[2018] CCJ 20 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No. BBCR2017/003
BB Criminal Appeal No. 7 of 2014

BETWEEN

DWAYNE OMAR SEVERIN	**APPELLANT**

AND

THE QUEEN	**RESPONDENT**

Before The Right Honourable	**Sir Dennis Byron, President**
and the Honourables	**Mr Justice Saunders**
	Mr Justice Wit
	Mr Justice Hayton
	Mr Justice Anderson
	Mme Justice Rajnauth-Lee
	Mr Justice Barrow

Appearances

Mr Douglas L Mendes SC, Mr. Andrew O G Pilgrim QC, Ms Naomi J E Lynton and Ms Kamisha Benjamin for the Appellant

Mr Anthony L Blackman, Deputy Director of Public Prosecutions (Ag), Ms Krystal C Delaney, Senior Crown Counsel and Neville Watson, Crown Counsel for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton, Anderson, Rajnauth-Lee and Barrow

Delivered by
The Honourable Mr. Justice Hayton
on the 26th day of June, 2018

Introduction

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[1] Dwayne Omar Severin (Severin) and Jabari Sensimania Nervais ('Nervais'), were convicted of murder and the mandatory sentence of death by hanging was imposed on each of them on 28th May 2014 and 21st February 2012 respectively. Both sought leave to appeal their conviction and sentence on the grounds that their convictions were unsafe and the mandatory sentence of death was unconstitutional. Severin and Nervais also sought leave to appeal as a poor person. We granted leave to appeal and leave to appeal as a poor person for both Appellants and also ordered that the appeals against conviction would be heard separately and the appeals against sentence consolidated. We now turn to Severin's appeal against conviction.

Factual background

[2] On 7 May 2014 the Appellant was indicted on the charge that he, on 30 November 2009 in the parish of St Philip, murdered Virgil Barton. On 28 May 2014 after a trial before a judge and jury he was found guilty and a mandatory death sentence was imposed. His appeal to the Court of Appeal was filed on 4 June 2014, heard on 23 March and 12 April 2016, and dismissed in a written judgment on 17 May 2017.

[3] The Appellant now appeals to the Caribbean Court of Justice on the following grounds.

(1) The mandatory death sentence was unconstitutional.

(2) The trial judge, who should have presented matters to the jury in a balanced manner, failed adequately to put the case of the defence before the jury.

(3) The trial judge erred when he directed the jury in a manner that would have negatived the defence case and thus elevated the prosecution's case; and, where there were discrepancies in the evidence, directed the jury in terms which implied that the prosecution's witness, Judd Barton, was a credible witness.

(4) The trial judge erred when he directed the jury that there were special circumstances supporting the identification in accordance with section 102 of the Evidence Act.

(5) The trial judge erred when he failed to deal with the specific weaknesses of the prosecution's case in a coherent manner so that the cumulative impact of those weaknesses was fairly placed before the jury.

(6) In light of the above there is a real likelihood that an injustice might have been done to the appellant and the conviction should therefore be quashed.

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Background to the Appeal Against Conviction

[4] On Independence Day, 30th November 2009, the deceased, Virgil Barton ("Barton"), together with several family members and friends attended the St Philip Carnival. Sometime in the afternoon at Long Bay, St Philip, some of them became involved in a fight with some persons from The Crane, St Philip. Injuries were suffered by some of the fighters. Afterwards Barton and some of his family and friends went to King George V Park before going on for a "lime" in Lucas Street, St Philip, where most of the Barton family lived, though Barton's nephew, Judd Barton ("Judd"), lived walking distance away in Duncan's Land, St Philip. Later, around 9.45pm, two guys were observed walking towards them by Judd, who stared at them for about seven or eight seconds, having heard a rumour that some guys might be coming to "shoot up the block." On coming closer the two guys each pulled out a gun and shot at Barton. He died on the spot, hit by six bullets, but Judd escaped by running away.

[5] The next day, 1st December 2009, Judd gave a statement to the police identifying "Zephrins" as one of the shooters. Zephrins had "a black hoodie that just covering his tam but his face was out", so Judd told the police he would be able to recognise him again if he saw him. The other guy had his head down under his hoodie so he could not be identified. It took a few days for the police to determine that the appellant was "Zephrins." On 8th December 2009, as a result of information supplied by Judd and another person (who has not given any evidence), the police obtained a warrant to search the premises where the appellant was residing. They then reached the premises at around 4 am on 9th December 2009 and carried out a thorough search.

[6] The police found a semi-automatic gun (a PT 111Millenium Model Taurus) and thirty-one rounds of 9mm ammunition for it in the deep upper recesses of a closet in the appellant's bedroom. Fourteen cartridge cases had been found at the scene of the killing and three of them were found after forensic testing to have been fired from the Taurus gun, while all the other 11 had been fired from a second gun. A bullet (or slug) identified as from the Taurus gun was also found at the scene as well as two deformed bullets that had similar characteristics to bullets test-fired from the Taurus gun, but the deformities meant there were insufficient individual characteristics to be sure that they had been fired from that Taurus gun. On the 12th December 2009, in an informal identity exercise the appellant was pointed out as the shooter by Judd, who had been

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told that the appellant might or might not be in the parade. The appellant was then formally charged with the murder of Barton.

<u>Identification of the Appellant by Judd</u>

[7] The grounds for appealing the conviction all relate to the alleged weaknesses of the evidence of the key witness, Judd, as appeared from the submissions to us of Mr Pilgrim QC on behalf of the appellant. If Judd's evidence was correct, then it fatally undermined the appellant's defence that he was elsewhere at the time of the shooting.

[8] Mr Pilgrim QC began by referring to s 102 of the Evidence Act which states as follows:

> **"Directions to jury**
>
> (1) Where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.
>
> (2) In particular, the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the accused was a person by whom the relevant offence was committed unless
>
> (a) there are, in relation to the identification, special circumstances that tend to support the identification; or
>
> (b) there is substantial evidence, not being identification evidence that tends to prove the guilt of the accused and the jury accepts that evidence.
>
> (3) Special circumstances include
>
> (a) the accused being known to the person who made the identification; and
>
> (b) the identification having been made on the basis of a characteristic that is unusual.
>
> (4) Where
>
> (a) it is not reasonably open to find the accused guilty except on the basis of identification evidence;
>
> (b) there are no special circumstances of the kind mentioned in subsection (2)(a); and
>
> (c) there is no evidence of the kind mentioned in subsection (2)(b),
>
> the Judge shall direct that the accused be acquitted."

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[9] Mr Pilgrim QC in his oral submissions focused upon whether or not there were special circumstances within s 102(3)(a), the possible absence of street lighting to make difficult the night-time identification of the appellant and the informality of the identification exercise, making it easier than it should have been for Judd to pick out the appellant.

[10] Judd thought he knew the appellant because he knew him by sight and by his name, having heard him called "Zephrins" in two recent circumstances where Judd had had a clear view of him. A week before Barton's death Judd first came across the appellant at a fete at Bayley's School where he had observed the appellant for a "good little while" and seen the appellant involved in a fight ("Zephrins and a couple of guys against this one guy") when someone had called out to the appellant by the name of Zephrins. The night before Barton's death Judd had been at a "street jam" in Christ Church where he happened to observe the appellant for about ten minutes, though he "wasn't really checking for him", not paying him much attention, and heard him called Zephrins. Thus, Zephrins' features were fresh in Judd's memory when, according to his evidence, for seven or eight seconds around 9.45pm he was looking at two persons bearing down on him and the other limers in Lucas Street before each of those persons pulled out a gun and shot at Barton.

[11] We agree with the Court of Appeal that these circumstances can justifiably be special circumstances within s 102(2) and (3)(a), such circumstances needing to be such as to provide clear support for the reliability of the identification of the appellant. There is, indeed, reinforcement provided by the fact that Judd's identification of Zephrins led to one of the two guns involved in Barton's murder being found in Zephrins' bedroom, so tending to prove the guilt of the accused if the jury accepted such evidence (see s102(2)(b) above) as it did, the Court of Appeal rightly stating at paragraph 55 of the judgment that "It is clear that the defence with respect to the planting of the firearm by the police did not sit well with the jury and that in fact they plainly disbelieved him."

[12] We thus take the view that that there were special circumstances to support the reliability of Judd's identification of the appellant despite criticisms of the judge's summing up in relation to the lighting situation when Judd stated he was able to see the appellant's face so as to identify him in the light provided by a streetlamp at the bottom

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of the road from which the two shooters emerged. Sergeant Daniels' evidence (Record p 580) was "As far as I can recall there was no streetlight there at the time."

[13] Mr Pilgrim QC criticised the trial judge as favouring the credibility of Judd Barton when the judge stated (Record p 1388),

> "And you remember one of the police officers, I believe, was asked the question and I think he indicated that he couldn't really say to the best of his knowledge there wasn't a light. But any way Judd Barton is saying to you that there is a light. What do you make of that, Madam Foreman and your members? One of the police officers who went to the scene says virtually words to the effect that he couldn't recall, there wasn't a light as far as he was concerned. Judd Barton is saying well, he goes there, he is someone who goes there every day and yes there was a streetlight in that direction."

[14] The judge, however did canvass the appellant's defence by reminding the jury (Record p 1450) when dealing with the evidence of Judd Barton, "The Defence is saying to you that you have a police officer saying there was no streetlight or that he couldn't recall whether there was a streetlight up there." The judge also stated (Record pp1442-1443), "Mrs Mitchell-Gittens [Defence counsel] is saying well, if you look at the evidence of Mr Daniel it would appear as if there was no streetlight. So there was no light there that would affect the identification. You will have to look at it. Do you think he Daniel is mistaken or the witness Judd Barton is mistaken? You will have to look at all of these things." The judge also explained how the jury needed to deal with discrepancies (eg Record pp1341-1342) and twice cited the *Turner* guidelines, emphasising that a convincing witness could be a mistaken witness and repeated this several times in his summation to the jury.

[15] The judge also stated as follows (Record p1423).

> "He [*Judd*] says no 1 can recognise him, I can identify him. So he is sticking to his story. What do you make of his testimony Madam Foreman and your members? He told you the distance, the time that he would have had to observe 7 or 8 seconds. And this is someone he said who he had seen before. You - - he is putting it to you through the Crown that this is not a perfect stranger to him. Someone he has seen before. Someone he had seen the night before and also within that same week. What do you make of his testimony?
>
> Remembering at all times, Madam Foreman and your members, as I told you a mistaken witness could be a convincing witness. So you will have to look at his testimony. What do you make of his evidence?

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> The Defence is saying he is mistaken, he doesn't know anything, he is too frighten, he can't say who it was. He is saying no, I had seen him twice before. I had seen him the night before. I had seen him within that week, like a week before also at Bayley's. And yes, he had - - when he first looked down there, yes he said he recognise him even though he was telling the others there, who is these men, who is these men? And he is saying well, he is only saying that more or less for emphasis. That is what he is saying, so that they know what is going on, because according to him he is on some look-out because of a rumour about persons coming to shoot up the block.
>
> He is not drunk that is what he is saying to you. He wasn't drinking the whole day. Because he wasn't drinking at King George V and he wasn't drinking while he was there on the block in front of Warren's shop. So you will have to look at it, Madam Foreman and your members. What do you make of that identification evidence? You will have to analyse it and go through it in the same way I took you through it, pointing out what he is saying.
>
> Mrs Mitchell-Gittens is saying well, he can't tell if it is light or dark where he sees so that is weak. You will have to look at it. What do you make of it? She is saying because of the circumstances, frighten, etc., she is saying to you that is highly unreliable evidence. You are not to place any faith in that witness.
>
> The Crown on the other hand is telling you this is a man who is known to him; he has seen him on two other occasions previously. On one occasion he observed him for about 10 minutes. He had seen him the night before. He had seen him within the same week, a week before, Madam Foreman and your members. He was able to recognise him that same night, that is the night of the shooting. Seven or eight seconds he said that is the time that he had him under observation. What do you make of his testimony?"

[16] The judge had also on several occasions (including just before the jury retired) emphasised that finding the facts as to what actually happened was for the members of the jury to decide for themselves, not the judge. The judge in saying above that Judd was "sticking to his story" was merely reminding the jury that cross-examination had not led Judd to alter what he had earlier said, so he had a consistent story, without prejudice to whether or not it was a true story. Thus, in our view, the appellant has not shown that the judge failed to sum up the case adequately, especially when the judge emphasised the appellant's defence of alibi, which would be disproved if Judd's eye witness identification was correct.

[17] The judge placed the appellant's alibi defence before the jury in four places in his summation.[1] He stated at page 1330 of the Record of Appeal

[1] See: Pages 1330-1331, 1377-1378, 1494-1495 and 1519-1520 of the Record of Appeal

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> "the accused man has told you that he was not, Madam Foreman and your members, at Lucas Street, so what he has raised is the issue of alibi. In other words what he is saying to you is that this is clearly a case of mistaken identity. I was elsewhere, whether it is on the block in the Crane or at home by his girlfriend, he was elsewhere and he does not have to bring anyone to prove that he was elsewhere. It is for the Crown to bring evidence of a nature, quality and kind to satisfy you, so as to make you feel sure that he was in Lucas Street and he was there part and parcel of that shooting that took place there."

When reading out the appellant's unsworn statement from the dock, which was the only evidence for his defence, the judge, in relating it to the evidence adduced, emphasised the defence of alibi.

[18] Mr Pilgrim QC criticised the judge for not referring to the weaknesses of Judd having identified the appellant in an informal identification exercise. On the evening of 10th December 2009 the appellant had agreed to a formal identity parade saying he would go on the parade and talk to his lawyer later. Eight persons were brought in for the identity parade but the appellant, when asked if he had any objections to the persons on parade, stated without giving reasons, "I am not going on parade with any of these people." It is notable that the appellant is a Rastafarian with locks covered by a tam and the police admitted that some of the persons on parade did not have Rasta locks.

[19] The police evidence was that it was difficult to find persons willing to participate in identity parades, but on 11 December 2009 the police found seven persons to assist with an identity exercise in which the appellant was prepared to participate. Since Judd had recognised "Zephrins" at the scene of the shooting and the police found where Zephrins resided and found a gun used in the shooting in Zephrins' bedroom it seems the police were content to seek confirmation of Zephrins' involvement in an informal identity exercise where Judd had been told beforehand that Zephrins might or might not be there. All the participants were sitting when Judd came into the room and pointed out the appellant as the shooter he had seen. This would have been the fourth time Judd had seen the appellant over a period of three weeks. He stated that some persons were tall, some short and some with locks and some without locks. As Mr Pilgrim QC pointed out, this obviously made it easier for Judd to identify the appellant than if there had been eight other persons of similar build and appearance to the appellant. Indeed,

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this point had vigorously been made by Mrs Mitchell-Gittens[2] in her address to the jury after all the evidence had been heard.

[20] The judge in his summation stated as follows (Record 1481).

> "So Mrs Mitchell-Gittens is saying to you, look the way how this parade, this exercise was carried out, falls short of an identification parade which is a more formal procedure. It does not mean that one cannot use an informal exercise to identify someone but it is not as strict in relation to an ID parade. And you will bear that in mind because he was picked out in an identification exercise and you would have heard what the officer Mr Sobers indicated to you, everyone did not have locks. Mrs Mitchell-Gittens is saying well, that would put her client at a disadvantage because the person was supposed to have ….. because he had locks so they should have found persons each with locks. So you will have to look at it. She is saying you cannot trust the identification done by Judd Barton. You can't trust him as to what he had seen and you cannot trust what was alleged to have done by way of this informal exercise because there weren't all the persons there of the exact similar characteristics, the hair in relation to the accused. You will bear that in mind. What do you make of that? Remember, I told you you have to be careful when you are looking at the evidence of identification and you will approach it in the way I told you that you should approach it" [which was at Record pp1378-1380 based on *R v Turner* and Archbold]

[21] The appellant's written submissions in reply to the Crown accepted (Record p 3103) that "It was at the discretion of the jury to attach whatever weight they saw fit to the informal exercise", though it was submitted that the judge was obliged to direct them as to the unreliability of such exercise when there were persons of dissimilar appearance to the accused person. In our view, however, the jury as persons of common sense were sufficiently apprised of the unreliability of the identification exercise and the reasons therefor. In the light of other identification evidence that they had heard, they could justifiably accept Judd's identification of the appellant at the informal parade as one of the shooters recognised as "Zephrins" at the time of the shooting, and found in possession of the "murderous" gun at Zephrins' residence once the police discovered that the appellant was the man known to Judd as "Zephrins".

[22] After his oral submissions on the above matters Mr Pilgrim QC rested on the appellant's written submissions prepared by Mrs Mitchell-Gittens. She submitted that Judd's ability accurately to identify the appellant had been significantly impaired by his alcohol consumption and the judge had not left this point adequately to the jury.

[2] See pages 1311 -1312 of the Record of the Appeal

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[23] In his evidence Judd had said that the night before the murder he had been at a street jam from around 1am to 5am. In the afternoon he attended the St Philip Carnival before going on to King George V Park and then to Lucas Street for a lime. He stopped drinking when in the Park and was only smoking in Lucas Street. In cross examination Judd denied that his identification had been vitiated by consumption of alcohol.

[24] The Judge dealt with the matters as follows (Record pp 1348-1349).

> "And she is saying also to you, you have to look at the evidence of Judd Barton. Remember her putting questions to him that he was…. he went to some parties the evening or night before, he would have been drunk or stale drunk or those kind of things. In other words that is the function of Defence counsel to attack the witness, the witness' credibility. What do you make of Judd Barton? He looked Madam Foreman and your members, when he was telling you about how fast he was running, or how he was running from there, stale drunkenness came over your mind Madam Foreman and your members. That is what Mr Watts is asking you to think about, Madam Foreman and your members, you really think he was stale drunk? Madam Foreman and your members, you really think he was confused? All of these things, you have to look at the whole circumstances in which the identification was said to have been made. Bearing in mind, I believe, it came from his mouth that he was there on the outlook because he had heard something was going to happen. So you will look at that.
>
> Mrs Mitchell Gittens is saying to you he has been partying the night before, the day he gone to part of Carnival and stuff like that. He is still enjoying himself. He gone there to the shop opposite that place in Lucas Street. Madam Foreman and your members, he drunk don't pay no attention to him. He either stale drunk, full drunk, tired sleepy. He ain't know what going on basically. That is what the Defence is saying to you."

[25] Later at page 1408 of the Record of appeal the judge stated as follows

> "What Mrs Mitchell-Gittens is trying here, Madam Foreman and your members, is putting to him, well, this is a man who went out the night before he was drinking. He went to the Carnival, he was drinking. He goes up to King George, he isn't drinking there, but he is moving around. He is either feting, drinking the whole night. He wasn't drinking on the block, he says no. You and 'Rude" weren't drinking. He said no. But she is just trying to zero in on how reliable is his identification."

[26] In our view, the judge did fairly and adequately leave to the jury the issue of the possibly impaired reliability of Judd's identification testimony on the night of the murder.

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[27] The judge also on sundry occasions made the jury well aware of the guidelines in *R v Turnbull*[3], taken from Archbold's Criminal Pleading Evidence and Practice.

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges was mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing witness and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words."

[28] Section 102(1) of the Evidence Act (at [8] above) also emphasises the need for caution before accepting identification evidence as does section 137 of the Evidence Act, though the only reference to this here and below appears in the appellant's junior counsel's written reply to the respondent's submissions. Section 137(2) requires that the judge (a) warn the jury that identification evidence may be unreliable, (b) inform the jury of matters which may cause the evidence to be unreliable, (c) warn the jury of the need for caution in determining whether to accept the identification evidence and the weight to be given to it. As Saunders JCCJ made clear in *Edwards and Haynes v The Queen*[4] element (b) is the most critical as it provides a rationale for the other two elements. In our view, however, while the judge could have been clearer in his 223-page summation to the jury, following up Mrs Mitchell-Gittens' address to the jury, he made them adequately aware of how the identification evidence could suffer from issues as to the streetlight at the bottom of Lucas Street, as to the sparseness of men at the informal identity parade that had similar characteristics to the appellant, and as to Judd's condition at the time of witnessing the shooting. We consider that the judge dealt with the specific weaknesses of the prosecution's case in a coherent manner that enabled the cumulative impact of those weaknesses to be fairly placed before the jury.

[29] Thus, we reject all the grounds for the appeal against conviction. We find the conviction to be a safe one, having no "lurking doubt" as to whether an injustice has been done to the appellant. This is the case despite the brevity of the terms of the indictment.

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[3] [1977] QB 224

[4] [2017] CCJ 10 (AJ) [50]

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<u>The Terms of The Indictment and Joint Enterprise Directions</u>

[30] The indictment is worded as follows

DWAYNE OMAR SEVERIN is charged with the following offence

STATEMENT OF OFFENCE

Murder

PARTICULARS OF OFFENCE

DWAYNE OMAR SEVERIN, on the 30th day of November 2009, in the parish of Saint Philip in this Island, murdered **Virgil Barton**

[31] This conforms to the form for murder in the Appendix to the Indictments Act Cap 136. By section 4 thereof

> "(1) Every indictment shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
>
> (2) Notwithstanding any rule of law or practice, an indictment shall, subject to thus Act, not be open to objection in respect of its form or contents if it is framed in accordance with the rules."

[32] In the absence of the law as to joint enterprise, it is impossible to prove that it was the appellant who actually killed Barton (as required on a superficial reading of the indictment) since two shooters were clearly involved and it cannot be proved which of them actually killed Barton. However, as a matter of law, a person can be found to have "murdered" a person, whether he is proved to have been responsible for actually himself killing someone or to have participated in a joint enterprise for grievously harming or killing someone.

[33] On this basis, it appears to be the practice in Barbados simply to charge an accused with having "murdered" a person as in the indictment of the appellant. Where, however, any reliance is to be placed upon the law of joint enterprise, we recommend that serious consideration should be given to developing the practice as in many other jurisdictions of charging the accused for having jointly with other identified or unidentified persons

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murdered a specified person, thereby making it clear from the outset that reliance may be placed on the law as to joint enterprise.

[34] As it happens, the depositions before the Magistrate indicated the involvement of two shooters in the death of Barton as did prosecuting counsel in his opening address[5] referring to two persons, a barrage of shots, and cartridge shells from more than one gun. In his address to the jury after the witnesses had given their evidence prosecuting counsel referred[6] to anyone participating in a joint shooting being liable to be found guilty of murder, whether or not actually responsible for the death, as the judge would be telling the jury. The judge then did explain to the jury the law of joint enterprise.[7] It is thus safe to uphold the jury's conviction of the appellant for the murder of Barton on the basis of the law as to joint enterprise.

Disposition

[35] The appeal against conviction is dismissed.

/s/ CMD Byron

The Rt. Hon Sir Dennis Byron (President)

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D. Hayton

/s/ W. Anderson

The Hon Mr. justice W. Anderson

/s/ M. Rajnauth-Lee

Mme Justice M Rajnauth-Lee

/s/ D. Barrow

Mr Justice D. Barrow

[5] See pages 499-500 of the Record of Appeal
[6] See page 1277 of the Record of Appeal
[7] See pages 1350-54, 1357-58, 1428-31, 1495-96, 1506 and 1524 of the Record of Appeal

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