` **IN THE SEYCHELLES COURT OF APPEAL**

[Coram: A. Fernando (J.A), M. Twomey (J.A), B. Renaud (J.A)**]**

CriminalAppeal SCA 23 & 24/2018

(Appeal from Supreme Court Decision CR62/2017)

Cliff Emmanuel — 1st Appellant

Marco Mathiot — 2nd Appellant

Versus

The Republic — Respondent

Heard: 25 April 2019

Counsel: Mr. B. Georges for the 1st Appellant

Mr. F. Bonte for the 2nd Appellant

Ms. B. Confait for the Respondent

Delivered: 10 May 2019

JUDGMENT

A. Fernando (J.A)

1. The 1st and 2nd Appellants have appealed against their conviction for murder.

The Charge

2. The amended charge against the two Appellants dated 18th May 2018 reads as follows:

"Statement of Offence

Murder, contrary to section 193 read with section 23 of the Penal Code and

punishable under section 194 there under.

Particulars of Offence

Cliff Emmanuel, 49 years old casual labour of Corgate estate and Marco Mathiot, 26 year old unemployed of Mont Fleuri, Mahe, on the 22nd day of October 2017, at Anse Faure, Point Larue, with common intention, murdered one Mr. Simon Esparon.**"**(verbatim)

3. I have set out herein the provisions of the Penal Code of Seychelles relevant to this case, which deals with the general rules pertaining to criminal responsibility under which the two Appellants were sought to be made liable and the description of the offences which become relevant in the determination of this case.

Relevant provisions of the Penal Code

Chapter IV of the Penal Code of Seychelles deals with the general rules as to criminal responsibility.

"**Joint offenders**

Section 23.*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.***"**

"Chapter XIX - Manslaughter and Murder

Manslaughter

Section 192. *Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "manslaughter". An unlawful*

omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

Murder

Section 193. *Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.*

Punishment of murder

Section 194. *Any person convicted of murder shall be sentenced to imprisonment for life*.

Punishment of manslaughter

Section 195. *Any person who commits the felony of manslaughter is liable to imprisonment for life.*

Malice aforethought

Section 196. *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.

Definition of Grievous Harm

Section 5: *"grievous harm" means any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense;*

Definition of Harm

Section 5:"*harm" means any bodily hurt, disease or disorder whether permanent or temporary;*

Causing death defined

Section 199. *A person is deemed to have caused the death of another person although his act is not the immediate or not the sole cause of death in any of the following cases*:-

(a)…

(b)…

(c)…

(d) *if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death*;

(e)…**"**

4. The difference between the offence of murder and manslaughter is that in the offence of murder, prosecution has to prove, an unlawful act with malice aforethought, which results in death. While the unlawful act is the actus reus or the

physical element of murder, malice aforethought is the mens rea or its mental element. In manslaughter all that the prosecution has to prove is an unlawful act that results in death. In manslaughter there is no requirement to prove malice aforethought. The mens rea of manslaughter is the intention to cause the unlawful act. In other words the unlawful act committed should be an intentional act.

Interpretation of section 23 vis-a-vis the offence of Murder

5. It is necessary to look into the application of the provisions of section 23 pertaining to joint liability in relation to the offence of murder as defined in sections 193 and 196.

6. In my view for one to be liable under section 23 for the offence of murder as defined in section 193:

a) There should be the involvement of 2 or more persons.
b) They should have formed a common intention to prosecute an unlawful purpose in conjunction with one another, namely, in this case robbery, and
c) In the prosecution of such purpose an offence should have been committed of such a nature that its commission was a probable consequence of the prosecution of such purpose. In this case the prosecution has alleged that the offence committed was murder.
d) Section 23 thus envisages a situation where an offence is committed which is distinct from the unlawful purpose the offenders had formed a common intention to prosecute in conjunction with one another. The sine qua non of liability under section 23 is that the offence committed should be of such a nature that its commission should have been a probable consequence of the prosecution of such purpose in the mind of the offender sought to be made liable. The mental element stipulated in the subsequent offence committed is 'knowledge'.

e) In **Sopha V The Republic [2012] SLR 296** this court held that section 23 **"***brings in the element of knowledge ie knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit. In such circumstances proof of the requisite intention on the part of the perpetrators, which may be an element of the other or second offence, need not be proved and proof of knowledge would suffice*.**"**In **Jean-Paul Kilindo and Gary Payet V Republic (2011) SLR 283** this Court said: **"***The law in Seychelles is that it suffices to show that a secondary act took place as a probable consequence of the agreed first act intended. In this jurisdiction we do not need to look for the intention of the perpetrator to carry out the secondary act. All that is necessary is that the secondary act took place as a probable consequence of the first agreed act to which they had agreed upon*.**"**

f) Knowledge as contrasted with intention signifies a state of mental realisation in which the mind is a passive recipient of certain ideas and impressions arising in it or passive before it. It is a bare state of conscious awareness of certain facts in which the human mind itself remains passive or inactive. Intention on the other hand connotes a conscious state in which the mental faculties are roused into activity and summoned into action for the deliberate purpose of being directed towards a particular and specified end which the human mind conceives and perceives before itself. An element of knowledge is subsumed in the intention required to constitute liability for an offence. The approach to proof of intention is basically subjective, while proof of knowledge is objective.

g) In **Sopha V The Republic [2012] SLR 296** this court held "Section 23 uses the words: **"***each of them is deemed to have committed the offence." This 'deeming' provision provides for an objective test and is in line with the derogation provided for in article 19(10)(b) of the Constitution to the right*

to innocence enshrined in article 19(2)(a) of the Constitution. Article 19(10)(b) states: Anything contained in or done under the authority of any law necessary in a democratic society shall not be held to be inconsistent with or in contravention of clause (2)(a), to the extent that the law in question…….declares that the proof of certain facts shall be prima facie proof of the offence or of any element thereof.**"**

h) Our Penal Code disjunctively states the alternative states of mind required for murder as either intention or knowledge. It is not possible to equate the element of 'knowledge that the act or omission causing death will 'probably cause' the death of or grievous harm to some person' specifically referred to in section 196(b) of the Penal Code to that of; 'Foreseeability on the part of the defendant, of the virtual certainty of death or grievous bodily harm as a consequence of his acts or omissions' as referred to in English case law, which undoubtedly requires a higher degree of knowledge. However it must be said that the word 'probable' means something more likely to happen than the use of the word 'possible'. Thus the word 'probable' means something more than 'possible or likely to happen' but less than 'virtual certainity'.

i) The words "*an offence is committed of such a nature*" in section 23 referred to at paragraph 3 above, requires the elements of murder to be satisfied, namely an unlawful act, causing death with malice afore thought; if a person is to be convicted of murder, on the basis of section 23.Thus it must be established from the evidence that the persons who formed a common intention to prosecute an unlawful purpose also had the requisite mens rea for committing murder, namely, either the necessary intention stipulated in section 196(2) of the Penal Code or knowledge that their conduct by way of an act omission would "*probably cause the death of or grievous harm to*

some person,…, <u>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</u>". This brings in the concept of 'wilful blindness' which is akin to indifference. In Sopha V The Republic and Jean-Paul Kilindo and Gary Payet V Republic, (supra), this court held proof of knowledge suffices and that is also because our Penal Code disjunctively state the alternative states of mind required for murder as either intention or knowledge

<u>Grounds of Appeal</u>

7. The 1st Appellant has raised the following grounds of appeal:

   i. **"**The Learned Trial Judge erred in failing to direct the Jury to consider the lesser charge of manslaughter in respect of the Appellant.
   ii. The Learned Trial Judge erred by not putting the case for the defence of the Appellant and the Prosecution fairly to the Jury and thereby prejudiced the case for the Defence.
   iii. The Learned Trial Judge erred by relying on evidence of a prime suspect and accomplice, Mr. Terry Jeremie, and gave undue credibility in his summing-up to Mr. Jeremie.
   iv. The Learned Trial Judge erred by not warning the Jury that the Appellant's right to a fair trial had been affected by the calling of Mrs. Marie-Josee Esparon, a key witness in the case, at the end of the Prosecution case when it was clear to the Prosecution that her testimony would differ on critical evidence that she had provided to the police in her two statements.
   v. In all circumstances of the case the conviction of the Appellant for murder was unsafe and unsatisfactory.**"** (verbatim)

8. The 2nd Appellant has raised the following grounds of appeal:

   i. **"**The conviction of the 2nd Accused/Appellant is against the weight of evidence.
   ii. The prosecution failed to establish any casual link between that the acts of the 2nd Accused/Appellant in causing or contributing to the death of the deceased person.
   iii. The prosecution failed to establish that the 2nd Accused/Appellant had the necessary mens rea to commit the act of murder against the person of the deceased.
   iv. The Learned Judge in his summing up failed to properly direct the jury that the DNA profile collected from the scene of the crime did not match the sample belonging to the 2nd Accused/Appellant**."** (verbatim)

Evidence in Brief:

9. The two important witnesses for the prosecution in this case had been PW 15, Terry Jeremie and PW 16, Daniel Tirant, who had testified under a conditional offer by the Attorney General under **section 61(A) of the Criminal Procedure Code** of Seychelles.

10. Section 61(A) which deals with conditional offer by Attorney-General reads as follows:

"61A.(1)*The Attorney-General may, at any time with the view of obtaining the evidence of any person believed to have been directly or indirectly concerned in or privy to an offence, notify an offer to the person to the effect that the person-*

(a) would be tried for any other offence of which the person appears to have been guilty; or

(b) would not be tried in connection with the same matter,

on condition of the person making a full and true disclosure of the whole of the circumstances within the person's knowledge relative to such offence and to every other person concerned whether as principal or abettor in the commission of the offence.

(2) Every person accepting an offer notified under this section shall be examined as a witness in the case.

(3) Such person if not on bail may be detained in custody until the termination of the trial.

(4) Where an offer has been notified under this section and the person who has accepted the offer has, either by wilfully concealing anything material or by giving false evidence, not complied with the condition of the offer, the person may be tried for the offence in respect of which the offer was so notified or for any other offence of which the person appears to have been guilty in connection with the same matter.

*(5) The statement under caution made by a person who has accepted an offer under this section may be given in evidence against the person when the person is tried as stated in subsection (4)***"**.

Section 61(A)of the Criminal Procedure Code, is in line with the powers of the Attorney General set out in **articles 76(4)(c) read with article 76(6) and 76(10) of the Constitution**, which gives the exclusive right to the Attorney General to

institute and discontinue criminal proceedings without being subjected to the direction or control of any other person or authority.

11. PW 15 Terry Jeremie, testifying before the Court had stated that he knew the 1st Appellant, who was also known as Katilo, who was his mother's friend for almost ten years. He had also known the 2ndAppellant since childhood and they had grown up together. PW 15 had stated that he had not been involved in any crimes or violence prior to this case. On the 21st of October 2017 he had received a phone call from the 1st Appellant to the effect that that he will come and pick him up at night, in a pirate car as there was a mission to be done and that PW 15 would have to drive the car. Sometime back PW 15 had told the 1st Appellant that he needed some money. The 1st Appellant had asked him to wear long trousers, a shirt and shoes. PW 15 had thought it was a drug transaction. As informed, the 1st Appellant had come to English River in a Kia Picanto to collect him. The driver of the car was a person whom he did not know. The 1st Appellant had told him that he could not contact the person he intended to bring as he was not picking up the phone. PW 15 had then thought of Marco Mathiot, the 2nd Appellant who had to pay alimony and was concerned that the police would come soon to get him. They had then gone to Corgate Estate to collect the 2nd Appellant. The 1st Appellant had asked the 2nd Appellant to change his clothing. He had also asked him whether he had a screw driver but the 2nd Appellant had told he does not have one but instead had brought a tyre lever. The 1st Appellant had then told PW 16 where to drive. PW 15 had then given a detailed description of how they proceeded to the house of the deceased. On reaching near the house of the deceased, the 1st and 2nd Appellants and PW 15 had got out of the car. The 1st Appellant had when alighting from the car taken his bag and removed a machete and a crowbar. They had also taken the tyre lever which the 2nd Appellant had brought. The 1st Appellant had given each of them a pair of gloves to wear. All three of them had then covered their faces with clothing. The 1st Appellant had called the driver of the car to bring

the duct or masking tape. The driver had left by that time, then returned and threw the masking tape into the alley which the 2nd Appellant had collected and given him. PW 15 had carried the masking tape in a bag.

12. The 1st Appellant having checked whether there were persons in the house had requested PW 15 to come along with him to go into the house. This was after he had broken the kitchen door with the crowbar. PW 15 had refused saying that his agreement was only to drive the car. The 1st Appellant had then gone into the house with the 2nd Appellant. PW 15 had then heard a breaking sound and a lady screaming. PW 15 had then gone inside and seen the metal gate opened and a lady standing in the corridor leaning against a wall. The 2nd Appellant had told the lady not to shout as no one would beat her. The 2nd Appellant had then asked for the masking tape which PW 15 had given him. PW 15 had taken the crowbar that the 2nd Appellant had given him and the machete that the 1st Appellant had carried into the house earlier and gone outside the house with them. He had taken the machete out as the 1st Appellant had earlier said there would be no one in the house, but as there were people, he thought that the 1st Appellant in fear would cut someone with it.

13. PW 15 had gone inside the house for a second time when he heard the voice of a man who seemed as if he was trying to scream while his mouth was being pressed. On this occasion he had not seen anyone in the corridor or living room but on hearing sounds he had proceeded to a room where he saw a lady sitting on a bed and a man on the floor face down. The lady's hands were on her chest tied up. He had seen the 1st Appellant bending down close to the man who was face down on the floor, but did not know what the 1st Appellant was doing. PW 15 had stated that he had not seen the 2nd Appellant on this occasion. Both the man and the woman were groaning. The 1st Appellant had told PW 15 to get outside the house as he was supposed to keep a lookout. After some time both the 1st and 2nd

Appellants had come out of the house of the deceased. 1st Appellant had thereafter removed a gunny bag from the boot of the car that was parked in the premises, gone inside the house and come back with it and two carton boxes. He had heard the sound of bottles inside the gunny bag. The 1st Appellant had told them that he had to pay for the car rental. The 1st Appellant had then called for the car from his mobile. When the car arrived, they had put the gunny bag and the two carton boxes in the car and left. After having got into the car they had removed their masks and gloves. Returning to English River they had shared the loot amongst themselves. Each of them had received Rs 1800 in cash. The 1st and 2nd Appellants had then left with the driver of the car leaving the clothes they wore at his place. Later he had received a call from the 1st Appellant to destroy the clothes, which as advised he had thrown into the bin.

14. Under cross examination it had been suggested to PW 15 by counsel for the 1st Appellant, that it was he who conducted the whole operation and was its leader, and that he now was attempting to be the least guilty of the three, all of which he had denied. PW 15 had denied that it was he who purchased the masking tape, but had admitted that he knew at the scene that the masking tape was going to be used to stop people making noise. He had specifically stated that he did not touch anyone at the scene of offence nor gone anywhere near the deceased or the woman.PW 15 had categorically denied the suggestion that it was he who used the masking tape on the deceased and the woman and dealt with the deceased. There is no reason attributed by the Counsel for the 1st Appellant as to why the prosecution decided to give a conditional offer to PW 15 if the evidence indicated that he was the ring leader or the master-mind behind this operation. Counsel for the 2nd Appellant had also suggested to PW 15 that he was as guilty as the one who was mugging the mouth to suffocate the deceased. PW 15 had reiterated in cross-examination that when he saw the 1st Appellant kneeling near the deceased who was on the floor, the 2nd Appellant was not there. It is to be emphasised that

we are in this appeal only looking into the appeals by the 1st and 2nd Appellants against their convictions and not into the decision of the Attorney General to grant a conditional offer to PW 15 or PW 16.

15. PW 15 to the question from the Jury whether at any moment he was in the house he heard the deceased say anything such as he was suffocating, had answered in the negative.

16. PW 16, Daniel Tirant had stated that on the 21st of October 2017 he had received a call from the 1st Appellant, whom he had known for a long time and had gone with the 1st Appellant to purchase some masking tape for him. Thereafter he had received another call from the 1st Appellant to undertake a trip for him around 11 pm that night. The trip had been delayed as the 1st Appellant was unable to contact another person to go along with him. Thereafter around midnight the 1st Appellant had asked him to come. On that day, PW 16 had been driving a Kia Picanto, rented from Parkinos Car hire. After picking up the 1st Appellant, they had gone to pick up PW 15 on the instructions of the 1st Appellant. On meeting PW 15 they had decided to go and fetch the 2nd Appellant to accompany them as PW 15 had refused to go only with the 1st Appellant. They had then gone to Corgate Estate to fetch the 2nd Appellant. The 1st Appellant had asked PW 15 to get a big screwdriver from the 2nd Appellant. When they met the 2nd Appellant, the 1st Appellant had asked him to change his clothes and to wear a pair of long trousers and come along with them. The 2nd Appellant had brought a car lever with him. The 1st Appellant had then instructed PW 16 to drive towards Katiolo. When PW 16 had dropped the 1st and 2nd Appellants and PW 15 opposite the butchers shop near Katiolo, the 1st Appellant had removed a bag, a machete and a crow bar from the boot of his car. The 2nd Appellant had a lever in his hand. PW 16 had stated that he did not know when these were placed inside the car but had said that they

were probably put in as the car was kept open. He had not gone back to town as the 1st Appellant had told him that he would call him in about 15 minutes time to come and pick them up. Thereafter the 1st Appellant had called PW 16 and asked for the masking tape and as instructed PW 16 had come and thrown it on the alley leading to a house. PW 16 had seen the 2nd Appellant coming to pick it up. Thereafter PW 16 had left the scene. Later around 4 am, PW 16 had received a phone call from the 1st Appellant to come and pick them up. He had picked them up at the very place he had dropped the 1st and 2nd Appellants and PW 15 earlier. They had loaded a gunny bag and two carton boxes into the car. He had heard the noise of bottles when the stuff was being loaded into the car. As instructed by the 1st Appellant he had then driven to Union Vale and at the house of PW 15 unloaded the gunny bag and the two carton boxes and taken it inside the house of PW 15. The 2nd Appellant had removed some money from his pocket and given it to the 1st Appellant, who in turn had given PW 16 three five hundred rupee notes from it. PW 16 had also received 8 liquor bottles while the 1st Appellant had taken a full carton of bottles. The 2nd Appellant had got two liquor bottles. After taking a shower at the house of PW 15, the 1st and 2nd Appellants had left with him. PW 16 had dropped 1stAppellant at Beaufond Lane and the 2nd Appellant at Corgate estate.

17. The first persons to visit the house of the deceased after they had been called in by the deceased's daughter PW 17, Ms. Brigitte M. Esparon, were PW 12, G. D. Baccari, a security officer, PW6, Shanon Chetty, a paramedic from the Seychelles hospital and PW 8, police officer Luana Jeremie. They have all described the manner the deceased's body was found when they entered the house after the commission of the offence. According to them the deceased was found lying face down and his left arm, feet and legs had been taped. The deceased's head was stuck in a carton box of liquor with his face down in between the bottles. PW 6 had turned him over to check for signs of life.

18. PW 18, the wife of the deceased testifying before the trial Court had stated that on the early hours of the morning of the 22nd of October 2017 she had been awakened from her sleep when she heard some sounds from the deceased's room and rushed to his room to find out what was wrong with him. In doing so she had rushed into the hands of a man who was black from head to toe and was about her shoulder height. The man had asked her for money. She had given him SR 2000 and told him that she would give the keys to Katiolo where they could go down and take everything. The man had taken PW 16 to the deceased's bed and tied her with masking tape on her mouth, arms and leg. She had heard the deceased crying out and had seen a shadow all in black in a crouching position on the deceased. She had heard the deceased say "Let me go, let me go. I can't breathe you are choking me suffocating me". The person who taped her had gone around overturning things while the other person who was near the deceased had got up from where he was and come up to her. She had tried to scream and the other person had told her "I am going to kill you shut up" and then tied her with a bed sheet covering her mouth, arms and legs. He had punched her on her head and right cheek. That person had been wearing gloves and thus the punches were not that painful. He had thereafter left the room. For about 15 to 20 minutes she heard the sound of bottles and things being thrown around and thereafter nothing. After about one or two hours her daughter had come and rescued her. Under cross examination it had been put to her that although in her evidence she had stated that there were only two persons inside the house, in the two statements she made to the police soon after the incident, she had stated that there were three persons. It had been pointed out to her that that in her statement to the police she had stated that when one person pushed her on the bed the other two were holding her husband down on the ground. She had stated that she was traumatized at the time she gave her statements to the police and that she was not misleading the court but what she stated to Court was the correct version. Counsel for the 1st Appellant while cross-

examining PW 18 about the statements made to the police had stated that the purpose of that questioning was not to establish that the 1st Appellant was not in the house, but simply as to the number of people who were in the house. In my view this line of cross-examination does not help the 1st Appellant, for if the Jury had placed reliance on the caution statement of the 2nd Appellant, who had stated that he was the one who tied up PW 18, then the 1st Appellant becomes one of the other persons who had held the deceased down on the ground and thus directly involved in the suffocation of the deceased.

19. PW 4, Doctor A. S. Garrido, who did the post-mortem examination on the body of the deceased had visited the house of the deceased on the morning of the 22nd of October 2017 around 6 am. He had seen the body of the deceased lying on the floor face up between a wardrobe and a bed, with both hands and feet tied with adhesive tape. According to his Forensic Report produced by the prosecution as P 40, on examination he had found the short pants and underpants the deceased was wearing, wet and smelling of urine. He had seen punctiform excoriations in the nose and in both cheeks, a blunt wound in internal portions of lips drawing the shape of teeth, excoriations in the right elbow, abdomen, left leg and a wound in the shape of an arch in the fifth fingertip of the right hand. The photographs produced by the prosecution as exhibits in this case shows the bruising on the nose and around the mouth of the deceased and the injury to the inner lip. On examination of the thorasic-abdominal cavity at the post-mortem examination, he had found adhesive pleurisy in all left lung and little sub-pleural haemorrhages less than 5 mm in the surface of both lungs. He had found myocardium with white zones with fibrosis and severe atherosclerosis in coronary vessels. The blood during performance of autopsy was dark and fluid. On macroscopic findings, he had noted old myocardial infarctions. As regards cause of death, he had stated **"**compression of nose and mouth provoking suffocation with the consequent asphyxia**"**. In testifying, before the Court PW 4 had said that death had occurred

less than 6 hours before his arrival at the scene of offence. According to him, the relaxation of the sphincter and the loss of urine are signs of asphyxia. According to the doctor the injury in the internal part of the lips could be as a result of the compression against the teeth, and the little sub-pleural haemorrhages in the surface of the lungs, the colour and fluid nature of the blood were general symptoms of asphyxia. The compression of the face and mouth according to the doctor was by a soft object with a rough surface such as a textile or pillow. According to PW 4 the deceased was very weak and ill as a result of atherosclerosis and pleurisy in the lungs and thus asphyxia would have occurred in less than three minutes of the compression. His condition made him more susceptible to asphyxia. The wound in the finger could have occurred from an edged object like a glass or knife but ruled out that it was a result of the deceased trying to defend himself from an attack.

20. The confessional statement of the 2nd Appellant had been led as part of the prosecution case as P 49 after a voir dire. The 2nd Appellant had stated that both the 1st Appellant and PW 15 were acquaintances of him but not that close to him. There was an alimony maintenance he had to pay by the 23rd of October 2017. In the early hours of the 22nd of October PW 15 had asked him to accompany him on a mission and asked for a crowbar. He did not have a crowbar but took a lever and went with PW 15. He had also taken a pair of white gloves. On embarking a white Picanto he had been told to go and change the clothes he was wearing by the 1st Appellant. The car was been driven by a "small black guy". Then they had proceeded in the car to a place near the UCPS quarry where he, the 1st Appellant and PW 15 had got off. The 1st Appellant had a crowbar and a machete. He too had a machete with him. Thereafter they had masked themselves in their faces and worn gloves. Thereafter the driver was contacted to bring in the tape, which according to the 2ndAppellant was brought by one of the other two who was with him. Thereafter they had gone into a house where the 1st Appellant had broken the

door and a metal gate. The 2nd Appellant had gone inside the house in the company of the 1st Appellant. After entering the house the 2nd Appellant had stated that he had **"**heard a male's voice shouting but I did not recall what he said. I ran to see what was going on and I saw a lady in the corridor. She cried so I held her hands, directed her to the room and I asked her where the money was. She told me to accompany her so as to give her money. So I went with her in another room where she handed me a purse. I took the purse and placed it in my pocket. Then I returned with the lady to the place we were in previously. I kept on holding the lady's hands and she was screaming that she had no more money, that it was the only money she had. If we freed her, she shall go for money at the Katiolo to give us each SCR 50,000/-. The lady kept screaming whilst (name deleted) was on the bed with the guy squeezing the guy's mouth. (name deleted) told me to stop the lady from screaming. I called Terry (*PW15*) to bring the tape. After a minute Terry (*PW 15*) came and I asked him where the tape was. He removed it from his bag and gave it to me where I applied the tape to the lady's hands, and I pushed the lady on the big bed where I applied tape to her feet and again to her hands, then to her mouth. The lady removed the tape from her mouth, so I re-applied. I afterwards put tape to the guy's feet, then his hands during which time (name deleted) was pressing his mouth. The tape finished, so (name deleted) tore the bed sheet to tie the guy with and I tore the bed sheet to tie the lady with. After having tied the man, (name deleted) woke from near me for the lady freed her mouth and she was screaming. I heard (name deleted) asking the lady if she won't stop making noise but I would not know if he hit the lady but I no longer heard the lady. I want to add that whilst I was dealing with the lady, I heard the guy said 'I am breathless, I am breathless....- mon pe toufe, mon pe toufe.....' Then I did not hear him again. After that we searched everywhere in the house. Then Terry (*PW 15*) came in and told us twice to hurry up.**"**(verbatim). Thereafter the 2nd Appellant had gone on to explain how they carried liquor bottles they had stolen from the house of the deceased, outside the house, how the 1st Appellant called the driver of

the picanto, PW 16, to come, and how they proceeded to the house of PW 15 where the money and the liquor bottles, were shared amongst the four of them, and how the 1st Appellant and himself were dropped off at their respective houses. The name, although redacted should never have been in my view shown to the Jury. However, sufficient warning had been given by both Counsel for the Appellants and the learned Trial Judge, not to draw any adverse inference against the 1st Appellant from the caution statement of the 2nd Appellant. The 1st Appellant has not raised a ground of appeal in relation to this. The 2nd Appellant had then gone on to say that on Monday 23rd October 2017, he had paid the alimony with the money he had, and then gone to PW 15 at English River. The 2nd Appellant had asked PW 15 whether he heard that the person to whose house they had gone had passed away. PW 15 had then confirmed that he had died and told him that he was worried because he did not know if the driver *(*PW 16) would talk about it. The 2nd Appellant had stated in his caution statement: **"**I dearly regret for the happenings.**"**(verbatim)

21. At the close of the case for the prosecution on the 25th of June 2018, when the rights were explained to the 1st Appellant in open Court, his Counsel had informed Court that the 1st Appellant had elected to exercise his right to remain silent. The rights in terms of section 184 of the Criminal Procedure Code had been explained to the 1st Appellant for a second time on the 26th of June 2018. The rights of an accused person are his constitutional right to remain silent without any adverse inference been drawn against him, the right to give evidence on oath from the witness box and to make a statement not on oath from the dock. An accused also has the right to call witnesses and adduce other evidence in his defence. On the 26th of June 2018, in the presence of the Jury the 1st Appellant had been asked by Court as to what he would wish to do. The 1st Appellant's answer as recorded by Court verbatim is: **"**Mwan mon anvi dir li mon regrete akoz sa kin arrive la mon admet monn fer sa lofans – I just wanted to tell him that <u>I regret what I have done</u>

and I admit.**"** (Volume IV page 811, emphasis added by me) After checking with the tape recorder, which had recorded the court proceedings we have come to know the exact translation of what the 1st Appellant said in Creole should read as: "I want to tell you that I regret what has happened and **now** I **admit** that I have committed the **offence**." (emphasis by me)The statement "...and now I admit that I have committed the offence", is not suggestive of a mistake or misunderstanding. It is to be emphasised that this was an unqualified admission made by the 1stAppellant after the close of the prosecution case and in respect of the charge of Murder that was preferred and proceeded against him in his presence. In my view formal admissions are an important and cogent part of the evidence in a trial. There has been no application thereafter to resile from this admission on the basis it was made by reason of mistake or misunderstanding. The Court had stated when the 1st Appellant made this statement: "No it's not necessary that will be decide. What is your plea just advice him Counsel." (verbatim) Thereafter when questioned by Court as to whether he wished to remain silent the 1st Appellant had answered in the affirmative. The 1st Appellant's decision to remain silent thereafter does not take away the unqualified admission of guilt made earlier. There had been no qualification made to that statement that the causing of death was unintentional or without knowledge. In his summing up the learned Trial Judge had stated that any statement made by the 1st Appellant when the rights of an accused person at the close of the prosecution case were explained, should not be used to draw any adverse inference.

22. **Section 129 of the Criminal Procedure Code** makes reference to proof by formal admission.

"Proof by formal admission.

Section 129.*(1) Subject to the provisions of this section any fact of which oral evidence may be given in any criminal trial may be admitted for the purpose of*

that trial by or on behalf of the prosecutor or accused person and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in that trial of the fact admitted.

(2) An admission under this section-

(a) may be made before or during the trial;

(b) if made otherwise than in court, shall be in writing;

(c) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;

(d) if made on behalf of an accused person who is an individual, shall be made by his advocate;

(e) if made at any stage before the trial by an accused person who is an individual must be approved by his advocate (whether at the time it was made or subsequently) before or during the trial in question.

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).

*(4) An admission under this section may with the leave of the court be withdrawn in the trial for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.***"**

23. **Section 220 of the Criminal Procedure Act of South Africa** has wording similar to section 129 of our Criminal Procedure Code. In the South African case of **S V Groenewald [2005] (2) SACR 597 (SCA) Cameron JA** said: **"***An admission is an acknowledgement of a fact. Wigmore on Evidence calls it 'a method of escaping from the necessity of offering any evidence at all': a 'waiver relieving the opposite party from the need of any evidence***"**. In **S V Mjoli [1981] (3) SA 1233 (A) Viljoen JA** said: **"***By reason of the fact that an admission formally made by or on behalf of the accused is 'sufficient evidence', the effect is that such fact virtually becomes conclusive proof against him because the accused himself or his legal representative on his behalf has made the admission and any effort by him or on his behalf to adduce evidence countervailing such fact would be inconsistent with his having made the admission*.**"** In **M Van Der Westhuizen V The State, 266/10 [2011] ZASCA 36** it was held by the Supreme Court of Appeal of South Africa: **"***For so long as a formal admission stands, it cannot be contradicted by an accused whether by way of evidence or in argument. To hold otherwise would defeat the purpose of s 220, eliminate the distinction between a formal admission in terms of that section and an informal admission which may be qualified or explained away, and thereby lead to confusion in criminal trials. The appellant, having made the admissions formally, was not entitled to require the State to cross the hurdle the admissions were intended to eliminate. And much less was it open to the appellant, having made the admissions, himself to create a hurdle by leading evidence inconsistent with the admissions, for the same reason*.**"** In **Kwenamore V The State 1983 BLR 208 (CA) Maisels P and Van Winsen JA** of the Court of Appeal of Botswana explaining a provision similar to our section 129 of the Criminal Procedure Code stated obiter "*A court is entitled to take into account every admission made by an accused person whether extra-judicially or in court, not for the purpose of dispensing with proof that the crime charged has been committed but as evidence tending to support the State case*."

24. The closing submission of the Counsel for the 1st Appellant to the Jury at the close of the prosecution case had been to the effect that **"**Simon Esparon died as a result of a burglary in which the 1st Appellant was involved**"**. That the defence of the 1st Appellant is that **"**he was there, he was in the house, he helped to take the bottles away. You heard him yesterday morning he said I was there I took part. He is sorry for what he did...But our defence is he did not kill Simon Esparon not through an act neither through an omission." This is a qualification made by Counsel for the 1st Appellant to the unqualified statement made by the 1stAppellant that he regretted what has happened and that he now admits that he committed the offence. This statement of the 1st Appellant's Counsel that the 1st Appellant was not involved in the killing of the deceased, runs contrary to the 1st Appellant's first ground of appeal, namely that the Learned Trial Judge erred in failing to direct the Jury to consider manslaughter in respect of the 1st Appellant. The unlawful causing of death (killing) are necessary elements of the offence of manslaughter. There is no evidence before the Court to support the assertion that it was not the 1st Appellant who suffocated or killed Simon Esparon. Quite contrary to that, the evidence of PW 15 is to the effectthat he had seen the 1st Appellant bending down close to the man who was face down on the floor.

25. Counsel for the 1st Appellant in his submission to the Jury had stated that the prosecution had decided at the very outset that the 1stAppellant is who they want and that is the reason PW 15 and PW 16 were given conditional offers. There is no reason given by Counsel for the 1st Appellant as to why the prosecution targeted the 1st Appellant, instead of PW 15. If that be the case there is no reason as to why the prosecution also indicted the 2nd Appellant for the murder. This in my view is an unsubstantiated and improper indictment against the prosecution.

26. I have stated at paragraph 6 (d) above that the sine qua non of liability under section 23 is that the offence committed should be of such a nature, that its

commission should have been a probable consequence of the prosecution of such purpose, in the mind of offender sought to be made liable. The mental element stipulated in the subsequent offence committed in this case is 'knowledge'. The learned Trial Judge while rehearsing the prosecution's argument, had in my view correctly stated: **"**It is the contention of the prosecution that when the 1st and 2nd accused got down from the vehicle all three with crowbars, machetes and wearing clothing to cover their bodies and gloves and thereafter broke and entered the house of Mr. Simon Esparon the two accused together with Jeremy had the common intention to commit the offence of robbery. It is for you the members of the Jury to decide on this issue. In a robbery the probable consequence of the committing of the offence of robbery is that if a house holder was present on the premises, they would either scream, shout, hide or resist the intruders and the intruders would attempt to subdue them by duct taping or gagging them or resorting to other violent acts. In doing so the causing of grievous harm and even death is a probable consequence**"**

27. It cannot be ignored nor has the two Appellants taken up the position that they were unaware that both Mr. and Mrs. Esparon were elderly persons. In duct taping and gagging, the causing of grievous harm and even death is a probable consequence. "Grievous harm" as per its definition also means any harm which amounts to dangerous harm, or harm which can seriously injure health or which is likely so to injure health. It is difficult to conceive from an objective stand point that the two Appellants were ignorant that duct taping and gagging elderly persons by surprising them in the stillness of the night while they were asleep after breaking into their house would cause them harm, which amounts to dangerous harm, or harm which can seriously injure health or which is likely so to injure health. It is to be noted that 'harm' as per its definition in the Penal Code also means any disease or disorder whether permanent or temporary. Disease necessarily includes those of the mind.

28. In the case of **Powell and Daniels [1999] 1 AC 1**, three persons went to the house of a drug dealer to purchase drugs. One of them had carried a gun and the other two knew about it. The drug dealer was shot by the one who carried the gun. The Crown was unable to prove which of the three men fired the gun that killed the drug dealer. All three were held liable because the two who did not carry the gun could have foreseen the use of the gun by the one who carried the gun and causing of death or grievous harm. Rejecting their appeals the Court of Appeal formulated the following question for the opinion of the House of Lords: **"***Is it sufficient to found a conviction for murder of a secondary party to a killing that he realised that the primary party might kill with intent to do so or with intent to cause grievous bodily harm, or must the secondary party have had such intent himself?***"** It was the opinion of the House of Lords that whoever did not kill the victim knew that the other was carrying a gun was evidence that its murderous use was contemplated. Their Lordships rejected the defence argument that it was unfair that a principal could only be liable upon proof of an intention to kill or cause serious injury whereas a secondary party, who was subject to the same mandatory penalty, was guilty upon proof of foresight (that P might kill with the mens rea for murder). In this case too when the 1st and 2nd Appellants along with PW 15 entered the house with machetes, a crowbar, a car lever and duct tapes they should have known that they might have to subdue the inmates if they screamed or resisted them by duct taping or gagging them or resorting to other violent acts and that a probable consequence of their conduct may result in causing of grievous harm and even death to the inmates. It is not necessary that they should have foreseen the precise events which could have unfolded. It would have been sufficient if they knew that a probable consequence of their conduct might result in causing of grievous harm and even death to the inmates. Their indifference to the probable consequences of their actions or wish that that such consequences may not happen is immaterial, so far as their liability is concerned. The argument

of the 1st Appellant's Counsel that it was PW 15 with the 2nd Appellant who caused the death of the deceased is misplaced in view of the decision in the case of **Powell and Daniels**.

29. In the Ugandan case of **Petero Sentali s/o Lemandwa v Reginam (1953) 20 EACA 20** the facts established that the deceased died in consequence of violence inflicted on her by the appellant in the furtherance of, or in consequence of his committing a felony in his house. It was held that by virtue of section 186 of the Penal Code, if death is caused by an unlawful act or omission done in furtherance of an intention to commit any felony, malice aforethought is established. In **Olenja v Republic (1973) EA 546**, a case from Kenya, the Court observed that as a general principle a person who uses violent measures in committing a felony involving personal violence is guilty of murder if death results even inadvertently. In the Tanzanian case of **Fadhili Gumbo alias Malota and three others v Republic (2006) TLR 50**, the murder in question was committed in the course of a robbery. The High Court convicted the appellants. On appeal to the Court of Appeal it was held that the law is clear that a person who uses violent measures in the commission of a felony involving personal violence does so at his/her own risk and is guilty of murder if these violent measurers result in the death of the victim. The Court went on to observe that if death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice is deemed to have been established in terms of section 200(c) of the Penal Code.

30. Counsel for the 1st Appellant had in his submissions to the Jury stated that the deceased died **"**either being suffocated while being subdued, or from his position on the floor where he cannot breathe…We do not know whether he was suffocated on the bed or suffocated on the floor**"**. And again, Counsel has raised the issue as to whether the suffocation was by a hand with a glove or with a pillow. Whatever the method of suffocation, the intention on the part of both Appellants was to

subdue the deceased. It cannot be argued by the 2nd Appellant, in the absence of any evidence, that the suffocation of the deceased was fundamentally different to what he and the 1st Appellant had intended to do or substantially different from the contemplated actions within the common purpose of committing robbery, when they carried machetes, a crowbar, a car lever and duct tapes into the house of the deceased and in fact gagged the deceased and Mrs. Esparon to subdue them. It cannot be argued that suffocation by a hand, pillow or pressing a person on the floor was more dangerous than the use of a machete or a crowbar. It cannot also be said that they were ignorant of the probable consequences of subduing someone by suffocation.

31. The Counsel for the 1st Appellant had also tried to challenge the cause of death. But PW 4, the doctor who did the post-mortem examination has categorically stated that the cause of death was **"**compression of nose and mouth provoking suffocation with the consequent asphyxia**"**. He had also stated that the deceased was very weak and ill as a result of atherosclerosis and pleurisy in the lungs and thus asphyxia would have occurred in less than three minutes of the compression. According to PW 4 the condition of the deceased made him more susceptible to asphyxia. It is clear that to establish causation the accused's conduct need not be the main or only cause of death, it suffices if it was a significant or substantial cause of death. It is trite law that the accused must take his victim as he finds him and a weakness or illness of the victim does not affect the causal link. Section 199 (d), under the title 'causing death defined' referred to at paragraph 3 above makes specific reference to this principle. One possible qualification to this general rule is where the victim of a crime dies of heart failure resulting from mere stress or fright and not as a result of any violence on him. In such a case the charge is likely to be one of manslaughter. But in this case PW 4 had pronounced that the cause of death was **"**compression of nose and mouth provoking suffocation with the consequent asphyxia**"** and therefore that issue does not arise. Further in this case

there is no evidence to indicate that the Appellants were ignorant of the victim's condition.

32. PW 15 had specifically stated that he did not touch anyone at the scene of offence nor gone anywhere near the deceased or PW 18, the wife of the deceased. There was no evidence to contradict this position. He had reiterated in cross examination that when he saw the 1st Appellant kneeling near the deceased who was on the floor, the 2nd Appellant was not there. PW 18, while testifying before the Court had spoken of having seen a shadow all in black in a crouching position on the deceased. She had also stated that the person who was near the deceased had got up from where he was and come up to her thereafter and punched her on her head and right cheek. That person had been wearing gloves and thus the punches were not that painful. He had thereafter left the room. It is clear from her testimony in Court that there were only two persons in the room and the one who taped her was not the one in a crouching position near the deceased. Counsel for the 1st Appellant had also submitted that there is no dispute that the 1st Appellant broke the door of the house of the deceased. The suggestion by the 1st Appellant's Counsel that it was the 2nd Appellant and PW 15 who dealt with the deceased and the 1st Appellant only restrained PW 8, was never put in cross-examination to PW 15. In **Bircham [1972] Crim. LR 430**, counsel for the accused was not permitted to suggest to the jury in his closing speech that the co-accused and a prosecution witness had committed the offence charged, where the allegation had not been put to either in cross-examination.

33. The 2ndAppellant had admitted to tying the hands and feet of PW 8. Counsel for the 2nd Respondent in his closing submission had submitted that the 2nd Appellant had only taped the deceased's hands and feet and that there is no evidence whatsoever to say that it was the 2nd Appellant who suffocated the deceased. That had been his position even in the Skeleton Heads of Arguments filed before this

court. It is on that basis that the 2nd Appellant in his second ground of appeal had argued that the prosecution failed to establish any causal link between his acts in causing or contributing to the death of the deceased. By the act of taping the hands and feet the 2nd Appellant had facilitated the 1st Appellant to suffocate the deceased. The 2nd Appellant in his caution statement had said that whilst he was dealing with the lady (PW 8), he heard the deceased saying "I am breathless, I am breathless....- mon pe toufe, mon pe toufe.....' Then I did not hear him again."

34. In my view the learned Trial Judge had correctly summed up the case against the 1st and 2ndAppellants when he said: **"**In this case, the evidence the prosecution contends, indicates that the accused had the common intention to break into the house and commit the offence of robbery. (This is admitted by the defence in their submissions). In the course of the robbery, both Mr. and Mrs. Esparon were duct taped and tied up and Mr. Esparon was further turned over on his face. The accused were acting at this time in the prosecution and furtherance to the purpose of robbery. Mr. Esparon had stated that he could not breathe and was suffocating. Despite this fact none of the accused chose to render assistance resulting in the probable consequence of death by suffocation.**"**From the evidence of PW 15, PW 18, the caution statement of the 2nd Appellant and the 1st Appellant's unqualified admission at the close of the prosecution case, it is clear that the one who suffocated the deceased is the 1st Appellant. This had happened according to the 2nd Appellant's caution statement and the evidence of PW 18 in the presence of the 2nd Appellant and there is no evidence to indicate that the 2nd Appellant had tried to prevent it. The evidence of PW 4, the doctor who did the post–mortem examination had clearly stated that death was a result of suffocation by asphyxia. PW 18 had stated that she heard the deceased saying that he is being suffocated. PW 15 had stated that he heard the voice of a man who seemed as if he was trying to scream while his mouth was being pressed. The 2nd Appellant in his caution statement had stated that he heard the deceased saying that he is being suffocated.

35. The learned Trial Judge had also stated: **"**Mr. Esparon had stated that he could not breathe and was suffocating. Despite this fact none of the accused chose to render any assistance resulting in the probable consequence of death by suffocation. It is this omission on their part that the prosecution invites you to find constituted malice aforethought – the failure to act to prevent the death of Mr Esparon which arose as a result of the dangers created by them in the pursuance of the robbery and of which they were aware of and had the knowledge, as they had heard him say he was suffocating. In such a situation one does not have to prove the intention of the perpetrators which may be an element of the subsequent offence. Proof of knowledge of the perpetrators that this was the probable consequences of the prosecution of the offence they set out to commit would suffice**."**

36. Murder can be committed by an unlawful act or 'omission'. "An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm." An omission becomes unlawful and resulting in liability when there is a legal duty to act. When a person has created or contributed to the creation of a state of affairs that he knew or ought to have known had become life threatening, there arises a legal duty to take steps to avert that situation and the failure to take make measures that lie within his power, to counteract that danger makes him criminally liable. In the case of **Miller [1983] 2 AC 161**, D fell asleep on his mattress while smoking a cigarette. When he awoke, he saw that his mattress was smouldering but, instead of calling for help, he simply moved into another room, thereby allowing the fire to flare up and spread. He was convicted of arson, for not starting the fire but for failing to do anything about it. In **R v Evans (Gemma) [2009] EWCA Crim 650** the appellant obtained heroin and gave some to her sister who self-administered

the drug. The appellant was concerned that her sister had overdosed so decided to spend the night with her but did not try to obtain medical assistance as she was worried she would get into trouble. When she woke up she discovered that her sister was dead. She was convicted of manslaughter and appealed. The Court of Appeal dismissed her appeal. The case of the 2nd Appellant falls squarely within the facts of the Miller and Evans cases. According to the caution statement of the 2nd Appellant he had heard whilst he was taping Mrs. Esparon, the deceased say 'I am breathless, I am breathless....- mon pe toufe, mon pe toufe.....' It is clear that he had done nothing about it despite the fact that he was in the same room where the deceased and the 1st Appellant was. This counteracts the ground of appeal that there is no causal link between his acts in causing or contributing to the death of the deceased and the 2nd Appellant's Counsel's argument that 2nd Appellant had only taped the deceased's hands and feet and that there is no evidence whatsoever to say that it was the 2nd Appellant who suffocated the deceased.

37. As regards ground 1 of appeal raised by the 1st Appellant as referred to at paragraph 7 above, Counsel for the 1st Appellant, with whom the 2nd Appellant associated himself strenuously argued that the Appellants should have, if at all, been convicted of manslaughter and not murder. It was the contention of the 1st Appellant that the circumstances of this case pointed out that the commission of the offence of murder was not 'a probable consequence' of the unlawful purpose the Appellants formed a common intention to prosecute but if at all, only a possible or likely consequence. He failed to elaborate on what other additional circumstances would have been needed to make the offence of murder of which the Appellants were charged and convicted 'a probable consequence' or on what rational basis he submitted that it was only a 'possible or likely consequence'. In my view suffocation, from an objective standard, is certainly a 'bodily hurt', even if 'temporary' to prevent a person from shouting. It is a harm, which amounts to a 'dangerous harm' or a harm, which seriously injures health or is likely to injure

health and thus comes within the definition of 'grievous harm' stated in section 196(b) of the Penal Code, in defining malice aforethought. I have dealt with this at paragraph 27 above.

38. Counsel for the Respondent submitted that on a perusal of the Summing Up shows that the learned Trial Judge had explained to the Jury the elements of both murder and manslaughter and the definition of malice aforethought and directed them that in the absence of malice aforethought the Appellants must be acquitted of the offence of murder. He had gone on to explain that where death results by an unlawful act committed by the accused without malice aforethought the offence would be one of manslaughter. He had told the Jury that it is for them to decide whether the accused had the requisite intention or knowledge to cause the death or grievous harm to the deceased "by an act of suffocation by closing the breathing orifices". In the absence of any direct evidence or an inference that could have been legitimately drawn from evidence before the Court that the 1st Appellant did not intend to cause the death or grievous harm to the deceased or had the knowledge that that his acts will probably cause the death or grievous harm to the deceased, I am of the view that there was no need to direct the Jury any further to consider the lesser charge of manslaughter in respect of the 1stAppellant. In view of what I have stated at paragraphs 21-24; 26-30 and 34-36 above, I am of the view there was obvious evidence to support a verdict of murder and none to support a verdict of manslaughter. In **R V Coutts [2006] 1 WLR 2154 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 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.**"** I therefore dismiss this ground of appeal.

39. As regards grounds 2 and 4 of appeal raised by the 1st Appellant as referred to at paragraph 7 above, a perusal of the Summing Up at pages 939 -943 of Volume IV shows that the learned Trial Judge had put the case for the defence of the Appellant and the Prosecution fairly to the Jury. He had told the Jury that the main contention of the defence was that it was the accomplice PW 15 who had planned the entire operation and instrumental in the murder of the deceased.

40. It was the contention of the 1st Appellant's Counsel at the hearing before us that the 1st Appellant was prejudiced to a great extent as a result of the prosecution calling PW 18 as the last witness and that after PW 15 and PW 16 had testified. It was his submission that he was therefore unable to prepare his defence to meet the evidence of PW 18 which was in contradiction to her two statements made to the police as referred to at paragraph 18 above, but tended to corroborate the evidence of PW 15 as to the number of persons inside the room when the deceased was attacked. It was his submission that this was a deliberate ploy on the part of the prosecution to fix its case to avoid any contradiction between the testimony of PW 15 and PW 18. He also argued that once the prosecution was possessed with the statement made by PW 15, it was their duty to record a third statement from PW 18 to clarify this apparent contradiction. It is my view, had the prosecution done that, the defence would have argued that the prosecution had tailored their case to avoid any contradictions. There is nothing to suggest that the prosecution was aware in advance as to what the testimony of PW 18 would be in Court at the trial. As regards the late calling of PW 18, Counsel for the Respondent informed us at the hearing of the appeal that PW 18 had been away from the country at the time of the commencement of the trial, attending to her daughter who had her

confinement in Australia. It is also my view that it is for the prosecution to decide the order in which to call its witnesses. I am also of the view that there could have been no prejudice to the 1st Appellant, since both statements of PW 18 and that of PW 15 had been given to the 1st Appellant before the commencement of the trial; and Counsel for the 1st Appellant had indeed cross-examined PW 18 at length as regards the contradiction between her testimony in Court and her two statements to the police.

41. The learned Trial Judge had dealt with the issue of calling PW 18, Mrs. Marie-Jose Esparon at the end of the Prosecution case and even placed her two statements made to the police, which were produced as 1D1 and 1D2 by the defence at the trial for the consideration of the Jury. The learned Trial Judge at pages 933 and 942 of Volume IV, dealt with in detail with the contradiction between the evidence given in Court by Mrs. Marie-Jose Esparon and her previous statements to the police and told the Jury that it was his duty to inform them that there is a material contradiction in her evidence and statements to the police but left it to them to decide whether she could be believed on this issue or not. In her statements made on the day of the incident and the day after the incident, she had stated that there were three people involved in the incident, whereas in Court she stated that there were two persons. He had then told the Jury that Mrs. Esparon's explanation regarding this was she was traumatized witnessing what was happening around her while she was being duct taped and assaulted. In this regard, it is to be noted that according to the prosecution witnesses there were three persons in the house as according to PW 15 he had also come into the house on two occasions. I therefore dismiss grounds 2 and 4 of appeal.

42. As regards ground 3 of appeal raised by the 1st Appellant as referred to at paragraph 7 above, a perusal of the Summing Up at pages 910-911 of Volume IV shows that the learned Trial Judge having clearly stated that this case depends on

the evidence of PW 15 and PW 16 who he described as accomplices and voluntary participants in the commission of the crime had gone on to explain to the Jury how they should treat their evidence. Citing the judgments of this Court in **Jean Francois Adrienne & Anr V The Republic [SCA 25 & 26 of 2015] and Dominique Dugasse & others V The Republic [SCA 25, 26 & 30 of 2010]** he had stated that the current law in Seychelles is that one could accept the evidence of an accomplice even without corroboration, if satisfied that the accomplice is speaking the truth in regard to the facts of the case. However if they feel that caution is to be exercised in the acceptance of the evidence of an accomplice in view that he has a reason to lie or that he is attempting to pass the blame onto another they should look for corroboration of his evidence and if none exists they should reject his evidence. This in my view was a perfect direction on how the Jury should deal with the evidence of PW 15 Terry Jeremy. Paragraphs 21, 25 and 32 above shows that the learned Trial Judge could not be faulted in placing reliance on the evidence of PW 15.Credibility of witnesses and the weight of evidence was ultimately a matter for the trier of fact, the Jury. I find that the evidence of PW 15 Terry Jeremy had been corroborated by the evidence of PW 18, the wife of the deceased who also had seen a person crouching on the floor where the deceased was lying as described by PW 15. The evidence of PW 15 that the 1st Appellant was wearing cotton gloves throughout until he embarked in the car is consistent with the evidence of the doctor who confirmed the cause of death was asphyxia by compression of the nose and mouth of the deceased with a soft fabric. I therefore dismiss this ground of appeal.

43. The evidence set out in paragraphs 11-20 above and the analysis of the very issues in paragraphs 21, 23-32 and 34-37above shows that ground 5 of appeal as referred to at paragraph 7 above, has no merit and is therefore dismissed.

44. Grounds 1,2 and 3 of appeal of the 2nd Appellant as referred to at paragraph 8 above has been dealt with at paragraphs 26-31 and 33-37 above. I find no merit in the said grounds and therefore dismiss them.

45. As regards ground 4 of appeal of the 2nd Appellant as referred to at paragraph 8 above I note that the learned Trial Judge at page 917 of volume IV had, referring to the evidence of the DNA expert and quite contrary to what is stated in ground 4 of appeal of the 2nd Appellant has stated, that the DNA expert had admitted that "the DNA profiles obtained from the exhibits analysed by him in this case, did not match the sample…belonging to the 2nd accused Mr. Marco Mathiot". The learned Trial Judge had in summarising the evidence of the DNA expert made reference to the explanations given by the expert in regard to the many factors that lead to DNA not being left on a surface and those factors affecting the retrieval of DNA. In my view this ground is frivolous as according the 2nd Appellant's confession he had duct taped the hands and feet of the deceased and Mrs. Esparon, which dispenses with the need for any DNA evidence to prove his presence at the scene of crime. Further Counsel for the 2nd Appellant in his submissions to the Jury and in his Skeleton Heads of Arguments had admitted that the 2nd Appellant had taped the hands and feet of the deceased. I therefore dismiss this ground of appeal as there was no need for any DNA evidence in this case in view of the admissions.

46. For the reasons enumerated above I have no hesitation in dismissing the appeals of both the 1st and 2nd Appellants against their convictions.

A.Fernando (J.A)

I concur:. ..... M. Twomey (J.A)

I concur:. ..... B. Renaud (J.A)

Signed, dated and delivered at Palais de Justice, Ile du Port on10 May 2019