physical involvement, the relevant active element in the aiding which has taken place. It is not, however, the word which the statue uses and sometimes it may not be an appropriate word in cases of aiding which occur where the aider stops short of active intervention. Encouragement may have a sense of active incitement which will not always be appropriate. It is possible, after all, to aid someone in the commission of an offence while harbouring feelings of disapproval of the offence and of the conduct involved in it. This form of aiding could occur because of the strong call of a bond felt by the aider with the principal actor who, for his part, may need no encouragement and is determined, anyhow, t o attempt to commit the offence. If the word "aids" needs any explanation at all, it might, on occasions be better understood in its effect by the use of words such as "give support to ... help, assist": see Collins English Dictionary and Shorter Oxford English Dictionary. The word which the Code itself uses is "aids" and it will always be necessary to come back to that. There must be some deliberate positive involvement, if not active physical involvement, when the offence of aiding occurs."

80. Clearly "encouragement" may not be wholly appropriate in some cases. But Macrossan CJ did not go so far as saying it should be totally avoided or that this would undermine a conviction upon that basis. He pointed out that "no objection had been made to the terms of the summing up but only to the sufficiency and strength of the case" on the aspect of "aiding" by speaking in terms of encouragement. He also indicated a degree of reservation by pointing out that that did not seem to be the occasion for any extended examination of decided cases on aiding. Moreover in the present case the reference to "encouraged" appeared only in one of the three particulars. Finally, the presence in question had positive aspects, e.g. the strategic position Robinson took, and the transporting of the three potential witnesses; and possibly passive aspects i.e. mere presence. In this light the direction can be seen to have been appropriate.

81. 2(b) (That the Judge erred in that he failed to direct the jury adequately or properly as to the legal consequences of the liability of a secondary party (which role was attributed to the Appellant) when the conduct of the principal is of or may have been outside the scope of the alleged enterprise, whether by reason of the latter's act or intent).

82. While we are unable to accept that the Judge erred in the manner suggested, whether the conduct of the principal is or may be outside the scope of the alleged enterprise is no longer material given that the case here is posited upon assistance with knowledge

and not the scope of any enterprise, that is the Appellant's knowledge of what was going on i.e. the production and lethal use of the metal bat, when he subsequently aided Burgess by his presence, and transportation of the three to Ambassadors.

83. The main thrust of his submissions here, Mr. Perry said, was that there was no plan to use any force. We have already addressed that matter in the context of Ground 1 and come to the conclusion that there was evidence upon which the Jury could infer a pre-existing agreement extending to assaulting the twins with fists, though not the metal bat. As to knowledge in that respect this, as we have said, was met in the way the Judge directed i.e. Robinson's presence when the metal bat was produced and used with lethal force that would have imbued him with knowledge that a lethal weapon was being used with lethal force and that with that knowledge he continued his positive assistance by his strategically positioned presence, and moreover his removal of the three potential witnesses from the scene at Burgess' request. Authority for this is to be found in the judgement of McPherson JA in **Lowrie and Ross** CA 77 & 92 of [1999] para 13:

> *"Once such a state of mind or knowledge [of the other's intention to kill or to do grievous bodily harm] on the part of one of the participants is established, he (or she) becomes criminally responsible for the act or acts of any of the others (whether identifiable or not) that cause or substantially contribute to the death or subsequent murder of the victim. Instructing the Jury in such a case, it is, I consider, ordinarily sufficient to direct that once a participant in such an assault becomes aware that life–threatening force is being used by*

one or more of the others, he or she, is by continuing to assist in the assault, liable to be found guilty if the victim's death results from injuries inflicted by any of the participants."

84. Given the foregoing factual and legal bases which in our view sustain the verdicts, Mr Perry's reliance upon his contention that the production of the bat by Burgess was a complete surprise to all at the scene is misplaced. The evidence was that only Cann and Whitter said that the attack by Burgess came out of the blue and the production and use of the bat came out of the blue respectively. There was no evidence whatever that Robinson who was present was surprised. Likewise the deficiency in the Judge's direction claimed in this Ground of appeal is irrelevant to the legal and factual bases which we consider are sustained by the evidence, and in respect of which proper directions were given.

Ground Three

85. (That the verdicts of the Jury in respect of both counts 1 and 2 and/or either of them are unreasonable and cannot properly be supported by the evidence) Mr. Perry acknowledged that this ground is essentially the same as ground 1. Except, he added that it required the Court to now stand back and ask itself whether any of the verdicts of the Jury are unreasonable and cannot be properly supported by the evidence. We have done so and satisfied ourselves that there is no reason to intervene upon the basis mentioned or any other.

Ground Four

86. (Without prejudice to the general contention that the convictions of the appellant cannot be supported by the evidence and are consequently unreasonable, the appellant specifically contends that in the light of the evidence of Cann and Whitter and the forensic evidence he could not be properly considered in any event as having aided in the commission of murder in respect of Jahmil (count 1) as it is plain that the injuries which caused death must have occurred when the appellant was not in the presence of Burgess whom the Prosecution contends inflicted the injuries.)

87. This ground obviously relates only to count 1 i.e. the murder of Jahmil. Cann's evidence relevant to this count is that Burgess struck Jahmil with one blow of his fist to the face, upon which Jahmil slumped to the floor unconscious or semi-conscious and was still there when Cann fled the scene. Jahmil had been drinking much more that Jahmal earlier and had been showing signs of it. Whitter's evidence was that while Burgess was attacking Jahmal with the bat, Jahmil opened his eyes and was struck by Burgess on his legs. Whitter did not mention any other blows. Dr Rao's and Professor Walsh Haney's evidence was that Jahmil's upper spine was severely damaged and that death would have resulted very quickly, probably within a few minutes.

88. Accordingly Mr. Perry submitted, rightly in our view, that the injuries which caused death would have been inflicted after Robinson left to transport the three to

Ambassadors, and thus that those injuries were not inflicted in his presence. This latter point was abandoned and in any case does not detract from the Prosecution's case, which, as the Judge put it in his summing up, the Prosecution case was that the injuries inflicted after Robinson departed could only have been inflicted by the person who inflicted the earlier injuries upon the twins. That, in our view is right. But it was an inference that was for the Jury to draw. Plainly there was evidence upon which the Jury could properly have drawn that inference and it would be surprising if they did not do so. There is no merit in this ground.

Grounds Five and Six

89. (That the judge erred in admitting evidence in relation to a van which was relied on by the Crown as suggesting that Robinson had assisted in the transportation of the bodies of the twins to Abbots Cliff from the place of the alleged killing.) (Allied to ground five above that the judge failed to properly direct the Jury in relation to the evidence led by the prosecution in respect of the van as aforesaid)

90. The evidence

This consisted of CCTV footage from an ATM camera overlooking a road which leads east from Crown Hill Lane towards an area known as Flatts, where there is a choice of three routes, one of which leads towards Abbott`s Cliff where the twins` bodies were later found. But the judge reminded the jury "off each of those roads there are multiple residential roads which lead off. So it doesn't – the fact that the van is travelling east by the ATM doesn't necessarily tell you where it was going" (page 2218).

91. A series of still prints taken from the video footage appeared to show a vehicle

travelling east at 0545 on Sunday 13 March, and another travelling west at 0638. An expert witness, Mr. Livecchi, blew up and enhanced the film and produced the still photographs. The judge commented “He works for the Secret Service but that’s rather grand for what he did, because he didn’t do much” (p.2217).The prosecution contended (1) that the vehicle shown in both sets of prints was a white van;(2) that it was the same van on both occasions; and (3) that the van was Robinson’s (of which other photographs were available for the jury). However, there was no positive evidence that the vehicle in any of the prints was Robinson's, and there was no identification of the driver or any other occupant of the van, There was evidence that his was one of 165 similar white vans in Bermuda at that time, and the fact that the van in the photographs appeared to have a logo on its side doors, which the prosecution contended was a blurred image of “Robust Cleaning” which was painted on Robinson’s van, had to be considered in the light of the Bermuda Regulation that “all commercial vehicles of this type are required to have the business name of the firm or person operating the truck in lettering not less than four centimetres nor more that 15 centimetres high on the exterior of both sides” (Summation page2219).

92. The issue raised by ground five is whether the judge erred in ruling that this evidence could be placed before the jury. We conclude, not without hesitation, that he was entitled to do so. The expert evidence of an entomologist was that the twins' bodies were dumped at Abbott’s Cliff on Sunday 13 March, and the prosecution contended that that this would have to be done during hours of darkness to avoid detection. Therefore, the recorded times and direction of travel of the vehicle shown in the photographs was consistent with this allegation. But clearly it was necessary for the judge to give a careful direction regarding the limited weight and possible relevance of the evidence they heard.

93. In the event, he directed them as follows –
“Now, the prosecution put this before you because they contend that the van shown in these pictures is Robinson’s van and they invite you to make a comparison of the photographs of that van………That’s a comparison, members of the jury, you can

attempt to make in the jury room. It's a question of fact for you whether it's the same van in some or all of these photographs.

Before you can use this evidence against Mr. Robinson, you would have to be sure that it was his van. Might be is not good enough for these purposes. In considering whether it's his van you should bear certain facts in mind. Bear in mind that Inspector Laws accepted that there are 165 Mitsubishi vans in Bermuda."

94. It is questionable whether the jury should have been directed that the comparison between the different photographs was a question of fact for them to decide. There was no expert evidence to assist them, and the correct interpretation of photographs would not normally be regarded as an issue of fact for the jury. It would have been better, in our view, if the judge had directed them that the photographs simply failed to identify the van or to show that the vehicle shown in them was Robinson's van. That would have relegated the evidence to the marginal role of supporting such other evidence as there was that Robinson's van was used to transport the bodies to Abbott's Cliff shortly before dawn on the Sunday morning, namely, the blood smear inside the van. Moreover, given the existence of 164 similar vans in Bermuda, it added very little weight to the prosecution's case in that respect.

95. However, the second paragraph of the direction, quoted above, put the matter less favourably for the prosecution and therefore more favourably for the Appellant. By directing the jury to disregard the evidence unless they were sure that it was his van, the judge effectively neutralized the evidence altogether. The jury could not be sure, on that evidence alone, and by directing them that "might be" was not good enough. He excluded the possibility that the evidence though less than conclusive might nevertheless have some relevance and weight in support of other evidence.

96. Unless we are to assume that the jury disregarded the direction altogether, it follows that their conclusion that Robinson was an accessory to the murders did not depend on the CCTV evidence. That conclusion was amply supported by the eye-witness evidence of Cann and Whitter, notwithstanding that their evidence was not in all

respects the same. We are satisfied that the admission of the CCTV evidence, given the direction the judge in fact gave regarding it, does not imperil the safety of the jury's verdict in any way.

Conclusion

97. For the foregoing reasons we dismiss Robinson's appeal, having earlier dismissed that of Burgess. We direct that the appeals against sentence be set down for hearing by the Registrar in consultation with Counsel.

Signed

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Zacca, President

Signed

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Nazareth, JA

Signed

....
Sir Anthony Evans, JA