Trinity Term
[2024] UKPC 14
Privy Council Appeal No 0108 of 2018

JUDGMENT

Anton Bastian (Appellant) *v* The King (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Lloyd-Jones
Lord Hamblen
Lord Burrows
Lord Richards
Lady Simler

JUDGMENT GIVEN ON
11 June 2024

Heard on 15 April 2024

Appellant
Philip Rule KC
Ryszard Humes
Daniel Henderson
(Instructed by Simons Muirhead Burton LLP (London))

Respondent
Tom Poole KC
(Instructed by Charles Russell Speechlys LLP (London))

LORD LLOYD-JONES:

1. On 3 November 2015, following a trial before Charles J and a jury, Anton Bastian ("the appellant") and two co-defendants, Craig Johnson and Marcellus Williams, were each convicted by unanimous verdicts of the murder of Kyle Bruner and two counts of armed robbery. Jamal Dorfevil was acquitted of murder but convicted by majority verdicts on two charges of robbery, the lesser alternatives to the counts of armed robbery he faced. A fifth defendant, Leo Bethel, who had also been arraigned on one count of murder and two counts of armed robbery, was discharged during the summing up when the case against him was discontinued and the Attorney General entered a nolle prosequi.

2. On 31 May 2016, the appellant and Williams were each sentenced to a term of 40 years' imprisonment on the count of murder and 12 years' imprisonment on the counts of armed robbery, the sentences to run concurrently. Johnson was sentenced to 45 years' imprisonment on the count of murder and 12 years' imprisonment on the counts of armed robbery, the sentences to run concurrently. Dorfevil was sentenced to 6 years' imprisonment on each of his two convictions for robbery, the sentences to run concurrently. The three years each defendant had spent in custody on remand were deducted from each of those sentences.

3. The prosecution case was that at about 4.00 am on Sunday 12 May 2013 Jane Robertson and Hayley Sayer were robbed of their iPhones, cash and purses in the area of Double Ds Restaurant in Nassau, The Bahamas. It was alleged that the appellant and the other four defendants were in a car, driven by Dorfevil, near the restaurant and that whilst they were in the car, one of the defendants noticed two women within a group of people and they agreed to snatch the women's purses. It was alleged that Williams, Johnson and the appellant exited the car. Williams and the appellant snatched the purses and ran off. Kyle Bruner witnessed the robberies and became involved in an altercation with Johnson. Mr Bruner shoved Johnson backwards onto a car, whereupon Johnson produced a handgun and shot and killed him.

4. The prosecution case at trial against the appellant, who was 19 years of age at the time of the incident and who had surrendered voluntarily to the police when he heard that he was being sought, was essentially that he had made two oral statements to the police acknowledging that he had been present at the incident outside the restaurant, that he had taken the purse of one of the women and that he had witnessed Johnson shooting Mr Bruner. The prosecution maintained that the two oral statements amounted to a confession of robbery or theft and evidenced the appellant's knowledge that Johnson had a gun. In addition, the appellant had been interviewed under caution and made a signed statement, which had been video recorded. However, following a voir dire, the record of interview and caution statement were ruled inadmissible and excluded at trial on the ground of oppression and police brutality. The prosecution maintained that, after

making the oral statements, the appellant took police officers to where he had discarded the purse he had snatched from one of the women.

5. At trial, Assistant Superintendent Perry Clarke gave evidence that on arrest and after being cautioned the appellant said:

> "Mr Clarke, I ga tell you the truth. I was at Double D's when the vibe gone down, but I ain't shoot nobody. One dude name Craig Johnson, who we does call Monks, who live off St. James Road, had the gun and he shoot the white man."

At trial, Corporal Lynden Seymour gave evidence that in detention the appellant said:

> "Man, they have me lock up for shooting the white man. Seymour, I only take the white woman bag I ain't shoot no one."

The appellant did not write or sign anything confirming the accuracy of those two oral statements. At trial, the judge ruled that there was no oppression or impropriety in obtaining the statement made to Corporal Seymour, which was voluntary. The appellant denied that he had made the two oral statements. In her summing up the judge directed the jury that the only evidence against the appellant was the two oral statements.

6. At the close of the prosecution case a submission of no case to answer was made on behalf of the appellant. It was contended that the alleged confession evidence, even if accepted, did not amount to evidence that there was any agreement to rob, nor evidence that there was any knowledge of the gun or foresight of the gun being used. It was submitted that the prosecution case that the appellant had prior knowledge of the gun depended on an inappropriate gloss and departure from the words allegedly spoken, which was unfair and unjustified. The judge rejected the submission on the ground that "a properly directed jury might on one view of the facts come to a conclusion that all of the defendants were a part of a joint plan to rob and in the course of the robbery the deceased was killed".

7. The appellant gave evidence on oath at trial denying all charges and denying having made the two oral statements. He testified that police officers had beaten and tortured him while in detention and that the second oral statement allegedly given to Corporal Seymour was unreliable and an untrue product of oppression and police brutality. He called his father, Everett Bastian, who had accompanied him to the police station when he surrendered himself, to rebut the allegation that he had made the oral statement alleged by Assistant Superintendent Clarke. He also adduced evidence of a

medical examination of the appellant by the late Dr Curry, prison doctor, who on 20 May 2013 had diagnosed myalgia secondary to trauma and some redness to the throat.

8. Under questioning by the foreman of the jury during the trial, a procedure permitted in The Bahamas, the appellant advanced an alibi. He claimed that he was at his girlfriend's house when the incident occurred. No alibi notice having been served, the prosecution maintained that the claimed alibi was false and invited the jury to draw implications from that lie. In summing up, the judge directed the jury that it might draw an unspecified adverse inference from non-compliance with the obligation to serve an alibi notice.

9. The defence case included submissions that if the appellant was present at the incident there was no evidence that he knew that Johnson was in possession of a gun before he produced and used it and, moreover, there was no shared intention to shoot and kill Mr Bruner.

10. The judge rejected a submission by counsel on behalf of the appellant that she should direct the jury that it was open to them to convict the appellant on the lesser offences of manslaughter and robbery. The judge did, however, leave to the jury the possibility of an alternative verdict of robbery in the case of Dorfevil.

11. Following conviction and sentence, the appellant, Johnson and Williams appealed against conviction to the Court of Appeal. On 18 October 2018 the Court of Appeal (Dame Anita Allen P, Crane-Scott and Jones JJA) dismissed the appeals.

12. The appellant now appeals to the Judicial Committee of the Privy Council, pursuant to permission granted by Her Majesty in Council on 21 July 2021, on the following grounds:

> Ground 1: The Court of Appeal erred in holding that the trial judge gave adequate directions to the jury as to the specific intention required for murder and armed robbery in the course of a joint enterprise.
>
> Ground 2: The judge erred in failing to leave and present an issue of fact to the jury to determine and/or in failing to leave to the jury lesser alternative counts of robbery and/or manslaughter in the appellant's case.
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> Ground 3: The trial judge failed adequately to differentiate between the separate cases and evidence, including alleged out of court confessions, that the jury was required to consider in each defendant's case.

Legislative provisions

13. Section 290 of the Penal Code, Chapter 84 of the Statute Law of The Bahamas, provides:

> "Whoever intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse, as in this Title hereafter mentioned."

In the law of The Bahamas, the mens rea of murder is an intention to kill. An intention to cause grievous bodily harm is not sufficient.

Article 289 of the Penal Code provides:

> "Whoever causes the death of another person by any unlawful harm is guilty of manslaughter …"

14. Section 339(2) of the Penal Code penalises armed robbery as follows:

> "Whoever commits robbery, being armed with any offensive instrument, or having made any preparation for using force or causing harm, shall be liable to imprisonment for twenty years:
>
> Provided that whoever commits robbery, being armed with any offensive instrument shall, where the offensive instrument is a firearm, be liable to imprisonment for life."

The offence of robbery is defined by section 4 of the Penal Code:

> "'robbery' is stealing accompanied with actual violence, or threats of violence to any person or property, used with intent to extort the property stolen, or to prevent or overcome resistance to its being stolen"

Ground 1: the Court of Appeal erred in holding that the trial judge gave adequate directions to the jury as to the specific intention required for murder and armed robbery in the course of a joint enterprise.

Joint enterprise: restatement of the law in R v Jogee; Ruddock v The Queen

15. In *R v Jogee; Ruddock v The Queen* [2016] UKSC 8; [2016] UKPC 7; [2017] AC 387 the Supreme Court and the Judicial Committee of the Privy Council sitting jointly provided an authoritative restatement of the law of joint enterprise. In particular, in their joint judgment Lord Hughes and Lord Toulson demonstrated that the law in England and Wales and in certain other common law jurisdictions had taken a wrong turn in the decisions in *Chan Wing-Siu v The Queen* [1985] AC 168 (a Hong Kong appeal to the Judicial Committee of the Privy Council) and *R v Powell* and *R v English* [1999] 1 AC 1 (appeals to the House of Lords) which had established a principle that later became known as parasitic accessory liability (Sir John Smith "Criminal Liability of Accessories: Law and Law Reform" (1997) 113 LQR 453). In *Jogee* that principle was described as follows (at para 2):

> "In the *Chan Wing-Siu* case it was held that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it."

16. Lord Hughes and Lord Toulson began by explaining (at paras 7-10) the general rule that accessory liability requires proof of a conduct element accompanied by the necessary mental element. The requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1. Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal. If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent.

17. Lord Hughes and Lord Toulson demonstrated (at paras 31-33, 39-45, 62-64) that the *Chan Wing-Siu* principle under which a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend, was not supported by the authorities relied upon.

> "From our review of the authorities, there is no doubt that the Privy Council laid down a new principle in *Chan Wing-Siu* when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it." (para 62)

They explained, moreover, (at paras 65, 66) that the Privy Council judgment elided foresight with authorisation and that authorisation of crime B cannot automatically be inferred from continued participation in crime A with foresight of crime B. As they observed (at para 66):

> "There can be no doubt that if D2 continues to participate in crime A with foresight that D1 may commit crime B, that is evidence, and sometimes powerful evidence, of an intent to assist D1 in crime B. But it is evidence of such intent (or, if one likes, of 'authorisation'), not conclusive of it."

18. Lord Hughes and Lord Toulson concluded (at para 79):

> "In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments."

Recognising the significance of departing from a statement of principle made and followed by the Privy Council and the House of Lords on a number of occasions, they nevertheless considered that it was right to do so (at paras 80-87).

> "We consider that the proper course for this court is to re-state, as nearly and clearly as we may, the principles which had been established over many years before the law took a wrong turn. The error was to equate foresight with intent to assist, as a matter of law; the correct approach is to treat it as evidence of intent. The long-standing pre-*Chan Wing-Siu* practice of inferring intent to assist from a common criminal purpose which includes the further crime, if the occasion for it were to arise, was always a legitimate one; what was illegitimate was to treat foresight as an inevitable yardstick of common purpose." (para 87)

19. They then proceeded to restate the principles which include the following:

> "89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. …
>
> 90. The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1 … If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. …
>
> …
>
> 93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent (the two are the same) which included, if things came to it, the commission of crime B, the offence or type of offence with which he is charged, and which was physically committed by D1. A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture, that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose.
>
> 94. If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances."

20. With regard to the relevance of prior knowledge by an accused of the presence of a weapon, Lord Hughes and Lord Toulson observed (at para 98):

> "What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in the *Chan Wing-Siu* case to focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. … Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

Joint enterprise: the law of The Bahamas

21. The law of The Bahamas appears to have avoided the wrong turn taken in *Chan Wing-Siu*.

22. *Farquharson v The Queen* [1973] AC 786, an appeal to the Privy Council from the Court of Appeal of the Bahama Islands in 1973, applied entirely orthodox principles of joint enterprise. There the appellant broke into a house with intention to steal, in company with two accomplices who were to his prior knowledge armed with a cutlass (Darling) and a pistol (Pinder) respectively. The occupants were disturbed and the husband was shot dead and the wife injured by Pinder. The trial judge directed the jury that if the defendants' common design or plan as they each understood it included the use of whatever force was necessary to achieve the object of breaking and entering, including their escape if resisted, even if this force involved killing or doing grievous harm, then if one of them in pursuance of this common design uses such force with fatal results they are each and all responsible for the consequences (p 792 F-G). He also directed the jury that if the shooter fired in panic or for some other purpose of his own, unconnected with the common purpose previously agreed between the three to rob with whatever force was necessary, in those circumstances he would alone bear responsibility for the consequences of the fatal shot (p 793E). The appellant was convicted and the Court of Appeal of the Bahama Islands dismissed his appeal. On further appeal, the Privy Council dismissed the appeal. Lord Kilbrandon, delivering the judgment of the Board, expressly approved the judge's direction on joint enterprise, observing:

> "This is one of the class of cases in which several persons have joined together in a criminal enterprise, one or more of the persons being armed with a lethal weapon, in circumstances in which it may be inferred that there was an intention common to all the participants that a lethal weapon would be used, if necessary, in furtherance of the common purpose for which the persons were associated." (at p 792 C-D)

23. *Rodney Johnson v The Queen* SCCrApp No 100 of 2012 concerned an armed robbery by a number of men during which one victim was shot twice and killed. Three defendants were indicted. One issue at trial was whether the shooter went outside the agreed plan. Following the conviction of the appellant for offences of murder and attempted armed robbery, he contended on appeal that the summing up had failed to give effect to the principles stated by the Supreme Court and Privy Council in *Jogee*. Dame Anita Allen P, delivering the judgment of the Court of Appeal of The Bahamas, considered (at para 91) that *Farquharson* established that knowledge that one's associates had a weapon and foresight that the common plan entailed the use of whatever force was necessary to achieve the object of that plan was evidence, in the event that fatal results ensued from the use of such force in executing that plan, from which it might be inferred that the appellant intended those results in common with the shooter. She concluded (at para 96):

> "The requirement of intent in cases of common design and extended common purpose, to which their Lordships returned in *Jogee* and *Ruddock* and which was the position in England prior to *Chan Wing-Siu*, has always been the position in The Bahamas, at least since *Philip Farquharson*."

As a result, she considered, *Jogee* and *Ruddock* did not affect the law of The Bahamas relating to common design which always had been that to be guilty the secondary party must share the intention of the shooter where the common purpose is extended to murder or another offence requiring specific intent (para 101). She considered that the judge's directions to the jury on common design in cases of murder and attempted armed robbery were impeccable and faithfully followed the principles of *Farquharson*.

24. The Board's attention was drawn to the following further decisions of the Court of Appeal of The Bahamas in which the principles stated in *Rodney Johnson* or in *Jogee* have been applied: *Leon v R* SC CrApp No 51 of 2016 (10 September 2018); *Gibson v R* SCCrApp No 204 of 2016 (15 October 2018); *Robinson v Commissioner of Police* MCCrApp No 124 of 2019 (31 March 2021); *Edwards and Burrows v DPP* SCCrApp No 96 of 2021 (7 July 2022).

The appellant's case

25. On this appeal Mr Philip Rule KC on behalf of the appellant submits that Charles J erred in law as regards joint enterprise in four material respects, errors which the Court of Appeal failed to recognise.

> (1) The judge directed the jury that it was sufficient in law to found a conviction for murder on a joint enterprise basis that the defendant "realised or foresaw or had knowledge that" the principal might act with intent to kill.
>
> (2) The judge failed properly to direct the jury as to the nature of the common intention or scope of the agreement necessary between the parties.
>
> (3) The judge failed to direct the jury at all as to the proper approach in circumstances where one party may fundamentally depart from the scope of that agreement.
>
> (4) The judge, having identified the specific issue of the presence of a weapon, failed to direct the jury as to any proper use to be made of that fact.

The summing up

26. In her summing up, Charles J dealt with the counts alleging armed robbery before turning to the count alleging murder. With regard to armed robbery, she directed the jury as to the ingredients of the offence. So far as joint enterprise was concerned her summing up included the following passages:

> "… [A]rmed robbery is where the person steals while armed with an offensive weapon like a firearm. The prosecution's case is that these five defendants were part of the joint plan to rob and it matters not who had the firearm. There was a firearm in the picture which was later used to kill Kyle Bruner."
>
> "In this case, the prosecution invites you to find that the gun was in the background and even though it was not physically in the possession of Anton Bastian or Marcellus Williams, if you find that they were the bag snatchers, there was a gun being carried by Craig Johnson who exited the car with them."

> "Since the prosecution's case is premise [sic] on a concept called 'being concerned together' and I'll come to that concept momentarily, it matters not who pulled the bag off Ms Robertson's shoulders if they were all in this plan to rob together, then they will all be guilty of armed robbery if they share the common intention." [**Passage A**]
>
> "… [I]n this case the prosecution invites you to find that a gun was in the picture and as I told you just a moment ago even though it was not physically in the possession of Anton Bastian or Marcellus Williams, who exited the car with them."

27. The judge then gave the following directions on joint enterprise:

> "I now come to a very important concept of being concerned together. You will recall when the charge of murder and two charges for armed robbery were read, you heard a phrase, 'being concerned together'. What does it mean? It simply means that the prosecution is alleging that these five defendants committed the murder and armed robbery together. They were all a part and parcel of the joint plan to rob, and in doing so, someone was killed. Whereas in a criminal offense is committed by two or more persons, each of them may play a different part, but if they're in it together, as part of a joint plan or agreement to commit it, they're each guilty. [**Passage B**]
>
> The essence of joint responsibility for a criminal offense is that each defendant share the intention to commit the offense and took some part in it however great or small so as to achieve that objective.
>
> Your approach to the case should therefore be as follows: If looking at the case of any defendant, and I ask you to look at them separately, if you are sure that the intention I just mentioned [sic], he committed the offense of murder or armed robbery on his own or that he took some part in committing it with others, he's guilty. Mere presence at the scene of a crime is not enough to prove guilt, but if you find that a particular defendant was on the scene and intended and did by his presence alone, encourage the other in the offense, he's guilty."

> "But if you find that a particular defendant was on the scene and intended and did, by his presence alone, encourage the others in the offense, he's guilty. Before you can convict any of the defendants with murder [sic] or armed robbery, you must be sure that he committed the offense himself or that he did an act or acts as part of a joint plan with the other defendants to commit it or to put it simply, you have to be sure that they were in it together."

The judge then directed the jury that the prosecution must prove participation by each defendant with a common purpose, although no formality was required and an agreement can be inferred from conduct, and continued:

> "… [I]f you accept the prosecution's case, that Craig Johnson, Anton Bastian, Marcellus Williams and Jamal Dorfevil set out to rob, and there was a gun in the picture at the very least, Craig Johnson, Marcellus Williams, and Anton Bastian were aware of the presence of the gun, that's the prosecution's case, it matters not who robbed or who used the gun. [**Passage C**]
>
> But in the case of the robbery, it matters not who did the snatching of the bag. If all of the ingredients that made up the crime of armed robbery is present [sic], as in the second and third counts, I believe that you may have no difficulty in finding that Craig Johnson, Anton Bastian, Marcellus Williams since they share in the intention to do so [sic]."

The judge then directed the jury that, if they found that Jamal Dorfevil was the driver of the car and he was unaware that there was the presence of a gun, they could convict him of robbery and not armed robbery. She continued:

> "Now, the difficulty lies with the count of murder. So let me give you further examples which may assist you in coming to a conclusion on that count. Where two or more persons embarks [sic] on a joint enterprise, each is criminally liable for acts done in pursuance of the joint enterprise. Including unusual circumstances arising from the execution of the joint enterprise, but if one of them goes beyond what was implicitly agreed, as part of the joint enterprise, the other is not liable for the consequence of the unauthorized act. [**Passage D**]

> … If a gang of youth [sic] goes out looking for trouble and one of them, … A, starts a fight, all of the others who joined in to back him up will be acting unlawfully and will be guilty of common assault at the very least.
>
> If the victim suffers some bodily harm, then each one who participated will be guilty of assault occasioning actual bodily harm. It does not matter which one actually caused the damage or the harm."

The judge continued:

> "Further, if one of the gang, A … has a knife and in the course of the fight uses it to kill, A will be guilty of the murder if the prosecution proves that he intended to kill, but in addition, each of the other gang members B or C or D who took part in the fight may also be guilty of murder, but only if when he took part, he knew of two things: That A had the knife, and two, he shared A's common intention to kill or realized or foresaw that A might use the knife to kill with that intention and nevertheless took part." [**Passage E**]

The judge then reminded the jury of the prosecution case:

> "The prosecution's case is that they were all aware of the existence of a gun. As I told you, perhaps with the exception of Jamal Dorfevil, if you accept what he stated there in the record of interview, and since a murder took place, in the course of two robberies they're all guilty of murder and armed robbery.
>
> Therefore, you can only convict Anton Bastian, Marcellus Williams and Jamal Dorfevil of murder only if when he took part, one, he knew that Craig Johnson had a gun. Two, he shared Craig Johnson's common intention to kill or realized or foresaw or had knowledge that Craig Johnson might use the knife [sic] to kill with that intention and nevertheless took part. The prosecution invites you to find that the defendants Craig Johnson, Anton Bastian, Marcellus Williams and Jamal Dorfevil were all part of a joint plan to rob Jane Robertson and Hayley Sayer at least two of them, Anton Bastian and

> Marcellus Williams knew that he had a gun with him and that car was being driven by Jamal Dorfevil [sic]." [**Passage F**.]

She continued:

> "When Craig Johnson shot and killed Kyle Bruner, Marcellus Williams and Anton Bastian shared that common intention to kill or realize that Craig Johnson might use the gun to kill, but nevertheless took part [sic] so they will be guilty of murder just like Craig Johnson." [**Passage G**]

She then directed the jury that if Craig Johnson did not have the intention to kill, and if they returned a verdict of manslaughter against Johnson "then equally you must return verdicts of guilty of manslaughter against [Bastian and Williams]". The judge then referred to the case against Dorfevil:

> "Again the prosecution is inviting you to find that Jamal Dorfevil was also a part of the plan and he also should be guilty of manslaughter, but I have already indicated to you that one of the circumstances or the ingredients that you have to look for is, did he know that Craig Johnson had a gun?"

The Court of Appeal

28. On appeal to the Court of Appeal, counsel for the appellant submitted that the judge's direction on joint enterprise failed to reflect the restatement of principles in *Jogee*. Jones JA, delivering the judgment of the court, referred to *Rodney Johnson* and stated (at para 71), correctly in the Board's view, that in this case the jury had to consider whether Williams, Johnson and the appellant shared a common intention to rob the two women, and to kill if necessary to facilitate the robbery, as part of the joint enterprise. However, he then stated:

> "72. Further, …, pursuant to section 12(3) of the Penal Code intention in The Bahamas is an inference reasonably drawn from the circumstances of the case.
>
> 73. In this case, Williams and Bastian admitted that they were part of a joint enterprise with Johnson to snatch purses from the white women, with knowledge that Johnson was armed with a firearm. These matters were properly before the jury,

> and the learned trial judge cannot be faulted for the directions given. These grounds have no merit and must fail."

No explanation was provided as to how the directions complied with the law as stated in *Rodney Johnson* and *Jogee*.

Misdirection on the issue of foresight and intention

29. In the law of The Bahamas, in order to establish joint enterprise liability for a crime it is necessary to prove an intention to encourage or assist the commission of the offence coupled with an intention that the principal should act with the requisite mental element for the offence. In the case of murder, in the law of The Bahamas the necessary mental element is an intention to kill. Accordingly, in the present case the jury should have been directed that nothing would suffice short of a shared intention that Johnson should act intending to kill, which would include a conditional intention that he should act in that way if necessary if there was resistance to the robbery. Not only did the judge fail to give such a direction, but she erred by directing the jury at a number of points that it was sufficient in law to found a conviction for murder that the appellant realised, foresaw or knew that Johnson might use the gun to kill or use the gun with an intention to kill. This error is readily apparent in the passages of the summing up identified above (at para 27) as Passage E, Passage F and Passage G. In the same way, the directions given in relation to the counts of armed robbery were defective. The jury should have been directed that an intention that a gun should be used in some way was required before the joint enterprise could be found to extend to an armed robbery. As in the case of a shared intention to kill, this could be a conditional intention.

30. Contrary to the submission of Mr Tom Poole KC on behalf of the respondent, these defects are not cured by the general directions in relation to intention given earlier in the summing up. The earlier directions were given in the context of the principal's liability. The jury was not told that they applied to secondary liability and, in any event, if they were so understood they were expressly contradicted by the later directions referred to above.

31. On behalf of the respondent, Mr Poole in his written case sought to rely in this regard on section 12(3) of the Penal Code, which was referred to in this context by both the judge in her summing up and the Court of Appeal. Mr Poole did not seek to develop this submission at the oral hearing. In the Board's view, he was correct not to do so. Section 12 of Penal Code provides:

> "(1) If a person does an act for the purpose of thereby causing or contributing to cause an event, he intends to cause that event, within the meaning of this Code, although either in fact

> or in his belief, or both in fact and also in his belief, the act is unlikely to cause or to contribute to cause the event.
>
> (2) If a person does an act voluntarily, believing that it will probably cause or contribute to cause an event, he intends to cause that event, within the meaning of this Code, although he does not do the act for the purpose of causing or of contributing to cause the event.
>
> (3) If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event, or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, until it is shown that he believed that the act would probably not cause or contribute to cause the event."

32. Section 12(3) is a difficult provision which has given rise to complications in other proceedings. (See generally *Pinto v R* (2011) 2 BHS J No 77, per Newman JA at para 36; *Miller v The King* [2023] UKPC 10, per Lord Turnbull at paras 13–22; *Watson v The King* [2023] UKPC 32, per Lord Lloyd-Jones at para 27.) In *Miller v The King*, at para 14, Lord Turnbull, delivering the judgment of the Board, provided the following explanation of section 12:

> "It is clear that these are evidential provisions. Their aim is to assist a jury in determining whether the Crown has established the necessary level of intention for the commission of the particular crime charged (see *Rahming v R* at para 14). Subsection (1) directs attention towards purpose, explaining that purpose equates to intention. Subsection (2) extends the concept of intention beyond purpose where something is done in the belief that it will probably have a particular outcome, even if that was not the person's purpose. Subsection (3) then sets out to provide a route through which such a belief can be established. In short, section 12 sets out certain statements as to intention and identifies a process through which intention can be established. The provisions of the section do not impose a burden of proof on the defence and the critical question of the defendant's intention remains to be determined by an examination of the whole evidence."

Lord Turnbull then observed that the process of arriving at a conclusion as to intention as set out in this provision is cumbersome and unnecessarily complex and that it would not be straightforward for a judge to convey the import of section 12(3) to a jury with clarity and precision.

33. Section 12(3) is not directly relevant to the issues on this appeal. It is concerned with the foreseeability of the consequences of a particular act that was intended by an accused person and whether those consequences were intended. In this ground of appeal we are concerned with the prior question whether such an act was intended by the accused person. As Mr Rule put it in his written case on behalf of the appellant, section 12(3) cannot convert an act that one accused did not intend a co-accused to commit (ie one not within an agreed common purpose) into one the accused did intend. In the case of murder the relevant mental element for a secondary party remains an intention that the principal act with an intention to kill. While section 12(3) might enlarge the circumstances in which such an intention can properly be identified, it does not elevate anything short of an intention that the principal act with an intention to kill to the status of sufficient alternative mens rea. In other words, before section 12(3) can have any application to a secondary party, that secondary party must be shown to have intended that the principal should act in that particular way. If it is shown that the conduct falls within the scope of the joint enterprise in this way, section 12(3) may then be relevant to the question whether the secondary party intended the consequences of that conduct. However, section 12(3) cannot fix a secondary party with liability for an act by a principal which the secondary party did not intend. It is consistent with this analysis that the reliance placed upon section 12(3) in *Farquharson* (at p 796 B-H) and in *Leon v R* (at para 31) was in relation to the intention of the principal, the shooter.

34. As a result, section 12(3) of the Penal Code does not assist the prosecution on this appeal.

35. It should be noted that in the present case the trial judge, Charles J, referred to section 12(3) when addressing the requirement that the prosecution prove to the criminal standard that the person who shot Kyle Bruner intended to kill him. While section 12(3) may have been relevant to that issue, the direction is open to criticism on the grounds that it involved reading out section 12(3) without a satisfactory explanation of its purpose and effect and a misdirection that the effect of the provision is that a person is presumed to intend the natural and probable consequences of his actions. (See *Miller*, per Lord Turnbull at para 16, referring to *Pinto* per Newman JA at para 31.) However, given the evidence as to the circumstances in which the gun was fired, these failings, in themselves, can have had no impact on the safety of the convictions.

36. In the Board's view, these misdirections in the summing up alone undermine the safety of the appellant's convictions.

Misdirection and/or failure to direct as to the scope of the agreement

37. The Board considers that there is force in the further complaint that the summing up failed to include an appropriate direction as to the scope of the common intention. The judge should have invited the jury to decide what precisely had been agreed between the appellant and his co-defendants. They should have been invited to decide the scope of any common purpose or design beyond a plan to rob. In particular, they should have been asked to decide whether any agreement was an agreement to commit robbery as opposed to armed robbery and whether a common intention extended to the use of lethal force if the circumstances arose or to do so with intent to kill. There was no such direction.

38. Furthermore, in the summing up the judge herself attempted to describe the content of the agreement (which should have been a matter for the jury) and did so in terms which obscured the real issues. This is apparent in Passage A, Passage B and Passage C above (See paras 26 and 27). In Passage A the jury were told that since the prosecution's case is based on a concept called "being concerned together" it matters not who grabbed the bag if they were all in this plan to rob together, in which case they would all be guilty of armed robbery if they share the common intention. In Passage B the judge introduced the concept of joint enterprise. The jury were told that it means simply that the prosecution was alleging that these five defendants committed the murder and armed robbery together, that they were all part and parcel of the joint plan to rob and in doing so someone was killed. There was no attempt to distinguish robbery, armed robbery and murder in defining the scope of the agreement. Similarly, in Passage C the judge directed the jury, incorrectly, that if the defendants set out to rob and "there was a gun in the picture at the very least" and the defendants were aware of the presence of the gun, it mattered not who robbed or who used the gun.

Misdirection and/or failure to direct as to fundamental departure

39. On behalf of the appellant it is submitted that the judge made a further error in failing to identify to the jury that it ought to consider whether the actions of Johnson amounted to a fundamental departure or an overwhelming supervening event amounting to a further crime for which the appellant did not bear criminal responsibility. The Board doubts that this submission advances the appellant's case on joint enterprise. First, the judge did direct the jury in general terms that if a party to a joint enterprise goes beyond what was agreed, the other parties are not liable for the consequences of the unauthorised act (Passage D at para 27 above). While a more elaborate direction as to fundamental departure or overwhelming supervening event will sometimes be required, the Board considers that in the circumstances of this case this would not have been necessary, provided that appropriate directions were given in relation to the intention of secondary parties and the scope of any common agreement, on the lines indicated above. (See *Jogee* para 98, cited at para 20, above.)

Misdirection as to the proper approach to the presence of weapons

40. The appellant further submits that at a number of points in the summing up the judge incorrectly directed the jury as to the effect in law of the presence of, and the appellant's knowledge of the presence of, the firearm possessed by Johnson. In the Board's view this submission is well founded.

41. First, the fact that a secondary party is aware of the presence of a firearm before the time of the commission of the offence is evidence to be considered when determining whether an inference of the specific intent necessary to prove guilt is made out. However, in a number of passages in the summing up knowledge of the gun was presented not as evidence from which an inference of intention might be drawn but sufficient of itself to prove guilt of armed robbery or murder. Knowledge was erroneously equated with intention. This is apparent, for example, at Passage C (para 27 above). A particularly striking example is Passage F (para 27 above) where the judge told the jury that the prosecution's case was that the defendants (with the possible exception of Dorfevil if the jury accepted his denial of knowledge in interview) were all aware of the existence of a gun and that since a murder took place in the course of two robberies they were all guilty of murder and armed robbery.

42. Secondly, the Board considers that the judge erred in failing to direct the jury as to the necessity of determining when the appellant became aware that Johnson was in possession of a gun. Knowledge of the gun could have probative value only if the appellant was aware of it before it had been fired. This failure is a serious deficiency in respect of what should have been a critical issue. Furthermore, this failure gives rise to broader concerns relating to the evidence on which the prosecution case of joint enterprise was founded which will be considered under Ground 2.

Conclusion in relation to joint enterprise

43. In the Board's view, the judge's directions on joint enterprise were seriously defective. Furthermore, while the Court of Appeal acknowledged (at para 71) the principles which it stated so clearly in *Rodney Johnson*, it failed to apply them to the summing up in this case. The Board would therefore allow the appeal on this ground.

Ground 2: The judge erred in failing to leave and present an issue of fact to the jury to determine and/or in failing to leave to the jury lesser alternative counts of robbery and/or manslaughter in the appellant's case.

44. A trial judge bears the responsibility of keeping under consideration whether it is necessary to leave to the jury the possibility of returning an alternative verdict to a

lesser offence. In *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154 Lord Bingham of Cornhill explained (at para 12):

> "… The public interest [in the outcome of a criminal prosecution for a serious offence] is that, following a fairly conducted trial, defendants should be convicted of offences which they are proved to have committed and should not be convicted of offences which they are not proved to have committed. The interests of justice are not served if a defendant who has committed a lesser offence is either convicted of a greater offence, exposing him to greater punishment than his crime deserves, or acquitted altogether, enabling him to escape the measure of punishment which his crime deserves. The objective must be that defendants are neither over-convicted nor under-convicted, nor acquitted when they have committed a lesser offence of the type charged. The human instrument relied on to achieve this objective in cases of serious crime is of course the jury. But to achieve it in some cases the jury must be alerted to the options open to it. This is not ultimately the responsibility of the prosecutor, important though his role as a minister of justice undoubtedly is. Nor is it the responsibility of defence counsel, whose proper professional concern is to serve what he and his client judge to be the best interests of the client. It is the ultimate responsibility of the trial judge …"

Lord Bingham went on (at para 23) to define the cases in which alternative verdicts should be left to a jury.

> "I would also confine the rule to alternative verdicts obviously raised by the evidence: by that I refer to alternatives which should suggest themselves to the mind of any ordinarily knowledgeable and alert criminal judge, excluding alternatives which ingenious counsel may identify through diligent research after the trial."

45. Under Ground 2, the appellant submits that the judge erred in failing to leave to the jury in his case the possibility of returning a verdict of guilty of manslaughter in the alternative to murder and verdicts of robbery in the alternative to armed robbery. On behalf of the appellant, it is submitted that the failure to leave these matters to the jury renders the convictions obtained on an "all or nothing basis" unsafe and unsatisfactory. It is submitted that both manslaughter and robbery were obvious alternative verdicts within Lord Bingham's formulation in *Coutts*. It is submitted that while the prosecution

contended for the most serious of criminality, and while the defence averred mis-identification and alibi, there was plainly a middle course that was open to the jury depending upon factual findings that should have been left to the jury to make and apply.

46. In the Board's view this issue is closely bound up with the question whether there was any admissible evidence against the appellant capable of establishing his liability for murder or armed robbery on a joint enterprise basis. In the circumstances of this case, the possibility of the prosecution securing the conviction of the appellant for armed robbery or murder depended on their proving that the appellant was aware prior to the robberies and killing that Johnson had a gun. It should be recalled that the only evidence in this case admissible against the appellant was the two oral statements set out in para 5 above and the evidence of police officers that the appellant took them to the location where he discarded the purse. Only if the jury were sure that the appellant knew of the gun at the relevant time could they then address the necessary further questions whether there was a common intention formed as regards the use of the gun and, if so, what that intention was. Proof of prior knowledge of the gun was essential if the prosecution was to establish that the appellant had the necessary intention to commit murder. It was also essential if the prosecution was to establish that the appellant committed armed robbery.

47. The only evidence against the appellant which could demonstrate that he knew of the gun at the relevant time was the oral statement he was alleged to have made to Assistant Superintendent Clarke:

> "Mr Clarke, I ga tell you the truth. I was at Double D's when the vibe gone down, but I ain't shoot nobody. One dude name Craig Johnson, who we does call Monks, who live off St. James Road, had the gun and he shoot the white man."

The prosecution maintained that this was an admission by the appellant that he had prior knowledge that Johnson was in possession of a gun. That was an essential plank of the prosecution case against the appellant.

48. While the words may indicate such prior knowledge, they are alternatively consistent with the appellant becoming aware of the gun for the first time only when Johnson produced it and shot Mr Bruner. At the close of the prosecution case, trial counsel for the appellant made a submission of no case, in the course of which he submitted that the alleged admissions did not establish prior knowledge of anything. The submission of no case was rejected. The defendant gave evidence in the course of which he denied that he had made the statement. Nevertheless, the Board notes that it was not put to the appellant in cross examination that his statement indicated knowledge

of the gun prior to the shooting, nor that he foresaw that the gun would be used, nor used in any particular way. After the close of evidence and before speeches, the judge accepted a submission on behalf of Dorfevil that she should direct the jury that, if they accepted what Dorfevil said in his police interview, namely that he was unaware that Johnson had a gun, they might find him guilty of robbery and not armed robbery. The judge refused an application to permit the jury to consider an alternative verdict of robbery in the appellant's case. She gave as her reason the fact that the Crown's case was that the appellant knew of the firearm.

49. The judge appears to have proceeded on the assumption that the appellant's statement to Assistant Superintendent Clarke, if made, had only one meaning and was an admission by the appellant that he had prior knowledge that Johnson was in possession of a gun. In the Board's view, the judge was not entitled to make any such assumption. The meaning of the statement, if made, was a question which the judge was required to leave to the jury. Not only did the judge withhold that issue from the jury, but she directed the jury on the basis that if the statement was made it was an admission of knowledge of the gun sufficient to found a case of joint enterprise. This is a further reason to conclude that the conviction of the appellant is unsafe.

50. Consistently with the view she took of the oral statement to Assistant Superintendent Clarke, the judge refused to leave to the jury the possibility of alternative lesser verdicts against the appellant. Had the judge left to the jury the issue as to the meaning of that oral statement and had the jury concluded that they could not be sure that the appellant had prior knowledge that Johnson had a gun, the jury could not have convicted the appellant of murder or armed robbery but could still have convicted him of manslaughter (ie causing the death of another person by any unlawful harm) or robbery. These were "alternative verdicts obviously raised by the evidence" to employ Lord Bingham's formulation. This conclusion is, moreover, reinforced by the verdicts actually returned against Dorfevil. In the Board's view, the ambiguity of the oral statement required the judge to leave to the jury both the question of the meaning of that statement and the possibility of returning alternative lesser verdicts of manslaughter and robbery. In the circumstances of this case, the failure to do so undermines the safety of the convictions of the appellant.

51. The Board would therefore also allow the appeal on this ground.

<u>Ground 3: The trial judge failed adequately to differentiate between the separate cases and evidence, including alleged out of court confessions, that the jury was required to consider in each defendant's case.</u>

52. On behalf of the appellant it is submitted that the judge erred in failing adequately to direct the jury that the case for and against each defendant must be

considered separately. While it is accepted that the judge gave, both at the start and the conclusion of the summing up, the standard general direction to consider the case against each accused separately, it is submitted that when the judge directed the jury as to the law and referred to fact or evidence she undermined the necessary approach such that the jury would not have differentiated between the cases against the appellant, Johnson and Williams. (By contrast, it is said, the jury was given a clear direction to give separate consideration to the case against Dorfevil.) It is submitted that given the nature of this case, which raised complex issues of cross-admissibility and joint enterprise, this failure was significant.

53. It is further submitted on behalf of the appellant that the judge undermined the general direction given at the outset of the summing up by immediately following it by a direction in the following terms:

> "In doing so it does not mean you should ignore the evidence background circumstances as the evidence against and for each defendant on each count does not exist … in a vacuum and background circumstances may well be evidence which may assist you in reaching your verdict."

The Board does not accept this submission. The general direction was given in clear and emphatic terms, including the statement that the jury would be doing a grave injustice to all of the defendants if they simply grouped them all together. The words complained of, which followed, could not reasonably be understood as qualifying the necessity of separate consideration.

54. Furthermore, in the Board's view there is little or no force in the specific criticisms made by the appellant in this regard.

(1) Complaint is made that when reminding the jury of the out of court statement to Assistant Superintendent Clarke attributed to the appellant, the judge observed that this "surely implicated Craig Johnson as the shooter". While that statement was not admissible against Johnson, the Board attaches little weight to it in this context.

(2) In directing the jury on the armed robbery counts, the judge stated that "if you find that all of the ingredients have been satisfied then the defendants will all be guilty of armed robbery". In the light of the general direction, there was no need for the judge to specify that the ingredients had to be satisfied in respect of each defendant.

(3) The judge directed the jury that if they considered that Johnson did not have an intention to kill and found him guilty of manslaughter, "then equally you must return verdicts of guilty of manslaughter against [the appellant and Williams]". While a direction identifying the elements of the offence of manslaughter in the context of joint enterprise would have been helpful at this point, the Board rejects the submission that the jury might have understood this as a direction that its verdict on murder would apply to Johnson, Williams and the appellant without distinction. The judge had already given a direction that the jury would be doing a grave injustice if they did not consider each count against each defendant separately.

(4) Leaving to the jury the possibility of returning alternative verdicts of manslaughter and robbery in the case of Dorfevil, but not in the case of the appellant, Johnson or Williams, could not reasonably be taken as an indication that the cases of the appellant, Johnson and Williams stood or fell together. It gave rise to other considerations which have been considered under Ground 2.

(5) Contrary to the submission on behalf of the appellant, the fact that each defendant relied on alibi and contended the confessions were untrue and obtained by police brutality could not reasonably give rise to a perception of "one defence" common to each, so as to require anything more than the general direction for separate consideration.

(6) The failure to leave to the jury the question of when, if at all, the appellant knew that Johnson had a gun adds nothing to this ground of appeal. Its implications have been considered under Ground 2.

55. In the light of the general directions at both the start and end of the summing up and the terms in which they were delivered, the Board considers that the jury would have understood the importance of giving separate consideration to the case against each defendant. The Board would therefore reject this ground of appeal.

The proviso

56. The proviso to section 13 of the Court of Appeal Act, Chapter 52 of the Statute Laws of The Bahamas, states that an appellate court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if the court considers that no miscarriage of justice has actually occurred. In the Board's view, there can be no question of applying the proviso in the present appeal. First, the errors in the summing up identified under Ground 1, in particular in relation to foresight and intention, were so fundamental as to make it impossible to conclude that, had the jury been correctly directed, the appellant's

conviction would nonetheless have been inevitable. Secondly, the judge's failure to leave to the jury the issue of when the appellant may have become aware that Johnson was in possession of a gun, considered under Ground 2, was equally fundamental. Thirdly, as Mr Poole very fairly conceded, the view the Board takes as to the judge's failure to leave alternative verdicts to the jury, also considered under Ground 2, would make the application of the proviso impossible.

Observation by the Board

57. The trial before Charles J in these proceedings raised complicated issues of law and fact, including complex issues of joint enterprise, alternative verdicts, cross-admissibility of evidence and inculpatory and exculpatory statements in interview. In the Board's view the jury would have been assisted and clarity would have been promoted had the judge reduced the necessary directions of law to writing and, after hearing (and where appropriate responding to) any submissions about them from counsel, provided copies to the jury during the summing up. This procedure has now become the norm in most criminal trials in Crown Courts in England and Wales. This course has the advantage of allowing counsel to make submissions in advance of delivery of the summing up on what may be disputed points of law. It encourages clear and concise explanation of complex issues. It is likely to reduce the risk of repetition or contradiction in directions. It assists the jury in understanding and retaining the legal directions and can provide a sound basis for discussion when they retire to consider their verdict. The Court of Appeal may wish to consider whether such a procedure should be followed in The Bahamas.

Appropriate disposal

58. In these circumstances, the errors in the judge's summing up identified under Grounds 1 and 2 undermine the safety of the appellant's convictions for murder and armed robbery which must be quashed.

59. The directions on joint enterprise are so flawed as to make it impossible for the Board to substitute a conviction for manslaughter on a joint enterprise basis.

60. The Board has given anxious consideration to the question whether the case should be remitted to the Court of Appeal with a direction that it consider whether to order a retrial.

61. In the unusual circumstances of this case the Board has concluded that the appellant should not be retried for murder. For reasons explained in this judgment, the appellant could be guilty of murder on a joint enterprise basis only if he shared an

intention that Johnson should act with an intention to kill. The only admissible evidence against the appellant that was relevant to this issue was the thoroughly ambiguous statement said to have been made to Assistant Superintendent Clarke. While that statement may be capable of being understood as indicating that the appellant had prior knowledge that Johnson had a gun, this alone, in the Board's view, is so tenuous as to be incapable of supporting a safe conviction for murder. It is not evidence on which any reasonable jury, properly directed, could be sure that the appellant had prior knowledge of the gun. Indeed, although this was not advanced as a ground of appeal, it is the Board's view that the judge should have accepted the submission of no case to answer on behalf of the appellant on the murder charge. Different considerations apply in the case of joint enterprise manslaughter, where it is sufficient that death has been caused by the infliction of unlawful harm. Accordingly, the matter will be remitted to the Court of Appeal with a direction that it consider whether it is appropriate to order the retrial of the appellant for manslaughter.

62. Similar considerations apply to the conviction for armed robbery. In the circumstances of this case, the appellant could only have been convicted of armed robbery on a joint enterprise basis if he had prior knowledge that Johnson had a gun. As the Board considers that the state of the evidence is such that a reasonable jury, properly directed, could not be sure of that conclusion, a retrial for armed robbery would be inappropriate. Once again, it is the Board's view that the judge should have accepted the submission of no case to answer on behalf of the appellant on the armed robbery charge. However, the Board considers that, in returning their verdicts, the jury must have been sure that the appellant was party to a joint plan to rob. Indeed, the judge directed the jury that in order to convict of armed robbery or murder the jury must first be sure that there was a joint plan to rob. (See Passage B and Passage C at para 27 above.) Furthermore, the jury must have concluded that the appellant's alibi was false and that he was present at the scene with Johnson, Williams and Dorfevil. In the circumstances, the Board considers that the appropriate course is to substitute a conviction for robbery and to remit the matter to the Court of Appeal for sentence on that charge.

63. Accordingly, the Board will humbly advise His Majesty that:

(1) The appellant's convictions for murder and armed robbery should be quashed;

(2) The matter should be remitted to the Court of Appeal of the Commonwealth of The Bahamas with a direction that it consider whether to order the retrial of the appellant for manslaughter;

(3) A conviction for robbery be substituted for the conviction for armed robbery and the matter be remitted to the Court of Appeal of the Commonwealth of The Bahamas for resentence for the offence of robbery.