

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MRS JUSTICE G FRASER JA
THE HON MRS JUSTICE TIE POWELL JA (AG)**

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00021

SEDIKIE FRANKLIN v R

Obika Gordon for the applicant

Mrs Kimberly Dell-Williams, Miss Sasha-Kay Henderson and Miss Brittney Rowtham for the Crown

7 and 10 July 2026

Criminal law – Joint enterprise – Common design – Adequacy of directions – Mere presence – Participation – Whether jury misdirected – Safety of conviction

Criminal procedure – Application for jury view of the *Locus in quo* – Refusal of application – Safety and security concerns – Material alteration of scene – Exercise of discretion – Whether refusal to view *locus in quo* led to unfair trial

Evidence – Documentary evidence – Photographs – Admissibility – Whether exclusion of photographs led to unfair trial – Evidence Act, section 31G

ORAL JUDGMENT

G FRASER JA

Background

[1] Following a trial before a judge and jury between 7 to 10 and 13 to 15 January 2020, the applicant was convicted of the offences of: making use of a firearm to commit a felony, murder, wounding with intent, and illegal possession of a firearm. On 20 February 2020, the applicant was sentenced to 15 years' imprisonment at hard labour for the offence of making use of a firearm to commit a felony, life imprisonment with parole

eligibility after serving 30 years for the offence of murder, 15 years' imprisonment at hard labour for the offence of wounding with intent, and 10 years' imprisonment at hard labour for the offence of illegal possession of firearm. The sentences are to run concurrently.

[2] By way of Criminal Form B1, dated 3 March 2020, the applicant sought leave to appeal the conviction on the grounds of misidentification by the witness, lack of evidence, conflicting testimony, unfair trial, and miscarriage of justice. There was no ground of appeal specifically relating to sentence. A single judge of this court considered the application, but the same was refused. In her ruling dated 8 March 2022, the judge of appeal found "... no basis on which the jury's verdict can be disturbed".

[3] As is his right, the applicant subsequently sought leave to renew his application for leave to appeal and to reformulate the basis of his appeal. To that end, on 12 June 2025, he filed supplemental grounds of appeal, which were incorporated into his skeleton arguments, and applied for permission to abandon the original grounds of appeal. The Crown raised no objection to that course, and this court granted the application. Accordingly, Mr Obika Gordon ('Mr Gordon'), appearing on behalf of the applicant, confined his submissions to the three supplementary grounds, which thereafter constituted the grounds upon which the application was advanced.

[4] We take each of those grounds in turn.

Ground 1: The Joint enterprise direction

"The Learned Trial Judge's summation to the jury on joint enterprise/common design is wholly inadequate in that there was a failure to make it clear to the jurors that mere presence at the scene of an offence was not evidence of participation in the offence, thereby making the guilty verdict unsafe."

[3] The applicant contends that the learned trial judge's failure to give an express direction on the principle of "mere presence" rendered the conviction unsafe. It is argued that, although the jury was directed on common design, identification and credibility, it was never specifically instructed that mere presence at the scene of a crime, even with

knowledge that an offence was being committed, is insufficient, without more, to establish criminal liability.

[4] In our view, that submission cannot succeed.

[5] The starting point is that criminal liability under the doctrine of joint enterprise or common design does not arise simply because an accused is present when an offence is committed. It is settled law that liability as a secondary party requires proof of intentional participation, assistance or encouragement given as such in the crime committed, and that presence alone, without more, cannot found guilt. This court has consistently recognised that mere presence at the scene of a crime, without more, cannot establish criminal responsibility. In **R v Anneth Livingston et al** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77, 81, and 93/2003, judgment delivered 31 July 2006, this court emphasised that the prosecution must establish conduct from which participation in the common design may properly be inferred. Presence assumes legal significance only when it forms part of the surrounding circumstances demonstrating encouragement, assistance, or active participation. Similarly, in **R v Jogee; Ruddock v The Queen** [2016] UKPC 7, the Privy Council made clear that foresight is evidence from which intent may be inferred but is not itself the legal test. Liability depends upon proof that the accused intentionally assisted or encouraged the commission of the offence.

[6] It is equally settled that a trial judge is not required to use any particular formula of words in conveying this principle, provided its substance is communicated to the jury. This was articulated, in the analogous context of directions on identification evidence in **Raymond Hunter v R** [2011] JMCA Crim 20. However, whether a specific direction on mere presence is required depends on the issues raised by the evidence. Jury directions must be tailored to the facts of the particular case. A trial judge is not required to recite every conceivable legal proposition. The question for this court is not whether the phrase mere presence is not participation appears in the transcript. The ultimate question is whether, reading the summing-up as a whole, the jury was adequately equipped to

determine the real issues arising on the evidence, specifically those concerning joint enterprise or common design.

[7] The applicant did not advance a defence that he was innocently present at the scene. His defence was fundamentally different. He accepted that he was in the vicinity of the shooting at a shop and acknowledged seeing the complainant driving the motor vehicle past the shop. His case was that he was not present at the motor vehicle and neither was he in possession of a firearm nor did he participate in the shooting, as he was not at the scene of the shooting. In essence, he denied being one of the gunmen.

[8] The prosecution's case was equally unequivocal. The eyewitness testified that at the relevant time of the shooting, he observed the applicant standing with another man beside the passenger side of the vehicle. He described seeing each of the men pointing firearms towards the passenger. At trial, he gave a detailed account of the firearm allegedly held by the applicant and explained how it was being held while directed towards the deceased. He further testified that, after driving away, he continued to hear additional gunshots and subsequently discovered that he himself had sustained a gunshot wound.

[9] Although counsel for the applicant relies on an inconsistency arising from the witness' evidence at the preliminary enquiry and his initial police statements, recorded closer to the time of the incident, in which he stated that he could not recall whether the applicant had a firearm, that inconsistency was fully ventilated before the jury. It was a matter bearing upon the witness' credibility and reliability rather than upon the legal ingredients of joint enterprise. The learned trial judge properly directed the jury on how to approach inconsistencies in the evidence and left it to them to determine whether the witness was truthful and reliable.

[10] We have examined the relevant passages of the transcript pertaining to the learned trial judge's summation on the joint enterprise issue. At pages 543–544, the learned trial judge explained the general concepts of principals and aiders and abettors,

correctly directing the jury that an aider and abettor is one who is “intentionally there to assist, encourage or cause other persons to commit the crime”. At pages 520–522, addressing the count of illegal possession specifically, she directed that, if the jury were not sure that the applicant himself held a firearm, they could nonetheless convict only if sure that he was “there to assist Pappa, to aid and abet ... to commit these offence[s]”, a formulation that clearly indicates that the law on joint enterprise, on its face, requires purposeful participation rather than mere presence.

[11] The passage we regard as most directly answering this ground, however, is that at pages 604–606, where the learned trial judge addressed the jury in the context of the applicant's unsworn statement and the substantive offences generally, not merely the possession count:

“The Prosecution is saying... that the defendant whether he fired that firearm or not... if you say that he was there along with Papa, participating in this joint enterprise to kill or cause grievous bodily harm to Brown Man it does not matter if he fired the firearm or not... His presence there the Prosecution is saying is not accidental... They are also saying he was an aider and abettor, his presence there was not merely there, he was there aiding and abetting the commission of this offence.”

[12] This passage, in terms, distinguishes “merely there” from purposeful, participatory presence, and conditions guilt on the jury being sure of the latter and of the eyewitness's identification being reliable. We do not accept the Crown's submission, insofar as it rests principally on the extract at pages 520–522, that this passage suffices on its own to answer the ground as pleaded. That passage is expressly tethered to the illegal possession count and does not, by its terms, speak to the murder and wounding counts. But taken together with pages 604–606 and the general direction at pages 495–497, 518–520, and 543–544, we are satisfied that the summation as a whole conveyed, with sufficient clarity across the counts, that presence had to be accompanied by purposeful participation before guilt could follow.

[13] We add that the evidential matrix in this case substantially diminishes any residual concern arising from the absence of a specific direction on mere presence. The prosecution's case was never that the jury should infer participation from the applicant's presence within an undifferentiated group. Rather, the evidence was that the applicant was individually and positively identified at close range, approximately 5 feet away, as one of two men standing beside the passenger side of the motor vehicle, armed with a firearm and pointing it towards the deceased while his co-assailant simultaneously did the same. If that evidence was accepted, the applicant's conduct plainly transcended mere presence and constituted direct evidence of active participation in the attack. It was capable, without more, of establishing that he intentionally acted in concert with the other assailant in furtherance of the common design to shoot someone in the vehicle.

[14] The applicant did not contend that he was innocently present but played no part in the shooting. Rather, he denied being at the motor vehicle, denied possessing a firearm, and denied any participation in the attack. Accordingly, the evidence presented the jury with only two realistic alternatives. The learned trial judge's summation properly identified the two competing factual scenarios arising on the evidence and appropriately furnished the jury with the adequate legal framework in which to assess each version and the consequences flowing from its acceptance.

[15] If they accepted the eyewitness' account, the applicant was an active and armed participant in the joint enterprise. If, on the other hand, they rejected that evidence, there was no alternative evidential basis upon which criminal liability could arise, and the proper verdict would necessarily have been one of acquittal. There was, therefore, no evidence of any intermediate factual scenario in which the jury could reasonably have concluded that the applicant was merely present at the scene yet nonetheless guilty by reason of that presence alone. In those circumstances, the learned trial judge's directions on identification, credibility, and common design adequately addressed the issues that truly arose for determination, and the absence of a separate direction on mere presence

did not occasion any miscarriage of justice, as it was neither necessary nor required in the context of this case.

[16] Ground 1, accordingly, fails.

Ground 2: Refusal to visit the *locus in quo*

"The Learned Trial Judge erred in law in the exercise of her Ladyship's discretion in refusing the application of Defence Counsel for a visit to the locus in quo."

[17] The applicable principle is not in dispute. A visit to the *locus in quo* lies within the discretion of the trial judge. Its purpose is to enable the jury as the tribunal of fact to understand and apply evidence already before it, not to substitute for evidence, and this court will not interfere provided the discretion was exercised judicially: **R v Warwar** (1969) 15 WIR 298 (**'Warwar'**) and **R v Herman Williams** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/1971, judgment delivered 30 July 1971.

[18] The transcript discloses two independent bases for the learned trial judge's refusal, each unimpeachable on its own terms. First, a genuine and articulated concern for the safety of jurors and court staff in an area she described, based on her own knowledge, as capable of becoming "unpredictable at any time". This was a security concern of the kind trial judges are entitled to weigh, and which counsel's offer of unspecified "security arrangements" did not obviously answer. Second, and independently, her concern, shared by both counsel on the record, that the *locus in quo* had materially changed since 2008: the gully had been resurfaced, the stall at which the applicant was said to have been standing had been replaced by a gate, and a plaza had since been constructed. This is the same category of concern that justified refusal in **Warwar** itself, where a change in the condition of a hedge since the material date was held capable of misleading a jury on a view. A view of a *locus in quo* substantially altered by the time of trial risks doing more harm than good, and a judge who declines to order one on that basis cannot be said to have acted on a wrong principle.

[19] As to the dispute concerning distance specifically, we do not accept the submission, advanced by Mr Gordon, that this was the true centre of gravity of the application. The eyewitness's evidence of the distances material to his identification of the applicant, approximately 25–26 feet at the first sighting, and some 5 feet at the moment he saw the applicant holding a firearm, was never challenged as inaccurate. The major contention concerned the distance from Shortwood Avenue where the witness claims to have first seen the applicant, to the slope of the gully, where the incident is said to have occurred. The defence contends that this was over 100 feet and not the distance stated by the Crown witness. This point, however, does not bear on the reliability of either of the identification distances actually given in evidence. It is also worth recalling the shape of the defence case as a whole: the applicant did not dispute that the shooting occurred where the witness described, nor did he dispute being in the general vicinity at the time. What he denied was being at the specific location where the shooting took place, any participation in the shooting, and possession of a firearm. Notably, however, despite the refusal of the application to visit the *locus in quo*, the defence was still able to call a witness to give evidence as to distance.

[20] We, therefore, accept the Crown's characterisation of this point as peripheral to the identification issue that was, in truth, central to the case. Furthermore, witnesses are notoriously poor at estimating distances. The authorities recognise that inaccuracies in estimating distance or speed are often matters affecting weight. We also note, as the Crown submitted, that the 100 feet measurement was never put to the eyewitness in cross-examination. An application to visit the *locus in quo* specifically to establish a fact that was never first put to the relevant witness sits uneasily with the settled principle that a view is not a substitute for evidence.

[21] We are not persuaded that the learned trial judge erred in refusing the application for a view of the *locus in quo*. Her decision represented a proper exercise of the discretion vested in her and discloses no basis for appellate intervention. In any event, and only in the alternative, even if it were assumed that the refusal was erroneous, which we do not

accept, the applicant would still be required to demonstrate that the ruling occasioned a substantial miscarriage of justice. The relevant inquiry for this court is whether there is a realistic possibility that the jury would have reached a different verdict had they been afforded the opportunity to visit the scene.

[22] On the facts of the present case, the answer must be in the negative, having regard to the issues joined at trial, which were whether the applicant was one of the two armed assailants, whether he was in possession of a firearm, whether he participated in the fatal shooting, and whether the eyewitness's account was truthful and reliable. Those issues were comprehensively addressed by the learned trial judge's directions on identification, credibility and common design, and the eyewitness gave detailed evidence of the applicant's alleged participation in the attack. Against that evidential background, the applicant has failed to demonstrate that an inspection of the *locus in quo* could have materially advanced the jury's assessment of those issues. In particular, there has been no showing that the physical layout of the scene was critical either to the witness's opportunity for observation or to the reliability of the prosecution's case. Consequently, the refusal of the application, even if assumed to have been erroneous, could not realistically be said to have affected the verdict or occasioned any miscarriage of justice.

[23] We reiterate that the decision whether to permit the jury to visit the *locus in quo* was a matter committed to the sound discretion of the learned trial judge. The authorities establish that such a visit is intended to assist the jury in understanding the evidence and should only be ordered where it would materially advance that purpose. It is not an exercise in evidence, nor is it to be granted as a matter of course. Given the evidence of the circumstances of this case, and absent any demonstrated need for the jury to inspect the *locus in quo* in order to resolve a material issue of fact, the refusal to grant the application cannot be said to have amounted to an improper exercise of discretion or to have deprived the applicant of a fair trial.

[24] Ground 2 also fails.

Ground 3: Section 31G and the photographs

"The Learned Trial Judge erred in law in ruling that Defence Counsel had to satisfy the requirements of section 31G of the Evidence Act before tendering photographs into evidence, thereby preventing the Applicant from receiving a fair trial."

[25] The applicant contends that the learned trial judge misdirected herself in law by ruling that defence counsel was required to satisfy the conditions prescribed by section 31G of the Evidence Act ('the Act') before photographs of the *locus in quo* could be tendered into evidence. It is submitted that this ruling improperly restricted the defence's ability to present its case and deprived the applicant of a fair trial.

[26] We address this ground on two levels: first, whether the ruling in fact prevented the tendering of the photographs, which we regard as dispositive; and second, in the alternative, whether the ruling was correct in law, which we address given the live disagreement between the parties as to the proper scope of section 31G.

(a) Did the learned trial judge's ruling prevent the tendering into evidence of the photographs?

[27] The premise of this ground is that the learned trial judge's ruling prevented the applicant from tendering the photographs. Against that background, it is necessary to consider the learned trial judge's ruling. The question is not whether section 31G of the Act applied in the circumstances, but whether the ruling ultimately prevented the defence from placing before the jury admissible evidence that was material to the determination of the issues.

[28] The transcript does not bear that out. Having indicated that the foundation required by section 31G of the Act would need to be laid, the exchange continued, and defence counsel, rather than attempting to lay that foundation, or seeking a formal ruling excluding the photographs, or renewing the application, stated: "M'Lady, I will just ask a few more questions, [M]'Lady and abandon that". No further attempt was made to tender the photographs, and no ruling of exclusion was made; instead, a ruling was made on the required foundation, followed by counsel's decision not to pursue the point.

[29] A ground of appeal framed in terms of a ruling having “prevented” the tendering of evidence cannot succeed where the true sequence of events shows that the evidence was never, in fact, excluded, but rather that its proponent elected not to proceed. We regard this as sufficient, on its own, to dispose of the ground.

(b) The correctness of the ruling, in the alternative?

[30] Given the significance of the point to future cases, we do not rest solely on the abandonment of the application to tender the photographs at the trial. We turn to consider whether the requirement imposed by the learned trial judge for the tendering of the photographs was correct in law.

[31] The admissibility of photographic evidence is governed by well-established principles. A photograph is not, without more, admissible merely because a party seeks to produce it. Like any other exhibit, it must first be shown to be relevant and properly authenticated. The party tendering the photograph must ordinarily establish, through a competent witness, that it fairly and accurately depicts that which it purports to represent at the relevant time. Once that evidential foundation has been laid, the photograph becomes admissible as demonstrative evidence to assist the tribunal of fact in understanding the oral testimony. It does not constitute independent proof of the matters depicted but derives its evidential value from the testimony with which it is associated.

[32] Section 31G of the Act forms part of the statutory regime governing the admissibility of documentary evidence generated or produced by electronic or mechanical means. Whether that provision was strictly applicable to the photographs in issue depends upon the purpose for which they were tendered and the evidential basis upon which they were sought to be admitted. However, even assuming that the learned trial judge adopted an unduly restrictive interpretation of the section, that conclusion does not, without more, establish that the conviction is unsafe.

[33] The applicant bears the burden of demonstrating that the impugned ruling occasioned substantial prejudice. It is, therefore, necessary to examine the significance

of the photographs, and the ruling made in relation to them, within the context of the trial as a whole.

[34] Section 31D of the Act, which governs the admissibility of statements in documents, is subject to section 31G, which addresses documents produced by computer. Section 31G(7) defines "computer" broadly, to include any device that, pursuant to a program, performs automatic processing of data.

[35] The Crown correctly submits that this court's earlier obiter dictum in related submissions treating **R v Cook** [1987] 1 All ER 1049 ('**Cook**') as directly answering the point goes too far, since **Cook** did not concern section 31G of the Act or its English analogue at all. But the Crown's answer, that **Cook** is simply inapplicable because it "did not treat with computer generated evidence" does not, in our view, engage with the true force of the point being made by reference to it. **Cook** establishes that a photograph is properly categorised as real evidence, evidence the tribunal of fact may inspect directly, rather than a hearsay-type "statement" tendered for the truth of an assertion. Sections 31D and 31G of the Act form part of a statutory scheme governing documentary hearsay, records, compilations, and similarly processed information supplied by a person and reproduced by a computer. A photograph of a scene, tendered to show what that scene looked like, is not of that character merely because the device used to capture it happens to contain a processor. The fact that a digital camera performs internal automatic processing to render an image does not, without more, convert the resulting photograph into a "statement" comprised in a "document produced by a computer" within the meaning the section was enacted to address. We consider there is real force in Mr Gordon's submission that the learned trial judge's ruling proceeded on too broad a reading of section 31G's reach.

[36] We add a further, narrower difficulty with the ruling as it was expressed. Section 31G of the Act applies only where the device in question is, in fact, a "computer" as defined. The transcript shows that it was never established whether the camera used by the witness Mr Marlon Mullings ('Mr Mullings') was digital. Crown counsel at the trial,

raised the possibility ("If it is a digital camera... we are talking about a computer generated evidence..."), but the point was never resolved on the evidence. A party invoking a statutory foundation requirement bears some obligation to establish the factual premise that triggers it before the requirement is treated as engaged; it does not follow automatically from the mere possibility that a camera might have been digital. To that extent, the ruling that the foundation "would have to be satisf[ied]" arguably proceeded ahead of a necessary factual finding.

[37] We are, however, conscious that the learned trial judge's concerns were not confined to section 31G of the Act. She independently and, in our view, properly raised the relevance of the 2020 photographs of a *locus in quo* that had, on the unchallenged evidence, materially changed since 2008, the stall having been replaced by a gate, and a plaza constructed where none had stood before. That concern stands independently of section 31G and would, in any event, have significantly limited the probative value of the photographs that learned defence counsel sought to tender, particularly insofar as they were directed at demonstrating distances rather than at any feature of the scene shown not to have changed.

[38] In the further alternative, even if the section 31G ruling was made in error, we are not satisfied it occasioned any miscarriage of justice. The applicant was not without means of placing relevant material before the jury about the state of the crime scene and its immediate vicinity as it stood in 2020 at the time of the trial. The witness Mr Mullings gave oral evidence, without objection, of measurements he had taken and of the changes he had observed in the area, and defence counsel was free to, and did, make submissions on that footing. The core issue in the case remained the eyewitness's identification of the applicant at the two distances he described in his direct evidence, neither of which was ever shown to be inaccurate or challenged by reference to the disputed 100 feet measurement.

[39] Nothing before this court demonstrates that the excluded photographs would have materially advanced the defence beyond the evidence already elicited. There is no

indication that they depicted any feature of the crime scene or its vicinity that could not adequately be described by oral testimony, nor has it been shown that they would have undermined the eyewitness's opportunity for observation or otherwise materially affected the assessment of his credibility.

[40] Their proposed relevance appears to have been directed principally to illustrating the distance between the stall, where the applicant was first observed, and the gully, where the shooting subsequently occurred. That issue was explored during the eyewitness's evidence, who was asked by defence counsel to point out the distance in question. The eyewitness indicated a distance estimated by defence counsel at 20–23 feet. No challenge, however, was mounted as to the accuracy of this estimate of the distance between the two points. In support of the defence's case, Mr Mullings gave evidence that the distance from the iron gate, the location formerly occupied by the stall, to the slope of the gully measured approximately 102 feet. Accordingly, the substance of the defence's contention as to distance was placed before the jury through oral testimony. In those circumstances, we are not persuaded that the exclusion of the photographs themselves, as distinct from the evidence describing the features they were intended to depict, deprived the applicant of the opportunity to present his case fully or otherwise occasioned any unfairness in the conduct of the trial.

[41] Ground 3 fails decisively on the basis that the ruling did not, in fact, prevent the tendering of the evidence. However, even if it did so on the basis that the legal reasoning underpinning it was broader than section 31G properly allowed, as we have opined, no miscarriage of justice has been shown to have occurred, rendering the conviction unsafe. For these reasons, the application for leave to appeal conviction must be refused.

Sentence

[42] Concerning the sentences imposed, no ground for leave to appeal against sentence was pursued before this court as the applicant's challenge comprised in the grounds of appeal was confined to his conviction. That was appropriate, as no issue concerning

sentence properly arose for determination. Accordingly, any appeal against sentence would not have succeeded.

Disposition

[43] For the reasons given, there is no prospect of success in any of the three grounds advanced in challenging the convictions, and there is no basis on which the sentences imposed could be justifiably challenged by the applicant and disturbed by this court. Accordingly, the court makes the following orders:

1. The application for leave to appeal is refused.
2. The sentences imposed are to be reckoned as having commenced on 20 February 2020, the date they were imposed and are to run concurrently as ordered by the learned trial judge.