

**CINAN v R**  
**(2013) SLR 279**

Domah, Twomey, Msoffe JJA  
30 August 2013

SCA 26/27/2009

J Camille for the first appellant  
J Renaud for the second appellant  
C Brown for the respondent

**TWOMEY JA**

[1] The appellants in this case were employed as security officers at United Concrete Products Services (UCPS), Anse des Genets, Mahé. They were convicted on 30 September 2009, pursuant to s 193 read with s 23 of the Penal Code, of the murder by common intention of a fellow employee, André Durup. At their trial each appellant blamed the other for the murder of the deceased. Both were convicted of murder and sentenced to life imprisonment. They have appealed against the verdict. I have had the benefit of reading my brother Domah J's judgment with which I concur.

[2] However, given the fact that the second appellant in his grounds of appeal raises issues of the law on common intention and intoxication I take the opportunity to further expand on the jurisprudence in these areas. The issues are:

- 1) Whether the test for common intention was satisfied in this case.
- 2) Whether the issue of manslaughter should have been left to the jury as an alternative verdict, given the fact that there was some evidence of intoxication of the second appellant.

*Common intention*

[3] The second appellant submits that there was insufficient evidence of common intention between the parties to commit the murder of the deceased. We have had the opportunity in the cases of *Kilindo v R* SCA 4/2010 and *Sopha v R* SCA 11/2010 to elaborate on the law of common intention in Seychelles. Counsel for the second appellant takes issue with the decided cases and our view that our law on common intention differs from that of English common law.

The test in terms of the secondary offence committed in pursuance of the agreed first offence is an objective one. He relies on s 4 of the Penal Code which states that:

This Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and *expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance*

*therewith.*

[Emphasis added]

[4] We do not see the relevance of s 4 to the provision on common intention as contained in s 23 of the Penal Code which provides:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Our law as stated in this statutory provision is different to the law of common intention as has developed in the common law of England. Section 4 of the Code clearly cautions the court to interpret the provisions within their context. In *Darkan v The Queen* (2006) HCA 34, the High Court of Australia held (at paragraph 30):

One of the objectives of codification of the criminal law was to avoid unnecessary elaboration of the law. Such elaboration may be prone to confuse rather than to assist juries. Especially where the law has been restated in a code, so as to make a fresh start, it would ordinarily be wrong to gloss the language with notions inherited from the common law or with words that merely represent a judicial attempt, in different language, to restate Parliament's purpose.

[5] Common law jurisdictions generally recognise three main possibilities where common intention or joint criminal enterprise may arise: first, where the two defendants joined in committing a single crime; in these circumstances they are in effect joint principals in what is sometimes referred to as the "plain vanilla joint enterprise," (Lord Hoffmann in *Brown and Isaac v The State* [2003] UKPC 10 at para 13); second, where D2 aids and abets D1 to commit a single crime, for example where D2 provides D1 with a weapon to commit a murder; third where D1 and D2 participate together in one crime and in the course of it D1 commits a second crime which D2 may or may not have foreseen.

[6] It is the third category which has proved challenging in terms of finding a test to assess whether the secondary party had the necessary intent to be charged with the secondary offence. In this respect English law on joint enterprise liability is at best unclear and has led to irrational decisions as is evidenced by the recent case of *R v Gnango* [2011] UKSC 59. The difficulties in English law are compounded by the lack of clarity as to whether there should be a distinction between secondary liability and joint enterprise liability. It is however generally true that in England and most other common law jurisdictions such as Australia (but only in states where the common law approach is applied), New Zealand and Canada, the test for liability of the secondary party in joint enterprise offences is subject to an evaluation of what the secondary party could have reasonably foreseen the primary offender might do insofar as the secondary offence is concerned. It is therefore a subjective test.

[7] The test for liability of the secondary party in the third scenario common intention offences in Seychelles is an objective one. In *Kilindo* (supra) we made the distinction based on the particular wording of s 23 the Seychelles Penal Code (supra). We are strengthened in our views by the recent case of *R v AAP* [2012] QCA 104 which reaffirmed *Stuart v The Queen* (1974) 134 CLR 426 and *R v Keenan* (2009) 236 CLR 397.

[8] In *Keenan*, Kiefel J quoted *Stuart* with approval at page 428:

The question posed by the section is whether in fact the nature of the offence was such that its commission was a probable consequence of the prosecution of the common unlawful purpose and not whether the accused was aware that its commission was a probable consequence.

[9] In *AAP*, Dalton J agreed, holding at paragraph 26:

... in deciding whether or not the offence actually committed was a probable consequence of the unlawful purpose, there is no resort to the views of any person, ordinary, reasonable or otherwise. The matter is simply to be determined as a matter of fact, objectively.

[10] The three cases cited are from the state of Queensland, Australia; s 8(1) of its Criminal Code being identical to s 23 of our Penal Code.

[11] Similarly the Privy Council, in the appeal from Bermuda in the case of *Furber v The Queen* [2000] 1 WLR 1716 on the interpretation of s 28 of the Bermudan Penal Code which is also identical to that of Seychelles on common intention, followed the Queensland authorities and also applied an objective test.

[12] In any event, the present case involves two persons, who as counsel for the respondent submits, set out to confront the deceased verbally. It can be inferred from the circumstances of the case that although this may have been their original intention, the situation escalated and that a physical assault ensued. The fact that the appellant appreciated the seriousness of the injuries that had been inflicted on the deceased is borne out in his own testimony where he states that he helped the first appellant transfer the body of the deceased into the boot of the jeep and saw the deceased "was still breathing and had not yet died." His knowledge that the state of affairs he had participated in had become life threatening is also evident when he states at page 777 of the transcript of proceedings:

I saw that he was still alive and he was still breathing and I felt that he would have remained alive if we had brought him to hospital.

This together with his failure to call for medical assistance or to bring the deceased to hospital or to report the matter to the police is evidence that he knew that he had created or contributed to the creation of a state of affairs endangering the life of the deceased.

[13] This evidence places this current case in the first scenario of joint enterprise crime -

in other words the defendants joined in committing a single crime; they were in these circumstances joint principals. There is no question of an objective test being triggered in the circumstances. The applicable principles are those as contained in the provisions of s 196 of the Penal Code relating to malice aforethought:

Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:

(a) an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;

(b) *knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.*

[Emphasis added]

[14] There is no doubt that knowledge can be inferred from the evidence adduced. In his summing up the trial judge explained the law on common intention to the jury and went on to state:

... common intention envisages a sharing of similar intention entertained by the accused persons ... common intention could be proved by showing the conduct of the two accused, that the two accused by reason of actually participating in the crime, some overt or obvious act, active presence ... as well as immediate conduct after the offence was committed ... The inference of common intention could be gathered by the manner that the accused arrived at the scene, mounted the attack and the manner in which the beating was given, the concerted conduct succeeding the commission of the offence are all matters to be taken into consideration as determining common intention....

[15] We find that this direction was sufficient and correct and in the circumstances reject counsel's submission that the trial Judge's direction to the jury regarding common intention was lacking.

*The alternative verdict of manslaughter for intoxication in murder indictments*

[16] Counsel for the appellant also contends that the trial Judge's summing up was wrong since it did not leave the issue of intoxication and the possibility of an alternative verdict to the jury.

[17] Section 14 of the Penal Code contains the following provisions on the subject of intoxication:

(1) Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and –

- a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
- b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(3) Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused person shall be discharged, and in a case falling under paragraph (b) the provisions of section 13 shall apply.

(4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

[18] From the above provisions it is clear that intoxication can be a defence to a charge of murder in limited instances. The law distinguishes between involuntary and voluntary intoxication. Section 14(2) of our Penal Code reflects the English common law generally on involuntary or innocent intoxication save for the exception provided by *R v Kingston* [1993] 4 All ER 373 which is authority that even in such cases the jury should be left to consider whether the accused's intent to commit the criminal act was induced by involuntary intoxication and thereby negated.

[19] Voluntary intoxication provides a bigger challenge. Criminal law seeks to punish those who have the requisite mens rea for an offence committed and intoxication clearly affects the mind and its ability to form intention. Yet many crimes are clearly alcohol or drug related and the state has a duty to protect its citizens from such harm. The laws on intoxication and crime try to do both and rarely succeed. The difficulty lies in not knowing whether the person who was intoxicated would have formed the same intent had he been sober.

[20] The law on intoxication distinguishes between crimes of specific intent and those of basic intent (*DPP v Beard* [1920] AC 479; *DPP v Majewski* [1977] AC 443). Murder is regarded as a crime of specific intent (*R v Sheehan and Moore* (1975) 60 Cr App R 308) and as such the issue of whether intoxication resulted in the lack of mens rea is left to the jury. Lord Birkenhead in *Beard* (supra at 499) put it thus:

In a charge of murder based upon intention to kill or to do grievous bodily harm, if the jury are satisfied that the accused was, by reason of his drunken condition, incapable of forming the intent to kill or to do grievous bodily harm ... he cannot be convicted of murder. But nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter.

[21] As has been pointed out, s 14(4) of the Seychelles Penal Code also provides that intoxication shall be taken into account to determine whether the person charged could form the necessary intention to commit an offence. Malice aforethought as defined in s 196 of the Penal Code (supra) deems the mens rea of murder proved by either evidence of intention or knowledge that the act or omission causing death would probably cause death or grievous bodily harm to the person although the knowledge is accompanied by indifference whether death or grievous bodily harm is caused. Hence, as in English common law, the mens rea of murder can be proved either by direct intention or by oblique intention.

[22] In *Sopha* (supra) we found that there was no reason to leave the issue of voluntary intoxication to the jury as “liability for murder under ss 196(b) and 23 of the Penal Code can arise even on the basis of knowledge”. In that particular case, as in this case, the evidence clearly pointed to the fact that the appellant had knowledge that his acts and omissions could lead to death or the grievous bodily harm to the deceased. Having read s 14(4) and s 196 together we are of the view that a narrow interpretation to the point of restricting s 14(4) to “intention” only could not have been intended by the legislator. The use of the word “intention” in s 14(4) must be given its ordinary, general and synonymous meaning with mens rea and not the narrow meaning of only the highest degree of fault. Such an interpretation would be consistent with the golden rule of statutory interpretation which seeks “in the construction of a statute to adhere to the ordinary meaning of the words used” (*Becke v Smith* (1836) 2 M & W 191, at page 195). Similarly, such an interpretation would also be in accordance with another rule of statutory construction, namely *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void) which requires a court to construe the statute to give effect to its provisions.

[23] In England, the courts in respect of oblique intention (or what we refer to as knowledge of probable consequence in Seychelles) have tried on various occasions to define ‘probable consequence’. We outlined this challenge in *Kilindo* (supra). Although the term ‘probable consequence’ seems to be now defined as ‘virtual certainty’ in England (*R v Woollin* [1999] AC 82) the definition is still not watertight as the Court has since held that “the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty” (*R v Matthews and Alleyne* (2003) 2 Cr App R 30, paragraph 43).

[24] Other common law jurisdictions have also struggled with the definition. In *Darkan* (supra), the High Court of Australia held (at 78–79) that the expression:

‘a probable consequence’ meant that the occurrence of the consequence need not be more probable than not, but must be probable as distinct from possible. It must be probable in the sense that it could well happen.

[25] In *R v Gush* [1980] 2 NZLR 92 the New Zealand Court of Appeal stated at [94]:

The two most common meanings are ‘more probable than not’ and what Lord Reid described as ‘likely but not very likely’. We prefer, for present purposes, to say that a probable event, in this second sense of the word,

means an event that could well happen. These two most common meanings are both descriptive of a stronger prospect of the occurrence of an event than is conveyed by the word 'possible'.

[26] In *DPP v Douglas and Hayes* [1985] ILRM 25, the Irish Criminal Court of Appeal used elements of recklessness, indifference or natural and probable consequence to define oblique intention.

[27] As we have explained in paragraph [3] (*supra*) this is yet another instance where it would be dangerous to ascribe to a codal provision a notion inherited from common law. As the High Court of Australia stated in *Darkan* (*supra*):

The expression "a probable consequence" consists of ordinary English words, but they have no single meaning common to lay speakers.

[28] We are of the view that the particular wording of s 196 of 'probable consequence' must be read within the context of the whole provision. Probability can indicate different degrees of odds. It is not our view that the provision should be construed as 'virtual certainty' which we see as too high a probability but rather that it denotes a 'likely outcome' which fits within the context of the whole of the codal provision.

[29] Hence, in our view a trial judge should leave an alternative verdict of manslaughter to a jury in cases where by reason of intoxication the persons charged at the time of the act or omission did not know that such act or omission was wrong and did not know what he/she was doing (see s 14(2) Penal Code).

[30] No such direction was given to the jury in this case because no such evidence was available. The rule is that in murder cases, the trial judge's duty is to sum up the evidence of both the prosecution and the defence and to leave to the jury the decision on a verdict. By evidence I mean all evidence that warrants an assessment to be made in order to arrive at a conclusion. When evidence of factors that impinge on the mens rea of the parties is clearly obvious in the evidence, it is the judge's duty to bring this to the attention of the jury and to direct their minds to the possibility of an alternative verdict.

[31] This is so even when such evidence is not relied on by the defence. (See *Von Starck v The Queen* [2000] 1 WLR 1270; *Hunter and Moodie v The Queen* [2003] UKPC 69; *R v Coutts* [2006] 1 WLR 2154; and *Larue and anor v R SCA 1 & 2/1989*). However it has also been established that manslaughter cannot be left for the determination of the jury as an alternative verdict in a murder trial unless there is evidence to support such a verdict. In *Coutts* (*supra*, para 23) Lord Bingham stated:

The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support. I would not extend the rule to summary proceedings since, for all their potential importance to individuals; they do not engage the public interest to the same degree. 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.

[32] Both appellants at the trial ran cut-throat defences and counsel did not raise the issue of intoxication as a defence, nor did he mention it in his closing speech. It appears for the first time in the skeleton heads of argument of the second appellant.

[33] Admittedly, there was some evidence that both appellants had partaken of some drinks before they assumed duty. However, neither drunkenness nor intoxication was an issue at the trial. For example Morel in his testimony said:

I had drank a little but not that it caused any problems.

Georges Adrienne stated of Morel for example:

I could smell alcohol on him. He was not drunk to fall down, he had control of himself.

[34] Evidence adduced also points to the fact that intoxication was not a factor since both appellants went about their activities in full control of their faculties. They drove the jeep to the various sites to be patrolled, they caused log books to be filled, they carried the body to the jeep, disposed of it some distance away, went home and washed their clothes. This is not evidence of intoxication.

[35] The Privy Council in the case of *Von Starck v The Queen* [2000] 1 WLR 1270 stated at [72]:

If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside.

[36] In *Xavier v The State* SCA 59/1997 the Court of Appeal were of the view that where the evidence is tenuous or uncertain it would be wrong to leave it to a jury as it would cause unnecessary confusion.

[37] Similarly, we are of the view that the trial Judge was correct in the circumstances not to leave the issue of intoxication and an alternative verdict of manslaughter to the jury.

[38] In the circumstances this appeal is dismissed.

## **DOMAH JA**

[39] The two appellants stood trial for murder under s 193 read with s 23 of the Penal Code before a judge and a jury who returned a verdict of guilty against both. They were each sentenced to life imprisonment. They have appealed against the verdict. The appeals were heard together. We shall consider both appeals as such and deliver one judgment, a copy of which will be filed in each case.



[40] The deceased, in this case, Joseph Georges Andre Durup, 47 years of age, was a security guard, a recent recruit of the UCPS Company which provides security services in the island. On Friday 28 November 2008, he was posted at the premises of Creole Holidays at Gondwana Granite. The two appellants, Jean Cinan, then 38 years old, and Albert Morel, then 52 years old, were two other employees. Cinan was one of its longest employees and very efficient. They were under the supervision of Mr Benediste Hoareau, the Human Resource Manager. The company had newly introduced a system of regular and periodic checks at the various security posts. Entries against signature of the posts checked were entered in a log book. Cinan was given a driver, Albert Morel, and on that day a Terios jeep to carry out the checks. Morel carried the log book and secured the signatures of the officers checked.

[41] The prosecution had adduced evidence that Cinan and Morel had some drinks before starting their rounds and Hoareau had received complaints against the two - principally Cinan - of harassment from two of the security guards being checked: Durup and Vital. Both had contacted the boss to complain. Hoareau had checked on Cinan to know more and wanted to see them on Monday. That obviously did not please Cinan and Morel. When they returned to the site of Durup, it did not go well between them. The place was the next morning found littered: a copper rod with mud marks, a brick, the two mobile phones of Durup, crushed watercress and Durup's broken spectacles, and Durup nowhere to be seen.

[42] Mr Hoareau's phone rings at around 7 pm the next morning. One of his workers is concerned that the gate is still locked and Durup has not opened the gate for her to have access. Hoareau checks with Morel and Cinan and wants them to report to him at Creole Holidays where he proceeds. Morel picks up Cinan who finds in the vehicle traces of blood, the gory shorts of Durup, blood stained breadfruit and watercress. Cinan reproaches Morel for his levity: these should have been cleaned. They proceed to a dumping site and dispose of these items before they show up at the premises of Creole Holidays. They find Mr Hoareau already there, the police alerted and the site already cordoned off. Mr Hoareau is assisting the police with whatever information and access he can provide for investigation.

[43] Where is Durup or his body? His wife tried to call him but his mobile number has been ringing without an answer until someone who has picked it up from the littered place gives a discreet answer. Both Durup's personal phone and the office mobile were picked up on site, with blood on them. Cinan and Morel feign ignorance of the fate of Durup. Morel's sandals have blood on them. Cinan gives a witness statement at 10.42 am denying any knowledge of what happened. As far as he was concerned, he stated, he was dropped at his place for the night at 9.00 pm by Morel. They had had one check at the post of Durup and all was well. It was Morel who had gone to secure the signature of Durup in the log book while he, Cinan, had waited in the Terios jeep parked outside. Later, Mr Hoareau called him to find out whether Morel was under the influence of alcohol and he had replied in the negative. In the morning, he was informed of the absent worker at Gondwana Granite. He called Morel and they together reached the site only to find that the police were in charge. That is found in his first statement.

[44] Morel also gives a first statement, at 11.10 am. He also denies any knowledge of what had happened to Durup. He explains that the blood on his slippers comes from some fish he was cleaning which his wife had bought.

[45] As prime suspects, their houses are searched subsequently. The clothes which Cinan had worn on the eve have been washed and are hanging out to dry. He is arrested. Morel's house searched reveals that his shirt is found in a bucket of water. These items are seized for forensic examination. The log book is seized. Entries in the log book contradict the account they have given in their first statements. They are taken in custody while the search for Durup is on.

[46] Some time later Morel decides to speak. His statement under caution starts at 5.09 pm. In course of it, at 5.35 pm, he decides to show the enquiring officers where the body is lying. On his way out, he tells Cinan that they had better show the place. Cinan joins in. The deposition is suspended and police accompany him for the purpose. His statement would resume at 6.35 pm after they are back and is completed at 7.35 pm.

[47] For the search, Cinan and Morel are in separate police cars, with Cinan showing the direction to the place: some casuarina trees at Anse Etoile. Back from there, Cinan would give his second statement to the police which started at 6.33 pm. Therein, he shifts the blame for the fatal attack heavily on Morel's shoulders. But he admits, though, that he helped Morel beat Durup by bending down and with fisticuff blows everywhere in the face, make him stop in case other people hear as he had started to scream. He explains how, at a certain time Durup stopped moving but he could not tell whether he was dead. It is then that the two of them picked him up, put them in the jeep and left the body at Anse Etoile among the casuarina trees.

[48] At the trial below, Cinan challenged his confession on the ground of violence and duress. He deposed under oath and called witnesses in support. Morel did not challenge his confession shifting most of the blame, in turn, on Cinan. In his court deposition, he added that police did not write everything that he wanted written down.

### *The appeal of Jean Cinan*

[49] Cinan has put up the following grounds of appeal:

- 1) The Learned Judge erred in admitting an alleged confession of the Appellant before the jury and in finding the same alleged confession has been made voluntarily in the face of the evidence tendered by Appellant in the *voire dire* proceedings.
- 2) Alternatively, the learned trial Judge failed to have evaluated the evidence tendered by the Appellant in the *voire dire* proceedings in the ruling given by the learned judge for admission of said alleged confession.
- 3) In all circumstances of the case, the Appellant's conviction is unsafe and unsatisfactory.

### *Grounds 1 and 2 of Jean Cinan*

[50] The skeleton arguments do not make a distinction between grounds 1 and 2. Submissions have been made on them together. We shall deal with them as such.

[51] Counsel for Cinan has urged before us that the Judge's decision to admit the confession was flawed in that it did not take into account the defence evidence, more particularly the repeated assaults which Cinan had received in the hands of the police; the duress which Cinan was subjected to by them; and the evidence which was adduced by witness Syra Antah, his girlfriend.

[52] On the other hand, counsel for the respondent supported the Judge's findings and conclusions. Counsel pointed out that the seven page ruling sets out the reasons for which he accepted the evidence of the prosecution that the confession was proved to have been made voluntarily and beyond reasonable doubt. Those, he submitted, are sound reasoning relating to the appreciation of facts of the matter which is the sovereign domain of the trial Judge.

[53] We have gone through the transcript. Our reading of the ruling shows that the Judge made clear mention of all those aspects of the evidence which defence counsel has referred to. After reciting what the allegation of Cinan had been: namely, that he "was hit on the face and stomach, electrocuted, water poured down his nose and mouth or that his face was immersed in a pail of water," the Judge commented that the wife of the accused who was present in the said police station at the material time never heard nor saw Cinan being assaulted. The Judge also mentions the fact that Cinan never complained about his ill-treatment to any of the authorities. He noted that Cinan was not a person who would not know what to do if anyone ruffled him. He was a man of brain and brawn. He had had some quasi-military training and exercised control and supervision over other persons. He had been bosun on a ship. The Judge also mentioned that the supposed duress exerted upon him by the police for locking up his wife and his two month old child is another fabrication of his.

[54] We would not say that the conclusion of the Judge on the issue of admissibility of the statement of Cinan stemmed from inadequate consideration, defective appreciation of evidence and incorrect findings.

[55] We would add our own reason for which we think that the story of police brutality, ill-treatment by water, use of an electric device and telescopic rod and duress to bear upon his will is pure confabulation on the part of Cinan. To test whether someone is speaking the truth or telling lies in life or in court, the natural lie detector test is to start with establishing the known from which to ascertain the unknown.

[56] On the known side, there is no challenge to the fact that Cinan started giving his account of the previous night's events at 6.33 pm the next day. The appellants were brought to the station after arrest and search of their houses only around 2 pm at which time, they were examined for bodily injuries. It is not challenged that the police squad set out at around 5.30 pm for the recovery of the body at Anse Etoile. There is evidence that the enquiring officers were busy trying to tie the loose ends of the case. They had yet to know whether Durup was alive or not. That leaves the busy police with barely any

time or opportunity to exert pressure on anyone, let alone on Cinan. It is simply impossible that so many activities which the defence very imaginatively conjures up could have taken place within the tight time available to them. It is a matter of common sense that to get someone to admit by force, threat or oppression to something he has not done does not happen by touch of button. It takes time to bear upon someone's will as a result of which he breaks down. Each of the allegations made by the defence such as slapping the soles of the feet, water logging, using a telescopic rod, pipe or electric apparatus demands logistics and involves longish preparations and operations. On the facts of this case, the police had neither the time nor the place nor the means nor the motive nor the opportunity to engage in the alleged practices. The police was already making headway in the enquiry. The clues were everywhere. They were progressively getting the results scientifically: the log book, the lies in the first statements, the results of the search of the houses, the data on the mobile phones. The decision of Morel that they had better tell where the body lies looks to be a natural outcome of the steady progress the police were making in the enquiry.

[57] The inconsistencies which Cinan adds to his story when he comes to give evidence are other indications of his untruthfulness. His account of assault, threat, oppression and duress is so different from what his counsel had put to the prosecution witnesses. In his testimony in court, he speaks of fainting and falling, of being dragged, of water being poured down his nose, of something hard being twisted around his handcuffs etc. One wonders where did all these fit in the order of the day.

[58] Counsel for appellant stated that the Judge overlooked the evidence of Syra Antah. Our reading of his ruling is that he did not. In fact, her evidence confirms that the concoction complained of has been by the defence rather than by the police. Her account is that she was picked up by the police at around 5.30 pm and she was needed because her boyfriend was not willing to sign a statement. First, the statement had not yet started. It would not start until 6.33 pm soon after the party had returned from the Anse Etoile. Second, she was supposed to relate about the supposed pressure exerted on Cinan to sign his statement. She speaks about the pressure exerted upon her with respect to her own statement. Counsel should have been wary not to become the mouthpiece of his client in the circumstances. The Judge would have failed if he had concluded differently than he did.

[59] We find no merit in grounds 1 and 2.

#### *Ground 3 of Jean Cinan*

[60] We have to straightaway state that ground 3 is no ground at all. It is a general proposition of law unsupported in the skeleton arguments.

#### *Conclusion in the appeal of Jean Cinan*

[61] In the light of what we have stated above, we find no merits in the grounds of appeal raised by appellant Cinan. We dismiss his appeal.

*The appeal of Albert Morel*

[62] The appeal of Morel demands our addressing some issues particular to his case.

[63] Appellant Albert Morel has appealed against both his conviction and his sentence. Against his conviction, his grounds of appeal are:

- a) That the Learned trial judge erred in that he did not put to the jury sufficiently or at all the case for the Appellant.
- b) The Learned trial Judge did not put to the jury the fact that the Appellant could have been convicted of the lesser offence of manslaughter by the evidence on record.
- c) That the evidence on record leads to the conclusion that the Appellant did not kill deceased.
- d) That there was no evidence or not sufficient evidence that there was a common intention involving the Appellant in the killing of the deceased.
- e) That the learned trial judge did not consider adequately or at all the discrepancies of the evidence of the prosecution in matters that cast sufficient doubt on the amount of proof that was required to satisfy the jury beyond any reasonable doubt of the guilt of the Appellant.
- f) That in any event, the conviction is unsafe.

Against his sentence, his ground is that:

- g) The sentence recorded against the prisoner reflects a breach of his fundamental rights.

*Grounds (a) and (b) of Albert Morel*

[64] Counsel merged grounds (a) and (b) in his written and oral submissions. We remarked from the Bench that one could not say that the Judge did not put to the jury the case of the appellant at all. We showed that he had put the case of the appellant. We are prepared, however, to consider whether his direction to the jury was sufficient.

[65] His submissions rely heavily on what we may discern in the CCTV footage. We are grateful to him for having provided us with a digital copy of the CCTV recording for chamber viewing since the quality of the public viewing in course of hearing of the appeal left a lot to be desired. We have to say that the pictures were no better than what we saw in open court. But to those who mattered the most, the Judge and the jury, it would appear from the comments in the transcript that they were clearer. The Judge made reference to the salient features.

[66] There is no gainsaying the fact that what the CCTV shows is but a slice of the film of events of Friday night which film could but have lasted for just some eight minutes.

The CCTV record shows only a part of the incident: from 1.29 am to 1.37 am. It does not show the beginning of the fight, nor the progress, nor the manner in which it ended. It is but an epilogue from which not much of what took place outside its capture may be deduced. A person is walking out, a vehicle like a Terios jeep is driving in, a couple of persons are moving, following which the jeep drives out. From such slim and blurred facts, counsel submitted to us that Morel was walking away from the aggression by Cinan upon Durup rather than participating in it. That simply does not follow.

[67] That conclusion of defence counsel is certainly not borne out by the rest of the evidence. One may not divine what took place before and after from the larger picture which comprises the oral and scientific evidence. If it is the contention of counsel that in the CCTV footage, Morel is seen leaving the scene of crime. That is also consistent with the prosecution version that he is only leaving the scene of crime to drive in the jeep to take the body away. If the argument is that he is driving in the Terios vehicle to take the injured to the hospital, this is exactly what Morel did not do. He had the keys of the car. He was in the driver's seat. It cannot be said that he was within the scope of his employment so that he had to follow doggedly the instruction of a 38 year old when he was a more mature person of 52. There is, therefore, more to the case than what the CCTV camera shows.

[68] In his second statement, Morel's version is that he had participated in the beating. This statement of Morel, subject to a ruling on admissibility, has not been challenged on appeal. When Morel came into the witness box, however, his version of things was not one but many. His account is incoherent, incomprehensible and implausible. When pertinent parts of his story were put to him, he came up with a standard phrase that he spoke the truth to the police but that the police did not write down what he stated. He also blamed the police and his lawyer.

[69] The number of times they had come to Creole Holidays that night was a crucial question. He was caught prevaricating. He could not reconcile his contradictions on whether there were one, two or three visits. When told that he had been seen three times in the camera, his answer was that the camera lies. One cannot blame the Judge for not taking his court version seriously nor the jury for returning a unanimous verdict against him.

### *Duress*

[70] Counsel also raised the question of duress under which, in his argument, Morel was labouring. Section 17 of the Penal Code does give a person acting under duress a defence but under limited circumstances. It reads:

A person is not criminally responsible for an offence if it is committed by two or more offenders, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threat of future injury do not excuse any offence.

[71] We are prepared to go along with counsel to decide that, even if not raised at the trial below, where the facts suggest that duress was available as a defence, the matter may be considered at the appellate stage, in an appropriate case. We have to state, however, that this was hardly an appropriate case. Section 17 envisages a situation way away from what happened in this case.

[72] One is certainly seduced by the thought that Morel was only a driver and Cinan his boss; that when Morel saw the manner in which Cinan had dealt with Durup, he was himself scared of Cinan who on the evidence has displayed a character of a no nonsense person in settling scores; that Morel tried to ring Mr Hoareau while Cinan and Durup were having their altercation etc. However, a closer reading of the transcript shows that such a submission is not supported by the facts and that Morel was not labouring under any real or unreal threat of Cinan. The facts show that he was *participes criminis* in his own right.

[73] Morel speaks of a knife threat which Cinan used to overpower him. But that was after the aggression which does not fit the conditions of s 17 above. Now, assuming that this version of his is true, there was no knife hanging over him after he dropped Cinan at his place. There is evidence that Mr Hoareau talked to him that night. The exchanges were job related. Morel did not appear by his words to be his usual self, in the words of Mr Hoareau so that the latter had to advise him not to go back to the site as he wanted to but to go back home and to come to see him the next day. His first statement to the police was given when he was away from Cinan. If he were innocent, this was the time to say it all. One does not conceal innocence. One conceals guilt. This is what he did in his first statement. Duress does not apply in law or on the facts.

#### *The issue of alternative verdict*

[74] Counsel submitted that there arose a duty on the presiding Judge to give the jury direction an alternative verdict. Our reading of the proceedings shows that such a duty did not arise on the facts for lack of credible evidence in that regard.

[75] If Morel was not *participes criminis* in the fatal aggression, he would have given Mr Hoareau at least a hint of what had taken place at work of which he had been an unwilling witness. Instead, he kept it as a secret to himself and continued with this secret down to the time he gave his second statement the next day. He put his clothes in the bucket. He and Cinan proceeded on a trip to conceal clues in the casuarina bushes: the breadfruit, the crushed watercress and the shorts of Durup which had blood on them before they found their way to the site where Mr Hoareau had asked them to report to him.

[76] But there is more. One may not lose sight of the injuries Morel had sustained on his body. They are consistent with a physical struggle. His knowledge of his injury to his ear came – according to his own evidence when a prisoner pointed out to him that he had a blue mark on his ear. This is consistent with a physical struggle when people are aware of their injuries long after the struggle.

[77] His deposition under oath, even in the transcript, is characterized by evasiveness,

and defensiveness. It cannot be said that they were not co-authors in the killing. They had a closer relationship than driver and supervisor. They had partaken of drinks together. In fact, at one stage, Morel showed by his answers how strongly bonded they were. At one stage in cross-examination he let out that since he had had a rough time with the police – which he had not - he did not want Cinan to have the same. That was a Freudian slip from his part. It cannot be said that the life sentence of Morel is an over-conviction as counsel submitted to us.

[78] The duty of a trial judge sitting with a jury over a murder charge against a defendant is normally to direct the jury on alternative verdicts unless the facts are so clear that such a need does not arise. In this case, the facts show that the need did not arise. There should be credible evidence at the hearing of a case before the judge may address the jury on the issue of an alternative verdict: see *Xavier v The State* SCA 59/1997; *R v Coutts* [2006] 1 WLR 2154; *Sanders v The Republic* (1992) SLR 206. Morel's story, therefore, that he did not participate in the killing but only in the removal of a dead body does not hold. We have stated enough to show that the facts and circumstances did not warrant the raising of any issue of alternative verdict by the Judge for the determination of the jury: *R v Hoareau* (1975) SLR 31; *R v Vel* (1978) SLR 124; *Paniapen v The Queen* (1981) MR 254 cited in Venchard, *Law of Seychelles Through the Cases* (Best Graphics, Mauritius, 1977).

[79] The above remarks are confined to the issue of an alternative verdict as regards the lesser intention involved with lack of intention to kill. However, there is also the issue of lack of intention arising out of intoxication. Both Cinan and Morel had partaken of drinks before they assumed duty. On this point, I would leave it to Twomey JA to expatiate on the law as we see it. I agree with her, for the reasons given by her, that the facts of the case do not attract the application of diminished responsibility on ground of intoxication.

#### *Grounds (c) and (d) of appeal of Albert Morel*

[80] Under grounds (c) and (d), defence counsel submitted that there never was a common intention in the murder of the deceased; that it was all orchestrated by Cinan; and all that Morel had done was to dispose of a dead body or a life that would have expired anyway. We have stated enough above to show that it was a "folie a deux." They wanted to teach Durup, the new recruit, a lesson to the effect that one does not as a new entrant in the company teach other senior officers how to do their work.

[81] The following proposition of *Paniapen v The Queen* (1981) MR 254 bears repetition:

To constitute a common purpose, it is not necessary that there should be a prearranged plan. The common purpose may be formed on the spur of the moment, and even after the offence has already commenced. Thus, if A assaults B, and C, who passes by and had no previous intention of assaulting B, rushes in to join in overpowering B, he becomes a co-author in the assault.



See also *DPP v Mudhoo & Anor* [1986] SCJ 23.

[82] Defence counsel also submitted that the decision of objective cum subjective liability in the interpretation of common intention needs to be revisited. However, apart from adumbrating the issue and inviting the court to pronounce on it, he did not enlighten us further. Jurisdictions the world over have wrestled with that issue. The common law system of the United Kingdom has a subjective approach to common intention: *R v Swindall* (1846) 2 Car & K 230; *R v Lovesey and Peterson* (1969) 53 Cr App R 461; *R v Hyde* [1991] 1 QB 134; *R v Rahman* [2008] UKHL 45, [2009] 1 AC 129; *R v Powell* [1997] 4 All ER 545; *Mendez v R* [2010] EWCA Crim 516, [2011] QB 876; *R v A* [2010] EWCA Crim 1622; *R v Gnango* [2011] UKSC 59 and others. Other jurisdictions have different approaches: for example, the common intention in Queensland's law is construed with some elements of objectivity: see *Stuart v The Queen* (1974) 134 CLR 426; *Brennan v The King* (1936) 55 CLR 253; *R v Pascoe* [1997] QCA 452; *R v Keenan* (2009) 236 CLR 397; *R v AAP* [2012] QCA 104. The American system has adopted a different approach. So has the Continental system. Counsel is welcome to contribute to the developing Seychelles jurisprudence on the matter, with materials in support.

[83] Speaking only for the law as we received them in Seychelles, it is a treacherous assumption to make that what the British gave to its colonies is a law of lesser quality. Some of the professionals who undertook the task were so dedicated that they used the experience of English history to instill new insights into the colonial laws to which our then judges added their own, harmonizing the old with the new. In fact, those of us who are exposed to comparative law know that England in many areas rues the fact that the ex-colonies were given better laws by those who went out. That is why it is oftentimes remarked that Britain has a knack of keeping its best for export. To assume that there was no enhanced wisdom in the formulation of the many offences of our Penal Code would be hasty. At the same time, to assume that s 4 is authority for interpreting our Code in accordance with English law would be equally hasty. Section 4 speaks not of interpretation but of the principles of legal interpretation obtaining in England. It also speaks of presumptions in the use of expressions which should be consistent with their context. We would have been pleased if counsel had come up with material which would have enabled us to probe these fine points of law further. General statements will not suffice. Until such time, the decisions of this Court on the matter remain good law.

#### *Grounds (e) and (f) of appeal of Albert Morel*

[84] Counsel also merged grounds (e) and (f) in his submission that the presiding Judge failed to adequately address the discrepancies in the evidence of the prosecution which would have cast sufficient doubt on the quantum of proof required to satisfy the jury beyond the criminal onus of proof. Not much material has been given to us on this matter. But the two loopholes mentioned are that the police failed to take fingerprints from the copper bar and the brick. We have to say that the officers on finger printing explained in cross-examination why they did not. Those knowledgeable in this practical science know that fingerprints cannot be taken from all items found on the crime scene, especially when it is a place which is frequented by people. Nor can it be taken from all types of surfaces such as wet and uneven. These are the short answers that may be

given to the points raised. Fingerprints on items are just one of the leads to the resolution of a crime. There were so many other leads in this case.

[85] Counsel has submitted that the police in this case have concocted evidence. It is much more a concoction by the defence rather than by the police in a straightforward case of murder. The submission that the conviction is unsafe is neither substantiated nor warranted on the facts as we have shown above. We find no merits in the grounds (e) and (f) raised by appellant Morel equally. We dismiss them.

#### *Ground (g)*

[86] Counsel abandoned ground (g) at the hearing of this appeal. His statement has been that he would raise the issue of constitutionality of the mandatory life sentence imposed by s 194 of the Penal Code at a more opportune time after he has examined a larger amount of material than he has at present on the matter. We agree that this matter requires a pronouncement of a Full Bench of the Constitutional Court before we may ourselves pronounce on the matter.

[87] All the grounds of appeals having failed to show merit, we dismiss them.

#### *Outcome of the two appeals*

[88] For the respective reasons given above, both appeals stand dismissed.

[89] I have read with great interest the added considerations of my sister Judge Twomey JA and my brother Judge Msoffe JA. I concur with them.

#### **MSOFFE JA**

[90] I have read in draft the judgment of my brother Domah, JA. I entirely agree with him in his findings and conclusions on the salient aspects of the case before us. I wish however to make one brief point purely for the purpose of developing the jurisprudence of Seychelles. I must admit that I have been prompted, or rather attracted, to make the point after hearing Mr Brown, state counsel, in his oral submission before us on the subject at the hearing of the appeal. I hope in the process I will put the point in its true and proper context and perspective in law.

[91] The point is in relation to a principle in the law of evidence obtaining in other jurisdictions whereby if a fact is deposed to as discovered in consequence of information received from an accused person, such fact is relevant in the determination of the case against him. The principle may loosely be referred to as “a confession leading to discovery.”

[92] It is common ground that the appellants made cautioned statements to the police. In the statements, it was alleged, they confessed to having killed Mr Andre Durup (the deceased). Following the confessions they volunteered to show, and actually showed, the police the exact spot in which they had dumped the deceased. I am fully aware that at the trial they retracted these statements. It is not my intention to discuss the effect in law of retracted confessions because this aspect of the case has adequately been dealt with by Domah, JA. Nevertheless, going by the above principle the confessions, if true,

were relevant factors in the determination of the case against the appellants because they led to the discovery of the deceased's body.

[93] It is in line with the above spirit that perhaps it will be a good idea that in future an amendment be introduced to the Evidence Act to provide for something to the following effect:

When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, is relevant.

[94] I understand and appreciate that the suggestion I am putting forward here is purely advisory in nature. The relevant authorities are free to or not to accept the advice.