

IN THE COURT OF APPEAL OF SEYCHELLES

Reportable

[2023] SCCA 6 (26 April 2023)
SCA CR 10 & 13/2022
(Appeal from CR 100/2021)

In the matter between

Ken Wess Jean-Charles

(rep. by Mr. Olivier Chang-Leng)

Sindu Cliff Parekh

(rep. by Mr. Basil Hoareau)

1st Appellant

2nd Appellant

and

The Republic

(rep. by Mr. Georges Thachett and Ms. Corrine Rose)

Respondent

Neutral Citation: *Charles and Parekh v R* (SCA CR 10 & 13/2022) [2023] SCCA6 (Arising in CR 100/2021)
(26 April 2023)

Before: Fernando President, Robinson JA, Andre JA

Summary: Appeal against conviction for murder

Heard: 11 April 2023

Delivered: 26 April 2023

ORDER

Appeals of the 1st Appellant and 2nd Appellant are dismissed and their convictions affirmed.

JUDGMENT

FERNANDO, PRESIDENT

1. In this case the appeals have been lodged before the Court of Appeal first by Sindu Parekh (SCA CR 10/22) and thereafter by Ken Wess Jean-Charles (SCA CR 13/22). We have for purposes of convenience decided to refer to them as Ken Wess Jean-Charles as the 1st Appellant (hereinafter referred to as 1A) and Sindu Parekh as the 2nd Appellant (hereinafter referred to as 2A), in the way they were charged before the Trial Court, namely Ken Wess Jean-Charles as the 1st accused and Sindu Parekh as the 2nd accused and consolidate the two appeals. 1A had appealed against his conviction for the offence of murder and 2A against his conviction for counselling and procuring 1A to commit the said offence of murder.

2. The 1A was charged as follows:

“Count1

Statement of Offence

Murder, contrary to section 193 of the Penal Code and punishable under section 194 thereunder.

Particulars of Offence

Ken Wess Jean-Charles 42 years old self employed residing at Le Niole, Mahe on the 11th day of September 2021, at an abandoned property at Bougainville, Mahe, murdered one Berney Appasamy, 37 years old male of Kosovo, Roche Caiman.”

3. The 2A was charged as follows:

“Count 2

Statement of Offence

Counselling or procuring another to commit the offence of murder, contrary to section 193 of the Penal Code read with section 22(d) & section 24 and punishable under section 194 thereunder.

Particulars of Offence

Sindu Cliff Parekh 46 years old businessman residing at Eden Island, Mahe, on or around the 2nd week of September 2021, counselled or procured one Ken Wess Jean-Charles 42 years old self employed residing at Le Niole, Mahe, to murder one Berney Appasamy, 37 years old male of Kosovo, Roche Caiman.”

4. Count 3 against 2A which was in the alternative to count 2 had not been considered by the Jury in view of the Learned Trial Judge’s directions to them and therefore I have not mentioned it.
5. 1A had raised the following grounds of appeal:

- “(1) The reports and interviews publicized on national television by the Truth, Reconciliation and National Unity Commission (“TRNUC”) throughout the trial, wherein the Appellant was directly implicated as a perpetrator of past unlawful killings, were immensely prejudicial and affected the Appellant’s right to a fair and objective trial by the Jury.
- (2) The Learned Trial Judge’s summing up was bias, one-sided and overtly directed the Jury to a finding of guilt, thus depriving the Appellant of his right to a fair and objective trial.
- (3) The Learned Trial Judge failed to properly direct the Jury on the dangers of relying on the testimony of a former co-accused, namely Terry Marie.

- (4) The Learned Trial Judge failed to properly direct the Jury on the inconsistencies in the evidence of the accused turned state witness, Terry Marie.
- (5) The Learned Trial Judge exceeded his remit under section 265(2) of the Criminal Procedure Code, thus depriving the Appellant of the right to a fair trial.
- (6) The verdict reached by the Jury is unsafe, unreasonable and cannot be supported by the evidence.” (verbatim)

6. 2A had raised the following grounds of appeal:

- “(1) The two counts, containing the charges against the 2nd Appellant did not inform the 2nd Appellant sufficiently and in detail of the nature of the offences with which he had been charged, contrary to article 19(2) (b) of the Constitution.
- (2) The trial of the Appellant by Jury was contrary to article 125 and 19 of the Constitution in that –
 - (a) The Appellant was tried by Jury instead of by a Judge or Judges of the Supreme Court and
 - (b) The Appellant was not provided with a reasoned judgment or with the reasons for his conviction.
- (3) The verdict of Jury, convicting the 2nd Appellant, is unsafe and the decision is unreasonable and cannot be supported by evidence.
- (4) The learned Trial Judge did not properly direct the Jury in respect of section 24 of the Penal Code, in relation to the offence of counselling.
- (5) The learned Trial Judge did not properly direct the Jury on the evidence in relation to the offence of counselling or procuring another person to

commit the offence of murder, including highlighting the weaknesses in the prosecution case.

- (6) The learned Trial Judge erred in law in failing –
 - (i) to rule, after the conclusion of the prosecution case, that there was no evidence on which the 2nd Appellant could be convicted of the offences laid against him; and
 - (ii) to direct the Jury to return a verdict of not guilty in respect of the 2nd Appellant.
- (7) The learned Trial Judge erred in law in failing to strike a fair balance between the prosecution case and the Appellant’s case, in his summing up to the Jury.” (verbatim)

7. Both Appellants have prayed that their respective convictions be quashed and for their acquittal.

Facts of the Case:

8. I state that it is clear from the evidence, that the deceased, Berney Appasamy (hereinafter referred to as the deceased) was murdered on the 11th of September 2021. The evidence of the main prosecution witness Terry Marie (herein after referred to as TM) in relation to this has been corroborated by the death certificate that was produced without objection as **P 166**, the evidence of the mother of the deceased Mrs. Levina Dick (hereinafter referred to as Levina) who stated that the deceased did not return after he left home on the morning of the 11th of September and the medical evidence that confirms the death of the deceased at the date set out in the death certificate. 1A and 2A have not challenged that the deceased had been killed nor the date of death in the appeal before us. Both Appellants deny their involvement in the murder. 1A’s defence being that he did not murder the deceased and 2A’s defence being that he did not counsel or procure 1A to murder the deceased.

9. I have therefore decided to refer to the relevant evidence that has a bearing in determining the guilt of 1A and 2A. In doing so I have made comments and made observations in exercise of the powers of the Court of Appeal under rule 31(1) and (3) of the Seychelles Court of Appeal Rules, which provides that *“appeals to the Court shall be by way of re-hearing and that the Court may draw inferences of fact”*.

Evidence:

10. Helena Simms (hereinafter referred to as Helena), a Marine Biologist testifying before the Court had stated that she knew 2A for over 10 years and had been in a relationship with him on and off. She had said that the deceased, came to see her in August 2021. She had gone to the Plaisance Secondary School with him during the period 1997 to 2001. Thereafter she had met him almost after 20 years when he came to see her and asked her for some money, and she had given him RS 500. That was in August 2021. Shortly after that, the date of which she had said she cannot remember, the deceased had come to see her again with a hand written note and asked her to type and print it. She had refused to do so as she was busy and since she had not interacted with him and also because she did not have a printer in her office at that time. Thereafter she had seen the deceased again at Eden Island Plaza through her office window, but the deceased had not seen her or spoken to her. Helena had then gone on to say that after the deceased had come to her office she had come to know that he had been in Prison for quite a few years and she had sought advice on what she could do. She had been told that she would need his NIN, his full name and address. She had tried to get this information through colleagues, friends and 2A.

11. Under cross examination Helena had said that the deceased was not in the same class but of the same age group. She had said that when the deceased first came to her office she did not recognize him but was able to identify him from a reference letter from the Secondary School which had his full name. It was the deceased who had told her that he had been in prison and asked for assistance with some money. Helena had said that she had sought advice regarding the deceased from a Lawyer's chambers and from a CID officer. It was the Lawyer's chambers that had advised her to get his NIN, his full name and address. She had said the deceased had not done anything wrong against her or the law. 2A had told her that he will try and find the information she was seeking about the deceased. In answer to a question from the Jury, Helena had said that it was the deceased himself who had told her that he had been in prison and this had been confirmed later by her colleagues. The Jury had then asked a very pertinent question, namely "Why did you need to seek legal advice after finding this information out?" to which she had said: "I am a single mother and Sindu (2A) was getting ready to go on a charter...and I was seeking for information to know what else can I do." Earlier under cross examination Helena had said that at that time she had been living at La Misere and 2A was not living at La Misere but was mostly staying on his boat.

12. Ms. Levina Dick, (referred to as Levina) the mother of the deceased, testifying before the Court had said that on the 10th of September 2021 that a person whom she later identified as Terry Marrie (referred to as TM) had come to her house around 11.30 am looking for her son the deceased and she had told him that he would be back around 6 pm. TM had come back to her house again around 5.30 pm, looking for the deceased but he was not around. TM had said that there is work for the deceased to be done at Pointe Larue. She had then asked TM to leave his telephone number so that she could ask the deceased to call him when he came home and which TM did. When the deceased came

home that evening Levina had asked the deceased to contact TM and she was aware that the deceased contacted him. The following morning, i.e. on the 11th, TM had come again and the deceased had gone with him. According to Levina that was the last time, she saw her son.

13. Terry Jules Marie (referred to as TM), the main witness for the prosecution, had testified in Court after having received a Conditional Pardon from the Attorney General. Thus the Prosecution had treated him as an accomplice, although the evidence does not indicate that he was involved in the killing, save the fact that it was TM who had asked the deceased, to come for work on the 11th of September 2021 at the insistence of 1A and failed to reveal to anyone about what he knew of the killing until he was arrested by the Police. TM testifying before the Court had said that he came to know 1A when they were in the army, but were not friends. Later he came to know 1A since June 2021 as he used to work for him as a casual labourer at construction sites, helping out in fencing work and cleaning lands at various places in Mahe, being paid on a daily basis.

14. TM's evidence in this regard has been corroborated by 1A in his dock statement when he said "I have an experience in the force for 23 years and I have residing also experience for 3 years in construction and for the last past 3 years I have been in construction. In construction I will use anybody to do the construction work and I have also employees employed with me as worker and also casual workers. Like we all know there is Terry (TM) who has been mentioned in the case, I have known Terry when I was looking for workers at Anse Aux Pins and he started working with me around June." (extracts from 1A's dock statement, verbatim)

15. One day in August 2021, 1A had asked TM whether he knew the deceased. He had said he knew him as both of them had once been in prison and since the deceased was at Roche Caiman. 1A had then told him that the deceased was harassing one of his sisters at Eden Island.
16. This part of TM's evidence has been corroborated by 1A himself in his dock statement, namely when 1A said "I asked Terry (*TM*) whether he knew Berny (deceased) and Terry told me that Berney is his good friend. I told him no problem because we were looking for some information about him and he asked me what was it. I said there is one of my friend looking for the information because Berney was going to his girlfriend asking for money. Terry said no problem and things were done, we did not speak about it again and this was on the 8th". (extracts from 1A's dock statement, verbatim)
17. Thereafter on Friday the 10th of September 2021, 1A had asked TM whether he can go look for the deceased as he has some work for him and had brought TM to Roche Caiman to look for the deceased in his white coloured pickup. At Roche Caiman TM had met Allen Dufrene aka 'Mwemwe' (hereinafter referred to as AD) who had directed him to the house of the deceased. Reaching the deceased's house, the mother of the deceased had told him that he was not home and to come later. AD has corroborated what TM had said regarding him. Levina, had also corroborated that TM came looking for the deceased to her house on the morning of the 10th.
18. 1A in his dock statement has corroborated TM's evidence in relation to this when he said "The next day the 10th, ... I took Terry (*TM*) go to... La Louise to check the information. We went through La Louise, reach the view point so that we can see Eden Island we did not see Berney (*deceased*)... Terry told me that he knows a guy that Berney was working with by the name of

"Mwemwe" (AD) and I also knew "Mwemwe"... when we were passing on the bridge at Roche Caiman Terry saw him... Terry came out the vehicle and go towards "Mwemwe" to speak to "Mwemwe"...Terry moved away from "Mwemwe"... Then Terry came back not too long after, Terry got into the pick-up, he told me that he had seen the mother of Berney and he told me that he has told the mother of Berney that Berney will be working with us the next day and this was true because on the 10th, 2 persons was supposed to go to work at Philip Pierre's residence, there was Terry and Edward.” (extracts from 1A’s dock statement, verbatim)

19. TM had then gone back in 1A's pickup to Anse Royale where they were doing some work. At 5pm, 1A had brought TM back to Roche Caiman to look for the deceased. The deceased was still not home and therefore TM had given his phone number 2533924 to Levina, requesting the deceased to call him when he came home. The phone card was in the name of Will Nicette who had bought it. It was a 'Nokia' phone. At 6pm, 1A had called TM to find out whether he had seen the deceased. TM had told 1A that he was expecting a call from the deceased. At 8pm the deceased had called him and TM had told him as stated to him by 1A that there is some work to be done at Point Larue at one Philippe Pierre's place the next day (11th September) and that they would be paid Rs 1500. TM had told the deceased that they will come to pick him up at Roche Caiman at around 6.30 in the morning and to wait for them at the market place. Levina, had corroborated what TM had said regarding TM coming to her house in the evening looking for the deceased and leaving his telephone number behind asking the deceased to contact him.

20. 1A in his dock statement has corroborated TM's evidence in relation to this when he said: "So it is now the 11th, the night prior I phoned Terry(TM) and I asked Terry whether he has managed to get in touch with Berney (*deceased*) to

come to work the next day... Terry told me that he has not got in contact with him and I think that Terry had left his phone number for Berney to call him. At around 9pm Terry phoned me and she said boss I have already got in touch with Berney, I have informed him that he needs to wait for us at 6.30 near the market. I said okay; the next day I phoned Terry, I said Terry I will be coming by to collect them it was a Saturday.” (extracts from 1A’s dock statement, verbatim)

21. On Saturday the 11th of September 1A had picked TM at Anse Aux Pins and had come down to Roche Caiman. Not having seeing the deceased at Roche Caiman TM had gone looking for him. Later having found the deceased at his home, the deceased after picking up his cloth bag had gone with TM and got into the pickup of 1A who had been waiting for them near Air Tel. TM had got in front and the deceased at the back of the pickup. When TM had told 1A that the deceased needs his drugs, 1A had said that he will stop at Chetty Flats where the deceased can buy his drugs. At Chetty Flats 1A had given Rs 500 each to TM and the deceased. There they had bought their drugs and the deceased his syringe and got into the pickup of 1A. 1A had then told them that there is some work to check at Anse Royale. Levina, has corroborated TM about TM coming to her house on the 11th morning and the deceased her son leaving with TM.

22. 1A in his dock statement has corroborated TM’s evidence in relation to this when he said: “When I come down at around 6.30... I went and collected Terry (*TM*), I picked up Terry and come down to collect Berney (*deceased*)... Upon arriving a little close whereby Vijay dropped its workers I stopped near Terry and Berney, Berney embarked at the back and Terry got in front. On our way I asked Terry if everything is okay and Terry informed me that they need

some money so that they can remove their sickness we all know what it is, I said okay I will give you each 500 and after completing the work I will give you each 1,000 and I gave Terry 1,000... Upon arriving at Anse Aux Pins...I stopped at Chetty Flat, Terry disembarked and Berney disembarked they went to look for their drugs. At around 15 minutes later this is our routine, on that day they took 45 minutes and then they came back. Like Terry had mentioned in his evidence they needed to look for a syringe this is why I think they took longer.” (extracts from 1A’s dock statement, verbatim)

23. At Anse Royale 1A had taken a small road to go to Bougainville. They had then ended up in a land where there was an abandoned house which was connected to a small house. There was also a small shed or store outside. TM had said that he had been there before to clean the place for a contract undertaken by 1A. According to TM there was only one access road to the property and none other by foot or otherwise. On reaching the place all three of them had disembarked from the pickup and 1A had opened the front door facing the pickup, from inside, having gained entry to the house from a side door. The deceased had then said he is going to take his drugs, sat on the stairs of the house facing the sea and was fixing his drugs to inject himself. TM had told the deceased that he will also get his drugs from the pickup. When TM was leaving to go to the pickup he had seen 1A entering the house in black gloves and an iron crowbar in his hand. The deceased could not have seen 1A as he came from behind the deceased and the deceased at that time was using his drugs. When TM came back to the house he had seen 1A hitting the deceased on his back with the crowbar and the deceased had asked 1A why he was hitting him and not to kill him. TM through fear had run and hid himself inside a toilet and in the process his drugs had got lost. Later TM had gone to the pickup. After sometime TM had heard someone pulling the corrugated iron, but did not hear anything from the deceased. Thereafter, 1A had come

out and told TM “Hurry up get out of the pickup and help me to finish with this”. TM had said that fearing the same thing would happen to him he had gone to help 1A. On entering the house, he had seen blood everywhere and the deceased was on a red coloured corrugated iron sheet, facing downwards. TM had then held the iron sheet with 1A and dragged it until the small shed. 1A thereafter dragged the deceased by his feet behind the shed as it was difficult to take the iron sheet through the shed. 1A had asked TM to get back to the pickup saying he will take care of the rest. After about 10-15 minutes’ time, 1A had come to the pickup and taken the pick hoe and the spade and gone back. The handle of the pick hoe was made of steel. After about another 10-15 minutes’ 1A had come back and placed the pick hoe and spade at the back of the pickup from where he had taken it. TM had noticed that there was dirt on it. There had been a part of a bottle that was cut and 1A had filled it with water from a tap nearby and gone inside the house a few times back and forth. Thereafter 1A and TM had left the place around 11am and gone to Pointe Larue. While going to Point Larue, TM had asked 1A where the deceased was and 1A had said that the deceased is where he is supposed to be. 1A had also told him about another murder he had committed earlier and said that he was a dangerous person. 1A had also told him that he will have to go to Bougainville the next day as he had forgotten one item. 1A had thereafter dropped TM at Philippe’s place at Pointe Larue and gone away. 11th happened to be Phillippe’s birthday and Phillippe had asked TM to wait so that he could give him a piece of cake. Around 4 to 4.30 1A had come back with his wife and child and spent some time there and had given him his daily wages of Rs 500. Later 1A had dropped TM at Anse Aux Pins near Chetty flats and TM had gone home. Later in the evening Levina had called TM and asked where the deceased was and TM, as instructed earlier by 1A, had told her that the deceased had been paid and gone home.

24. On the morning of Sunday, the 12th of September 1A had come and picked up TM and gone to Bougainville to pick up a crow bar that he had forgotten the previous day. 1A having picked up the crow bar left Bougainville and went and dropped TM at Philippe's place at Anse Royale. After work TM had taken a bus and got back to his home at Anse Royale.
25. IA in his dock statement states that he went to Bougainville on Sunday the 12th but that was because TM had requested of him to take him there to collect a STC bag and a knife he had left at Bougainville.
26. On Monday the 13th of September Levina had called TM, while he was working at Philippe's place at Anse Royale and said that the deceased had not come home and that she was going to the police station to which TM agreed. At the time of the call 1A had been with TM and had told him to make sure that he does not tell anyone of what had happened. On Thursday the 16th September TM had received a call from the CID to come and make a statement about the disappearance of the deceased the next day. When TM received the call 1A had been next to him and he had told TM what to tell the CID, namely that the deceased had come to work at Phillip's place at Anse Royale and after the day's work he had been paid and had taken a bus and left. TM had on Friday the 17th of September given a statement to the police as instructed by 1A, on the same lines, as he feared for his life. On that day the CID had asked TM for the phone number of Philippe and since TM had said he did not know the number the CID Officer had given her phone number to TM to give it to Philippe and ask him to call her. TM had texted the number to 1A and asked him to give it to Philippe. 1A had constantly told him that he is a dangerous person and anyone looking for trouble with him, will get trouble and that he has a lot friends in higher places. Thereafter on the 21st of September the police had come to Au Cap

where he was working and arrested him. TM had been questioned again and he had as instructed by 1A said that the deceased had come to work with him on the 11th of September and left. Later TM had revealed the truth about the incident, how 1A had beaten the deceased and shown the place at Bougainville, where the deceased was beaten. After been on remand for some time TM had reflected on what happened, realized what happened was wrong and decided to tell the truth after consultation with his lawyer. Thereafter TM had decided to be a State Witness on a Conditional Pardon given by the Prosecution. TM had said that 1A had called him on two numbers and he had saved them on his phone as “Boss Ken 3”. In Court, TM had identified from photographs shown to him, the pickup, the abandoned house at Bougainville with all its details from inside and outside, the store, the shed and the toilet nearby, he had run into when he saw 1A hitting the deceased, where the pickup was parked at Bougainville, where the deceased was sitting when he was beaten by 1A, the place where the corrugated iron sheet was when he first saw the deceased lying on it motionless, the place where they dragged the corrugated iron sheet, where he saw the blood, the crowbar used by 1A to beat the deceased, the pick hoe and the spade, the various construction sites where he worked for 1A, and the plastic bottle which 1A used to carry water after dragging the deceased’s body. TM had identified on CCTV footages when the deceased, 1A and himself were on 1A’s pick going up on the road leading up to Bougainville which was about 200 meters from the abandoned house, where they were seated (1A on the driver’s seat, TM on the passenger seat in front and the deceased at the back of the pickup), what each of them were wearing and the crow bar, the pick hoe, and spade at the back of the pickup. According to the screen shot the date and time when TM, 1A and the deceased were going up on the road leading up to Bougainville was, 11th September 2021 at 08.45.17. The CCTV footage at 10.19.32 showed the pickup going in the direction to Pointe Larue with 1A and TM inside it, but there was no one at the back. At the back of the pickup there

was the pick hoe and spade. According to TM the deceased had already been beaten by this time. Other CCTV footages showed the time line of the many events on the morning of 11th September as testified by TM before they went to Bougainville, from 6.59 in the morning up to 8.47.17; which confirmed TM's testimony in Court, as spoken of by him, namely, 1A's pickup entering Kosovo at 6.59 in the morning of 11th September, at 7.00.0 TM going to be dropped at the deceased's house, at 7.53.57 1A's pickup moving out from Eden. TM had said that when he went to Bougainville on the 11th of September there were only the three of them, namely the deceased, 1A and himself. He had categorically denied that there were any Rasta or other people there or in the surrounding areas. TM had said that he had not gone to Bougainville after the 12th of September. TM had said that he had no idea as to what was going to happen to the deceased on the 11th and had he known, he would never have taken the deceased along with him. He had believed that they were going to work at Philippe's place at Anse Royale.

27. Under cross examination TM had said that he had been in prison from 2004 to 2010 for drugs and he had met the deceased while in prison and after leaving prison they were friends. He had admitted that he was a heroin addict prior to his arrest. TM had said that he had taken the Police to the property at Bougainville but did not show where the body was as he did not know where it was. Counsel for the 1A had then sought to mark contradictions and omissions from previous statements made by TM which in my view could not have been marked, as TM had not denied making those statements and further they are not material in anyway. In fact, he had said that at the time the statements were made he was afraid of 1A and confused due to withdrawal systems of having being a drug addict earlier. Some of the contradictions marked in fact corroborate the evidence of TM and implicates 1A in the murder by making reference to the following: "Then Ken (1A) came to the pickup truck and

removed a black glove at the back of the seat and put it in his hand; I saw Ken (1A) walking slowly with the crowbar in his hand and I just heard Berney's voice screaming; Then I heard corrugated iron being pulled on the ground; then I saw ken coming out without the crowbar and Ken asked me to come and help him. I was scared so I went to help him to pull the iron sheet where there was a hole already dug. He pulled Berney by the feet and threw him in the hole." In explaining the last statement TM had said that by the time he made that statement he knew that Berney (deceased) was found buried. Counsel for the 1A had then got TM to confirm all what he had said in his examination in chief in relation to contacting the deceased, getting him to come and work on 11th September and what happened up to the time they went to Bougainville. TM had however denied that it was him who had suggested to 1A that the deceased should come and work with him, that it was him who suggested to 1A that they go to Bougainville to collect some pipes. TM had denied the suggestions by Counsel for the defence that on reaching the abandoned house at Bougainville he and the deceased got out of the pickup and went behind the house where there were two other men and when he returned the deceased was not with him and on being questioned he had told 1A that the deceased would come later. Thereafter Counsel for the 1A had suggested to TM that what he said in his examination in chief regarding the deceased being hit on the back of his head with a crowbar by 1A, that TM had run away on seeing this and later found the deceased lying on a corrugated iron sheet was a fabrication, which TM had denied. Counsel for 1A, had also suggested to TM that his evidence pertaining to identification of the crowbar, pick hoe and spade was not true. Counsel for 1A, had then in order to challenge TM's credibility taken pains to question TM about an earlier case in which TM had been convicted and sentenced in relation to a case of possession of drugs, and suggested to him that he tried to blame someone else for the offence, just like in this case, which in my view is not of much significance.

28. Finally, it had been suggested to TM, that it was he along with the other two persons who had killed the deceased which TM had vehemently denied. It is to be noted that if TM was the killer or was aware of 1A's sinister plan to kill the deceased, would he have boldly gone to the house of the deceased on the 10th of September, identified himself as Terry, and asked the mother of the deceased Levina, as to the whereabouts of the deceased and left a message with her to the effect that the deceased was needed to do some casual work the next day, namely on the 11th of September. TM had also left his telephone number with Levina and had requested her to ask the deceased, her son, to call him when he comes home. TM had turned up at the deceased's house on the 11th morning to pick up the deceased. Levina had testified in Court to this effect, corroborating what TM had said. Allen Dufrene (referred to as AD), aka 'Mwemwe', who knew both the deceased and TM as they were his students, testifying before the Court had corroborated the evidence of TM and said that on the 10th of September TM came looking for the deceased. It is he who had directed TM to the house of the deceased. AD had said that even on the 11th he met TM who was looking for the deceased. What is to be noted is that while TM was sent to look for the deceased 1A had remained hidden in the background. It had also been suggested to TM that his testimony cannot be believed as he had not come out with it when he first made his statement to the police. Counsel for 1A has not suggested any motive for TM to have lured the deceased to Bougainville to kill him with two unknown men after persuading 1A to take him and the deceased to Bougainville as claimed.

29. The evidence of TM in relation to 1A asking him to find the whereabouts of the deceased and taking TM to look for the deceased on the 10th of September, the call made by 1A to TM asking whether he had seen the deceased in the evening of 10th September, and the evidence of TM pertaining to the arrangements made

by 1A to pick up the deceased on the morning of the 11th of September has been corroborated by 1A when he made the dock statement. In answer to a question from the Jury TM had said that 1A did not tell him the name of the sister that the deceased had been harassing.

30. Karyn Pouponneau (hereinafter referred to as Karyn), was a witness called by the Prosecution who works for the Financial Crimes Investigation Unit of the Seychelles Police, and experienced in analysis of calls from mobile phones from records of data obtained from service providers and finding patterns and links and drafting up charts in Microsoft Excel. Testifying before the Court she had stated she had worked on the mobile phone numbers of certain persons that had been provided to her to establish the link between the callers and ascertaining who was calling who, and on what days and at what times. KP had then established a chart, like a timeline of the call records, giving the dates and times of the calls made, during the period 8th September to the 21st September 2021 in respect of the following mobile phone numbers. She had also been informed in whose names the said mobile phones had been registered. Cable & Wireless (C&W) phone number 2519404 had been registered on Ms. Helena Simms (Helena). C&W phone number 2515736 was registered on Elegant Yeganyotin c/o the 2nd Appellant (2A) and was used by the 2nd Appellant. Airtel phone number 2832200 was registered on the 1st Appellant (1A) and the C&W phone number 2533125 registered on Shirley Jean Charles, was also used by 1A. C&W phone number 2533924 was registered on one Willis Nicette but was used by Terry Marie, (TM). Based on her findings, she had then drafted her report, which had been marked **as P 156**. KP has gone on to state that based on the analysis performed on the above mentioned phone numbers it was found that most interactions were between 1A and 2A's phone numbers, that 2A was mainly in contact with 1A's Airtel number and that a majority of calls exchanged between them began on the 8th of September 2021.

31. During the period 8th to 21st September, 1A from his Airtel mobile phone number 2832200, had contacted TM on TM's C&W mobile number 2533924, 21 times and TM had contacted 1A, 3 times on that number. TM had contacted 1A, on 1A's other number, namely his C&W mobile number 2533125, 4 times and 1A had, from the said number contacted TM, 18 times. 1A from his 2533125 number had contacted 2A once, but from his Airtel number 2832200, 9 times. 2A had contacted 1A on his Airtel number 2832200, 7 times. 2A had contacted Helena Simms 7 times and Helena Simms had contacted 2A 4 times.
32. KP had then detailed out the calls on a day to day basis from the 8th of September to the 21st September.

On the 8th September, there have been 6 telephone calls between 1A and 2A between the hours 07.15 am to 05.56 pm. 4 of the calls had been by 2A to 1A (7.15am; 10.31am; 02.31pm; and 16.10). 1A had called 2A twice using his C&W (01.22pm) and Airtel (03.31pm) mobiles. On the 8th morning, 2A had called (08.30am) **Helena** and there had also been a call from **Helena** to 2A (08.46am).

On the 9th of September, at 10.02am, 1A had called 2A and within a matter of 14 minutes (10.16am) 2A had called 1A. At 10.28am 2A had called **Helena** and soon thereafter 1A had called 2A. After the call with 2A, 1A had called TM at 10.34am. Soon thereafter 1A had called 2A at 10.35am. 2A had then called **Helena** at 10.37am. Thus within a matter of 33 minutes there had been an exchange of 7 calls between 1A, 2A and **Helena**. At 04.29pm 1A had called **TM**.

On the 10th of September, **1A** had called **TM** at 07.08, 08.27 and 09.36am. After the call to **TM**, **1A** had called **2A** at 09.46am and at 10.00am **2A** had called **Helena**. **1A** had called **TM** at 05.33pm and 05.57pm. **TM** had called **1A** at 08.40pm.

On the 11th of September, **1A** had called **TM** at 06.35, 06.45, 07.23, and 07.35am. At 07.49am **TM** had called **1A**. **1A** had called **2A** at 11.51, 11.52 am and 07.30pm. At 08.20pm **TM** had called **1A**. The call log showed that the duration of the call from **1A** to **2A** at 11.51 was 03 seconds and the duration of the call at 11.52 was 29 seconds.

On the 12th of September, **1A** had called **TM** at 06.49, 07.00am and 02.57 pm.

On the 13th of September, **1A** had called **TM** at 08.38am. **2A** had called **1A** at 09.02am. **1A** had called **2A** at 10.03 and 10.13 am. There had also been an exchange of 3 calls between the mobiles of **1A** and **Helena** between the hours 09.45 to 04.21pm.

On the 14th of September, **1A** had called **TM** 3 times at 08.35, 10.26 and 12.58.

On the 15th of September, **2A** had called **Helena** at 08.02am. At 08.52am and 12.51pm **1A** had called **TM**.

On the 16th of September, **1A** had called **TM** at 07.52am.

On the 17th of September, **1A** had called had called **TM** at 07.44, 11.28am and 12.01pm.

On the 18th of September, **1A** had called **TM** at 12.38 and 16.17pm.

On the 19th of September, there had been an exchange of calls between **1A** and **TM** at 04.05 and 04.08pm.

On the 20th of September, there had been an exchange of calls between **1A** and **TM** at 08.00, 08.12am, and 06.03 and 06.06pm.

On the 21st of September, there had been an exchange of calls between **1A** and **TM** at 08.13, 10.15 and 10.17am.

33. It is clear from the cross-examination on behalf of both appellants there was no challenge to the telephone numbers allegedly used by 1A, 2A and TM and the dates and times of the calls. Under cross-examination KP had said that she was instructed by the CID only to look into the period 8th to 21st September. She had said that she does not know the relationship between the callers nor the reasons for the calls. KP had said that the timeline does not indicate whether it was a call or a text message nor the duration of the call. She had said that 2A was not in direct contact with TM but the calls indicated, that it was 1A who was the 3rd party between 2A and TM and that 2A would contact 1A and then 1A would contact TM.

34. In the case of **Saidi Banda and the People SCZ Appeal No 144 Of 2015** the Supreme Court of Zambia upheld a conviction of murder where call logs extracted from telephones of the accused and the deceased was part of the circumstantial evidence led in that case. In that case the evidence of a subscriber information analyst, was very much akin to the evidence of Karyn in this case showing how many calls had been made between the deceased and the accused during the relevant period.

35. In the Sri Lankan case of **AG V Potta Naufer and Others (2007) 2 SLR 144**, one of the main items of evidence, that led to the conviction of the accused at the Trial-At-Bar, that was upheld by a five Judge bench of the Supreme Court was a record of telephone calls amongst the accused. The numerous phone calls from phones possessed by the accused, proved by way of mobile phone records, showing the interlinking communication between them at a time relevant to the commission of the offence, was considered as crucial evidence against the accused.
36. In the case of **The State V Victor Elia (CC 18/2018) [2021] NAHCMD 148 (31 March 2021)** the High Court of Namibia, text messages sent and calls made between the accused and deceased was part of the circumstantial evidence that was used to convict the accused of unlawful and intentional killing. The phone recovered from the accused had been plugged into the universal extraction device and data extracted.
37. Dr. Luis Perdomo Rodriguez testifying before the Court in relation to the post-mortem examination of the deceased had said that death was due to mechanical asphyxia and severe cranial and cervical trauma. The 4th and 5th cervical bones were fractured which could have been as a result of the sudden turning of the head. He also said the trauma from a heavy object was apparent on the head, neck, temporal and left parietal region. This was corroborative of the evidence of TM.
38. At the close of the prosecution case 1A had made a dock statement. I have decided to repeat verbatim, as found on the record of proceedings (with its many typos and grammatical mistakes), that part of his statement in relation to events that took place from early September up to the 13th of September 2021,

since it is the version of 1A as to what happened in this case. That part of his statement in relation to events that took place after the 13th of September, I have decided to omit as it has no relevance whatsoever to the determination of this case and both the prosecution and defence have not placed any reliance on it. 1A in his dock statement has stated as follows:

39. “Thank you my Lord, to give me the opportunity to address the Court. My name is Ken Jean Charles at Le Niole. I am 43 years old. I have an experience in the force for 23 years and I have also experience for 3 years in construction and for the last past 3 years I have been in construction. In construction I will use anybody to do the construction work and I have also employees employed with me as worker and also casual workers. Like we all know there is Terry (TM) who has been mentioned in the case, I have known Terry when I was looking for workers at Anse Aux Pins and he started working with me around June and I have known Sindu for a long time even when I was in the force I knew him. For us to go on the incident like mentioned early September I met with Sindu Parekh at Eden Island, he asked me whether I knew a Berney Appasamy (deceased). I said no, I was in a hurry and he was also in a hurry and we left each other. This happened early September not in August like I have heard. On the 8th of September, Sindu phoned me; I was going to Anse Royale to bring the workers we were working at Mingles Anse Royale and I said to Sindu that after dropping the workers I will pass by to see him for me to clearly make you understand it was on the 8th. After coming from Anse Royale I went to see Sindu, I parked my transport and went to speak to Sindu. Sindu asked me again whether I know Berney Appasamy and I said no and he told me he had information he is searching, the only person he knew since I was in the force and Sindu told me that he is looking for his identity and where he lived to give the authority. I told Sindu no problem and after leaving Sindhu

I asked him to message me the name and Sindu messaged me the name and I left him and I told him not to worry. I went to look for my document at STC and went to Anse Royale at Mingle. Upon arriving at Anse Royale Terry was working with me and Sindu had already informed me that Berney was out of prison, I asked Terry whether he knew Berny and Terry told me that Berney is his good friend. I told him no problem because we were looking for some information about him and he asked me what was it. I said there is one of my friend looking for the information because Berney was going to his girlfriend asking for money. Terry said no problem and things were done, we did not speak about it again and this was on the 8th. We continued with our work on the 9th September, I came out to take the workers to go to Anse Royale, upon arriving at Anse Royale to work Sindhu phoned me again if I could recall and asked me not to forget and I was speaking to Terry and it was then at Mingle like it was at Mrs. Green this is totally false it was at Mingle we were working. It was then that I was talking to Terry and he told me that he knew where Berney was working, he told me that Berney was working at La Louise because we have a site at La Louise where we were working, he said that over there they talked. I said no problem and Terry asked me if we want we can go and see if we can locate him, I told him that the next day after dropping the workers we will go because we were already on site. The next day the 10th, I took the workers to go to Anse Royale but I passed through Anse Aux Pins to collect Terry, this was our daily routine. Go to Anse Royale, drop the workers are Mingle where they were working, I took Terry go to town, there were timber for us to collect, we did not go to town but we went at La Louise to check the information. We went through La Louise, reach the view point so that we can see Eden Island we did not see Berney. We came down and he told me to go to Plaisance we did not see Berney and Terry told me that he

knows a guy that Berney was working with by the name of "Mwemwe" and I also knew "Mwemwe", he told me that "Mwemwe" used to sit at the Casuarina trees at Roche Caiman. He insisted that we went, we went; when we were passing on the bridge at Roche Caiman Terry saw him sitting under a Casuarina tree, we entered Kosovo, I made a round and turn the vehicle to go towards town, Terry came out the vehicle and go towards "Mwemwe" to speak to "Mwemwe". What he said to "Mwemwe" I do not know, Terry moved away from "Mwemwe" and he saw him going through the mirror and I lost him. Then Terry came back not too long after, Terry got into the pick-up, he told me that he had seen the mother of Berney and he told me that he has told the mother of Berney that Berney will be working with us the next day and this was true because of the 10th, 2 persons was supposed to go to work at Philip Pierre's residence, there was Terry and Edward. They were going to work at Philip Pierre to cut timber because we needed 2 person and on the 10th, Terry informed me that he is going to look for Berney and it will be Berney who will be going with him and the condition that was set way before when we will be cutting the timber we will be giving SR 3,000 each shared SR 1,500 and we went back to Berney's mother we are speaking about the 10th and this is what Terry told to the mother of Berney that we will be working the next day, this was the arrangement. Terry said all is okay, I took my phone and phoned Sindu, I asked him where he was, he said that he is at Eden Island I went to Eden Island, upon arriving at Eden Island I met with Sindu, Terry was with me, he sat in the truck and I went to speak to Sindu and I said everything is okay we will get the information we were looking for because Terry and Berney are good friends and Berney is coming to work with me. Sindu said ok, we went to STC collect the timber and went to Anse Royale at Mingles. On Friday in the afternoon I went to Mrs. Green since we have a

contract for me to fence her property, I made the inspection, we made a condition for me to come to work on the 13th it was Monday. In the afternoon I went to Mingles, collect the workers and go down. On our way Terry said boss do not drop me at Anse Aux Pins, he will drop at Roche Caiman to go to his mother in law and he will check if he sees Berney. I said okay, we come down and I dropped him at Roche Caiman. I went directly to Le Nirole, all my workers live at Le Nirole so I dropped the workers at Le Nirole, only Terry was the one living at Anse Aux Pins. Some workers reside where I live and some of them lives higher up at Le Nirole. So it is now the 11th, the night prior I phoned Terry and I asked Terry whether he has managed to get in touch with Berney to come to work the next day, if Berney did not make it I would have asked Edward to come to work with him, Terry told me that he has not got in contact with him and I think that Terry had left his phone number for Berney to call him. At around 9pm Terry phoned me and she said boss I have already got in touch with Berney, I have informed him that he needs to wait for us at 6.30 near the market. I said okay; the next day I phoned Terry, I said Terry I will be coming by to collect them it was a Saturday. When I come down at around 6.30 I passed by I did not see anybody at the Bazaar, but since Berney was waiting for us and I do not know him I went and collected Terry, I picked up Terry and come down to collect Berney. On our way down Terry looked at the market side he saw Berney, he said boss there is Berney, since we were going to buy oil at Mont Fleuri, I asked Terry whether we will collect Berney now or we will go to Mont Fleuri and then come by to collect him. Terry told me to pick him up and this is when I rolled inside of the Kosovo to come out and he said no boss let us pick him up when we come back. I went down to go to Mont Fleuri, upon reaching the bridge Terry said no boss let me get down go and get him and when you come back from Mont Fleuri you will pick up

both of us. I went to Mont Fleuri, took the oil, come back, upon reaching the bridge I phoned Terry, Terry told me he has not seen Berney, I went through Eden Island and parked my truck next to the Security Gate. I was on the phone Terry was trying to phone me, I think maybe he has seen Berney and he was trying to tell me but he did not get through to me. After cutting the call I called Terry and he said he is walking towards Airtel, I removed the transport and tell him I am on my way and I moved out of where I parked and go towards them. Upon arriving a little close whereby Vijay dropped its workers I stopped near Terry and Berney, Berney embarked at the back and Terry got in front.”

40. Comment by me: According to 1A all that he wanted was some information about the deceased, his identity and probably his whereabouts. If that be the case why did 1A with TM go to such extents in looking for the deceased at Eden Island, at Plaisance, at Kosovo and going to meet Mwemwe and getting TM to ask the deceased to come and work for him, and ensuring that he came on the 11th of September, when he could have got the information he wanted from TM, who had claimed to be a good friend of the deceased. By the 11th of September TM knew where the deceased lived and had passed that information to 1A. The question also arises why 1A took the deceased, whom he did not know and who had not worked for him before, to work on the 11th of September, instead of Edward, whom he knew and as originally decided.

41. “On our way I asked Terry if everything is okay and Terry informed me that they need some money so that they can remove their sickness we all know what it is, I said okay I will give you each 500 and after completing the work I will give you each 1,000 and I gave Terry 1,000. I asked Terry whether if he will go to Plaisance or Corgat because it was closer and he said no he will get a better deal at Anse Aux Pins because it is his friend. We went through Pointe

Larue, leave Philip's residence and go to Anse Aux Pins. Upon arriving at Anse Aux Pins I went through Chetty Flat, this is a routine every day because I have some workers who is on drugs and we use to go to Chetty Flat and I stopped at Chetty Flat, Terry disembarked and Berney disembarked they went to look for their drugs. At around 15 minutes later this is our routine, on that day they took 45 minutes and then they came back. Like Terry had mentioned in his evidence they needed to look for a syringe this is why I think they took longer."

42. Comment by me: It is surprising that 1A, a contractor, was prepared to take his workers to get their drugs and wait for 45 minutes until they got it. This creates a serious doubt as to whether 1A wanted the deceased to be drugged.

43. "When Terry got into the truck, Terry said boss there is the pipes at Bougainville and we will it at Pointe Larue to water the plants that we were preparing, I said Terry no problem we went to Bougainville. Upon arriving at Au Cap Terry asked me to stop, this is a routine we used to stop there he went to look for his cigarette together with Berney. We went on our way to Bougainville. When we reached Bougainville we go up the road, this is very important to listen carefully, we took the road to go up there were 3 individuals in the pick-up. Myself as the driver, Terry in the passenger seat and Berney in the cargo I have no doubt that this is true. We go up to Bougainville and I parked the vehicle where I used to park. After I parked the vehicle, I was on the phone and Terry disembarked from the pick-up I was still in the pick-up, Terry told Berney jump and Berney jumped and went to get the pipes. During on that time I was on the phone and I after cutting the call I know where the pipes where, I come out the pick-up I go round the house I saw Berney and Terry near the shed and then there were 2

other individuals, a rasta in a yellow shirt and another person in a black shirt they were next to the shed but a little bit further way up. I called Terry, Terry what is going on you do not pick up the pipes what are those people doing here and Terry said no boss those people we have made a small arrangement and they phoned me and they needed some pipe, the only chance they got since he was there and now he will be helping those guys to bring the pipes. We got into an argument and then they left, they went through the bushes.

I went to pick up to get my phone because after calling the 1st call I left my telephone in the pick up, I went to the pick-up to get my phone so that I would call Terry but Terry his mobile phone was left on the seat near his bag. I said okay I will wait for Terry, I had a quotation in my pick-up who had just been drafted and I was looking at the quotation, everything that I am saying since the 19th October is in my statement remember well since the 19th of October. Terry came back after 1 hour 15 minutes, we had a lot of trouble on that day because during those times I was waiting I think I was on the phone if I am not mistaken and then I said Terry let us go we need to go to Philip. So we came down, but before that Terry when he came back he came back alone Berney did not come with him. I asked him where Berney, he said Berney is staying with those guys and he will later come to Pointe Larue because they will waste too much time so then we came down me and Terry and the camera also is true, Terry and myself came down and Berney has remained up there.”

44. Comment by me: It is also surprising that 1A having changed course and gone to Bougainville at the request of his worker TM only to get the pipes to water the plants they were preparing at Philippe’s place at Pointe Larue, had got back to Pointe Larue minus the pipes and the deceased who 1A had with much

difficulty contacted to come and work for him at Pointe Larue. It is also surprising that 1A had patiently waited for 1.15 hours at Bougainville for TM and the deceased to return when there was work to be done at Philippe's place at Pointe Larue. He had also tried to come up with the excuse of going through a quotation that had been drafted to explain why he waited for 1.15 hours for his workers to merely carry the pipes to the pickup. 1A, in my view had to come up with an explanation to fall in line with the CCTV footage which indicated a period of 1 ½ hours between going up on the road leading to Bougainville and thereafter going in the direction of Pointe Larue. It is important to note that 1A does not state anything to the effect from which one could conclude that it was TM who killed the deceased that day. All that he says is that when he last saw the deceased, he was with TM next to the shed and there were two other persons also next to the shed but a little bit further way up. There was nothing to indicate that there was any problem with the deceased and TM and in fact when 1A came, TM had an argument with 1A and the two other persons had gone away. 1A does not state that he heard any cries or commotion thereafter until TM came and joined him in the pick-up. According to 1A, TM simply came to the pick-up and said that the deceased will join them thereafter. There was nothing to indicate that TM had come after killing the deceased.

45. "And for information during those time Berney was still alive, I came down, I went, just before I continue, in my pick-up based on the comments I need to clarify, Terry said when he got into my pick-up he said that he saw a pike, a spade and a crowbar, all of this is a lie. In my pick up like you have seen on camera there was a ladder, there was gunny bag with piece of concrete, white gunny bag, there was a hammer 14 pounds, 2 hammer 4 pounds, there was one

steel bar taller than I, one taller than I and one shorter, a spade, like I see this spade present in Court this is wrong. My spade in black, in front is round and at the handle is also round like the one showed on the picture. There is a red box to which they have not been able to identify containing grease, there was also a plastic back containing rubbish that we had picked at Mingle the day before and we went down. Now I have clarified what we had in my pick-up now and then we go to Pointe Larue at Philip's residence. When we get down Terry said he will be going to Chetty Flat, he went to Chetty Flat I wait for him and then he came back, we come from Chetty Flat and then we went to Pointe Larue. Since it was later around 11 Terry got down at the bus stop he said we will meet later I said okay I go down. I went to Le Niole Christian one of my workers was waiting for me, I picked him and I took him to Quincy on my site, tools were on the site he usually keeps them on the site, I dropped Christian over there. It is true that all my tools are kept on the site, it is not true that the tools found over there was in my pick-up and the tools were it was on the ground when they took the pictures was not supposed to be there. It was supposed to be in the corner next to the wall where the blue barrel was and then after I left. I went to Le Niole, there was a gate I was welding I did what I had to do. 4.30 I took my wife and my kids we were going to Philip because it was his birthday. I go down next to Barclays Bank near the Indian Bank I buy a cake for Philip I went to Pointe Larue. Upon arriving at Pointe Larue it was 15 minutes to 5, I went to Philip I asked Philip how are you, how did my workers do, he said everything is okay your workers have worked well they have cut the timber. Something I want put out, Berney Appasamy was still alive because he came to Philip, I went there drink a few Whisky with Philip and Philip told me that he gave them SR 3,000 I said Philip you should have given them SR 2,000 because earlier I have already given SR 1,000 and Philip said that Terry took the money and go, we drank a few alcohol; at around 6 I left Philip's residence and I go down to pick up Christian to

whom I took earlier at Quincy, I picked up Christian and went to Le Nirole, I did not get in touch with Terry, at Le Nirole 8pm Terry phoned me. He said boss, I said yes and he told me that Berney's had phoned him and I asked him why, I asked him after finishing your work where did Berney go? He said I went to the bus stop that goes to Anse Aux Pins and Berney took the bus stop going towards town. Berney was still alive, I said Terry okay, on the 12th Sunday I usually get up to go and buy meat, before I left I phoned Terry. They were supposed to go to Pointe Larue to work, Terry said okay boss but there is a small thing, I need to inform you, I said Terry okay, Terry said boss can we go shortly to Bougainville? I said Terry what are we going to do at Bougainville he said there is his bag and a knife he left at Bougainville, I asked Terry you did not go Bougainville last night how come you left your things there? Terry told me boss yesterday after coming out from Philips' residence me and Berney needed to go and get our money from the guy up there to which we gave the pipes earlier. I said Terry no problem, I go up and picked up Terry at Anse Aux Pins again, we to go Bougainville, I parked where I usually parked and Terry get out the pick-up I also get down, I was on my phone, Terry come with a blue bag just like the cloth bag sold at STC with a knife he put it in the cargo.”

46. Comment by me: It is strange that 1A at the request of TM had gone to Bougainville on the 12th of September merely to collect TM's STC bag and a knife. This is different to TM's version that 1A had come and picked him up and gone to Bougainville to pick up a crow bar that he had forgotten the previous day.

47. “We come down, I asked Terry is coming to work, he said no Berney has other work he is going to handle. I come down for me to put him at Philip's residence Pointe Laure, Terry said not drop him at Anse Aux Pins he will

come later I said Terry no problem ensure that you go. I come down and go to Le Niole I did whatever I had to do, Philip phoned me because I was supposed to go to his resident again, I asked Philip whether Terry had come and Philip said no Terry did not come and it is true Terry did not come. Philip phoned me several times later, I called Terry I asked him why he did not go to Philip, was he going he said that he needed to go to his mother in law at Kosovo that is why he did not get enough time to go to Philip. I said Terry Okay. I carried on I was supposed to go to Philip but I also did not manage to go to Philip, on Sunday nobody went to Philip, neither Terry neither I that was on the 12th. On the 13th we had a contract for fencing work this was Monday, I took the workers as usual, I took the tools I called Terry and I asked Terry if Berny was coming. Terry said I have not been in touch with Terry, I passed by and picked up Terry at Anse Aux Pins. We went to Anse Royale for work, whilst we were at Anse Royale the tools that we took there were mixer, there were electrical tools for us to cut the metal the only 2 tools that we did not have we went back to the pike and the shovel which were in the store at this lady's residence like we showed on the picture. I said Terry you have a shovel and a pike at Bougainville, Terry said yes boss and we go to Bougainville. Upon arriving over there I remained in the pick-up, Terry disembarked to collect his tools, the door that you see with the house that have a footprint on it this is the technique Terry used to open the door because the door you are unable to open it with your hand and Terry went and opened the door, took his tools whatever he came back, we came down to Anse Royale. The work continued, during those time Sindu phoned me and asked me for the information, I said the information no problem but Berny did not come to work for 2 days. I said okay we worked, we completed our work and then we went home, this was Monday the 13th."

48. Comment by me: 1A's position that they went back to Bougainville on the 13th

of September to pick up a spade and a pike hoe was possibly to deny TM's evidence that 1A had on the 11th of September, taken the spade and pike hoe from the pickup and gone with it and returned with them and put them inside the pickup after the deceased had been attacked by 1A. It is also strange that 1A in his statement states that he had told 2A that the deceased had not come for work for two days and thus unable to provide the information 2A was seeking, when in fact the deceased had been picked up by him and taken to Bougainville in his pick up on the 11th of September and he would have all the time to get the information he claimed he needed to provide 2A.

49. It is to be noted that nowhere in the statement of 1A does he state that it is TM who had killed the deceased. I therefore cannot understand the basis on which Counsel for 1A could have suggested to TM that he was the one, with the two other persons who according to 1A, had been seen near the abandoned house at Bougainville that had killed the deceased. It is accepted that a dock statement although evidence, is different to evidence given on oath, as it has not been subjected to cross-examination. There is no challenge that the Judge had misdirected the Jury in his summing-up as regards how to consider 1A's dock statement. If there had been a misdirection, a complaint could validly have been made that the Judge erred. It was entirely a matter for the Jury to decide what weight should be attached to a dock statement in relation to the whole of the evidence and especially, as against the testimony of the sworn evidence of TM. It is my view, when considering 1A's dock statement as against the testimony of TM's sworn evidence, the Jury were entitled to and probably gave more weight to TM's evidence especially on the issue of who killed Berney Appasamy.

50. I state below the two statements made by 2A to the Police, which had been produced by the Prosecution as **P 164** and **P 165**, without objection from the

defence. There had been no complaint that the Constitutional rights of 2A enshrined in article 18(3) of the Constitution had been violated. **Article 18(3) of the Constitution** reads as follows:

“A person who is arrested or detained has a right to be informed at the time of the arrest or detention or as soon as is reasonably practicable thereafter in, as far as is practicable, a language that the person understands of the reason for the arrest or detention, a right to remain silent, a right to be defended by a legal practitioner of the person’s choice and, in the case of a minor, a right to communicate with the parent or guardian.”

This shows that 2A had waived or opted not to exercise his right to remain silent, both at the investigation stage and at the trial stage. At the investigation stage 2A had not said that he wants to remain silent or that he does not want to talk to the Police. The line of questioning by the police in both **P 164** and **P 165** shows that there had been no intimidation, coercion or deception. The questions have been very simple and a general inquiry on certain matters and it is clear from **P 165** that 2A had freely and voluntarily spoken and explained in detail what was asked from him. 2A had not been challenged by the Police on any of the answers he had given both in **P 164** and **P 165**. There is nothing on record to show nor there is any contention that 2A had not understood his Constitutional right to remain silent, both at the time of making a statement and at the trial. Thus it can be inferred that 2A had knowingly and voluntarily waived his right to remain silent and this is further confirmed by 2A not having objected to the production of **P 164** and **P 165**.

51. In the US case of **Berghuis v. Thompkins, 560 U.S. 370 (2010)**, the defendant Thompkins was advised of his rights in full compliance with **Miranda v. Arizona, 384 U. S. 436**, which sets out conditions similar to article 18(3) of the Constitution. Thompkins was convicted of first degree

murder, partly on the basis of the statement he made. In that case, unlike this case, Thompkins had moved at his trial before the Trial Court, to suppress the statements made during the interrogation. He argued that he had invoked his Fifth Amendment right to remain silent. According to the Trial Court the evidence in the case showed that at no point did Thompkins say that he wanted to remain silent, that he did not want to talk with the police, or that he wanted an attorney. Had he made either of these simple, unambiguous statements, he would have invoked his ‘right to cut off questioning.’ His appeal to the Michigan Court of Appeals was rejected on the same basis. The United States Court of Appeal for the Eastern District of Michigan, also denied his subsequent habeas corpus request, reasoning that Thompkins did not invoke his right to remain silent and was not coerced into making statements during the interrogation, and therefore the decision of the Michigan Court of Appeals was not unreasonable. However, the United States Court of Appeals for the Sixth Circuit while acknowledging that a waiver of the right to remain silent is possible and need not be expressed, as it can be “inferred from the actions and words of the person interrogated, reversed, the ruling of the Court of Appeal for the Eastern District of Michigan, purely on the basis that the established facts in that case did not disclose an implied waiver.

52. In the case of **North Carolina v. Butler, 441 U. S. 369, 373 (1979)**, the Court of Appeals acknowledged that a waiver of the right to remain silent need not be expressed, as it can be “inferred from the actions and words of the person interrogated.” The prosecution therefore does not need to show that a waiver of Miranda rights was expressed. An “implicit waiver” of the “right to remain silent” is sufficient to admit a suspect’s statement into evidence. It was held as a general proposition, the law can presume that an individual who, with a full understanding of his or her rights, acting in a manner inconsistent with their

exercise, has made a deliberate choice to relinquish the protection those rights afforded.

53. In his first statement to the Police, i.e. **P 164**, 2A had stated: “I do not have anything to say in reference to this case and I do not know Berney Appasamy.”

54. 2A in making his second statement, had opted not to exercise his right remain silent, of which he had been informed. In his second statement to the Police, i.e. **P 165**, 2A has stated as follows:

“I was arrested on the 24/9/2021 when I returned from my charter. I was taken to CID office and I was asked to give a statement. They asked me whether I knew one (01) Berney Appasamy (*deceased*) and I told them no. They told me that Berney Appasamy has been killed and whether I knew anything about this case and I told them no. Now in response to further questions put to me by the police I have been asked to give a statement to answer to those questions; thus this statement is a continuation of my first statement. In respect of the first question put to me today as to whether I know Berney Appasamy and whether he has slept on my boat at any time. The answer to both of these questions is no. The second question was what is my relationship with Daiyan Ibrahim and the answer is that Daiyan is a good friend of mine, he has a security company and we socialise together very often. I have been asked as the third question what is my relationship with Ken Jean Charles (*1A*) and the answer is Ken Charles is an ex police officer and I was introduced to him by Daiyan Ibrahim earlier this year. I became friends with Ken Charles where we will meet occasionally and chat mostly about fishing and life. We also communicated on the phone. The fourth question is what is my relationship with Charles De Clarisse and I do not know him personally but I believe he is the GM of VMA at Eden Island. I will meet

him on and off and we would exchange greetings and small talks. The fifth question I am being asked is what is my relationship with Anastasia Nagaeva and if I have any problems with her; Anastasia is my ex-employee as sales marketing for a long time and I think that it was in March 2020 that she resigned. I never had any problems with her. The sixth question I was asked again by the police today whether I knew anything regarding the death of Berney Appasamy and the answer is again that I do not know anything regarding Berney Appasamy the death of Mr. Appasamy. The seventh question I was asked in respect to my relationship with Helena Sims (*Helena*) and I have been with Helena Sims for over nine (09) years. Our relationship is on and off. I do not live full time with her; most of the time I live on my boat and sometimes at her place. In the early September 2021, when I was at Helena's place she mentioned to me whilst we were talking that she was concerned regarding an ex-convict by the name of Berney Appasamy who has been to her office several times asking for money. She told me that she was very concerned and that she has gone to the authorities. She told me that she has contacted a CID officer and through an intermediary judge Twomey's office. The response she received was that nothing could be done as the person has not done anything illegal to her and that they will need his full name and address to give to the authorities so that the authorities could assist her. I took my phone and searched on Google and Facebook for Berney Appasamy but did not get any information. The following week after talking to Helena, I bumped into Ken Charles and asked him, as an ex-police officer, if he knows an ex-convict by the name of Berney Appasamy and where he lives. Ken Charles told me that he did not know the guy but he will see when he is driving around if he could get any information on Berney Appasamy and he will let me know. I told him that I needed the information to be able to give to my girlfriend to give to the authorities as my girlfriend was very concerned about this guy as he has been coming to the office asking her for money. Then Ken Charles asked me to text him the name which I did by texting him immediately there and then.

I only texted Ken Charles the name of the person that Helena told me and nothing else. This is normal practice to do these days. After that, I spoke to Ken Charles a few times and in one of those times, he mentioned to me that Berney Appasamy lives somewhere at Roche Caiman and that he would find more specific details and let me know. I told him I was busy as I was preparing my boat for charter and I will call him back later. When I called him back later a few times, his phone could not be reach. Few days later, Ken Charles and I spoke and during our casual conversations I had also asked him if he got any more information and he said no but he will let me know if anything comes up. From one of these calls, I informed him that I won't be around and that we will speak when I come back. Then I went on my charter and after returned I was arrested.”

55. My comments: It is clear that 2A had clearly tried to deny any knowledge of the deceased in his first statement, which obviously has to be taken as false when one considers his second statement. In it 2A had admitted that his girlfriend Helena had spoken about the deceased to him in early September as she was concerned about him. 2A had said that he had even searched for the deceased on Google. He had thereafter told 1A to look for the deceased and even texted 1A the name of Berney Appasamy and continued to make inquiries about the deceased. It is clear that 2A had been compelled to admit his knowledge of the deceased, which he earlier tried to deny, in view of the questioning of him by the Police about Helena Simms. What Helena testified in Court about the deceased is confirmed by 2A, but there is a big difference between the two versions. According to Helena the deceased had asked her for SR 500.00 only once and she had given that to him without any qualms. Whereas according to 2A the deceased had gone to the office of Helena several times asking for money. According 2A his relationship with 1A was that they will meet occasionally and chat mostly about fishing and life. 2A had also said that he and 1A also communicated on the phone. There has been no mention about the regularity of

phone calls, between 2A and 1A from the 8th of September to the 15th of September 2021 and especially the two calls 2A received from 1A on the 11th of September at 11.51 and 11.52 AM which was about 1-2 hours after the killing of the deceased by 1A, according to the evidence of TM.

56. The case against **1A** undoubtedly rests on the direct evidence of TM which is corroborated by the evidence pertaining to the phone calls as testified by Karyn Pouponneau, the medical evidence and that of 1A's own dock statement. According to the evidence of TM, 1A had been requesting him since 8th of September to locate the deceased and get him to come to work for 1A at Phillippe's place at Anse Royale on the 11th of September. According to TM the deceased and himself were good friends and there has not been an iota of evidence of any animosity between TM and the deceased. According to the evidence of TM, 1A had called him on two occasions on the evening of the 10th of September, to ensure that TM brings the deceased along with him, for work on the 11th morning, when in fact 1A could have easily got Edward, who usually works for him. It is also clear that by the 10th of September 1A could have obtained all the information 2A asked for from TM, who was a personal friend of the deceased. Further by then 1A knew where the deceased lived and had all the information about the deceased that 2A had requested from him. As to why 1A had to take the deceased to Bougainville on the morning of 11th September, merely to find out his NIN and whereabouts remains answered. Also, 1A had not offered any explanation as to why he has not questioned the deceased about the information 2A was asking him, when the deceased got into his pickup and travelled with him to Bougainville. The suggestion to TM by Counsel for 1A, that it was TM, along with the other two persons who had killed the deceased, which TM had vehemently denied, is therefore fanciful. The law would fail the community if it admitted fanciful possibilities to deflect the course of justice. The simple issue being would 1A who was carrying workers to work at

Philippe's place at Anse Royale and gone to Bougainville at the request of TM had simply waited there for nearly 1 ¼ hours until TM, the deceased, the Rasta in a yellow shirt, and the other person in a black shirt had sort out the issue pertaining to the pipes. I therefore have no doubt that it was 1A that killed the deceased.

57. Before I analyze the case against 2A, I have to state that Counsel for 2A, Mr. B. Hoareau sought to file on the 21st of April 2023 at 9.10AM, Written Submissions on behalf of the 2nd Appellant on the issue pertaining to the Court drawing an adverse inference from the exercise by an accused person of his right to remain silent. The proceedings will bear out that this was a live issue in the case and Mr. B. Hoareau submitted at length on the issue at the hearing before us. Mr. B. Hoareau did not request permission of the Court, nor did the Court request of Mr. B. Hoareau, to file any submissions or any authorities on the matter, at the conclusion of his arguments. At the conclusion of the hearing Counsel for the 1st and 2nd Appellants were informed that judgment will be delivered on the 26th of April 2023. The three Justices who heard the case, that is inclusive of myself, at a meeting held in my chambers on the 21st of April 2023 were all of the view and decided that we shall not entertain the late filing of the Written Submissions, i.e. 10 days after the conclusion of the hearing on the 11th of April 2023 and 4 days before the delivery of judgment, that is 26th of April 2023, without consent of the Court, as it was totally inappropriate. It was also because the filing of these Written Submissions had been after the draft judgment in the case had been forwarded to the two Justices on the panel by the Scribe, for their comments on the 16th of April 2023. It was therefore unanimously decided by all three of us, that the Written Submissions shall not be forwarded to the Respondent and that the Court will not entertain the Written Submissions.

58. To understand and come to a decision on the case against **2A** one has to look at all the pieces of the jigsaw as correctly stated by the Learned Trial Judge. It all started with 2A when he asked 1A to get some information for him, regarding the NIN and the whereabouts of the deceased Berney Appasamy, and this according to 2A was because he was harassing his girlfriend, Ms. Helena Simms, by going to her office several times and asking for money. Up to that time, 1A had nothing to do with the deceased and had not even known of his existence. According to 2A, Police had asked Helena to get information about the NIN and whereabouts of the deceased to investigate her complaint. When 2A was told about the deceased by Helena, 2A had tried to make inquiries about the deceased on Google and had asked 1A to find out about the deceased and had continued to make inquiries about the deceased from 1A. 2A had also texted the name 'Berney Appasamy' which is the name of the deceased to 1A. 2A had also been told by 1A that the deceased lived at Roche Caiman. If both Helena and 2A knew the name of the deceased, what more did they want? In a small country like the Seychelles, with a population of about one hundred thousand people finding about Berney Appasamy, who had gone to school with Helena and who had also been in prison, was not a herculean task. The Police had also told Helena that nothing could be done as the deceased had not done anything illegal and Helena herself had admitted this under cross examination. It is to be noted that according to Helena, the deceased had asked her for money only once which she had given and thereafter on one occasion had requested her to type a document and give a print out to him, which she had refused. Both these incidents had taken place in August 2021. Helena had said that the deceased had not troubled her or come to her thereafter. It is also to be noted that the deceased had been in school with her. As to what necessitated Helena to worry about this apparently innocuous behavior of the deceased to complain to 2A and for 2A to rush to get that information sought by Helena on a somewhat insignificant matter, by contacting 1A several times, and having exaggerated to

1A what Helena had told 2A as to what the deceased had allegedly done, is indeed a mystery to me. It is emphasized that 1A did not know the deceased prior to the 11th of September and the deceased had never worked for him before. There is no evidence to indicate that 1A had anything personal against the deceased. The exchange of many telephone calls between 2A and 1A from the 8th of September to the 15th of September 2021, has not been explained by 2A. There have been 6 telephone calls between 2A and 1A on the 8th of September, namely, 4 calls by 2A to 1A and 2 calls by 1A to 2A. On the 9th of September there had been an exchange of 4 calls between 2A and 1A; namely 3 calls by 1A to 2A and 1 call by 2A to 1A. On the 10th of September 1A had called 2A twice. All these calls had been made after 2A had asked 1A to find out about the deceased. On the 11th of September, 1A had called 2A, at 11.51, 11.52 am and 07.30pm. The calls by 1A to 2A, at 11.51 and 11.52 are of particular significance as that was about 1-2 hours after the killing of the deceased by 1A according to the evidence of TM. 2A has not sought to explain why he persistently denied any knowledge of the deceased in his first and second statements (four times) and therefore lied, until he was questioned about Ms. H. Simms, and after he had readily sought to explain his knowledge of Daiyan Ibrahim, 1A, Charles De Clarise, Anastasia Nagaeva and Helena Simms without any hesitation, on being questioned. The facts been such, 2A's persistent denial of knowledge about the deceased Berney Appasamy until questioned about H Simms necessitated an explanation, as it was undoubtedly a lie.

59. A lie told by a defendant may amount to corroboration of the prosecution case depending on the lie and the nature of the rest of the evidence. In **R V Lucas (1981) QB 720 Lord Lane CJ** said: *“to be capable to amounting to corroboration the lie told out of court must first of all be deliberate. Secondly it must relate to a material issue. Thirdly the motive for the lie must be a*

realization of guilt and fear of the truth. The Jury should in appropriate cases be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behavior from the family. Fourthly the statement must clearly be shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say by admission or by evidence from an independent witness.” This case thus falls on all fours with the pronouncement made in R V Lucas. Lord Lane CJ in R v Lucas went on to state: *“There is, without doubt, some confusion in the authorities as to the extent to which lies may in some circumstances provide corroboration...In our judgment the position is as follows. Statements made out of court, for example statements to the police, which are proved or admitted to be false may in certain circumstances amount to corroboration. There is no shortage of authority for this proposition...It accords with good sense that a lie told by a defendant about a material issue may show that the liar knew that if he told the truth he would be sealing his fate ...”*

60. Lucas was applied in the Singaporean case of in **PP v Yeo Choon Poh [1994] 2 SLR 867**. There, it was said: *“lies can in certain circumstances amount to corroboration because it indicates a consciousness of guilt.”* Also in **PP v Chee Cheong Hin Constance [2006] 2 SLR 24** it was held that when a lie offers corroboration, it does that by corroborating some existing evidence. The Supreme Court of New South Wales in the case of **R V Heydie NSWLR 1990 (20)** has held following R V Lucas that it is open to rationally conclude that a consciousness of guilt motivated the lie.

61. The evidence in this case shows that the deceased had been killed by 1A who had no apparent motive to kill the deceased, after having lured the deceased to Bougainville and TM had been a witness to the incident. The evidence in the case shows that 1A and TM had nothing against the deceased. The only person

who was searching for the deceased and had a motive to get at the deceased was 2A. In such circumstances 2A's failure to testify and offer an explanation to the many phone calls between him and 1A during the period 8th to 12th September and his persistent lies that he did not know the deceased until he was questioned about Ms. Helena Simms carries a high degree of probability that it was he, that had counselled or procured 1A to murder the deceased.

62. I am conscious of the fact that according to the Constitution of the Republic of Seychelles, 2A was not be compelled to testify at the trial nor could any adverse inference drawn from the exercise of the right to silence, but where there was incriminating evidence against him, which he alone could have explained, and his failure to come up with an explanation at the trial, in my view, will undoubtedly have a bearing in determining his guilt. It is to be noted that 2A by agreeing to place his two statements, namely **P 164** and **P 165** as part of the prosecution case, without objection has opted, not to exercise his right to silence at the trial. He has thus jumped into the prosecution arena where the duty was solely on the prosecution to prove its case and thus had to remove himself, by explaining his lies in **P 164** and **P 165** and his other conduct. It is to be noted that 2A had been defended by a senior lawyer and would have been informed of the consequences of the failure to explain, the incriminating evidence against him, which 2A alone could have explained. It is seen from the proceedings of the Trial Court that Counsel had moved court for an adjournment to consider their position at the close of the prosecution case and on the next day, counsel for 2A had informed court that he will not be making a submission of no case and that 2A will not be giving any evidence or calling any witnesses. There is no evidence before us from 2A or any other source that he decided to exercise his right to remain silent in light of what the learned Trial Judge had told the Appellants when the rights of defence were explained to them after their

counsel had indicated to Court that they were not making a No-Case Submission.

63. I am of the view that there is a difference between the right ‘*not to be compelled to testify at the trial or confess guilt*’ guaranteed in **article 18(2)(g) of the Constitution** and the right ‘*not to have any adverse inference drawn from the exercise of the right to silence either during the course of the investigation or at the trial*’ guaranteed in **article 18(2)(h) of the Constitution**. To compel an accused to testify at the trial or confess guilt would certainly and directly breach the right of an accused to remain silent and the right to be treated as innocent until the person is proved or has pleaded guilty, whereas drawing any adverse inference from the exercise of the right to silence in a case where there has been compelling and incriminating evidence against an accused, which he only could explain but fails to do so, would only indirectly affect the right as it will be entirely at the discretion of the accused to act as he chooses. Here the accused is not required to confess guilt but to rebut a presumption of guilt that human reason and common sense demands. It is an opportunity to exculpate himself and not to inculpate himself and hence is not a violation of the right to be treated as innocent. What is the effect of the accused’s silence? The reason is simple: silence can be very probative. **In R. v. Noble, [1997] 1 S.C.R. 874 Lamer CJ** of the Supreme Court of Canada stated: “*When the Crown presents a case that implicates the accused in a strong and cogent network of inculpatory facts, the trier of fact is entitled to consider the accused’s failure to testify in deciding whether it is in fact satisfied of his or her guilt beyond a reasonable doubt. Under the right circumstances, silence can be probative and form the basis for natural, reasonable and fair inferences. There are certain situations where the web of inculpation fashioned by the Crown requires the accused to account for unexplained circumstances or face the probative consequences of silence.*” **In Noble McLachlin J.** said: “*To say that*

an inference has been drawn from the accused's failure to testify is only to say that the Crown's evidence stands unchallenged. This does not violate the accused's right to silence or presumption of innocence."

64. As Ritchie J. said for the majority of this Court in **McConnell v. The Queen**, [1968] S.C.R. 802, at p. 809: "...it would be 'most naïve' to ignore the fact that when an accused fails to testify after some evidence of guilt has been tendered against him by the Crown, there must be at least some jurors who say to themselves "If he didn't do it, why didn't he say so". In **Avon v. The Queen**, [1971] S.C.R. 650; Fauteux C.J. quoting **R. v. Pavlukoff (1953)**, 106 C.C.C. 249 (B.C.C.A.), said: "...the fact that [the] accused did not testify in the face of inculpatory facts was a matter which the Court of Appeal could place on the scale..." In **Marcoux v. The Queen**, [1976] 1 S.C.R. 763 it was said: "Even in such a matter as the failure of an accused to testify, although neither judge nor counsel can comment upon the failure, a jury is free to draw, and I have no doubt frequently does draw from the failure, an inference adverse to the accused." In **Ambrose v. The Queen**, [1977] 2 S.C.R. 717; it was stated: "This Court is, of course, as was the Appeal Division, entitled to take cognisance of the fact that despite this mass of circumstantial evidence pointing well-nigh irrefutably to the guilt of the accused neither of the accused offered any evidence in defence. I need not cite authority for the proposition that such a circumstance is a proper one for an Appellate Court to consider."

65. The necessity to give a satisfactory account to avoid conviction is thus seen as a practical impetus created by the circumstances of the particular case and not one called for by the law. What would be the position where an accused person elects to give evidence and refuses, fails or is unable to answer a question put to him by a skilful prosecutor which would clearly show his guilt? What would be the position where a dock statement made by an accused person, tends to

incriminate him, or is so unbelievable that no reasonable court will be prepared to act on it? Can it be said that even in such situations no adverse inference can be drawn? Would we also not then be discriminating against a person who elects to give evidence or make a dock statement and one who chooses to exercise his right to silence by not testifying at the trial or by not making a dock statement? Can there be three different standards to the drawing of inferences in the said situations. It will also amount to mental gymnastics for a jury not to draw adverse inference in such circumstances. It is also to be noted as stated earlier, that 2A by agreeing to place his two statements, namely **P 164** and **P 165** as part of the prosecution case, without objection and has thus opted not to exercise his right to silence at the trial. He is thus in the same position of an accused person who elects to give evidence or make a dock statement as referred to above. In the case of **John Murray V United Kingdom (1996) 22 EHRR 29, No 18731/91, the European Court of Human Rights** stated that a conviction based exclusively or primarily on the suspects refusal to respond to police queries would be incompatible with the right to remain silent. It acknowledged, however, that inferences can be made *“in instances which obviously demand for an explanation” and that they may be applied to evaluate the weight or persuasiveness of the prosecution’s case...*” However, this would apply only where a prima facie case has already been established by the prosecution. In this case 2A alone could have explained his denial of knowing the deceased **at P 164 and P 165**, until he was questioned about Helena. It is 2A alone that could have explained why he was on a witch hunt for the deceased on a rather innocuous matter and the frequency of the series of phone calls between him and 1A, as set out in detail at paragraph 32 above, (namely 6 calls on the 8 September, 4 calls on 9 September, 1 call on 10 September, 3 calls on 11 September) and especially the ones by 1A to 2A at 11.51 and 11.52am, after the killing of the deceased. This is similar to an accused deciding to exercise his right to silence and failing to explain his finger prints or DNA

found at the scene of a crime or his presence at the scene of crime shortly before or after a murder. I am of the view that in view of our constitutional safeguard, an accused is not required to explain anything until the case has been proved against him by the prosecution, but where such proof has been given and the nature of the case is such as to warrant an explanation which only the accused can give, can human reason and common sense do otherwise, than adopt the conclusion to which proof tends, when an explanation is not forthcoming. This is based on Jeremy Bentham's 'common sense' defence of the right to voice one's mind: "*Innocence claims the right to speak, and guilt invokes the privilege to silence.*" An accused's right not to have an adverse inference drawn from his exercise of the right to silence, needs to be balanced as against what human reason and common sense demands.

66. The Australian case of **Weissensteiner v The Queen [1993] HCA 6529**, was based on circumstantial evidence. It involved the unexplained disappearance of two people from a boat whilst on a voyage with the accused. In that case an adverse inference was drawn about uncontradicted circumstantial evidence. **Azzopardi v The Queen [2001] HCA 25** clarifying the decision stated, that the decision in Weissensteiner is relevant only where the ability to contradict, lies peculiarly within the knowledge of the accused. In Azzopardi the court went on to say: "*There may be cases involving circumstances such that the reasoning in Weissensteiner will justify some comment. However, that will be so only if there is a basis for concluding that, if there are additional facts which would explain or contradict the inference which the prosecution seeks to have the jury draw, and they are facts which (if they exist) would be peculiarly within the knowledge of the accused, that a comment on the accused's failure to provide evidence of those facts may be made.*" In this case it is only 2A who could have explained why he had lied to the police at first that he did not know anything about the deceased, when in fact he is the one who was desperate to find the deceased and

also what were those calls he received from 1A, after the killing of the deceased. They certainly were additional facts which were peculiarly within the knowledge of 2A, and no one else, could have explained or contradicted the inference that it was him who counselled 1A to kill the deceased.

67. The House of Lords (Northern Ireland) in the case of **Murray v. Director of Public Prosecutions (1992), 97 Cr. App. R. 151**, held that the trial judge was entitled to infer that the accused was guilty where there was no innocent explanation offered by the accused in circumstances that called out for one. They went on to say: *“This is not of course because a silent defendant is presumed to be guilty, or because silence converts a case which is too weak to call for an answer into one which justifies a conviction. Rather, the fact-finder is entitled as a matter of common sense to draw his own conclusions if a defendant who is faced with evidence which does call for an answer fails to come forward and provide it..It is however equally a matter of common sense that even where the prosecution has established a prima facie case in the sense indicated above it is not in every situation that an adverse inference can be drawn from silence.... Everything depends on the nature of the issue, the weight of the evidence adduced by the prosecution upon it ... and the extent to which the defendant should in the nature of things be able to give his own account of the particular matter in question. It is impossible to generalise, for dependent upon circumstances the failure of the defendant to give evidence may found no inference at all, or one which is for all practical purposes fatal.”*

68. In **Osman and Another v Attorney-General, Transvaal, (CCT37/97) [1998] ZACC 14; 1998 (4) SA 1224; 1998 (11) BCLR 1362 (23 September 1998)** Madala J of the Constitutional Court of South Africa said: *“Our legal system is an adversarial one. Once the prosecution has produced evidence*

sufficient to establish a prima facie case, an accused who fails to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice..."

69. Similarly, in **S v Sidziya and Others, 1995 (12) BCLR 1626**, the court effectively held that the constitutional right to silence does not preclude the presiding officer from considering as part of the overall assessment of the case, the accused's silence in the face of a prima facie case established by the prosecution. As was so aptly put by Naidu AJ in Sidziya: *"The right entrenched in section 25(3)(c) means no more than that an accused person has a right of election whether or not to say anything during the plea proceedings or during the stage when he may testify in his defence. The exercise of this right like the exercise of any other must involve the appreciation of the risks, which may confront any person who has to make an election. Inasmuch as skilful cross-examination could present obvious dangers to an accused should he elect to testify, there is no sound basis for reasoning that, if he elects to remain silent, no inferences can be drawn against him."*

70. This issue was also dealt with by the Botswana Court of Appeal in **Attorney General v Moagi, 1981 Botswana LR 1**. The court there had to interpret the meaning of section 10(7) of the Botswana Constitution which provides that "[n]o person who is tried for a criminal offence shall be compelled to give

evidence at the trial.” Maisels JP, delivering the majority judgment, held that where the prosecution had established a prima facie case: “[u]nless the accused’s silence is reasonably explicable on other grounds, it may point to his guilt.”

71. In the case of **The Attorney General V Potta Nauffer and Others, (2007) 2 SLR 144**, a five bench judgment of the Supreme Court of Sri Lanka stated: “*The Ellenborough dictum contained in Lord Cochraine’s case and as adopted and developed by courts today provides that “No person accused of a crime is bound to offer any explanation of his conduct or circumstances of suspicion which attach to him; but nevertheless if he refuses to do so where a strong prima facie case has been made out, and when it is in his power to offer evidence, if such exist in explanation of suspicious appearance which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest.*”

72. In the case of **Jose Nenesse V The Republic CR SCA 35/2013 [August 2016]** this Court held:

*“When pretty stringent proof of circumstances is produced tending to support the charge, and it is apparent that the accused is so situated that he could offer evidence of all the facts and circumstances as they exist, and show, if such was the truth, that the suspicious circumstances can be accounted for consistently with his innocence and he fails to offer such proof, the natural conclusion would tend to sustain the charge. In **Burdett (1820) 4 B. & Ald 95 at p.120** it had been held “No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the*

*nature of the case is such as to admit of explanation or contradiction, can human reason do otherwise than adopt the conclusion to which proof tends?” In the South African case of **Magmoed V Janse van Rensburg and others 1993 (1) SACR 67 (A)** it has been held that where there is direct evidence implicating an accused in the commission of an offence, the prosecution case is ipso facto strengthened where such evidence is uncontroverted due to the failure of the accused to testify. In the South African case of **S V Tandwa 2008 (1) SACR 615** it was held that an accused has the constitutional right to remain silent but his choice must be exercised decisively as ‘the choice to remain silent in the face of evidence suggestive of complicity must, in an appropriate case, lead to an inference of guilt’.*

73. This undoubtedly is a ‘contract killing’, cunningly planned and hatched by 2A and in such cases, a conclusion can be reached only by a deduction to be made from the available facts. The case against 2A is so strong as to leave only a remote possibility in his favour, which can be dismissed with the sentence, of course it is possible but not in the least probable.

Grounds of Appeal of 1A:

74. Counsel for 1A in his Skeleton Heads of Argument had stated that the Appellant abandons and withdraws **ground (1)**. Despite the withdrawal of ground 1 take the opportunity to comment on it since in a small jurisdiction like the Seychelles it is well-nigh impossible to prevent people talking about incidents of this nature. It is for this reason that Judges make it a point to warn Juries in their summing-up not to be guided by any form of prejudices in arriving at their verdict. At paragraph 7 of the summing-up, the learned Trial Judge had said: “There is another and I must stress a very important matter which I must bring to the attention of you the members of the jury especially in today’s context, in deciding matters of fact, your decision must be based solely on what all the

witnesses testified to or deponed at this trial before you. You must completely disregard anything you may have seen or heard or read about outside this court room, in the newspapers, television and social media. You must not and I repeat must not let such matters influence you in arriving at your decision. Further as members of the jury, you must not be guided by emotions or sentiments but base your decision fairly and impartially, on the evidence led at this trial.”

75. **Grounds (2) and (5)** can be dealt with together as they are complaints against the manner the learned Trial Judge dealt with the cases of the prosecution and defence in his summing-up. At the very commencement of the summing-up the learned Trial Judge had at paragraphs 4 and 5, said that the Jury shall consider all the evidence both that of the prosecution and defence and the submissions by counsel for the prosecution and defence. At paragraph 114 of the summing-up the learned Trial Judge before analyzing the evidence against 1A had warned the Jury thus: “First of you all have to decide whether you all are going to accept Terry Marie’s evidence or not.” At paragraph 126 of the summing-up the learned Trial Judge had said that it is for the Jury to decide whether TM was telling the truth and whether his evidence was corroborated. The learned Trial Judge making reference to the dock statement of 1A at paragraphs 74 to 76 of the summing-up had said that it must be looked upon as evidence subject to the infirmities that it was unsworn and not tested by cross-examination, but if the Jury were to believe, it must be acted upon and if it raises a reasonable doubt about the prosecution case, the defence must succeed. He had repeated this at paragraphs 118 and 119. He had also gone on to say that 1A’s dock statement cannot be used against 2A. The learned Trial Judge had at paragraph 123 and 130 of the summing-up had said that it is for the Jury to consider whether the deceased was murdered by 1A or TM and at paragraph 125 highlighted what Counsel for 1A had said as to why TM should not be believed.

76. Ground 5 is to the effect that the learned Trial Judge exceeded his remit under section 265(2) of the Criminal Procedure Code. An examination of the provisions of **section 265 of the Code** is helpful to understand the province or roll of a Judge in a Jury trial:

“(1) The judge shall decide—

(a) all questions of law arising in the course of the trial and especially all question as to the relevance of facts, the admissibility of evidence and the propriety of questions to witnesses asked or proposed by the parties or their counsel and, in his discretion, preventing the production of irrelevant or inadmissible evidence, whether objected to by a party or not;

(b) the meaning and construction of all documents given in evidence at the trial;

(c) all matters of fact necessary to be proved in order to enable evidence of particulars matters to be given;

(d) whether any question which arises is for himself or for the jury.

(2) The Judge may, whenever he thinks proper in the course of the summing up, express to the jury his own opinion on any question of fact, or of mixed law and fact, relevant to the proceedings.”

77. The learned Trial Judge had clearly directed the jury on their role in accordance with section **266 (a) and (c) of the Criminal Procedure Code**, namely “*decide which view of the facts is correct and shall then return the verdict which under such view ought, according to the direction of the Judge, to be returned; and decide all questions which, according to law, are deemed to be questions of fact;*” At paragraph 6 of the summing-up the learned Trial Judge had said emphatically that the Jurors are the sole Judges of facts. “It is important that you the members of the jury, remember that in regard to the facts of the case that were presented to you by all those who gave evidence at this trial, you are the sole judges of these facts. It is you the members of the jury who will decide

whether the facts as borne out or shown by the evidence that was led at this trial, should be accepted as the truth or not. I too will be stating my views on the facts of the case, you are free to accept or disregard it. The final decision with regard to the facts of this case will be made by you, based on the evidence led before you which you are free to accept or disregard. In doing so, you may either accept or disregard, the views expressed on these facts by learned counsel for the prosecution and the defence or even by me. You the members of the jury are not bound to accept these views and are the sole judges of fact in this case.” The learned Trial Judge had thereafter repeated himself in saying that the Jurors are the ones to decide on the facts of the case and should not allow themselves to be influenced in anyway in considering the case against 1A at paragraph 137 of the summing-up and in considering the case against 2A at paragraph 151.

78. In the case of **R V Nelson (1997) Crim. L. R. 234, CA Simon Brown LJ** said: *“Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the Jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing up. No defendant has the right to demand that the Judge shall conceal from the Jury such difficulties and deficiencies as are apparent in his case. Of course, the Judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities ...there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis. Why should pointing out those matters be thought to smack of partiality? To a play a case down the middle requires only that a judge gives full and fair weight to the evidence and arguments on each side. The judge is not required to top of the case for one side so as to correct any substantial imbalance. He has no duty to cloud the merits either by obscuring the strengths of one side or the weaknesses of the other. Impartiality means no more or no less than that the judge shall fairly state and*

analyse the case for both sides. Justice moreover requires that he assists the jury to reach a logical and reasoned conclusion on the evidence.” In **Uriah Brown v The Queen [2005] UKPC 18**, the Privy Council opined, that “*a judge is entitled to give reasonable expression to his own views, so long as he makes it clear...that decisions on matters of fact are for the jury alone and does not so direct them as effectively to take the decision out of their hands”*”.

79. In the case of **Adrian Forrester v R, SC Criminal Appeal NO 42/2016, [2020] JMCA Crim 39**, the Court of Appeal of Jamaica said: “*In summing up a case to the jury, the trial judge is also entitled to along with defining the issues express his opinion, and in a proper case may do so strongly, so long as the jury are informed that they are entitled to ignore them, and the issues are left to the jury for their final determination.”*”

80. The editors of **Blackstone’s Criminal Practice 2002** at page 1449 paragraph D16.16 states: “*Provided he emphasises that the jury are entitled to ignore his opinions, the judge may comment on the evidence in a way which indicates his own views. Convictions have been upheld notwithstanding robust comments to the detriment of the defence case (e.g., O’Donnell (1917) 12 Cr App R 219 in which it was held that the judge was within his rights to tell the jury that the accused’s story was a ‘remarkable one’ and contrary to previous statements that he had made). However, the judge must not be so critical as to effectively withdraw the issue of guilt or innocence from the jury’ (Canny (1945) 30 Cr App R 143, in which a conviction was quashed because the judge repeatedly told the jury that the defence case was absurd and that there was no foundation for defence allegations against the prosecution witnesses.) It is the judge’s duty to state matters ‘clearly, impartially and logically’, and not to indulge in inappropriate sarcasm or extravagant comment (Berrada (1989) 91 Cr App R 131).”* I have scrutinized the summing up carefully and find that no complaint

can be made that the summing up in this case gave rise to the situation that arose in **Canny and Berrada**.

81. In **Mears (Byfield) V R (1993) 42 WIR 284** it was stated that a Judge's task in a jury trial is never an easy one, for it is all too easy to criticise a Judge who has felt that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. Thus the summing-up must be taken as a whole and the question that needs to be asked in the words of **Lord Sumner in Ibrahim V R (1914) AC 599** is whether there was *"Something which...deprives the accused of the substance of a fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future."* In **Beck V HM Advocate (2013) HCJAC 51** it was stated that if the charge when read as a whole is clear and correct, minor deviances or inexact examples on a particular topic, will not normally be regarded as productive of miscarriage of justice. It is not appropriate to scrutinise the words used in isolation. In the case of **Snowden V HMA (2014) HCJAC 100** it was said: *"A contention that a miscarriage of justice has occurred, which is supported only by pointing to a judge's failure to mention a particular point or points raised by the defence, will not, of itself, suffice. The criticism must be a substantial one of imbalance going to the whole 'tenor' or 'purport' of the charge. Put simply, an appellant will require to demonstrate that, looking at the charge as a whole, its tenor was unbalanced in the sense of demonstrably favouring the Crown upon a contentious issue of fact raised during the trial."* I am of the view that the learned trial judge's summing up was not bias, one-sided and overtly directed the jury to a finding of guilt, thus depriving the Appellant of his right to a fair and objective trial. I therefore dismiss 1A's grounds (2) and (5) of appeal.

82. **Ground (3)**, is based on the evidence of Terry Marie (TM), the so-called accomplice. I state that although TM has been treated as an accomplice in this case even 1A in his dock statement does not directly implicate him as commented upon by me at paragraph 45 above. The fact that the Prosecution had treated TM as an accomplice and the learned Trial Judge had treated him as one such goes in favour of 1A. Accomplice evidence is dealt with under section 61A of the Criminal Procedure Code and the relevant parts are as follows:

“61A. Conditional offer by Attorney-General

(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), (4), (5)”

83. I am of the view that the directions given at paragraphs 51 to 54 in the summing-up by the learned Trial Judge in regard to accomplice evidence was more than adequate and certainly did touch on the dangers of relying on the evidence of TM. The learned trial judge had said: “An accomplice is a person who has voluntarily participated in the commission of a crime. The case for the

prosecution depends on the evidence of Terry Marie who was formally an accused in the case. No doubt his evidence reveals, that he voluntarily participated or played some part however small in the commission of the crime and chose not to bring it to the notice of the authorities, and in fact did so, only after they were arrested. However, ladies and gentlemen of the Jury please keep in mind, this certainly does not prohibit him from being called as witness for the prosecution...The law however has introduced certain safeguards in the consideration of the evidence of an accomplice. In the Seychelles, the current law is that one could accept the evidence of an accomplice even without it being corroborated by other evidence, if one is satisfied that the accomplice is speaking the truth in regard to the facts of the case. If his evidence is not contradictory in nature or even after cross-examination his evidence is not found to be in doubt and you the foreman and members of the Jury are satisfied that the accomplice has spoken the truth in respect of the facts of this case, then you may proceed to accept the evidence of the accomplice even without corroboration. However, if you feel that caution is to be exercised in the acceptance of his evidence, that his evidence is not reliable as he had a reason to lie or that he is attempting to pass the blame onto another, you may look for corroboration of his evidence prior to accepting it and if none exists you may even reject his evidence if you feel he is lying. If no such evidential basis exists for you to look for corroboration you may accept his evidence even without it being corroborated if one is satisfied that he is speaking the truth.”

84. In the case of **Jean Francois Adrienne and Terrence Servina V The Republic, CR SCA 25 & 26/2015**, this Court said: *“The rationale put forward to look for corroboration of accomplice evidence is because an accomplice is a self- confessed criminal, is morally guilty and that he may have a purpose of his own to serve, or may want to exaggerate or invent the accused’s role in the crime in order to shield himself or minimise his own culpability. The argument*

*that an accomplice is a self- confessed criminal and is morally guilty can be discarded as courts accept the testimony of other criminals without requiring a warning as to their credibility. There is no requirement in law, for a Trial Judge to ‘warn’ the Jury with respect to testimony of other witnesses with disreputable and untrustworthy backgrounds or other items of weak evidence. Also the moral guilt of an accomplice may vary with the nature of the crime involved and the law makes no distinction as regards the types of offending. On the issue that an accomplice may have a purpose of his own to serve, **Lord Adinger** said in **R VS Farler (1837) 8 car. & P.106** “The danger is, that a when a man is fixed, and knows that his own guilt is detected, he purchases impunity by falsely accusing others”. Credibility, however, is matter of obscure variety and it is impossible and anachronistic to always conclude that an accomplice’s story must always be distrusted because of a promise of immunity. Certainly some accomplices may attempt to minimize their involvement in the crime but where an accomplice, openly acknowledges his participation, the question arises whether there is a need for a warning. Thus the rationale put forward to look for corroboration of accomplice evidence has its flaws similar to the rationale put forward to look for corroboration in sexual offences as we pointed out in the Raymond Lucas case... There would need to be an evidential basis for suggesting that the evidence of the witness might be unreliable. Where some warning is required, it is for the judge to decide the strength and terms of the warning. An appellate court should be disinclined to interfere with the judge’s exercise of his discretion save in a case where the exercise of discretion had been wholly unreasonable.”*

85. The learned Trial Judge had also at paragraphs 10 and 11 of his summing-up advised the Jury how to assess the testimony of any witness in order to determine whether they are speaking the truth. At paragraph 114 of the summing-up the learned Trial Judge, before analyzing the evidence of 1A, had

warned the Jury thus: “First of you all have to decide whether you all are going to accept Terry Marie’s evidence or not.” I therefore dismiss 1A’s ground (3) of appeal.

86. **Ground (4)** is based on the alleged inconsistencies in the evidence of TM at the trial with that of TM’s previous statements made to the police, which I have dealt with when making reference to the evidence of TM. In my view they are not material to cast any doubt as to the testimony of TM. The learned Trial Judge had in fact at paragraphs 127, 128, 129, 131 and 134 of the summing-up made references to the alleged inconsistencies highlighted by Counsel for 1A at the trial, the explanation offered by TM when the said inconsistencies were drawn to his attention and a clear direction to the Jury at paragraphs 128 and 134 of the summing-up that it is for them to decide whether to accept the evidence of TM or not or the defence of 1A in his unsworn statement. Counsel for 1A in his Skeleton Heads of Argument takes offence to the learned Trial Judge having corrected him in regard to his submission to the Jury that TM’s evidence contradicted the medical evidence at paragraph 129 of the summing-up. 1A’s Counsel had said that Dr. Rodriguez brought out that the fractures would have been caused by a sudden rotation of the neck and not by a blow with a crowbar. According to him, Dr. Rodriguez’s finding did not match the evidence of Mr. Marie who stated that he saw 1A strike the victim at the back of his head with a crowbar. In the Skeleton Heads Counsel states that he did not mislead the Jury in regard to this and has the audacity to say that it is the Trial Judge that had mislead the Jury. Reading through the proceedings, I find that it is Counsel for 1A who has attempted to mislead this Court. This is because it is Counsel for 1A in his cross-examination of Dr. Rodriguez had asked the doctor: “And it is also correct that this trauma could be caused by any heavy object that strikes the body” and to which the doctor had answered “Normally yes, usually Yes”. It is my advice, that counsel should read the proceedings well before

making incorrect and misleading submissions when arguing appeals before this Court and especially when they chose to fault the Trial Judge. I therefore dismiss 1A's ground (4) of appeal.

87. **Ground 6** is a general ground that the verdict is unsafe, unreasonable and cannot be supported by the evidence. In view of the evidence of both the prosecution and the defence detailed out in paragraphs 10-36, 38, 40-49, and my comments therein, I am of the view that this ground has no merit and certainly the verdict reached by the Jury in this case cannot be said to be unsafe, unreasonable and unsupported by the evidence. I therefore dismiss 1A's ground (6) of appeal.

Grounds of appeal of 2A:

88. **In relation to grounds (1) and (4)**, I wish to state at the outset that 2A having pleaded to the charge and not having raised any ambiguity as to the particulars of the charge during the trial and having proceeded along with the trial, without complaint, cannot now be heard to complain about it on appeal. It has been stated in **RV Chapple and Boling broke (1892) 17 Cox 455** that the proper time for making an application to quash an indictment is before the plea is taken. It is my view that otherwise accused may be encouraged to go through the whole trial process, knowing that the charge is defective, but hoping to take it up on appeal in the event of a conviction. 2A has not complained, nor do I find, that the charge is a nullity (i.e. where an indictment discloses no criminal offence whatever or charge some offence which has been abolished), that the indictment has been preferred without jurisdiction, nor that the charge has prejudiced or embarrassed 2A. Further the charge could not have embarrassed 2A in anyway in view of his specific defence that he had not counselled or procured 1A to 'murder the deceased'. Therefore, the nature and manner of

counselling or procuring was not of any relevance. It is clear from the case of **Ayres 1984 AC 447** that even if the charge is defective so long as the charge has not caused prejudice or embarrassment to the defence it would not affect the conviction. In the instant case the particulars of offence in the charge left no one in doubt that the substance of the crime alleged was one of counselling and procuring 1A, by 2A to murder Berney Appasamy as set out in section 24 of the Penal Code. The learned Trial Judge in my view had in his summing-up given the appropriate directions in relation to the offence and it was left to the Jury to decide whether the circumstantial evidence available was sufficient to prove the offence of murder against 2A.

89. 2A has been convicted for counselling and procuring 1A to commit the murder of Berney Appasamy. It is to be noted that before anyone can be convicted of counselling or procuring an offence, there has to be an offence that is committed. Unless an offence is proved to have been committed, the issue of counselling or procuring an offence does not arise for consideration. The charge against 2A read “Counselling or procuring another to commit the offence of murder, contrary to section 193 of the Penal Code...” The learned Trial Judge had at paragraphs 59 to 63, and 67 of the summing-up explained what counselling and procuring means and what it entails and the punishment for it. In some instances, a distinction between counselling and procuring can hardly be made out as they do overlap. To counsel, means to incite, or solicit or encourage. There needs to be a connection between the person who actually commits the act and the person who counsels him and some connection between the counselling and the offence that is committed. To procure means taking the necessary steps to make something happen. A person may be said to procure the commission of a crime by another even though there is no conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take. In the case of **AG’s Reference (No 1 of**

1975) [1975] Q.B 773, it was held “You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take.”

90. Sections 22, 23 and 24 contained in Chapter V of the Penal Code do not create any offences but sets out the basis of criminal liability. According to **section 22(d) of the Penal Code**: “When an offence is committed, any person who counsels or procures any other person to commit the offence, is deemed to have taken part in committing the offence and be guilty of the offence, and may be charged with himself committing the offence or with counselling or procuring its commission. A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.”

91. **Section 24 of the Penal Code** does not create an offence or another form of criminal liability, different to that of section 22(d) but merely goes on to ‘explain’ counselling to commit an offence, by stating: “When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel. In either case the person who gave counsel is deemed to have counselled the other person to commit the offence actually committed by him.”

92. It is my view that there was no need to specify in the charge, as argued by Counsel for 2A, whether the Prosecution was relying on the first or second limb of section 24, namely, “*whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way*”. It is not necessary to mention in a charge what is clearly specified in section 24, as ignorance of the law is not an excuse. Reference to section 24 in my view was ‘mere surplusage’. In the case of **Dossi (1918) 13 Cr App R 158** it was held that the alleged defect in the charge complained of was mere surplusage and could not be a ground to allow the appeal.

93. This shows that it is not necessary that the person who counselled or procured another to commit the offence had knowledge of the precise crime that was ultimately committed. This is because it will be impossible to require proof of knowledge of an offence yet to be committed. It suffices if the person who counselled or procured another could have foreseen the type of crime that was committed as a substantial risk. If it was within the contemplation of the person who counsels or procures, that several offences were likely to be committed by the person counselled or procured, he will be liable in the event of any of the offences being committed.

94. Section 24 is somewhat like the definition of ‘Malice Aforethought’ in section 196 of the Penal Code which explains one of the elements of the offence of murder in section 193 of the Penal Code, save for the exception that section 193 deals with the ‘elements of the offence of murder’ and section 24 goes on to explain section 22(d), which is a ‘form of criminal liability’. In charging a person for murder it is not necessary to set out the circumstances under which malice aforethought is sought to be established, namely whether under (a) or (b) of section 196. **Section 196 of the Penal Code** states:

“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.”*

95. It is however to be noted that the learned Trial Judge had in his summing up explained at paragraphs 65 and 66 both the first and second limbs of section 24, namely “whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way”, through clear examples, at paragraph 64 of the summing-up. At paragraph 65 he gives the example of the person counselled killing the victim in a way different to that he was counselled to do, namely by shooting the victim, when asked to poison him. At paragraph 66 he gives the example of the person counselled beating and killing the victim, when he was counselled only to beat him. In both instances the accused becomes liable for counselling another to commit the offence of murder, provided in either case death was a probable consequence of the counselling. Counsel for 2A tried to argue that 2A may have only told 1A to slap the deceased. This argument is misconceived as ‘slapping’ is a form of ‘beating’ and further 2A did not seek to explain what he counselled 1A to do, if it was different to killing the deceased.

96. It is therefore illogical for Counsel for 2A to argue that “The manner of the learned trial Judge’s summing-up in respect of section 24 of the Penal Code, would have left the Jury with the impression that if the 2nd Appellant had

counselled the 1st Appellant to do anything in respect of Berney Appasamy, then the 2nd Appellant would be guilty of count 2”. Both examples given by the learned Trial Judge are necessarily offences that the person counselled had been asked to commit and certainly not ‘anything’.

2A has argued that the particulars of offence failed to state as to how the 2nd Appellant ‘counselled or procured’ the 1st Appellant to murder Berney Appasamy. I am of the view that both these words are self-explanatory and the fact that reference was made to section 24 further explained ‘counselling’. The rest was a question of evidence and not one that had to be particularized in the charge. Further in view of the wording in section 22(d) (for ease of reference, see paragraph 87 above), it is clear that 2A could have been simply charged with “murder contrary to section 193 of the Penal Code read with section 22(d) & section 24 and punishable under section 194 thereunder”, without any reference to counselling or procuring.

97. Section 24 makes it clear that the issue as to whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, is immaterial. What is material is, whether the facts constituting the offence that is committed, in either case, are a probable consequence of carrying out the counsel. Reference to section 24 in the charge thus informed 2A that the Prosecution was relying on both limbs of section 24 and was basing themselves on the fact that 2A had counselled 1A to commit the murder of Berney Appasamy. I am also of the view that the prosecution was perfectly entitled in accordance with the provisions of the Criminal Procedure Code, to state both counselling and procuring in the alternative in the charge as laid.

98. I am of the view that that the charge against 2A has not been in violation of the requirements of article 19(2)(b) of the Constitution and section 111 of the Criminal Procedure Code as argued by Counsel for 2A.

99. The case of Leslie Ragain (CR SCA NO: 02/2012) cited by Counsel for 2A has no relevance to this case as the misunderstanding of the appellant, who pleaded guilty in Ragain was in relation to the elements of the ‘offence of manslaughter’ with which he was charged and not as to the basis on which he became liable for the offence. The case of G. R. J. Pothin (CR SCA No: 13/2017) dealt with the particularization of the ‘elements of the offence’ of rape and not that of the particularization of the manner of ‘criminal liability’, of the accused. This Court in Pothin found the charge was not defective. Also in both these cases appeals were allowed not on the basis of any defect in the charge but on other grounds. I therefore dismiss 2A’s grounds (1) and (4) of appeal.

100. Counsel for 2A, in the Heads of Arguments filed on behalf of 2A has informed Court that the **ground (2) of appeal** will not be pursued.

101. **Ground (3)** is a general ground that the verdict is unsafe, unreasonable and cannot be supported by the evidence. The crux of the complaint of 2A is that “it cannot be said that the circumstantial evidence was complete and conclusive in respect of the guilt of 2A and there were certainly co-existing circumstances which weakened and destroyed the inference of 2A’s guilt.” Put it in another way, the circumstantial evidence that was relied upon against 2A cannot be said to be compatible with his guilt and was incapable of explanation on any other reasonable hypothesis than that of his guilt, since they were also consistent with his innocence. In view of the evidence of both the prosecution and the defence detailed out in paragraphs 10-36, 38 and 52, and my comments therein, I am of the view that this ground has no merit and certainly the verdict

reached by the Jury in this case against 2A, cannot be said to be unsafe, unreasonable and unsupported by the evidence. In the Sri Lankan case of **Punchi Mahattaya V The State (1973) 76 NLR 564**, the Court of Appeal of Sri Lanka (At that time was the apex and final appellate court in Sri Lanka) said: *“In a case dependent on solely on circumstantial evidence, it is not the function of the Court of Criminal Appeal (first appellate court), or of this Court, for that matter to consider an interference with the verdict reached by a Jury, unless misdirection, mistake of law or misreception of evidence of evidence has been established.”* Otherwise this Court will be usurping the functions of the Jury whose duty is to *“decide which view of facts is correct and shall then return the verdict which under such view ought, according to the direction of the Judge, to be returned”*. In my view there has been no misdirection or non-directions by the learned Trial Judge or a mistake of law or misreception of evidence that has been established. It cannot also be said that the verdict of the Jury is perverse, in view of the circumstantial evidence that was available against 2A.

102. This was a case that necessitated an explanation from 2A in view of the incriminating evidence against him and his failure to do so in my view goes against his innocence. Counsel for 2A in his Heads of Argument has submitted that there was no motive for 2A to kill the deceased and has taken objection to the comment made by the learned Trial Judge that “the motive for the killing, being the fact that Berney Appasamy has been troubling his girlfriend Helena Simms”, as “vague and an overstatement and not consistent with the evidence”. Surely the very fact that Helena Simms started making inquiries about the deceased as claimed by her, from her friends, the police and a lawyer’s chambers and complained about him to 2A goes to show that she was in fact troubled by the conduct of the deceased. Motive in the mind of a criminal may

not be visible and it is for this reason that the law does not expect the prosecution to prove a motive. I therefore dismiss 2A's ground (3) of appeal.

103. **Grounds (5) and (7)** are criticisms of the learned Trial Judge's summing-up. Counsel for 2A has, in his Skeleton Heads of Argument faulted the learned Trial Judge, for not having "directed the Jury that they had to be satisfied on the evidence, that 2A had done one or more of the acts of 'counselling' or 'procuring', such as advising or encouraging 1A to commit the offence of murder". Counselling and procuring means advising and encouraging and there was nothing further to explain in the said words, save by reference to section 24 of the Penal Code which the learned Trial Judge had done by giving examples. The rest was a matter of evidence which the learned Trial Judge had asked the Jury to consider. At the very commencement of the summing-up the learned Trial Judge had at paragraphs 4 and 5, said that the Jury shall consider all the evidence both that of the prosecution and defence and the submissions by counsel for the prosecution and defence. Counsel for 2A has also complained that the learned Trial Judge had failed to strike a fair balance between the prosecution case and 2A's case. The learned Trial Judge had itemized the evidence against both Appellants. He has also referred to the submissions of both Counsel and expressed his own views about the case, stating in no uncertain terms that the Jury was not bound to accept them and could disregard them. In **R V Nelson (1997) Crim. L.R. 234** it was held that the right of the accused to have his defence faithfully and accurately placed before the Jury does not mean that he is entitled to have it rehearsed blandly and uncritically, by concealing the apparent deficiencies in the summing-up. According to Nelson if common sense and reason demonstrate that a given defence is riddled with implausibility, inconsistencies and illogicalities there is no reason for the Judge to withhold from the Jury the benefit of his own powers of logic and analysis. In fact, Justice moreover requires that he assists

the Jury to reach a logical and reasoned conclusion on the evidence. If not section 265(2) of the Criminal Procedure Code referred to at paragraph 66 would be rendered meaningless. I repeat paragraphs 75 to 78 above, in which I have dealt with grounds 2 & 5 of 1A. I therefore dismiss 2A's grounds (5) and (7) of appeal.

104. Appellant has tried to base his ground (6) of appeal on section 249 of the Penal Code which states:

“(1) If, when the case for the prosecution has been concluded, the Judge rules, as a matter of law, that there is no evidence on which the accused could be convicted, the jury shall, under the direction of the Judge, return a verdict of not guilty.

(2) In any other event the court shall call upon the accused for his defence.”

105. In R V Stiven [1971] SLR 137 Sauzier J held: “A submission that there is no case to answer may properly be made and upheld:

(a) when there has been no evidence to prove an essential element in the alleged offence; or

(b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.”

106. In the case of Galbraith [1981] 1 WLR 1039, guidelines as to how a judge should approach a submission of ‘no case’ was laid down. If there is no evidence that the defendant committed the crime, the judge will stop the case. The difficulty arises where there is some evidence but it is of a tenuous character. In such cases it was said: “... Where the Judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury

properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury ... There will of course, as always in this branch of the law, be borderline cases, they can safely be left to the discretion of the judge."

107. Certainly, in my view the case against 2A was not one where there was no evidence whatsoever, that the crime alleged has been committed by the 2A. This was also not a case where there were inherent weaknesses or vagueness or inconsistencies in the evidence relied upon by the prosecution against 2A. This was a typical case where the strength or weakness of the unchallenged prosecution evidence depended upon matters (Helena's evidence, the series of telephone calls between 2A and 1A, the fact that both 1A and TM had no motive to kill the deceased and the only person who was looking out for the deceased was 2A and the statement of 2A which was produced as part of the prosecution case in which on four earlier occasions 2A had denied any knowledge of the deceased and also exaggerated as to what had happened between Helena and the deceased) which were generally within the province of the Jury and where on a possible view of the facts there was evidence upon which a Jury could properly come to the conclusion that 2A was guilty of count 2.

108. In both *Stiven* and *Galbraith* the Court had taken the view that a case is stopped, normally, at the end of the prosecution case, if a submission of 'No Case' is made by the defence, except in those instances where the Trial Judge is

of the opinion that there is no evidence whatsoever that the crime alleged has been committed by the accused or where there are inherent weaknesses or vagueness or inconsistencies in the evidence relied upon by the prosecution against the accused. As stated earlier this was not a case that fell into either of the categories.

109. At the close of the prosecution case Counsel representing 2A and 1A have moved for an adjournment to discuss with the Appellants as to how they are to proceed with the case. When queried by the learned Trial Judge as to whether there will be, a no case to answer submission, both Counsel had informed Court that they will inform Court of their position the next day. The learned Trial Judge had then said “We will give them time to consult, I can only read the rights once you all decide on the aspects of a no case to answer. We will have the case mentioned tomorrow, give them time.” Addressing both Appellants, the learned Trial Judge had said “Both of you are given time to discuss with your lawyers and let me know tomorrow morning what you intend doing” On the next date Counsel representing 2A and 1A had said that they will not be making an application to make a submission of no case and had requested Court to put the options before the Appellants. This was clear indication by Counsel for 2A, that 2A had a case to answer. I quote below an extract from the Court proceedings that followed after Counsel had informed Court that they will not be making a submission of no case against both accused. “This court is satisfied that sufficient evidence exists that the case has been made out against the accused sufficiently to call for a defence, under section 249 of the Criminal Procedure Code. This Court proceeds to call for a defence from both the accused in respect of the charges against them. Prior to putting their election, a substance of the charges against each accused may be explained to each accused.” An appellate court will not interfere with the discretion exercised by

the Trial Judge under section 249 for leaving the case to be decided by the Jury unless it is palpably wrong.

110. I am of the view it is inappropriate for Counsel for 2A to fault the Judge, when he himself had opted not to make an application for a submission of no case, and in view of the evidence that was available against 2A at the conclusion of the prosecution case and also because where the strength or weakness of the prosecution evidence depended upon matters which were generally within the province of the Jury as stated in the case of Galbraith. I therefore dismiss 2A's ground (6) of appeal.

111. For the reasons enumerated above I dismiss the appeals of both 1A and 2A and affirm their convictions.

Fernando President

I concur:

F. Robinson JA

I concur:

S. Andre JA

Signed, dated and delivered at Ile du Port on 26 April 2023.