IN THE COURT OF APPEAL OF SEYCHELLES

Reportable
[2023] SCCA 46
(August 2023)
SCA CR 21/2022 and SCA CR 22/2022
(Arising in CRO 13 /22)

1. RYAN UNDERWOOD

(rep. by Anthony Juliette)

and

2. STEFFI ROBERT **Appellants**
(rep. by Joshua Revera)

And

THE REPUBLIC **Respondent**
(rep. by Langsinglu Rongmei and Luthina Monthy)

Neutral Citation	*Underwood & Anor v R (*SCA CR 21/2022 & SCA CR 22/2022 [2023] SCCA 46 (25 August 2023) (Arising in CRO 13 /2022 [2022] SCSC 1045
Before:	Twomey-Woods, Robinson, Tibatemwa-Ekirikubinza, JJA
Summary:	murder, inconsistencies, defences of provocation and self-defence, aiding and abetting, intent, words and actions amounting to aiding and abetting, misdirection- application of section 344 of Criminal Procedure Code
Heard:	7 August 2023
Delivered:	25 August 2023

ORDER

Both the appeals of the First and Second Appellant are dismissed. Their convictions and sentences of life imprisonment are affirmed.

JUDGMENT

DR. M. TWOMEY-WOODS JA

(Robinson and Dr. Tibatemwa-Ekirikubinza JJA concurring)

Background

[1] On 11 January 2022, an argument ensued between Hubert Mothé and the second appellant, Steffie Robert, at the playing field in St. Louis, Mahé. There had been, from late afternoon a drinking party on one side of the playing field under a mango tree attended by a group of people, including both Ms. Robert and Mr. Mothé. It would appear that this was a regular occurrence. At some point, swear words were exchanged between the deceased and Ms. Robert. The group, together with Mr. Mothé, moved further down the field near an old car, but Ms. Robert followed them, and the swearing continued. At some point, Mr. Mothé pushed Ms. Robert, and she fell. She made a phone call following which the first appellant, Mr. Underwood, her partner, came to the scene and was involved in a fight with Mr. Mothé. The latter was stabbed numerous times and was transported to the Seychelles Hospital but was pronounced dead at 9.30 pm.

[2] The first appellant, Ryan, Underwood (Mr. Underwood), now 34 years old and Steffie, Robert, now 27 years old (Ms. Robert), stood trial for the murder and the aiding and abetting the murder, respectively, of 26-year-old Hubert Mothé (the deceased) before a judge and a jury who returned a verdict of guilty against both. They were each sentenced to life imprisonment. They now appeal against their convictions.

[3] Their appeals are heard together. I shall consider both appeals together and deliver one judgment.

The appeal of Ryan Underwood

[4] Mr. Underwood has put up the following six grounds of appeal:

1. "The learned trial judge erred in his direction to the jury in respect of the locus in quo and the 'evidence' of Col Kelly Auguste not given under oath at the locus in quo in relation to the lighting and other material factors that had not been adduced in the trial. The learned judge also erred in his finding that he 'appreciated that Mr. Juliette appears to have adopted a different approach in his address by telling you that pictures do not lie and that you should rely on these pictures' in that it had always been the position of the Appellant that the jury should rely on the photographs taken on the night of the 11 February 2022.

2. The learned trial judge erred in his direction to the jury in respect of the Appellant's statement given to the Police that the same 'remains a discretion of the Prosecution and the Defence has the liberty to summon the officers who recorded the statements to have them produced in court…Most statements are not produced by the Prosecution because it is felt that they will add nothing to the Prosecution's case, and similarly why its production is not called by the Defence" in that firstly, the Defence did call for the production of the statements and secondly this direction offends the Appellant's right to remain silent and the learned judge's undue and biased comments on the same prejudiced and confused the jury. In essence, the learned judge commented adversely about the Appellant's right not to give or produce any evidence and implied to the Jury that because he raised issues regarding those statements, then he should bring evidence about the same.

3. The learned trial judge erred in his direction to the jury in respect of the discrepancies in the testimonies of material prosecution witnesses when such discrepancies are so material that the learned judge should have directed the jury that such testimonies should not be relied on.

4. The learned trial judge erred in his direction to the jury that he was "of the opinion that this is not a case where the accused can rely on the defence of provocation" contrary to the weight of the evidence.

5. The learned trial judge erred in his direction to the jury that he considers the defence evidence of Steven Robert and Lizette Maria to be irrelevant in this case and in his remarks about the fact that swearing parlance is part of our language in the absence of proof thereof. The Appellant has always maintained that he had been attacked by the deceased and others and that that continued into the home of Steven Robert and the Appellant."- is that in relation to self defence

I now consider each of the grounds of appeal of Mr. Underwood.

Ground 1 -The direction regarding the locus in quo, the exhibited photographs and the lighting at the murder scene

Submissions

[5] Mr. Juliette, learned Counsel for Mr. Underwood, has submitted that the learned trial judge misdirected the jury regarding the *locus in quo*, the lighting at the crime scene and the evidence pertaining to these issues.

[6] He contends that the jury should have been directed that the evidence given under oath by Corporal Auguste should be preferred to statements she made at the visit to the *locus in quo.*

[7] He has also submitted that the learned trial judge did not direct the jury on changes to the scene of the murder caused by the cutting of bushes and trees after the incident, as these could affect the credibility of the witnesses since they may not have been able to see as much on the night of the incident.

[8] Ms. Monthy, learned Counsel for the Republic, has replied that the learned trial judge was correct in not giving a *Turnbull* direction regarding the identification of people involved in the incident as their identity was not disputed at trial.

[9] She also submits that Corporal Auguste's court testimony was not different from what she said at the visit to the locus. On the night the court visited the locus, some of the lights on the pole were flashing. She has directed our attention to Corporal Auguste's testimony as follows:

"…on the night upon arriving at the scene, all the lights were on."

And *when asked whether all the lights were on or flashing, she stated:*

"Yes all the lights on the pole were on".
(Verbatim Page 805 of the transcript of proceedings)

[10] In his cross-examination of Corporal Auguste, she added that Mr. Juliette suggested the photographs depicted more light than was actually there on the night of the incident. And that later, he seemed to indicate in his closing address that, in fact, the photographs correctly showed the lighting at the time of the incident, viz:

"…what is depicted on a photo is what was taken real time at a particular place, at the particular time… the lighting that you see on the photograph when you go through them are the lighting that was captured on the night, on the 11 February 2022. We went on the locus, someone would have told you there was light, and if there was light, there would be on the photograph, so it is up to you to decide on the day what the correct state of the scene was at that date as captured by these photographs, and nothing else.

Therefore, people might be prone to lie; photographs normally no…"
(Verbatim, pages 882-883 of the transcript of proceedings)

[11] She submits that this was addressed by the learned trial judge:

"At the scene, Corporal Auguste took pictures. Her pictures were challenged in that, apart from the camera flash, there wasn't sufficient light to show a clear picture of the location. The officer maintained that there was sufficient light from light posts and lights from buildings. Mr. Juliette changed his position when delivering his address. (Verbatim, paragraph 120 of the summing up, page 973 of the transcript of proceedings)

[12] There appears to be some confusion regarding the point being made by Mr. Juliette. I understand him to be saying that the lighting was not sufficient for the witnesses to see what they alleged to have seen and that this is obvious both from the photographs taken on the night, which appear clearer because of the flash from the camera and as would have been evident at the visit to the locus.

[13] In the circumstances, was the direction of the trial judge misleading? The two parts of the direction complained of are as follows:

"[76] …As to the conditions of light, note that according to Cpl Kelly Auguste, the night of the incident, when the Police came on the scene, there were more lights at the scene compared to what was observed when we conducted the locus. In fact, she claims that the lights in the playing field were lit up..." (Verbatim, paragraphs 85 of the summing up, page 957 of the transcript of proceedings)

"[85] You will recall that we visited the scene of the incident. You had the opportunity to observe the surroundings and that could have assisted you in piecing together the puzzle of what could have happened…

[86]…you have been given two albums of photos...some of these pictures will help you understand the scene in particular, but the scene had changed a bit by the time we went for the locus in quo. Mr. Juliette has criticised this and even suggested that the scene had been purposefully sanitised. However, no evidence of the same was adduced. I personally do not subscribe to such a suggestion, especially since the locus is a public place. It is common for a locus to be different at the time that [the visit] to the locus in quo happens months and sometimes years after the incident…I appreciate that Mr. Juliette appears to have adopted a different approach in his address by telling you that pictures do not lie and

that you should rely on these pictures…" (Verbatim, paragraphs 85-86 of the summing up, page 961 of the transcript of proceedings).

The applicable law

[14] It is trite that observations by a judge or a jury at a *locus in quo* should not be substituted or preferred to sworn testimony of witnesses at the scene of the incident. In the case of *William Mukasa v Uganda*[1], Sir Udo Udoma G (as he then was) held as follows:

"A view of a locus in quo ought to be, I think, to check on the evidence already given and where necessary and possible, to have such evidence oculary demonstrated in the same way a court examines a plan or a map or some fixed object already exhibited or spoken of in the proceedings. It is essential that after a view of a judge or magistrate should exercise great care not to constitute himself a witness in the case. Neither a view nor personal observation should be a substitute for evidence."

[15] However, the purpose of a *locus in quo* is to understand the evidence, and its viewing may confirm or call into question the credibility of a witness. A *locus in quo* forms part of a trial and the same rules of evidence that apply at trial apply to proceedings during the locus in quo. Nothing prevents the administering of oaths at visits to a locus in quo.

[16] However, evidence given without an oath should be taken cautiously, even when made at the visit to the locus. I have scrutinised the direction, and I must conclude that the learned trial judge did not misdirect the jury on this issue. He has not substituted the evidence at the *locus* to that in court. He has summarised the different strands of evidence on this issue and has concluded this part of his direction as follows:

"Members, you need not follow either Counsels' or the Court's view of the evidence if they do not correspond with your assessment of the evidence; you are the sole judges of facts." (Verbatim, paragraph 87 of the summing up, page 962 of the transcript of proceedings

Other inconsistencies and findings

[17] A separate issue concerning the lighting and where the stabbing took place is also raised by Mr. Juliette. He submits that one of the suggested sites of where the stabbing occurred was not well-lit, which could cast severe doubt on the accuracy or credibility of the eyewitnesses.

[1] [1964] E.A 696 at page 700.

He contends that Michaela Elizabeth and Vivienne Sanguignon, the deceased's mother, provided testimonies that the stabbing occurred next to the mango tree in contradiction to Richard Robert, who stated that it happened at the side of the main road. Moreover, Jemina Boniface testified that she didn't see the stabbing and that it was getting dark then. He disputes the accuracy of Vivienne Sanguignon's evidence as, in his submission, she was not at the scene when the stabbing happened, given the entry in the police diary, which reports that Mrs. Sanguignon told the police that she was on her way home when she was told that her son had been stabbed. He further submits that given the considerable distance between the two different reported sites of the stabbing, the evidence of the witnesses cannot be relied on. Additionally, as the knife was recovered near the mango tree, the stabbing could not have happened near the main road. Mr. Juliette submits that the trial judge did not address this issue in his direction to the jury.

[18] In reply, Mrs. Monthy submits that the evidence of Cpl Auguste, who took the photographs, is crucial and puts to rest any doubt about where the stabbing occurred and whether the area was well-lit. Cpl Auguste, in cross-examination, testified about the lighting and stated:

"Yes all the lights on the pole were on. Now your lordship this is where the alleged suspect, namely Ryan Underwood showed me the area where he stabbed the deceased namely Hubert Mothé which I labelled with the letter C…

And also this is where it was shown to me by Sergeant Eulentin where I found the red substances."

Her evidence was unchallenged.

[19] 'C' is a spot between the wall and the mango tree, shown in photographs 72 and 73 of the exhibited album of photos of the crime scene (Exhibit 1) where the knife was retrieved and presumably where the stabbing happened. This is confirmed by the splatter of blood on the wall near 'C', as shown in photograph 78. It is Mrs. Monthy's submission that this is confirmed by the witnesses, Vivienne Sanguignon and Jean-Marc Larue, who retrieved the knife from the scene. It is her submission that at the place where the stabbing happened and where the knife and blood were found, there is lighting on an adjacent pole. In admitting the inconsistency between the entry in the police diary and the evidence of Vivienne

Sanguignon, she submits that the inconsistency was rightly pointed out by the learned trial judge, who left the issue to the jury to decide. Vivienne Sanguignon's presence at the scene for a part of the incident was witnessed by Jean-Marc Larue. Mrs. Monthy further highlights the provisions of section 365 (2) of the Criminal Procedure Code, which permits the judge to express his opinion to the jury. In expressing his opinion he has acted properly.

[20] I have examined the testimony of the witnesses and the inconsistencies between them. I have scrutinised the evidence of Richard Robert. He testified about the fighting at both sites and a chase ensuing between Mr. Underwood and the deceased to the public road and away from it. The post-mortem examination revealed several incised wounds on the deceased's right arm and shoulder which the doctor described as defensive wounds, three of which were superficial but a fatal wound in his left thorax and two other gaping wounds in the left thorax, among other incised wounds.

[21] While Richard Robert describes that he saw Mr. Underwood stab the deceased near the public road, there is no evidence establishing whether the stabbing only took place at one site or at two sites and the exact place where the fatal stab wound was inflicted. The evidence only confirms that the deceased was stabbed numerous times during the fight, which also comprised of a chase of the deceased by Mr. Underwood. In the circumstances, I am not satisfied that the trial judge did not address these issues in his charge to the jury. If anything, he was meticulous in pointing out the discrepancies and making sure that the jury considered them when reaching their verdict. The expression of his opinion on this issue, as submitted by Mrs. Monthy, is entirely in line with section 365 (2) of the Criminal Procedure Code (See on this point *Charles and Parekh v Republic).*[2] It did not create an imbalance in the summing up or a biased direction. The learned trial judge's approach was entirely correct.

[22] This ground of appeal, therefore, is without merit and is dismissed.

[2] (SCA CR 10 of 2022; SCA CR 13 of 2022) [2023] SCCA 6 (26 April 2023).

Ground 2 -The failure by the prosecution to admit the statement of Mr. Underwood, the direction thereon to the jury and the right to remain silent.

[23] Mr. Juliette has submitted that the following direction by the learned trial judge to the jury was prejudicial to Mr. Underwood:

"137 …I wish to point out that usually the investigating officer is called as a witness but the discretion as to decide whom to call as a witness is at the direction of the prosecution and the defence and not calling the investigating officer to testify is not fatal. In fact, if the defence wanted the investigating officer to testify they were always at liberty to summon that officer to come to court." (Emphasis added- verbatim transcript of proceedings on Page 977)

[24] Mr. Juliette believes that that direction is prejudicial to the defence case as it infers that the accused, on raising issues about the investigating officer not testifying, had the consequential duty of having to bring evidence himself of that fact. Mrs. Monthy has replied that this is a strained interpretation of the direction and that the ordinary reading of that part of the learned trial judge's summing up would show that he was only indicating the general discretion of both parties to call evidence.

[25] I agree and am confident that an objective reading of the above direction shows that it is a general opinion on the adduction of statements. I fail to see how it prejudices the constitutional right of the accused to remain silent. The learned trial judge was only stating the obvious. In *Antat & Ors v R*[3] this Court rightly court stated:

"…the position as far as this country is concerned is as set out by Diplock LJ (as he then was) in Dallison v Caffery, [[1964]2 All ER 610], when he said at 622:
"This contention seems to me to be based on the erroneous proposition that it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt of the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or although not inconsistent with his guilt is helpful to the accused, the prosecutor should make such witness available to the defence…" [4]

[3] [1995] SCCA 24 (13 June 1995).
[4] Ibid, page 16.

[26] Once the statements are made available to the defence, it is then up to them to decide whether to call the witness. Therefore, I cannot fault the judge's direction on this issue. In the circumstances, this ground also has no substance and is dismissed.

Ground 3 -Material discrepancies in the prosecution evidence

[27] Mr. Juliette has submitted that the following direction by the learned trial judge was a misdirection:

> *"[81] …Nonetheless, I need to remind you that it was people deponing to court. It is virtually impossible for two persons having witnessed the same incident to describe the event exactly the same way. There will always be discrepancies in their evidence. That does not mean they are lying. Our power of observation is not the same and our power of observation can be affected by many factors…*
>
> *[82] …It is for you… to decide what weight you are to accord to the testimony of the witnesses… You have to decide whether the discrepancies are material and pertinent to the case…*
>
> *[83] Defence Counsel implored you to disregard the evidence of Dean, Jean-marc and Joshua completely. However, before you can do that, you have to be satisfied that either they were lying or that their evidence has been so tainted with contradiction that you cannot rely on…"*

[28] In this regard, Mr. Juliette has made extensive submissions regarding the unreliability of all the prosecution witnesses. In his view, although seven witnesses were called, four did not witness the stabbing incident, and their testimony did not help establish that Mr. Underwood murdered the deceased. He adds that the three witnesses who did witness the stabbing contradict each other. He has indicated the minimal effect of the witnesses who did not see the stabbing incident on the charge of murder. As to those who witnessed the stabbing, what he deems vast inconsistencies in their testimonies have already been addressed.

[29] With regard to the forensic pathologist, he urges the court to find that he is biased as he mentions in his report and evidence that "the victimiser was running…" and he could only have come to that conclusion through information obtained from the police.

[30] As concerns the investigation diary, this was not produced by the prosecution but by the defence. He posits that the prosecution might have wanted to hide something, especially in not calling the investigating office to explain the discrepancy in the diary regarding Vivienne Sanguignon. He submits further that both the deceased and Mr. Underwood had multiple wounds on their bodies, as shown in the photographs and recorded in the investigation diary, indicating that this was a fight in which both received injuries and that Mr. Underwood was acting in self-defence. He urges this court to find that the learned trial judge should have directed the jury that as evidence is unreliable, the prosecution was not proved beyond reasonable doubt.

[31] In response to these submissions, Mrs. Monthy has conceded that there are inconsistencies in the evidence of the witnesses who saw the incident. She submits that this is to be expected, given the intensity and the speed at which the events occurred. As much as there are minor discrepancies in the evidence, she submits that the prosecution witnesses largely corroborate each other. It was Mr. Underwood who came armed to the scene after an altercation between the deceased and his girlfriend which he had not witnessed, gave chase and stabbed the deceased to death.

[32] Mrs Monthy further submits that the more glaring inconsistencies, namely the spot where the deceased was stabbed and the whereabouts of Ms. Robert at the time of the stabbing, do not have great significance as there is clear forensic evidence that the knife used for the stabbing had the blood of the deceased on it, that the t-shirt worn by Mr Underwood had the deceased's blood on it, and that the swabs taken from Mr. Underwood's palm contained epithelial cells of the dead.

The effect of inconsistent evidence

[33] Having examined the different testimonies, I conclude that there are inconsistencies but they are not irreconcilable or fatal to the prosecution's case. With regard to inconsistencies in the evidence of witnesses generally, this Court stated in *Beeharry v R*[5] :

[5] (2012) SLR 71

"In all criminal cases discrepancies in the evidence of witnesses are bound to occur. The lapse of memory over time coloured by experiences of witnesses may lead to inconsistencies, contradictions or embellishments. The Court however on many occasions is called upon to assess whether such discrepancies affect the very core of the prosecution case; whether they create a doubt as to the truthfulness of the witnesses and amount to a failure by the prosecution to discharge its legal burden."

[34] In *Monthy v R*[6], this Court cited foreign authorities for the principle that a holistic approach must be undertaken in reviewing evidence which may be inconsistent. The Court stated:

"[29] In the Canadian case of R v Cameron 2017 ABQB 217 (CanLII) it was stated that the exercise of assessing evidence involves considering the "whole tapestry" (or the "whole scope and nature") of the evidence. In JMH, 2009 ONCA 834 (CanLII) the court stated that it was an error of law to evaluate reliability and credibility on the basis of individual pieces of evidence without looking at the totality of the evidence.

[30] In the South African case of S v Trainor 2003(1) SACR 35(SCA) the court stated:
"A conspectus of all evidence is required. Evidence that is reliable should be weighed alongside such as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of the evidence must of necessity be evaluated as must corroborative evidence, if any." (at 41b-c)

[31] We have adopted the same approach in Seychelles. In Volcere v R [2014] SCCA 41 (12 December 2014), Domah J held that
"Judicial appreciation of evidence is a scientific rationalization of facts in their coherent whole not a forensic dissection of every detail removed from its coherent whole."

Finding on this issue

[35] I endorse the approach by the Court in the cases cited above. When the jury, as opposed to the judge, is the trier of fact, the same principles apply. In the present case, they should decide whether the discrepancies in the different witnesses' evidence are evidence of lies, lapses of recollection or inconsistencies that may be explained. Giving weight to any of this evidence is the domain of the jury. We cannot find in the present case that the learned trial judge did not effectively summarise both the prosecution and defence evidence, point

[6] (SCA 04/2018 (Appeal from the Supreme Court Decision in CR 42/2015)) [2018] SCCA 32 (14 December 2018).

out the inconsistencies and leave the issue of the credibility of the witnesses to the jury to decide. That the jury chose to reconcile these inconsistencies and find the prosecution case proved beyond reasonable doubt was entirely their province. An appeal court does not review a jury decision to see if the correct verdict was reached but rather whether the verdict was reasonable in light of the evidence and the law. In the circumstances, this ground of appeal also has no merit and is dismissed.

[36] Before I move to the rest of the grounds, I must observe that in view of the next grounds relating to the defences of provocation and self-defence grounds 1 and 3 of this appeal relating to inconsistencies would be largely redundant. One cannot seem to be saying in the same breath that "I did it" but did so in self-defence and /or under provocation while at the same time contest inconsistencies in how the stabbing occurred.

Ground 4 - The defence of provocation

[37] Mr. Juliette has submitted that the learned trial judge misdirected the jury on the issue of provocation. It must be noted that no submissions were made on this ground of appeal. After quoting the provisions of the Penal Code relating to provocation and some common law cases, the trial judge stated that the defence of provocation was not available given the circumstances of the case. He stated:

"[60] An accused relying on the defence of provocation must establish that not only he was provoked but that such provocation objectively assessed as grave and sudden enough to prevent the offence from amounting to murder. It must be shown by the defence that the acts of provocation would have caused a reasonable or ordinary man to have acted in the way he did. Not all offensive act (sic) or acts will amount to provocation. The provocation should have happened suddenly. For example, if the act or acts of provocation happened in the morning and during the day, the parties to conflict do not meet, but in the evening, the one towards whom the act or acts of provocation was directed takes a knife and goes to the house of the other and stabbed him to death, the defence of provocation will not be available to him…

…

[62] The defence cannot rely on provocation for the alleged incident that happened at the Robert residence. This is simple. The alleged incident happened after the stabbing incident. Furthermore, I cannot from the evidence, find provocation before that stabbing took place.

Steffie was swearing, and Hubert was equally swearing back at her. This is not provocation, otherwise, we would have killings every day in this country and there is certainly no evidence that she was being assaulted and about to be gang raped by a group of people and even if that was the case, the defence produced absolutely no evidence that Hubert was one such person..."

The law on provocation

[38] Was this summing up a misdirection? Should the learned trial judge have left the provocation issue to the jury? Unlike the UK, our law on provocation is regulated by statute. The provisions of the Penal Code define provocation – a defence which, if successful, reduces the offence of murder into one of manslaughter.

[39] In this respect, sections 197 and 198 of the Penal Code provide:

"197. Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

198. Definition of provocation

The term "provocation" means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult it done or offered.

When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give the latter provocation for an assault.

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

For the purposes of this section, the expression "an ordinary person" shall mean an ordinary person of the community to which the accused belongs." (Emphasis added)

[40] The provisions above relating to provocation, as are other provisions of our Penal Code, are verbatim the Griffith Code adopted in 1899 by Queensland as its Criminal Code, which we also subsequently adopted. The provisions of sections 197 and 198 of our Penal Code are equivalent, respectively, to sections 268 and 304 of the Queensland Criminal Code. The jurisprudence from Australia in relation to these provisions is, therefore, relevant.

[41] In *Masciantonio v The Queen*[7], the court stated:

"The provocation must be such that it is capable of causing an ordinary person to lose self-control and to act in the way in which the accused did. The provocation must actually cause the accused to lose self-control and the accused must act whilst deprived of self-control before he has had the opportunity to regain his composure"[8]

[42] This court, in *Thelermont v R*[9], cited with approval the summing up of the trial judge when he 'charged' the jury as follows:

"In law, provocation is some act or series of acts done or words spoken which would cause in any reasonable person and actually causes in the accused a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him for the moment not master of his mind."

[43] The case of *Julien Barra v R*[10] lays down important rules that must be considered in a case of murder when the defence of provocation is invoked by the accused. Notably, the court stated:

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[7] (1995) 183 CLR 58.
[8] Ibid, 66.
[9] (SCA 23 of 1993) [1994] SCCA 26 (25 March 1994)
[10] (SCA 21/2012) [2014] (unreported).

"[18]The following elements have to be present before one could say that the killing was on provocation:

(i) The accused acted in the heat of passion before there is time for his passion to cool;
(ii) Caused by sudden provocation;
(iii) Provocation was as a result of any wrongful act or insult of such a nature as to be likely when done to an ordinary person; ('An ordinary person' shall mean an ordinary person of the community to which the accused belongs.)
(iv) To deprive him of the power of self-control and;
(v) To induce him to assault the person by whom the act or insult is done.

[19] The words "in the heat of passion and before there is time for his passion to cool" necessarily connotes a subjective test, and the words "any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control" brings in the objective element. The words "acted in the heat of passion, before there is time for his passion to cool." are not a matter of degree but is absolute and there is no intermediate stage between icy detachment and going berserk…
So long as the accused had acted in the heat of passion and before there is time for his passion to cool and the provocative conduct was of such a nature as to be likely, when done to an ordinary person, to deprive him of the power of self-control and to induce him to assault the person who provokes him that would suffice. As to what the nature of the assault should be, has not been specified…"[11]

[44] The provisions and jurisprudence thereon infer some specific triggering event in the presence of the accused causing *heat of passion* which leads to the assault. Hence, a successful defence of provocation comprises three basic elements: evidence of an act amounting to provocation, the requirement of the immediacy of the provocation to the assault and the resulting loss of control. The test is an objective one but with some subjective elements. In other words, while an accused person may have personal reasons to be particularly enraged by certain remarks, the community would not be wrong to expect some minimum degree of self-control from him. For the defence to operate, the provocative words or actions must be outside the bounds of ordinary interaction acceptable in our society.

[11] Ibid, pages 11-12.

[45] Therefore, the defence can only succeed where the jury is left in reasonable doubt that the accused killed during a sudden loss of self-control caused by provocation which was enough to make a reasonable man do as he did. This calls for an objective and subjective interpretation of the circumstances.

[46] Most recently, the Court of Appeal in *Swallen Jourdan Basset v R*[12] emphasised this two-prong test before one can successfully argue provocation, stating that:

> *"15....there are two essential elements to be satisfied before one could be said to have benefited from the mitigatory defence of provocation. The subjective element being, it should be clear from the evidence, that the accused was in fact deprived of his power of self-control so as to induce him to assault the person by whom the act or insult was done or offered. The objective element is that the act or insult done or offered to the accused should have been of such a nature as to be likely, when done to an ordinary person, of the community to which the accused belongs to have deprived him of his power of self-control so as to induce him to assault the person by whom the act or insult was done or offered."*[13] (Emphasis added)

Applying the law to the present case

[47] Given the above elements, there are several difficulties with the provocation defence in the particular circumstances of the present case.

[48] First, can it be said that mere swearing amounts to provocation? While it is now trite that words can amount to provocation, we have no evidence of how hurtful the cursing was towards Ms. Robert and indirectly to Mr. Underwood or in what context it was made so as be so vile or unsupportable as to make him lose his self-control. The only evidence is that Ms. Robert and the deceased were swearing at each other. This was what the trial judge was alluding to in his direction to the jury. Swearing is commonplace in Seychellois society, perhaps more so than in many other parts of the world. It is so prevalent that it cannot be said that, in general, there is a correlation between swearing and ensuing acts of physical violence. It is not one of those *specific events calculated to rob a person of his self-control.*

[12] (SCA CR 31/19) [2021] SCCA 42.
[13] Ibid, page 10.

Unless the provocation is sufficiently grave, it will not satisfy the objective test imposed by section 198.

[49] Further, and with regard to the first element, the provocation must be in the presence of the accused person who perpetrates the assault. It is common ground that the deceased and Ms. Robert were involved in some confrontation. However, Mr Underwood was not present when the alleged provocation occurred. It would therefore appear that the defence is not available to him in the words of section 198 *as the wrongful act or insult* was not done in his presence *to another person to whom he stands in a conjugal relation, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.* The provisions do not appear to cover incidents where the provocation is remote.

[50] Even the common law rule in the UK is to the effect that provocation must occur within the sight and hearing of the accused (See *R v Fisher*[14]), amounting to a rule against 'hearsay provocation.' In *R v Terry,*[15] the court was concerned with whether the provocation was available to an accused who had not been the direct target of the provocation. In that case, the conduct alleged to amount to provocation by the deceased was directed towards the sister of the accused but in the accused's presence. The court found that:

> *"[T]he mere fact that the provocation was not offered by the deceased to the accused but was offered to the deceased's wife and the accused's sister, does not prevent the operation of the principle that provocation will reduce murder to manslaughter provided that the provocation was offered in the presence of the accused, and provided all the other elements of provocation are present."*[16] (Emphasis added).

[51] *Terry* can easily be distinguished from the present appeal. The words said were not in his presence. The provisions of section 198 of the Penal Code are, therefore, not satisfied.

[14] (1837) 173 E.R. 452.
[15] [1964] VR 248.
[16] Ibid, 248.

[52] The second element is also problematic. Immediacy between the provocation and the resulting loss of self-control must be shown.

[53] The defence of provocation is reserved for those occasions when any ordinary community member, in the face of a particular act by an aggressor, temporarily and suddenly loses his self-control. I say this knowing that as the law stands, it is particularly problematic for defendants with battered wife syndrome as the vital element of a sudden and complete loss of self-control in response to a provocative act is hard, if not impossible, to establish for women who have killed after having been subjected to many years of violent and degrading abuse at the hands of a partner (see in this respect *Labiche v R*[17] where the court suggested that in cases involving an accused suffering from 'battered-wife syndrome,' a defence of self-defence might be more appropriate).

[54] In *Labiche,* the Court of Appeal approved the trial court's direction to the jury about provocation as follows:

> "*For the accused to successfully raise a defence of provocation, he/she must lead some evidence to show on a balance of probabilities that what was said or done to him or her by the deceased caused her to suddenly and temporarily lose her self-control and commit the act of killing."*[18]

[55] As to the two-pronged test, neither the subjective nor the objective limb of the test as to the loss of self-control by Mr. Underwood is proved. Mr. Underwood arrived at the scene armed with a knife and proceeded to attack the deceased without any evidence of provocation from the deceased at that time. The evidence concerning what immediately occurred before the stabbing is that Mr. Underwood pushed the deceased's brother, Dean, and that the deceased pushed him back and ran away when Mr. Underwood pulled out a knife. Mr. Underwood gave chase and stabbed the deceased to death. He did not lead any evidence to show that he lost his self-control after hearing that his girlfriend had been attacked or upon seeing injuries on her. There is also no evidence whether the injuries on Ms. Robert were sustained before

[17] (1(a) of 2004) (of 2004) [2006] SCCA 9 (28 November 2006).
[18] Ibid, paragraph 11.

he arrived or during the fight which ensued when Mr. Underwood arrived and in which she participated.

[56] Given all the above considerations, I cannot fault the learned trial judge's decision not to leave this issue for the jury. The defence was not available to the Mr. Underwood in the circumstances in which the stabbing took place. In this regard, the words of Lord Morris in *Palmer*[19] are apposite:

> *"It is always the duty of a judge to leave to the jury any issue (whether raised by the defence or not) which on the evidence in the case is an issue fit to be left to them."*[20]

[57] There was no evidence to support provocation, and it was not therefore an issue to be left to the jury. This ground, therefore, also fails.

Ground 5 - The defence of self-defence

[58] Mr. Juliette has submitted that the learned trial judge erred in his direction to the jury to consider the evidence of Steven Robert and Lizette Maria as irrelevant as this was proof that Mr. Underwood had been attacked and that that attack continued into the home of Steven Robert and the deceased. Further, the injuries as recorded in the medical report of Ms. Robert show that she suffered some injury, and the photographs and investigation diary show that Mr Underwood also had some injuries. This is compatible with Mr. Underwood's acting in self-defence. Further, there is some eyewitness evidence that the deceased held a piece of wood during the altercation with Ms. Robert.

[59] Mrs. Monthy has submitted that apart from the report of the minor injuries on both appellants, there is no evidence adduced to show whether they were sustained before, during or after the incident, especially as it took two hours to find Mr. Underwood after the incident. There was no evidence of an unjustified threat to himself. He arrived at the scene armed with a knife after the altercation with Ms. Robert had ended. Moreover, it was Mr Underwood who initiated the attack on the deceased.

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[19] (1971) 55 Cr. App. R. 223.
[20] Ibid, page 229.

[60] It must be noted that there is no evidence of what Mr. Underwood saw or heard upon arriving at the scene. If anything, the swearing and altercation had ended.

The law on self-defence

[61] The law on self-defence is not statutorily defined, but section 18 of the Penal Code provides that:

> *"Subject to any express provisions in this Code or any other law in operation in Seychelles, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law."*

[62] There is local jurisprudence on this issue, with the courts referring to English common law. In *Francis v R*,[21] the Court of Appeal decided to give guidance on the issue. It referred to:

> *"the classic pronouncement on the law of self-defence by the Privy Council in Palmer v R (1971) 55 Cr. App. R. 223, approved by the English Court of Appeal in R v McInnes (1971) 55 Cr. App. R. 551. From these authorities, the law on the matter may be paraphrased in these terms:*
>
> 1. *it is both good law and good sense that a person who is attacked may do whatever is reasonably necessary to defend himself;*
> 2. *however, everything will depend upon the particular facts and circumstances of the case;*
> 3. *if there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation;*
> 4. *if an attack is serious, so that it puts an accused in immediate peril, then immediate defensive action may be necessary;*
> 5. *if the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction;*
> 6. *if the attack is over and no sort of peril remains, then the use of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity;*
> 7. *of all these matters, the good sense of the jury will be the arbiter;*
> 8. *if there has been an attack so that the defence is reasonably necessary, it is recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action;*

[21] (SCA 7 of 1997) [1998] SCCA 46 (4 December 1998).

9. *if the jury thought that in a moment of unexpected anguish, the n a moment of unexpected anguish, the person attacked had only done what he honestly thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken;*
10. *if the prosecution have shown that what was done was not done in self-defence, then the issue is eliminated from the case;*
11. *if the jury consider that an accused acted in self-defence or if the jury are in doubt as to this, then they will acquit;*
12. *the defence of self-defence either succeeds so as to result in an acquittal or it is disapproved, in which case it is rejected as a defence;*
13. *in a homicide case, the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other issues will remain;*
14. *if in any case the view is possible that the intent necessary to constitute the crime of murder was lacking then the matter would be left to the jury; and*
15. *there is no rule of law that a person must wait until he is struck before striking in self-defence. If another strikes at him, he is entitled to get his blow in first if it is reasonably necessary so to do in self-defence…"*

[63] The above summary has been referred to in most cases before this court where self-defence has been invoked (see, among others, *Antat & Ors v R*,[22] *Jeffrey Francis v The Republic*[23], *Dodin v Republic*,[24]*Freminot v R*[25]. It continues to be the best guide on the law relating to self-defence.

[64] The case of *Swallen Jourdan Basset*[26] is almost entirely on all fours with the present case and involved the application of *Palmer*. In that case, this Court stated:

"10. …The deceased had every right to stand his ground and fight the accused. But the deceased retreated and ran away while the Appellant decided to run after him, up and down Harrison Street, until he stabbed the deceased. Also, the use of a knife and the manner it was used by the Appellant on the deceased in the circumstances of this case cannot be said to be the use of necessary and reasonable force. The Appellant in his Written submissions had argued that the learned Trial Judge failed to direct the Jury, that "it is for the prosecution to destroy the plea of self-defence and not for the accused to establish it". I do agree that it would have been preferable for the learned Trial Judge to have said so, but firmly believe

[22] [1995] SCCA 24 (13 June 1995).
[23] Criminal Appeal No. 7 of 1997.
[24] (SCA 6 of 2003) [2004] SCCA 7 (26 October 2004).
[25] (SCA 17 of 2012) [2015] SCCA 14 (17 April 2015).
[26] Supra, fn12.

that no prejudice had been caused to the Appellant as a result of the learned Trial Judge not making specific reference to it in his summing up, especially in view of the evidence in this case… However, the learned Trial Judge, in [his] summing up, an unlawful act, which is an essential element of murder and which the prosecution had to prove, had said, it was the duty of the prosecution to prove the unlawful act beyond a reasonable doubt and that a person acting in self-defence is not committing an unlawful act. In making this statement the learned Trial Judge had informed the Jury that the burden was on the prosecution to negative self-defence."[27]

[65] Applying the law as set out above, I now examine the direction of the learned trial judge to the jury in the present case. First, he stated that the prosecution had to prove that Mr. Underwood was not acting in self-defence and that Mr. Underwood did not have to prove anything. He gave a thorough exposé of the law on self-defence. He then summarised the testimonial evidence of all the prosecution witnesses who witnessed the assault on the deceased and addressed the defence evidence. He opined that there was no immediate attack or threat to Ms. Robert at the time.

[66] He stated that Mr. Underwood had exercised the right to remain silent and that no inference should be drawn from that fact. He then summarised the evidence of the two witnesses Mr. Underwood had called: Steven Robert and Lizette Maria.

[67] Steven Robert and Lizette Maria testified about incidents that had happened sometime in the night after the stabbing had taken place: a gang of people coming to Ms. Robert's house and throwing stones. Mr. Juliette has stated that the court should have directed the jury that this incident is consistent with the stabbing due to Mr. Underwood and Ms. Robert being attacked earlier.

[68] Considered against the provisions of the law as I have set out, I cannot in any way find fault with the learned trial judge's direction on this issue. It would seem that the defence of self-defence is illusory as no evidence exists to sustain it. In the instant case, there was evidence of the accused chasing the deceased, corroborated by the pathologist's report of defensive wounds on the deceased. Like the deceased in *Basset*, the deceased had every right to maintain his ground and defend himself, but he ran, and still, the accused pursued and

[27] Ibid, page 7.

stabbed him. The use of a knife is also not a reasonably proportionate response to being shoved. There was no proof that both the accused were ever in immediate danger. Instead, the first accused went to the crime scene armed with a knife. He cannot now claim self-defence. The trial judge, therefore, did not misdirect the jury, and this defence must fail.

[69] This appeal ground has no substance and is therefore dismissed.

[70] Mr. Underwood's appeal fails in its entirety. His conviction and, therefore also his sentence are upheld.

The appeal of Steffie Robert

[71] The Second Appellant, Ms. Robert, has appealed on two grounds, namely:

1. *The judge having explained the elements of the offence of aiding and abetting in paragraphs 46 and 94 of the summing up, the verdict was unsafe, unreasonable and not supported by the evidence making it a perverse verdict as it was entirely against the weight of the evidence in that there was no proof:*
   (i) that the Appellant had a specific intent to facilitate the commission of the crime by another
   (ii) that the Appellant had the intent of the underlying substantive offence (murder)
   (iii) that the Appellant participated or assisted in the commission of the substantive offence (murder)
   (iv)nothing allegedly said by the Appellant was directed directly or indirectly at Ryan, encouraging him or 'egging" him to commit any offence, let alone murder.
2. *Having set out the elements of the offence of aiding and abetting (participating) and specifically stating in paragraph 46 that the Appellant must have had knowledge of that person's criminal intent or criminal plans in the commission of the murder/killing, the learned judge erred by directing the jury to focus on "words" (bottom of paragraphs 104, last few lines in paragraph 106, paragraph 113 and finally last paragraph 194) leading to the perverse verdict.*

Grounds 1 and 2 –requirements to prove the offence of aiding and abetting.

[72] Learned Counsel for Mrs. Robert, Mr. Revera, has submitted that the learned trial judge's explanation of the elements of the offence of aiding and abetting led to an unsafe, unreasonable and unsupported verdict. Mr. Revera submits that in line with the case of

Charles and Parekh,[28] whilst knowledge of the precise crime ultimately committed is not required, at least the knowledge of the substantial type of crime to be committed is necessary to show intent. Moreover, he submits that there was no proof that Ms. Robert had a specific intent to facilitate the crime committed by Mr. Underwood. The fact that an eyewitness (Dean Mothé, the deceased's brother) stated that the knife used to stab the deceased was concealed on Mr. Underwood's body also indicates that Ms. Robert could not have known that the offence was to be committed. The summing up, therefore, was prejudicial to Ms. Robert.

[73] Mrs. Langsinglu for the Republic had submitted in response that guidance for the elements to be proved for the offence of aiding and abetting could be sought from the case of *Dugasse v R*[29] in which it was settled that the abettor:

> *"… should have had knowledge as to the essential elements of the type of offence committed although knowledge of the precise crime intended to be committed by the principal is not necessary."*

[74] With regard to intention in the present case, she submits that an inference can be drawn from Ms. Robert's actions around the material time of the offence, which determines her intention.

[75] First, I must point out that the case of *Charles & Parekh*[30] is only partly instructive as that case did not comprise a charge of aiding and abetting murder but rather one of counselling and procuring to commit the offence of murder. There are some important distinctions, as will become apparent in the discussions below.

[76] I set out the provisions of the Penal Code in relevant part about aiding and abetting:

> *"22. Principal offenders*
> *When an offence is committed, each of the following person is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with actually committing it, that is to say—*

[28] Supra, fn2.
[29] (2013) SLR 67.
[30] Supra, fn 24.

(a) every person who actually does the act or makes the omission which constitutes the offence;
(b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
(c) every person who aids or abets another person in committing the offence;
(d) any person who counsels or procures any other person to commit the offence.

Intent

[77] At the outset, it must be noted that Ms. Robert was charged with aiding and abetting in committing murder contrary to section 193 of the Penal Code read with section 22 (c) and punishable under section 194 thereunder. I say this because the Penal Code recognises two types of aiding and abetting: first, section 22 (b) considers every person "who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence" to be treated like the principal offender and secondly, section 22(c) deems every person "who aids and abets another person in committing the offence" also to be treated as the principal offender. From the wording of the two sections, section 22(b) focuses on the purpose of aiding, whereas section 22(c) focuses on the act of aiding and abetting.

[78] In this context, the elements of aiding and abetting set out in *Dugasse,*[31] refer to aiding and abetting as provided in the Misuse of Drugs Act; however, the provision is identical to aiding and abetting as set out in section 22(c) of the Penal Code

[79] The distinction between the two forms of aiding and abetting in the Penal Code is as follows: as long as there was the purpose to aid or abet, section 22 (b) does not require the offence to be aided or abetted by the conduct of a secondary party. There could be a conviction under this provision, even in cases where an attempt to render aid was ineffective or frustrated if the offence was nevertheless committed. In contrast, section 22 (c) requires the principal to have been aided in committing the crime but does not require the purpose to do so.[32]

[31] Supra, fn 29.
[32] See http://www.paclii.org/libraries/criminal/solomon/14.pdf.

[80] We ought, therefore, to focus on what was done by the abettor. Jurisprudence, however, has established that 'aids' means 'knowingly aids' (see *Beck*,[33] *Jervis v R*,[34] *R v Manedetea).*[35] In *Jervis*, the Queensland Court of Appeal suggested that 'aids' is a word which carries a mental element within itself. It is sufficient that the secondary party contemplates the kind of crime to be committed by the principal but is not necessary that he knows its precise details: *Ancuta v R* [1991].[36]

[81] Seychelles has followed this position. As has been pointed out Mrs. Langsinglu, in the case of *Dugasse,*[37] it was emphasised that "*knowledge of the precise crime intended to be committed … [was]not necessary".*

[82] However, where the crime the principal commits has a specific intent, the aider and abettor must know that she is aiding the other to act with that intent. In this regard, in *R v Jeffrey,*[38] it was held that a person convicted of murder (a crime of specific intent) under the provisions of aiding in the Criminal Code (Queensland) had to have known that the principal offender intended death or grievous bodily harm. By contrast, offences involving section 22(b) will always include its express mental requirement (a 'specific intent') in the form of the purpose of aiding the commission of the offence.[39]

[83] Hence, in the present case, a murder case and a crime of specific intent, it was incumbent on the prosecution to prove that Ms. Robert had the same intent as Mr. Underwood, that is, that she intended that death or grievous harm be inflicted on the deceased. We cannot infer from her silence at trial that she plotted the death of the deceased with Mr. Underwood as the law prohibits such inferences.[40]

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[33] (1989) 43 A Crim R 135.
[34] [1993] 1 Qd R 643[34].
[35] [2017] SBCA 19 at [22]).
[36] [1991]2 Qd R 413.
[37] Supra, fn 29.
[38] [2003] 2 Qd R 306.
[39] Ibid page 7.
[40] The right to remain silent is universally enshrined in domestic and international jurisprudence. In Seychelles, the right of the accused to remain silent is enshrined in Article 18(3) of the Constitution. The same constitution under Article 19(2)(h) also warns that no adverse inference should be drawn by the accused choosing their right to remain silent.

[84] In the instant case, the learned trial judge directed the jury on aiding and abetting as follows:

"47. For a successful prosecution, the provision of "aiding and abetting" marks must be considered alongside the crime itself, although a defendant can be found guilty of aiding and abetting an offence even if the principal is found not guilty of that crime itself. It is necessary to show that the defendant has wilfully associated himself with the crime being committed, that he does, through his own act or omission, as he would do if he wished for a criminal venture to succeed. Before you can in fact, convict [Miss Robert] of the offence of murder you must be sure that:

(a) [Mr. Underwood] committed the offence charged

(b) [Ms. Robert] helped assisted encouraged or incited [Mr. Underwood] to commit the offence

(c) [Ms. Robert] intended to aid or abet [Mr. Underwood]to commit the offence.

(Emphasis added - Page 946 of the transcript of proceedings)

[85] While the learned trial judge is correct in matching the first two requirements to the circumstances, stating that for the first element, Mr. Underwood committed the murder; for the second element, Ms. Robert helped, assisted, encouraged, or incited Mr. Underwood to commit the offence, he essentially misdirects the jury on the last requirement. It must be noted that the learned trial judge later adds:

"*[194] Mens rea, that is, the state of mind or mental element, is necessary in aiding and abetting. It is impossible to go in the mind of an accused; in that case [Ms. Robert] to find out what her intentions were. However, you can deduce that from her actions and words said before, during and after the commission of the offence. The elements of abetting are as follows:*

(i) that the accused had specific intent to facilitate the commission of the crime by another;

(ii) that the accused had the intent for the underlying substantive offence;

(iii) that the accused participated or assisted in the commission of the substantive offence;

(iv) that someone committed the underlying offence.

The underlying offence in this case is murder. So you will have to consider whether [Ms.Robert] helped, assisted, incited and encouraged [Mr. Underwood] in the commission

of the offence of murder. You will have to consider words allegedly said by [Ms. Robert] which included that she was going to call her boyfriend and Dean and Michaela saw her making a call and a while thereafter [Mr. Underwood] appeared with a knife. When she said she was going to call her boyfriend she also warned that the drama would end that day. After Hubert had been stabbed, she said "pa in bez li, in byen bez li." Was that what she meant when she said the drama would end that day, was the stabbing the outcome she wanted? The words she said are pertinent to establish her mental state at that time, and I'm sure will guide you to consider her intentions." (Emphasis added)

[86] The question I have to ask is whether this is sufficient to correct the direction on the mental element required for aiding and abetting. I am not of this view. It should have been clearly stated that Ms. Robert needed to have substantially the same intent as Mr. Underwood.

[87] However, section 344 of the Criminal Procedure Code provides that:

"no finding, sentence or order passed by a court of competent jurisdiction, shall be reversed or altered on appeal… on account …"
(c) of any misdirection in any charge to a jury,
Unless such error, omission, irregularity or misdirection has, in fact occasioned a failure of justice."

[88] In this regard, I must consider whether the failure to properly direct the jury on the law on the mental element to be proved in aiding and abetting was an irregularity of such a nature that it could not be cured by an appreciation of the verdict a jury would have returned if they had been properly directed. This merits consideration of the evidence.

[89] What is the evidence relating to whether Ms. Robert had knowledge of Mr. Underwood's criminal intent or criminal plans? Are there clues pointing to the fact that she must have been aware of the intended criminal act and willingly participated in its commission?

[90] Mrs. Langsinglu has submitted that after the altercation with the deceased, Michaela Elizabeth stated that Ms. Robert made a phone call and shouted, "The drama will end today,"

and that when her boyfriend arrived, she pointed to the deceased and stated that that was the person looking for trouble with her. Jean-Marc Larue also testified that after being pushed down by the deceased, Ms. Robert said she was going to call her 'husband'. He arrived only five minutes after she made a phone call. There is evidence that he lived nearby. After the stabbing happened, she uttered the words "la i bez li, e i been in bez li" (He got him, he got him good)". Mr. Underwood arrived at the scene with a knife, and she did nothing to stop the attack on the deceased. She also jumped on Richard Robert's back and pulled at him when he tried to help the deceased whom Mr Underwood was attacking. Jemina Boniface stated that Mrs. Robert also shouted, "Pa in kanmi" (Did he not get his comeuppance?). These acts and words, in Mrs. Langsinglu's submissions, clearly show the intent required for the crime with which she was charged.

[91] Mr. Revera has taken the opposite view. He submits that mere words do not infer criminal intent, and the lack of explanation or emphasis on the intent could have led to a misunderstanding of what constituted the offence. In addition, he submits that the fact that a phone call was made does not indicate who it was made to and what was said. He also submits that the weapon used was concealed and did not indicate that Ms. Robert knew that such a weapon would be used to inflict injury on the deceased. He submits that if there was a murderous intent or an intent to cause grievous bodily harm on the part of Mr. Underwood, the prosecution has not shown that Ms. Robert had the same intent.

Case law regarding words amounting to abetting

[92] In the Canadian case of *R. v. Ouellette*,[41] which involved a charge of aiding and abetting a manslaughter, the Court surveyed previous cases where words were found to amount to aiding and abetting and stated that:

"[139] Although abetting can be established both by actions or words, this appeal concerns abetting through the use of words alone. ...

[140] In R v Black, 1970 CanLII 1022, [1970] 4 CCC 251 (BC CA), Black and a number of people stood by watching, laughing and yelling while a victim was confined and assaulted by multiple others. Black and the other spectators were convicted of abetting the offences

[41] 2022 ABCA 40.

against the victim. On appeal, the British Columbia Court of Appeal accepted that the spectators' laughing and yelling constituted encouragement, and further, their presence at the scene prevented the escape of the victim.

[143] In R v Monkman, Tavares and Ponce, 2010 MBQB 72, upheld on appeal, cited as R v Ponce, 2012 MBCA 87, the trial judge accepted that a jury had found two defendants guilty of manslaughter as either aiders or abettors by relying on the words spoken by each. Neither defendant was involved in the physical act of killing the victim, but both had been in a vehicle with the principal shortly before and made statements to the effect of "we're going to fix him up" or "get it done and we'll fix you up". The trial judge accepted the jury must have considered those words as being words of encouragement to the principal offender to commit the offence.

"…[148] The general principle, if any, that may be gleaned from the above cases is that there is no threshold for what types of words might constitute abetting; it is the context and circumstances of the discussion that is most important. As such, the analysis will be highly fact specific."(Emphasis added)

[93] The words of Hawkins J in the Queensland case of *Coney*[42] in this context are also persuasive:

"In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal, or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words or gestures, or by his silence, or non-interference, or he may encourage intentionally by expressions, or gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power to do so, or at least to express his dissent, might under some circumstances, afford cogent evidence upon which a jury would be justified in

[42] (1882) 8 QBD 534.

finding that he willfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not."[43]

[94] In a similar vein, in *R v Johnson*; ex parte Attorney-General,[44] the Supreme Court of Queensland upheld a conviction of aiding and abetting murder on the basis that words said by the abettor and his presence at the scene aided and abetted the perpetrator.

Applying the law to the circumstances of the present case

[95] It is trite that the prosecution has the burden of proving criminal intent. As rightly pointed out by the learned trial judge, we cannot see into the mind of a person. Intent, therefore, can only be inferred by Ms. Robert's words and actions. This is a case where both the *mens rea* and *actus reus* of the offence can be established by words used. The intent for murder and its aiding and abetting would be that Ms. Robert had knowledge of the planned murder or at least grievous bodily harm, or knowledge accompanied by indifference as to whether death or grievous bodily harm would be caused by the intent to assist or encourage the commission of the crime. I asked at the hearing why when the kerfuffle was over, was there a need to phone one's boyfriend if not only to exact revenge or to teach the deceased a lesson. Was this not inciting, encouraging or abetting his grievous or fatal wounding by Mr. Underwood? It would also have been necessary for Ms. Robert to have known of Mr. Underwood's intent but to have been indifferent as to whether a fatal stabbing or grievous bodily harm be inflicted on him. If one calls one's boyfriend to give a hiding to someone, and does not intervene when the boyfriend pulls out a knife or even tries to stop someone trying to stop the fight, is that not indifference that death or grievous harm would be inflicted? They were inferences a jury properly directed could have drawn.

[96] The words uttered would have a direct bearing on Ms. Robert's state of mind in relation to the intent required for the crime of aiding and abetting. My learned sister Robinson posed the question about the context in which the words were used and Ms. Robert's actions at the time of the incident. These are important. Ms. Robert's actions - pointing out the deceased "to be dealt with," jumping on the back of Mr. Richard Robert to prevent him from separating

[43] Ibid, Paragraph 557.
[44] (Qld) [2007] QCA 76.

the perpetrator from the victim are all acts of encouragement. She instigated this attack and did nothing to stop it. Instead, she urged it on.

[97] I am, therefore of the view that this is a fit case for the application of the provisions of section 344 of the Criminal Procedure Code. I believe that there is evidence beyond reasonable doubt that a jury properly directed would have come to the same verdict as it did.

[98] In the circumstances, Ms. Robert's grounds of appeal are all dismissed. The conviction is upheld.

Decision and Orders:

[99] Both appeals are dismissed. The convictions and therefore, the mandatory life sentences of Ryan Underwood and Steffi Robert are affirmed.

Signed, dated and delivered at Ile du Port on 25 August 2023.

Dr. M. Twomey-Woods, JA.

I concur

F. Robinson JA

I concur

Dr. L. Tibatemwa-Ekirikubinza, JA