



The Court of Appeal for Bermuda

CRIMINAL APPEALS No. 9, 10 & 18 of 2009

Between:

**KYLE SOUSA
SHANNON JEROME TUCKER
VERNON MICHAEL SIMONS**

Appellants

-v-

THE QUEEN

Respondent

**Before: Zacca, President
 Evans, JA
 Auld, JA**

Appearances: Mr. C. Richardson for Kyle Sousa
 Mr. M. Pettingill for Shannon Tucker
 Ms. S. Subair for Vernon Simons
 Mr. R. Field, Mr. C. Mahoney & Ms. T. Burgess
 for the Crown

Reasons for Judgment

Date of Hearing: 10th / 23rd November 2010
Date of Judgment: 23rd November 2010

EVANS, J.A.

1. The Appellants, Kyle Sousa, Vernon Simons and Shannon Tucker, were convicted of murder after a trial before The Hon. Carlisle Greaves J. and a jury which ended on 13 April 2009. The victim was Matthew Clarke who was a friend of Shannon Tucker and an associate of Vernon Simons, but on the evidence he and Kyle Sousa were unknown to each other.
2. Matthew Clarke was killed in his room at his parents' house in North Shore Road on the afternoon of Wednesday 9 April 2008. He had been viciously attacked with blows to his body and head from a blunt instrument, and no less than twenty six stab wounds from one or possibly more than one sharp weapon. He died at the scene.
3. The trial had begun on 12 March 2009. The Crown relied upon a certain amount of circumstantial evidence and upon a large number of out-of-court statements made by the defendants, including tape-recorded interviews by the police officers investigating the crime. None of the defendants submitted that there was 'no case' for him to answer. As the trial progressed, each defendant gave evidence and was extensively cross-examined by counsel for the prosecution and for each of his co-accused.
4. The jury returned unanimous verdicts after retiring for about three and a half hours and the defendants were sentenced to life imprisonment.
5. The grounds of appeal include submissions that the learned judge wrongly admitted evidence of certain out-of-court statements made by Kyle Sousa to a police officer in response to questions by him, and that the directions he gave the jury regarding those statements and regarding the police interviews generally, were misleading and incorrect. Other grounds of appeal raised on behalf of Kyle Sousa alone will be dealt with separately below.
6. The learned Judge directed the jury, correctly, that it was necessary for them to distinguish between the evidence given from the witness box by each defendant, and any out-of-court statements, including police interviews, which that defendant had made. The former was admissible as evidence, not only in his own case, but also in the cases of his co-accused, but statements made out of court could only be evidence against the defendant who made them. That rule, the learned Judge said was subject to

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certain exceptions, and counsel for the appellants criticise the directions he gave in that respect.

7. When considering these detailed criticisms, it is necessary to bear in mind that all the defendants gave evidence at the trial, and the jury heard their individual accounts first-hand. Anything they had said beforehand, therefore, had to be considered in the light of what they said in court, and for this reason the appeal demands an overview of the state of the evidence as it was at the end of the trial. The appellants' complaints about the wrongful admission of evidence and of errors in the Summation have to be seen in the context of the evidence as a whole.

Overview

8. Each of the appellants gave a detailed account of his movements on the afternoon in question, and acknowledged that in doing so he was contradicting much of what he had said in his police interviews, which initially consisted largely of denials. As regards events during the late morning and early afternoon, they gave substantially the same account. They were in Shannon Tucker's truck – he is a builder or contractor and used the truck in the course of his business – from about 12 noon. They stopped near what they called Admiralty House in the Pembroke area of Bermuda and walked on the beach there, where they were seen by an independent witness. There was some discussion between them, but they differed sharply as to what was said. Then they resumed their journey to Matthew Clarke's house where Shannon Tucker parked the truck in the drive way outside its gate. Shannon Tucker and Vernon Simons said that they had stopped a short distance before and that Kyle Sousa got out at that stage; he denied that, and said that he was in the truck until they reached the house.
9. From then on, until after the killing, their accounts were quite different, and they each accused one or both of the others of having caused Matthew Clarke's death. But despite these differences, the outline was the same.
10. Shannon Tucker said that he and Vernon Simons rang the bell to call Matthew Clarke, who let them into his room where they talked about a pending drugs offence charge with which they were all involved. He said that Vernon Simons left the room (because he was sweating, and "to cool down") and when he returned "he pulled something and hit Matthew in the head". Matthew grabbed Vernon, and he, Shannon Tucker, walked toward them, asked Vernon why he did it, and "was about to hit Vernon when he

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notice[d] somebody jump over the wallwith a red scully on his face.” That person, he said, entered the room and took something from his waist, and went past him to Matthew. He said that he, Shannon Tucker, bolted for the door, followed by Matthew Clarke whom he was “trying to lead out”; but Vernon Simons and the other person grabbed him, Shannon Tucker, and whilst he was trying to pull him out, Matthew “appeared to get stabbed in his back” and had an expression on his face “like a hurting type when he let go”. Then he, Shannon Tucker, got out and lost his balance and the door closed behind him. From outside, he heard Matthew Clarke saying “Why you guys doing this to me? I have a family”, and he heard someone say “Because you snitch”. He ran to his truck and was joined, first by Vernon Simons, then by the other person whom he realised was Kyle Sousa. Both came running out and had blood on them. He said that he went back to Matthew Clarke’s room where he saw him lying injured on the bed and “breathing heavy”. He then said “I cannot leave Matthew like this” but Kyle Sousa pulled out a knife and said “I’ll stab you if you don’t leave.” So they all got into the truck and he drove off.

11. Vernon Simons said that they dropped off Kyle Sousa then went to Matthew Clarke’s house where Shannon Tucker shouted for him and he unlocked the gate for them. They talked about the pending drugs charges and then, when Shannon Tucker and he were leaving and they had reached the gate on their way out, he said that he heard a sound and as he looked back he saw someone jump over the south wall of Matthew’s apartment, with a red scarf across his face. He could only see his eyes. He was terrified and said to Shannon Tucker “Let’s get out of here”, but he did go back and “saw somebody attacking Matthew”. He said that he tried to save Matthew by pulling the attacker away, but “the attacker spun towards him” and he, Vernon Simons, ran outside the truck and joined Shannon Tucker there. Then he noticed someone running to the gate, with his shirt off, and he saw the attacker’s face. It was Kyle Sousa and he had “a deranged look in his eyes”. The truck backed out (Shannon Tucker was driving) and they all drove to his (Vernon Simons’) home.
12. Kyle Sousa said that when they arrived at the house, he was still in the truck. The other two got out and Shannon Tucker told him to wait there, which he did. He waited for five to ten minutes then walked across the street to a barber shop where he spoke to “a Jamaican-accent person”. As he was walking back to the truck he heard “a screaming noise like someone was in pain” which he first thought came from another house, then

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he realised that it was from the yellow house where the truck was parked. He said that at a certain point (which he identified) he “saw Vernon in a room in the yellow house hitting somebody with a pipe/stick object”. He said he was scared, and that he also saw that “Shannon.....when Vernon stopped hitting Matthew Clarke, walked towards the person Vernon had been hitting and with his hand made to and fro motions” which he, Kyle Sousa, demonstrated to the jury. To the Judge, they appeared to be stabbing or punching motions. He, Kyle Sousa, said to the other two, “What the fuck are you guys doing?” and Shannon “came towards the wall and said “Don` t worry about what the fuck we guys are doing. Aren` t you supposed to be in the truck anyway?”. He said that a car driven by a lady “startled him” and that he walked “real fast” towards the barber`s shop, then started running until he stopped to catch his breath. At that point the truck drew up and Vernon Simons said “Get the fuck into the truck” and pushed him towards it. That was how, he said, he got blood on his shirt sleeves. He said that “Vernon looked like a madman, had blood on his pants, shirts and hands, and kept ranting at him saying “If you tell anybody you will be next”. Shannon Tucker just gave him dirty looks.

13. There was little divergence between their three accounts of what they did after leaving the North Shore Road. They drove to Vernon Simons` home — where Shannon Tucker left his truck and went on to a pre-arranged appointment at Hamilton Police Station in connection with the pending drugs charge. Kyle Sousa and Vernon Simons both had showers and changed into different clothes. That was confirmed by independent witnesses at the house. The truck was cleaned, particularly the passenger side of the front seat where Vernon Simons and Kyle Sousa had been sitting, the latter in the centre next to the driver. Shannon Tucker returned later and according to him Vernon Simons required him to take off his jacket and sweater. They were put into a trash bag together with the clothes that the other two had been wearing before their showers, and he took them in his truck to the incinerator. Kyle Sousa went with him and they left the bag there. Kyle Sousa said that he didn` t know what was in the bag. Meanwhile, a piece of piping which Shannon Tucker said had been in his truck for some time, and which it was accepted was the blunt instrument used to inflict blows on Matthew Clarke, though not the stab wounds, was put in a plastic bag and taken to a nearby lake, where it was later found by the police, weighted down by two rocks.

14. Apart from the three accused, there was no direct evidence of the circumstances of the killing, and the expert evidence was of limited relevance. A DNA sample taken from a

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bracelet worn by Matthew Clarke could not be excluded as having come from Vernon Simons. It was suggested that Kyle Sousa's account of looking into the room and seeing what was happening there, from somewhere outside the rear boundary wall, could not be correct, because of the layout and distances involved, and the jury were taken on a site visit so that those and other features could be seen and checked by them personally. The knife or other sharp instrument, or instruments, used to stab Matthew Clarke was never identified, though there was some evidence about its possible provenance.

15. Any possibility that the killer was the unidentified "Jamaican" man or boy who Kyle Sousa claimed that he saw nearby when he took a short walk from the truck was effectively negated by Shannon Tucker's and Vernon Simons' evidence that the attacker who came into the house was Kyle Sousa himself. That and other references to such a person remained relevant, however, because the Crown alleged that the murder was a joint enterprise which the defendants had carefully planned. Part of the plan, it was suggested, was to say that Matthew Clarke was attacked by a stranger for some reason connected with his previous involvement with persons handling unlawful drugs, in Bermuda and the USA.
16. The story of pending drugs charges against Shannon Tucker and Vernon Simons - both had been required to report for police interview, Shannon Tucker on the afternoon in question and Vernon Simons on the following day - was constantly in the background but was never described in detail at the trial. It seemed that, some time before, a relatively small quantity of drugs was found in some machine parts imported by Shannon Tucker's business from the USA. He and Vernon Simons and Matthew Clarke had all been to the USA in connection with that matter, though not all together. There was a suggestion that Matthew Clarke had failed to pay the USA handlers who had hidden the drugs in the machine parts, and thereby incurred their displeasure, and Shannon Tucker claimed that he had had to pay US\$60,000 to them on Matthew Clarke's behalf, whether in respect of that shipment or some other. Significantly, both Shannon Tucker and Vernon Simons said that they were trying to persuade Matthew Clarke to become party to a scheme which would save Shannon Tucker and perhaps Matthew Clarke himself from being sent to prison for this importation; the suggestion was that Vernon Simons was willing to plead guilty and accept full responsibility for it, on the remarkable terms that Matthew Clarke would pay him US\$2/300,000 in cash and Shannon Tucker would pay him US\$15,000 for every year that he spent in custody.

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Though these matters were not explored in any detail in the evidence at the trial, it was clear from these figures and suggestions alone that the two defendants, and Matthew Clarke himself, were or had been involved or suspected of being involved in unlawful drugs handling on a substantial scale.

17. There was no suggestion, however, that Kyle Sousa was involved in these drugs matters at any stage. He was a friend of Vernon Simons who introduced him to Shannon Tucker, who may or may not have offered him a job some weeks or months before. But Kyle Sousa gave evidence of a conversation which took place, he said, when they stopped and got out of the truck at Admiralty House. As they walked down to the beach, “Matthew Clarke came up in the conversation. Shannon was saying how Matthew Clarke done him wrong with some drug stuff.....Shannon seemed angry.....He seemed angry because he had to answer bail.” Then, he said, Shannon shouted at him: “Kyle, suppose I give you a grand, would you kill this guy?” Sousa said that he replied “No way” and that he just thought Shannon was blowing off steam, “venting”. Shannon Tucker denied making any such remark, and Vernon Simons said that it did not happen within his earshot. Kyle Sousa also said that, as they were leaving Admiralty House in the truck, he asked where they were going, and Shannon Tucker replied that he was going “to check this guy before he answered bail at three o’clock”, though without naming the guy in question.
18. Finally, in relation to the Crown’s allegation that Shannon Tucker organised the murder and recruited Kyle Sousa for that purpose, there was evidence of a meeting at Shannon Tucker’s house the previous evening at which Vernon Simons was present. Shannon Tucker said that Kyle Sousa was also there, but Kyle Sousa denied this; and there was evidence of telephone records which showed significant numbers of calls between them both on the previous day and on the day of the murder itself.

The issues for the jury

19. All three defendants admitted travelling together in Shannon Tucker’s truck to Matthew Clarke’s home, with a stop at Admiralty House where they walked on the beach. They gave different accounts of what followed, but they all agreed that Matthew Clarke was attacked in his room and was injured and wounded whilst they were at the property or, in Kyle Sousa’s case, standing nearby. It was not disputed that he was beaten with a blunt object and stabbed with a sharp weapon, and that the attack caused his death. Shannon Tucker and Vernon Simons drove off in the truck and went to the latter’s

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home. Kyle Sousa agreed that he went with them, though he said that he had run from the scene and they stopped the truck to pick him up when he paused to recover his breath.

20. Each defendant gave a different account of who the attackers were and denied that he was one of them. The jury had to decide whether they were satisfied, taking the evidence against each defendant separately, that that defendant was guilty of murder, either as a principal offender who inflicted the fatal blows, or as an accessory who was present and assisted the attacker at the scene, or as a party to a joint enterprise which had the intention of killing or causing serious injury to Matthew Clarke and which achieved that result, each playing his respective part as agreed between them.
21. If it was correctly admitted, there was ample evidence which entitled the jury to conclude that Matthew Clarke was murdered as the result of a joint enterprise and that all three defendants were parties to it. On that basis, it was unnecessary for the jury to be satisfied precisely what blows were struck and what wounds were inflicted, and by which one or more of the defendants. If and to the extent that they did reach a conclusion on those matters, there was evidence which enabled them to convict Kyle Sousa (direct evidence from Shannon Tucker and Vernon Simons that he was the attacker) and/or Vernon Simons (direct evidence from Shannon Tucker and from Kyle Sousa) and/or Shannon Tucker (direct evidence from Kyle Sousa only).

Appeal submissions

22. On behalf of the appellants, it is submitted (1) that evidence was wrongly admitted at the trial; (2) that there were deficiencies in the learned Judge's directions to the jury; and (3) (in the appeal by Kyle Sousa) that his defence was not properly conducted by counsel who advised and represented him at the trial. On these grounds, it is submitted on behalf of each defendant that the guilty verdict against him should be set aside.
23. We shall consider each of these submissions below. But first it has to be said that none of them leads easily to the conclusion that the jury's verdicts, reached after hearing detailed evidence from all three accused, were influenced by any of the matters about which complaint is now made.

Wrongful admission of evidence

24. Two matters arose out of the cross-examination of Kyle Sousa by counsel who appeared for Vernon Simons at the trial. In view of the criticisms now made against him by Miss Subair, we shall refer to him as “Simons’ trial counsel”.

(a) The ‘gang’ evidence

25. First, he asked certain questions which were founded, we were told, on out-of-court statements made by Kyle Sousa to the police which the Judge had ruled, at a pre-trial hearing, could not be proved as part of the prosecution case. They could be regarded as damaging to Kyle Sousa and they were only relevant to the murder of Matthew Clarke insofar as they might suggest the he was a person pre-disposed to use violence. Counsel introduced the questions on that basis –

“Q. And you’re accustomed to violence, aren’t you. Mr. Sousa?”

A. No, I’m not.

.....
Q. Do you have a tattoo, Mr. Sousa?

A. Yes, I have a tattoo.

Q. And what’s that tattoo say?

A. “Killa”.

Q. “Killa”. How did you get that tattoo?

A. Well, I got initiated from a gang and they made me.....”.

He said that they, the gang, “jumped” him and punched him, and asked whether they drew blood he answered “Not really”. Counsel continued –

“Q. So you were a member of a gang then?”

A. Yeah. Not really. I was not a member of the gang.

Q. You got initiated you said?

A. Yes, well, I didn’t have the heart to be in the gang.....I wasn’t really in it.”

26. The questions were not objected to because, Mr. Richardson told us, he (as counsel for Kyle Sousa) believed that defence counsel were entitled to raise the matter in cross-examination on behalf of a co-accused, provided the test of relevance was satisfied, and he accepted that they were relevant, though only marginally, to Vernon Simons’ defence. On appeal, however, he submitted that the evidence should have been excluded because the questions were based on statements in the nature of confessions which the Judge had held were involuntary and could not be proved as part of the prosecution case. The legal argument was developed by Mr. Richardson on behalf of Kyle Sousa and by Mr. Pettingill on behalf of Shannon Tucker in relation to the second part of the cross-examination which was objected to on this ground, and we shall consider it in that

context. Our conclusion is that there is no rule that prevents counsel for a co-accused from introducing evidence that is relevant to the co-accused's defence, except when an out-of-court statement is in the nature of a confession, or admission, which this 'gang' evidence was not.

(b) Statements made to D/C de Silva (the 'verbals')

27. Detective Constable de Silva's Witness Statement included his account of statements made to him by Kyle Sousa when the latter was being taken in a police vehicle to the Magistrates' Court where he was formally charged with the offence. On the fifth day of the trial, the Judge heard arguments in the absence of the jury and ruled that the statements were not made voluntarily and that they could not be relied upon as part of the Prosecution case. At that closed hearing, we were told, counsel accepted and the Judge recognised that it would be open to counsel for the co-accused to introduce the statements through cross-examination of D/C de Silva, if they were minded to do so, even if the Crown could not. This understanding was reflected in the guarded terms of the Judge's Ruling –

"...the Court is not satisfied that these said verbals could be said to be voluntary. But even if they are the Court is of the view in the circumstances in which they were given, it was so highly unfair, in effect, that they ought not to be admitted as part of the prosecution's evidence." and it explains why no objection was made in Court when the cross-examination took place. The learned Judge also said this –

"The Court is of the view that on the face of the record the question and answers at the time were so highly prejudicial that they amounted to a degree of unfairness. Not only to the defendant Sousa but to his co-defendants."

This reference to unfairness was not taken up later as a ground of objection to the Simons' trial counsel's cross-examination of D/C de Silva, nor is it relied on as a specific ground of appeal. We shall, however, consider it separately below.

28. Mr. Richardson, for Kyle Sousa, and Mr. Pettingill, for Shannon Tucker, submit that on a correct view of the law the evidence should have been excluded, following the Judge's Ruling that the statements were not voluntary and could not be proved as part of the Prosecution case.
29. The common law rule that out-of-court confessions made by a defendant can only be proved against him when they were made voluntarily has found statutory form in section 76 of the Police and Criminal Evidence Act 1984 in the United Kingdom and in

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Bermuda in section 90 of the Police and Criminal Evidence Act 2006. “Confession” is defined as including “any statement wholly or partly adverse to the person who made it” (sections 82(1) and 98(1) respectively). Moreover, section 91 of the Bermuda Act governs the circumstances in which an accused person’s confession may be given in evidence for another person charged with the same offence. It is excluded unless made voluntarily (as defined in the section). Section 91 follows the wording of section 76A of the United Kingdom Act which was added to it by the Criminal Justice Act 2003.

30. The Act therefore made D/C de Silva’s evidence inadmissible, counsel submit, because the statements were a “confession” which the Judge had already ruled was involuntary.

31. The evidence may be summarised as follows. According to the Detective Constable, he opened the conversation by observing to Kyle Sousa “You’re going to Court now”. Sousa replied “I can’t believe this here” [meaning that he was being taken to Court to be charged with the offence of murder] whereupon D/C de Silva cautioned him and “ He immediately started talking”. He said “I was the one who showed you guys where the pipe.....the weapon was. I told you about the clothes I took to the incinerator for Shannon.” D/C de Silva asked “Did you tell us all the truth?”, and later “You were at the apartment, weren’t you?”. Kyle Sousa’s answer was “Yeah, I was at the guy’s apartment. Shannon asked me to go and do the job. He wanted me to kill the guy and he was going to give me a grand for the job. But I couldn’t do it. I couldn’t get involved with that shit there. But I was there when the plan went down with those guys with Shannon and Vernon to get the guy Clarke.” D/C de Silva asked “Who stabbed him?” and he replied “When Vernon was beating the guy with the pipe, Shannon had the knife and was stabbing him.....in his neck and all over the place.....I don’t know where the knife is.....Shannon took the knife there to the guy’s house. I didn’t go inside. I didn’t do nothing.....”.

32. Later, on the way from the Court to the Westgate Correction Centre, D/C de Silva added, he said “I think you stabbed the guy, Kyle” and Kyle Sousa replied “Aye, De Silva. I know you think I’m lying but Shannon and Vernon stabbed ya boy with the same knife. Shannon stabbed in the side and chest, and Vernon stabbed him in his neck while he was out cold on the bed cold. He was already out.”

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33. Essentially, these were allegations that the two co-accused were responsible for the killing and that he, Kyle Sousa, had refused to get involved with their plan. He was there in (or outside) the apartment (D/C De Silva's term for Matthew Clarke's room) and had seen what they had done, but he took no part in it. It is difficult to categorise these as "confessions" defined as statements which were adverse to Kyle Sousa, but counsel submit that they included a limited admission – that he was present at the scene – and that the whole statement therefore falls within the statutory definition and therefore should not have been admitted in evidence as part of a co-accused's case.
34. Mr. Pettingill further widened the submission by contending that as a general principle of law, no involuntary statement can be admitted as evidence, whether by the Crown or by or on behalf of any co-accused. That principle is necessary, he contended, to protect the human rights of all accused and in the interests of society generally, in order to deter police officers from obtaining involuntary statements in the hope that later they would find their way into evidence at a trial.
35. We were referred to many authorities which as we read them establish a general rule that the only restrictions placed on the cross-examination of prosecution witnesses on behalf of an accused person are, first, the general test of relevance (*Lobban v. The Queen* [1995] 1 WLR 877 (JCPC)), and secondly, the rule now stated in statutory form, that a defendant cannot rely upon a confession made by a co-accused unless it was made voluntarily. (That was canvassed by the House of Lords in *Myers v. R.* [1998] A C 124, though there may be some room for doubt as to whether the exception of involuntary confessions was part of the common law rule.) But we can find no support for the proposition that the test of relevancy is also qualified in respect of all involuntary statements, regardless of whether they were confessions or not. It would be surprising, in our view, were there such a rule. The courts have long recognised the right of co-accused to indulge in 'cut-throat' defences and to introduce evidence which is prejudicial to their co-accused. It has also been recognised that no protection may be available to the co-accused short of severing the indictment and holding separate trials, unless possibly an application under section 78 of PACE (section 83 in Bermuda) on the ground of unfairness if the evidence is admitted.
36. Counsel therefore invite this Court to hold (1) that the statements made to D/C De Silva were a "confession" within the statutory definition; and/or (2) that the Bermudian Act

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applies, because it came into force on 8 September 2008, before the trial but after the date of the offence; and/or (3) that the statutory and/or the common law rule applies to the whole of a statement which contains an admission, even when the major part consists of self-exculpatory allegations made against co-accused.

37. We do not find it necessary to say more about these issues in the present case. The reason is because the statements made to D/C De Silva added nothing of any great significance to what Kyle Sousa had already told the police about his own involvement, during an interview which had already been given in evidence without objection from any defendant.

38. The interview in question had taken place on the previous day, 14 April 2008, before Kyle Sousa was charged. He gave a detailed account of his movements on the day of the offence, including the following –

- i. (at Admiralty House) “Yeah, they said somebody snitched or whatever the case may be, and fucking, you know what I’m saying, they said they’re gonna deal with it, like, you know what I’m saying?”
- ii. (at Matthew Clarke’s house) ““Oh, I was, like, right, like, outside of the, outside of the fence, like.....where the verandah is.....No, I weren’t at the door. You know what I’m saying, I was on the outside.....
- iii. “Q.....what did you see Vernon doing?
 1. He was hitting him.Q.....with what?
 - A. A pipe.”
- iv. “[CLARKE] was saying, “Yeah, Shannon, how you gonna let this guy do this to me?” Dah, dah,dah,dah,dah. That’s all I heard.”
- v. “Q. And then you said that Vernon, you saw Vernon stabbing, stabbing him where?
 1. Right here. Like, in his side.”
- vi. “Q. What did Shannon say to him?
 1.Nothing.Q. What you mean, he just stayed silent?
 - A. Yeah.Q. What did Shannon do?
 - A. Walked off.Q. Did Shannon hit him?
 - A.[pause] Couldn’t tell you.Q. Did Shannon hit CLARKE?
 - A. No.Q. Did Shannon have a knife?
 - A. No.”

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vii. “Q.What did Shannon Tucker do when you saw this guy hitting Matthew?

1. [no reply]

Q. You`re shaking your head. Can you just....

A. Nothing. Nothing.

Q. Did he try to stop him?

A. No.”

viii. “Q. Did you kill Matthew CLARKE on Wednesday...

1. No, I did not...

Q. Were you present when he was killed?

A. I was present, yes. I was present! That`s how you guys got all the information..

Q. Did you participate in that?

A. No, I did not.”

39. Kyle Sousa had already admitted, therefore, in evidence that was before the jury, that he was present at the scene, outside the house but able, he claimed, to see what was happening in Matthew Clarke`s room. What he said to D/C De Silva about his own movements and lack of involvement added nothing to what they had already heard from him during the police interview, which was tape-recorded and played to them. What was new in what he said on the following day was that Shannon Tucker was actively involved in the killing, and that could not be called an admission or “confession” by Kyle Sousa, in any sense.

40. The fact was, therefore, that insofar as Kyle Sousa`s statements to D/C De Silva included any confession or admission by him, the same evidence was already before the jury. The remainder of the statements was not within the statutory or common law rules regarding involuntary confessions. He therefore was entitled to cross-examine about them, assuming that they were relevant to Simons` defence. Moreover, if objection had been taken, the confession element could have been deleted and the remainder of the statements could not have been challenged, save on the ground that they were not relevant to Simons` defence.

41. Mr. Richardson and Mr. Pettingill, counsel for Kyle Sousa and Shannon Tucker respectively, do now submit that the statements were not relevant to Vernon Simons` defence, and that the evidence ought to have been excluded on that ground. We agree with them that it is not easy to see how Sousa`s allegation that he saw both Shannon Tucker and Vernon Simons assaulting the victim was intended to assist Simons` defence, but no objection was made at the time and we do not feel able to say at this

stage that the evidence was irrelevant so far as Vernon Simons was concerned. The perception of relevance must vary in the course of a trial, particularly during the prosecution case when the nature of the defence may not have become clear, and especially when there are three defendants each putting forward, or reserving, his own defence.

42. We hold therefore that the evidence of Kyle Sousa's 'verbals' was properly admitted during the cross-examination of D/C de Silva by Simons' trial counsel. This makes it unnecessary to consider the further question whether the admission of this evidence, if it ought to have been excluded, had any effect on the subsequent course of the trial and ultimately the safety of the jury's verdicts. We cannot see that it had any such effect. Kyle Sousa repeated the substance of the statements in his evidence to the jury, including his denial that he entered the property and his claim that he saw both Vernon Simons and Shannon Tucker attacking Matthew Clarke in the room. There was some suggestion that, if evidence of the 'verbals' alone had been excluded, both Sousa and Shannon Tucker, more particularly the latter, might have been advised and decided not to go into the witness box at the trial. We regard this suggestion as fanciful, in the circumstances of this case.

The Judge's Direction on out-of-court statements

43. The first ground of Kyle Sousa's appeal was that the learned Judge misdirected the jury in relation to out-of-court statements made by each of the defendants to the police.
44. The Judge first explained, correctly, that "the principle is a little different when you're dealing with out-of-court statements as opposed to when you're dealing with in-court evidence. He then stated, again correctly, the "general rule" that "out-of-court statements made by one co-defendant against another co-defendant constitute evidence against the defendant who made the statement only and do not constitute evidence against the other defendant, unless that other defendant, either expressly or by implication, adopts those statements made against him and thereby make them his own".
45. His direction continued as follows, and it is these passages that are complained of—
- "The exception is this; where, however, out-of-court statements are made by a co-defendant in the course of a joint enterprise or in pursuance or*

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furtherance of a joint enterprise – and the prosecution is saying this was a joint enterprise case – against another co-defendant who was a party to that joint enterprise, those statements may constitute evidence not only against the maker but also against the co-defendant.....”

He gave as an example “the statement allegedly made at Admiralty House about the offers and so on” and said “that would be an example of how that principle would work”. He continued –

“The proviso, however, is that that is so providing there is evidence to support it. Put another way, the acts and declarations of any conspirator, that is persons party to an agreement to do an unlawful act, in the course of or in the furtherance of the common design, that is the agreement, are admissible against any other conspirator provided there is independent evidence to prove the existence of the conspiracy and that the persons concerned are parties to it.”

As an example of that, he took the conflict between Vernon Simons` and Shannon Tucker`s statements in police interview that “Kyle jumped over the wall”, and Kyle Sousa who had said “that wasn`t true”. He then said “One way to deal with that evidence would be look for independent evidence”, and referred to “the independent evidence of Miss Simons, the lady who drove up and saw him out there, looking over the wall and so on.”

46. Finally, he added –

“As for the adoption area, I think you shouldn`t have much difficulty with that because sometimes you can see in the respective statements they said the same thing, so they adopt each other`s, what they were saying.”

47. Counsel makes three main criticisms –

(i) the direction about a joint enterprise was not relevant in this case, and the Judge failed to point out that there were no out-of-court statements made by any of the defendants which could be said to have been made in the course of a joint enterprise: this part of the direction was unnecessary, and confusing for the jury;

(ii) the reference to “independent evidence” was out of place in this context, because the rule that out-of-court statements are inadmissible as evidence against co-accused (who were not present when the statement was made) is not subject to any qualification that they do become admissible when “independent evidence” can be found: again, this tended to confuse the jury; and

(iii) “adoption” by a co-accused who “says the same thing” does not make the statement admissible as evidence against him, and in any event, the term “adoption” is properly

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used when the person who made the statement out-of-court “adopts” it when he comes to give evidence in Court.

48. We consider that there is force in these criticisms, though perhaps less so in (iii) where it seems to us that the Judge was not using “adoption” in any technical sense. He clearly meant no more than that the co-accused might “say the same thing” in his own statement, whether or not he knew that his co-accused had already said something to the same effect. In that situation, both defendants have made statements to similar effect, and each statement is admissible in evidence against its maker. We agree with counsel, however, that the Judge’s direction could have suggested, wrongly, that the first statement somehow becomes evidence against the co-accused, when the second statement has been made.
49. The first and second criticisms are more substantial. It is not clear to us why the learned Judge did refer to statements made in the course of a joint enterprise, because there was no evidence of statements made to any third party which it could be said were admissible in evidence on that basis in the present case. The example he gave, of the conversation which took place at Admiralty House “about the offers and so on”, if Kyle Sousa’s evidence was accepted, was inapposite. Evidence of what was said then was admissible in any event, not as an “out-of-court statement”. It was part of the Crown’s ‘joint enterprise’ case, as well as being relevant to the reasons why the defendants went to Matthew Clarke’s house. And this led to the passage where the Judge spoke of independent evidence “to prove the existence of the conspiracy”, followed by further references to “looking for independent evidence” in connection with admissibility of out-of-court statements as evidence against co-accused. We agree with counsel that this part of the Summation may well have left the jury feeling somewhat confused as to whether out-of-court statements, in this case, could be treated as evidence against anyone other than the maker.
50. But it must be remembered that by the time the Summation was given, the jury had heard oral evidence from all three defendants, each giving his own version of events and alleging that one or both of the co-accused was the attacker. To a greater or lesser extent, those allegations were foreshadowed in their own police interviews, but none of them, with one exception, withdrew any material allegation he had made before. In other words, any out-of-court statement which was adverse to any co-accused was repeated in Court in oral evidence which was admissible against the co-accused, even if

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the out-of-court statement itself was not. The inadmissibility of the latter had ceased to be relevant.

51. The one exception, referred to above, was that Sousa said in his police interview that when he looked into the room he saw Vernon Simons, not just hitting Matthew Clarke with a pipe, but also stabbing him with a knife, and that Shannon Tucker had not taken part in the attack. But in his answers to D/C De Silva he said that it was Shannon Tucker who stabbed him, and that was what he said in Court. He withdrew the allegation of stabbing against Vernon Simons, but this did not detract from his evidence that Vernon Simons was the attacker who struck blows with the pipe.
52. For these reasons, whilst accepting the thrust of counsel's criticisms of this part of the Summation, we hold that any mis-direction of the jury can have had no effect upon their deliberations or on their verdicts, and it cannot be a ground of appeal.
53. For the sake of completeness we add –
 - (1) when the Judge came to direct the jury regarding the D/C de Silva 'verbals', he gave an express direction that they were not statements made in the course of any joint enterprise, therefore they were not within that exception to the general rule;
 - (2) he also reminded them, "wherever in those conversations Sousa has implicated his co-defendants, that evidence must be disregarded as against them unless elsewhere in the evidence they have adopted it", and that they should look for independent evidence in support of whatever Sousa had said; and
 - (3) he gave the jury a clear warning, in relation to the defendants' in-court evidence, that when one defendant had given evidence which damaged another's case, or which tended to show that another defendant was involved in some way in the commission of the offence, they should "examine that evidence with particular care as "A" in saying what he said against "B", or vice versa, may have been only interested in serving his own interests and may have been only interested in protecting himself rather than being concerned about telling the truth".

'Incompetent representation' by trial counsel for Vernon Simons

54. A short procedural history will explain why this issue was heard at an adjourned hearing of the Appeal, on 23 November 2010.
55. The Notice of Appeal for Vernon Simons dated 7 December 2009 read as follows-

“Ground 1

The Appellant had defective representation by counsel.....who represented the Appellant in the Supreme Court trial. [He] failed to adequately prepare the case and he failed to put the Appellant’s case to the prosecution witnesses and to the jury. The appellant, because of the conduct of his case by his attorney, did not receive a fair trial, thereby resulting in a miscarriage of justice.”

56. His Perfected Grounds of Appeal were dated 29 October 2010, when the Appeal hearing was already fixed for 9 November 2010. Ground 1 was re-cast under 10 headings, lettered A. to J. They were accompanied by an Affidavit by Vernon Simons dated 29 October 2010 (“Mr. Simons`Affidavit”). A Skeleton Argument prepared by Miss Subair, counsel for Vernon Simons at the Appeal, accompanied these documents when they were served. It is unclear what the actual date of service was, but for whatever reason, it was not until the last week before the hearing date that Trial Counsel, against whom the allegations were made, was notified of them.
57. This Court regrets that, once again, it is necessary to remind all parties concerned that whenever an allegation of this kind is made as a ground of appeal, it is imperative that the trial counsel is given adequate notice of it and an opportunity to reply to the charges made. Counsel acting for the appellant is primarily responsible, but the Prosecuting Authority and the Courts Registry must also play their parts.
58. This did not occur in this case, and it was necessary to adjourn this ground of appeal for argument at a future date, which was fixed for the last day of the present Sitting of the Court. Fortunately, it was possible to complete hearing the Appeals by the other two Appellants, and the other two Grounds relied on by Vernon Simons, on the two days originally fixed.
59. An Affidavit by Trial Counsel (hereinafter called “Counsel’s Affidavit”) was received by the Courts dated 16 November 2010, but unfortunately (again, for whatever reason) it was not received by Miss Subair and the DPP until the day before the adjourned hearing. The hearing was able to proceed, but this episode too suggested that preparations for it had not proceeded as efficiently as they should.

Grounds of Appeal

60. Miss Subair’s Skeleton Argument put forward her submissions under the ten heads lettered A to J in the Perfected Grounds of Appeal. They were greatly expanded in the

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Skeleton Argument and the Appendix which accompanied it. Whilst this was a tribute to the energy and care with which she had prepared the case on behalf of Vernon Simons, the amount of detail made it difficult for her to summarise and compress her oral submissions, as she recognised it was necessary for her to do.

61. However, she concentrated on four of the Grounds, which were –

“A. Counsel failed to adequately advise the Appellant Simons on his rights to silence during the police investigation stage.

B. Counsel failed to adequately conference with the Appellant as part of trial preparation and Counsel failed to take sufficient instruction from the Appellant in preparation for the trial.

C. Counsel failed to object to the wrongful admission of Vernon Simons` witness statement of 9th. April 2008 into evidence.

.....
H. Counsel failed to adequately put the Appellant Vernon Simons` case to the Co-Accused during cross-examination. The impact of this failure was enormously harmful to Simons` defence case because each of the Co-Accused gave evidence tending to implicate Simons in the case before the jury.”

62. Grounds A and B referred to the time before the trial began, on 12 March 2009, and Grounds C and H to counsel`s conduct of the trial itself. Therefore it is necessary to give a short account of events from the date of the murder until the first day of the trial, and then a brief summary of the trial itself.

Pre-trial

63. The murder took place on 9 April 2008. Vernon Simons was due to attend Hamilton Police Station for interview that same afternoon in connection with the drugs charges that had been brought against him and Shannon Tucker. At 6.20 pm he was interviewed as a witness in connection with the murder enquiry. He said that he had been with Shannon Tucker during the morning and until about 2 pm when he`d been dropped at his house and slept until leaving for the police station at about 5.15 pm. He denied knowing Matthew Clarke.

64. By 13 April 2008, however, he was arrested on the charge of murder, and he was interviewed at 4.32 pm in the presence of trial counsel, whom he had contacted on the previous day. Counsel`s Affidavit describes how he had arranged for Vernon Simons to meet an individual police officer, Sgt. Christopher, at Hamilton police station in connection, he (counsel) initially thought, with the pending drugs charge. In reply to the

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police officers' questions, he repeated that he had been with Shannon Tucker until about 1pm after which he was at home until about 4.30 pm. He said that he now realised who Matthew Clarke was and that he'd been to his house in North Shore Road with Shannon Tucker some time earlier, in about January. The interview concluded at 5.31 pm and was recorded on two tapes.

65. A further interview began at 6 pm and continued until 7.29 pm. Trial counsel was present. Vernon Simons denied that he had been to North Shore Road in the course of April 9th. Then there was a third interview which started at 9.19 pm. Again, trial counsel was present. Vernon Simons admitted that he had been to the house in North Shore Road with Shannon Tucker and had spent time there with Matthew Clarke. He said that when they were leaving "I noticed...there was this other person coming over the wall in the back of his yard and when I heard all the rumbling inside that's when I left.....whoever came over the wall was ski'd up, you know, I couldn't see their face or nothing." The interview continued until 10.31 pm.
66. He was interviewed again on the following day and described how he'd heard Jamaican voices and thought there was more than one person there, though he saw only one.
67. His next interview was nearly twelve months later, on 5 March 2009, one week before the trial. It took place at his own request, though he now says that he requested it only because of trial counsel's advice and that he did not want to do it. In this pre-trial interview he gave a different account of events. It was asserted on behalf of his co-defendants that he did this, because he had worked out from what they had said in their interviews, particularly Kyle Sousa in his 'verbals' which directly accused Vernon Simons of beating Mathew Clarke with a blunt instrument, not a knife, what his best line of defence would be, in other words, to accuse Kyle Sousa by name of carrying out the attack. He also explained how a DNA sample taken from the deceased's bracelet might be linked to him, Vernon Simons. But Miss Subair on behalf of Vernon Simons disputed this. His evidence in his Affidavit was that the reason for the immediate pre-trial interview was trial counsel's insistence, alone.
68. Whatever the reason for it was, Vernon Simons' 5 March 2009 interview foreshadowed the evidence he gave at trial. He and Shannon Tucker were leaving the premises, when a person jumped over the rear wall of the property and attacked Matthew Clarke; and the attacker, he said, was Kyle Sousa, not a Jamaican stranger as he had suggested before.

At the trial

69. Ground C of the Perfected Grounds of Appeal was that trial counsel ought to have objected to the admission of Vernon Simons's Witness Statement, made on 9 April 2008, except on proof that he was not a suspect on the charge of murder at that time.

70. Ground H referred to various aspects of trial counsel's conduct of the trial. All three of the Defendants gave evidence, in the order Kyle Sousa, Vernon Simons then Shannon Tucker. Miss Subair accepted that it was inevitable that Vernon Simons would give evidence, and her suggested criticisms of trial counsel all related to his failure, as she alleged, to cross-examine the co-accused to the extent that he ought to have done. The criticisms related particularly to (1) whether any agreement was made before the attack on Matthew Clarke between Shannon Tucker and Kyle Sousa; Vernon Simons' evidence was that no such conversation took place within his earshot, and that the only arrangement between them concerned a construction job that had been discussed some weeks before; (2) the provenance of the knife used to inflict the stab wounds, where trial counsel failed to question Kyle Sousa about inconsistencies in his evidence; (3) what happened and was said during the drive from Admiralty House to the deceased's house, and whether Kyle Sousa was dropped off before the truck arrived at the house; (4) Vernon Simons' account of "the heart of Simons' case – the fatal attack"; and (5) subsequent parts of the story, including disposal of a trash bag containing his (Vernon Simons') clothes, which he denied having been involved in at all.

71. The situation at the completion of the evidence was that all three defendants had given oral evidence and had been cross-examined on behalf of all other parties; each defendant had departed to some extent from their original statements to the police, so that his credibility was under challenge on that ground; each defendant admitted being at Mathew Clarke's home at the time of the attack; and each defendant accused one or both of the other two of having been responsible for it. Vernon Simons' account was that, when leaving with Shannon Tucker after a peaceable visit to Matthew Clarke, an intruder whom he later identified as Kyle Sousa climbed over the wall and attacked Matthew Clarke in his room, inflicting all the wounds which caused his death, and then joined them in Shannon Tucker's truck for the return journey to his, Vernon Simons' house. This summary does not include evidence about the disposal of the pipe, which it seemed to be accepted was one of the murder weapons, and which Vernon Simons helped to dispose of.

The correct approach

72. The Director of Public Prosecutions reminded us that in cases such as this, where the alleged incompetence of trial counsel is relied upon as a ground of appeal against a jury's guilty verdict, the Courts' concern is whether or not the verdict should be regarded as safe, notwithstanding any shortcomings in the conduct of the defence case: *John O'Donald Fox v. The Queen* (Bda. CA Criminal Appeal No. 19 of 2007; and compare *R. v. Thakrar* [2003] EWCA Crim. 1060). The incompetence, if proved, is possibly a reason for treating the verdict as unsafe: it is not an end in itself.
73. We therefore have approached the matter in the following way. If and to the extent that there are valid criticisms of the way in which Vernon Simons' defence was conducted, the Court nevertheless must consider what effect, if any, that had upon the course of the trial and upon the safety of the jury's verdict.
74. Trial Counsel's Affidavit described how Vernon Simons asserted from the start that he was not involved in the murder, and that initially he believed him. That was his reason for urging Vernon Simons to tell the truth in his statements to the police, and for saying that he would learn what evidence the police officers had by listening to the questions they asked in the interviews. As for the trial, it was a difficult one for any counsel to conduct, in the light of the intense 'cut-throat' rivalry which grew up between all three accused, the strength of the evidence against them, and the extent to which the credibility of each one was compromised by previous inconsistent statements in out-of-court police interviews.

Individual criticisms

75. These concern, first, Trial Counsel's alleged failure to inform his client that, if he were to exercise his right of silence at the police interviews, the Court and a jury would not draw any adverse inference against him. Had that advice been given, it is suggested, he would not have answered the questions as he did. He accepts that he was fully and carefully cautioned by the police officers at each interview – the transcripts bear this out – but it is submitted on his behalf that he was deprived of the opportunity to exercise his right of silence when he might have done so.
76. The transcripts also show that the police officers were at some pains to make sure that he had legal advice and that he was answering the questions voluntarily. Counsel's Affidavit is instructive in this regard; he says, more than once, that Vernon Simons was

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“surprisingly well aware of his right to remain silent” and that he “insisted that he wished to speak with Sgt. Christopher”. Vernon Simons had previous experience of a criminal prosecution and trial. He had been convicted of robbery on a previous occasion.

77. We are satisfied that Vernon Simons was fully aware that he was entitled to exercise his right of silence at each of the interviews and that he took part in them voluntarily, knowing that he was at liberty not to do so. We do not consider that he can have thought that a refusal to answer questions could be prejudicial to him at his trial, or that it was incumbent on counsel to advise him that it would not.
78. Secondly, Vernon Simons in his Affidavit asserts that Trial Counsel urged him to request his final pre-trial interview, on 5 March 2009. He says that he did not want to do this. The transcript shows that he assured the police that the request was made voluntarily, and that he was anxious to tell his side of the story after reading in the case documents what was being said about him by his co-accused. The allegation of incompetence appears to be that Trial Counsel ought not to have advised his client to make the request. We reject this as an allegation of incompetence. Indeed, it seems that the advice given was clearly correct. The interview was a precursor of the evidence Vernon Simons gave at trial. Given the ambivalent nature of his previous interviews, it was clearly beneficial for him to have on record what he said was a full, truthful account. If he were to give evidence at the trial, he could point to it as evidence of his consistency, despite his earlier denials. And if he did not go into the witness box – a decision which cannot be made definitively until that stage of the trial is reached – his account would be on the record, when otherwise it would not.
79. As for the allegation that Trial Counsel failed to take full instructions from his client, we were at first impressed by Miss Subair’s submission that Trial Counsel failed to obtain a proof of evidence from his client and that no such document appears in the file of documents she had received from him. But having seen the records of police interviews which Trial Counsel did have, including the lengthy account given on 5 March 2009, it appears to us that a separate proof probably was not necessary in this case.
80. At the trial, the first complaint is that Trial Counsel ought to have objected to the admission of his first Witness Statement. The denials contained in it undoubtedly were

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damaging to him. But Counsel's Affidavit shows how the first visit to the police station was in connection with pending drugs charges, and it was at a time when the investigation into the murder was at a very early stage. We are far from satisfied that the objection, if one had been made, would have succeeded, and we do not find that Trial Counsel was incompetent or negligent in failing to raise this issue at the trial.

81. Among the items to which specific argument was directed, we come to the allegation that Vernon Simons' defence was not sufficiently put in cross-examination of the co-accused. This related specifically to the cross-examination of Kyle Sousa. The allegation is not that he was not asked about the main features of Vernon Simons' defence – that Kyle Sousa was the intruder who entered the property from the rear and carried out the attack – but that what Miss Subair described as “pertinent details” of the defence were not put to him during what the transcript shows was a fairly lengthy cross-examination on this central issue. We are not clear what support would have been gained for Vernon Simons' defence, if this course had been pursued. There was little or no prospect that Kyle Sousa would have agreed with Vernon Simons' version, where there were material differences between them. There is no mechanistic obligation on trial counsel to put his client's case to co-accused in every detail; his duty is to make the jury aware of the conflict of evidence between the two defendants which it would be required to resolve: *R v. Kevin Fenlon* (1980) 71 Cr. App. R. 307. That needed no emphasis in the present case.
82. Finally, one criticism related to Trial Counsel's failure to cross-examine Kyle Sousa more rigorously regarding the knife which was the murder weapon. Counsel's Affidavit tells us that “the most startling thing that Simons said to me, was that he discarded the knife that had been used, he never said he used it but that he discarded it.” That admission never came into evidence before the jury. Trial Counsel clearly was justified in cross-examining lightly about the knife, if that is what he did, when there was a risk that further evidence, damaging to his client, might emerge from it.
83. We have referred to some but not all of the complaints that were developed in Miss Subair's oral submissions to us. As for the remainder, and for the mass of detailed criticisms that were included in her written submissions, we do not consider it necessary to make specific reference to them. The Director identified some that appeared significant to him – for example, Trial Counsel's likely reasons for cross-examining Shannon Tucker as to his marital history – and we confirm that we have read the whole

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of the written submissions. In our judgment, it is the duty of this Court to stand back and take an overall view.

84. It is notorious that representing one of a number of co-accused in a criminal trial where there are ‘cut-throat’ defences places high demands on the skills of defence counsel; possibly the most arduous that criminal advocates ever experience. That is particularly so when the charge is one of murder and the killing was as brutal and remorseless as this one was. An added difficulty for after-the-event criticism of the way in which the defence was conducted is that both before and during the trial defence counsel have to make many strategic and tactical decisions in the advice they offer to their clients and as to their conduct of the trial. There is no formula for success. All advocates have their own individual styles. These are factors the Court has to bear in mind when considering allegations that the necessary standard of competence was not reached.

85. Vernon Simons in his Affidavit states “I truly believe that I would not have been found guilty had I been given competent representation from Counsel from the outset of this case”. Trial Counsel says that “in any event Simons never expressed to me as is claimed that he was dissatisfied with my services”. His Affidavit also included this –

“...it was a very difficult case, where judgment calls had to be made at every turn, and the circumstantial evidence in the case was very strong.....I did the best in the circumstances that faced me. And played my hand as best I could in Simons` defence.”

He also explained how, after initially believing his client`s denial of any involvement in the matter, he found it increasingly difficult to accept the contradictions that became apparent and what it later transpired were outright lies.

86. The jury`s verdicts were reached after they heard oral evidence from all three Defendants together with a mass of pre-trial statements and a certain amount of circumstantial evidence. It cannot be said that they were unaware that they had to decide between the different accounts which each of the defendants gave, and as to the truthfulness of each defendant. In Vernon Simons` case, the complaint is that the evidence included his original Witness Statement and the lengthy account he gave in his final pre-trial interview (though the latter enabled him to claim that he was consistent at least from that time). The verdicts were based on all the evidence they heard, and in our judgment the matters complained of made no appreciable impact on the whole.

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87. We therefore hold that the jury's verdict in the case of Vernon Simons was not unsafe on this or any other ground. In fairness to Trial Counsel, we further find that none of the allegations of incompetence charged against him is made out. We are satisfied that he used his best efforts in the conduct of a difficult case, and that they did not fall short of the high standards which it demanded from him. The evidence against Vernon Simons was such, that not even the advocacy of a Marshall Hall or a Birkett could have prevented the inevitable outcome.

Conclusion

88. The Appeals of Kyle Sousa, Vernon Simons and Shannon Tucker are dismissed. Their convictions are upheld.

Signed

Evans, JA

Signed

Zacca, P

Signed

Auld, JA