

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. Nos. 31 & 32 of 2002

BETWEEN

**1. KENRICK LONDON
2. CHANDROUTI LONDON** **APPELLANTS**

AND

THE STATE **RESPONDENT**

**Panel: R. Hamel-Smith, JA
L. Jones, JA
W. Kangaloo, JA**

Appearances:

**Mr. I. Stuart Brook for the first Appellant
Mr. J. Pantor for the second Appellant
Mr. D. Rampersad for the State**

Date: July 29, 2004

JUDGMENT

R. Hamel-Smith, J.A.

1 The appellants are husband and wife. They were convicted on May 15, 2002, for the murder of the wife's sister, Meena Sookoo ("Meena").

2 The story unfolds as Meena is on her way home on the evening of November 24, 1997. She is accompanied by a friend but they part ways after disembarking from a taxi on Spike Road. Her route takes her along a path that passes in front of the appellants' home. She fails to arrive home that evening and is never again seen alive. Her body is found on November 27, 1997 in a pasture and a bottle, which tests positive for paraquat, is lying next to it.

3 The post mortem examination discloses the cause of death as respiratory failure due to mechanical and chemical asphyxia. The Forensic Pathologist, Dr. Chandulal, finds evidence of an oblique abrasion on the middle of the front chest, suggestive of mechanical asphyxia caused by the prevention of the chest cavity from expanding during the act of breathing. Points of hemorrhage are found on the surface of the heart and lungs, indicative of positive proof and scientific evidence of respiratory failure.

4 Dr. Chandulal submits samples of blood, stomach contents and liver for a toxicology examination. Scientific Officer Neela Pooransingh examines the liver and stomach contents. The results indicate the presence of paraquat in both. She concludes that the findings are consistent with death due to paraquat poisoning. In light of these results Dr. Chandulal revises his findings to include death by chemical asphyxia.

5 There are no eye-witnesses to the murder. Everything turns on two written statements that the appellants allegedly give to the police. In Kenrick's statement he says that his wife persistently told him that she wanted him to help her get rid of Meena because "*with Meena out of the way*" her mother "*would love her more*". Kenrick promised that he would assist her and it is pursuant to that promise that Meena finds herself in the appellants' home on the evening of November 24. It is not that Meena intended to go there that evening. Quite to the contrary; as Kenrick recalls in his statement, he sees her coming along the path towards his house and makes a grab at her as she passes, in an attempt to pull her into the house. She falls to the ground and it is then he beckons her into the house, promising not to harm her. As she enters Kenrick calls out to Chandrouti, telling her that he has brought Meena and she could do what she wants with her.

6 The statement continues - Chandrouti immediately tells him to tie Meena to the bed. He does so, using a bra and a lace to fasten her hands and feet to the bedposts. According to him, his wife is a lesbian and she begins '*making love*' to Meena. When the act is completed Chandrouti tells him to help her carry Meena into the pasture at Windsor

Park. He unties Meena and as they walk out of the house he gives her the assurance that no harm will come to her. At the same time Kenrick sees Chandrouiti pick up a *soft drink* bottle containing gramoxone (paraquat). Accompanied by his wife, he takes Meena to the pasture, some distance away.

7 There, Kenrick relates, he watched as Chandrouiti gives Meena the bottle containing the paraquat and orders her to drink. Meena refuses and Chandrouiti picks up a stick and begins beating her and threatening to kill her. Obviously terrified, Meena immediately drinks from the bottle but at once spits out the paraquat.. He sees Chandrouiti take off Meena's clothes and begins to '*make love*' to her once again. She then burns Meena on the leg with a match and forces the paraquat down her throat. She uses her bodice to cover Meena's mouth and sits on her face, obviously to prevent her spitting it out again. He sees Meena *fighting up* until she eventually succumbs to the pressure and appears to be dead. It is then, he relates, that Chandrouiti asks him to move the body from the pathway into the nearby bushes, a task he carries out immediately. The soft drink bottle is placed near the body and the bodice is thrown into the bush. They both leave for home.

8 It is this statement that the prosecution relied on to convict Kenrick. If the jury accepted, as they did, that Kenrick gave it freely and what he had said was true then it is open to them to convict him of murder. The statement discloses an ongoing episode, one that begins with a promise to assist his wife in getting rid of Meena and, in pursuance of that promise, his grabbing at Meena as she walks by his house and ends with the hiding of the body in the bushes later that evening. It is for no other purpose therefore that he lures her into the house that evening; as he puts it: *for you (Chandrouiti) to do what yuh want with her*. When Chandrouiti orders him to tie her to the bed he complies without demurrer. He looks on as his wife assaults Meena on the bed, preferring to describe that act as *love making*. In any event, Chandrouiti obviously needed his assistance to tie Meena to the bed for the purpose of the assault. Again, Chandrouiti obviously appreciates the inherent difficulty in getting Meena to the pasture by herself and calls on Kenrick to assist her. He willingly obliges and promises Meena that no harm will result, a promise, as it turns out, obviously void of any meaning. Kenrick's presence is therefore key to the enterprise and he obliges without protest.

9 The jury would be asked to infer that the moment Kenrick saw his wife pick up the bottle containing the paraquat on the way out he would have foreseen the purpose for which it would be used, in spite of his words of comfort to Meena as he untied her from the bed, and yet continued in the enterprise. He walked her to the pasture and, again, in spite of his promise, he watched as his wife assaulted Meena and forced the paraquat down her throat. When Meena stopped *beating up* he willingly hid the body in the bushes, leaving the empty bottle next to it.

10 Notwithstanding the fact that the evidence disclosed two causes of death viz., mechanical asphyxia and chemical asphyxia, whatever the cause, the statement was powerful evidence to show that Kenrick was not there by chance but that he actively

assisted and/or encouraged the wife in killing Meena, whether it was on the footing of *basic* or *parasitic* accessory liability but we shall come to that issue later on.

11 Turning to Chandrouti's statement, she begins by recalling her early childhood, an unhappy and unpleasant one by any standard, mainly because of the way she was treated by her parents. She recalls the evening of November 24, when Kenrick and Meena walk into the house and Kenrick tells her that he has brought Meena "*for you to have your revenge*".

12 It is she who ties Meena to the bed and sexually assaults her while Kenrick stands at her side. She then tells Kenrick "*let we carry she in the pasture and nobody would see when we leave to go.*" She takes up the bottle of paraquat and some matches on her way out.

13 In the pasture, the statement continues, she removes Meena's clothes and *makes love* to her once again while Kenrick stands close by. Meena then asks for something to drink and she gives her the bottle of paraquat. Meena takes a drink but immediately spits it out. Meena keeps asking for water. When told that she has none, Meena asks for the same bottle. She drinks from it. At the same time Chandrouti lights a match that falls on Meena. Meena begins to '*make noise*' and Chandrouti takes off her bodice, stuffs it into her mouth and sits on her shoulder with her hands on Meena's chest. She sits there for a *good while* until Meena stops struggling. She then recalls Kenrick saying "*she dead*".

14 Again, it is on the basis of this statement that the prosecution sought to persuade the jury to convict her of murder, whether death resulted from mechanical or chemical asphyxia. Counsel representing the appellants obviously appreciated the significance of both statements because, once admitted, it was open to the jury to convict the appellants of murder. From the outset of the trial therefore both sides indicated that there would be a challenge to the voluntariness of the statements and a *voir dire* was held to determine the issue.

15 At the end of the *voir dire*, in a judgment that took into account the inconsistencies of the police officers' evidence with regard to Kenrick's statement and the implausibility of Chandrouti's version of events, in particular her claim that her husband was present when her statement was written, the trial Judge admitted both statements into evidence. He was satisfied that no unfairness would operate against either accused by admitting the statements into evidence. He then rejected a no case submission and called on the defence.

16 Both appellants testified. Kenrick claimed that he had nothing to do with the death of Meena and had been forced to give the statement through threats and acts of violence upon him. Although not a ground for challenging the written statement at the *voir dire*, he pretended not to be able to read properly. His wife however testified that he was an ardent reader of the Bible and other spiritual books, an assertion he did not challenge. In the end this would have weighed against his credibility.

17 Chandrouti, on the other hand, ran a *cutthroat* defence, implicating Kenrick in Meena's death. While her written statement could not be used against Kenrick, her evidence, if believed, was sufficient to implicate him in the murder. It had the added effect of placing both of them at the scene at the material time. She testified that Kenrick was the one who brought Meena into the house and had sex with her. He then picked up a bottle of gramoxone and ordered both women to head for the pasture. She claimed that he had a bag containing spirit oils and bottles, which he brought with him. There, he drew a circle and commanded Chandrouti to stand in it while he performed his *ritual* on Meena. He laid Meena on the ground and had sex with her again. He then forced the paraquat down her throat and sat on her until she succumbed.

18 Chandrouti claimed that she had given the written statement to the police because she lived in mortal fear of her husband. She painted him as a tyrant who controlled her life and he had forced her to accept blame for the killing of Meena. She claimed that he had directed her to say those things in the statement because, he had told her, as he was a man, *they* would be harder on him; but as she was a woman *they* would be easier on her. Further, Kenrick was allowed to be present when she gave the statement to the police. He squeezed her hand and kicked her leg to ensure that she went along with his instructions as she was in mortal fear of him.

19 Medical evidence was led on her behalf to show that she suffered from diminished responsibility and from *battered spouse syndrome*. In fact, both doctors, Dr. Iqbal Ghany and Dr. Krishna Maharaj, portrayed her as a battered wife who had been ill treated during her childhood by her family and was a victim of incest by her father between the ages of six and thirteen. Dr. Maharaj found her to be a victim of physical, emotional and psychological abuse and completely dominated and controlled by her husband whom he deemed to be aggressive and dominating.

20 All these issues were questions of fact and if the jury accepted what Chandrouti had said in her evidence, it was open to them to convict Kenrick of murder and acquit her. From the verdict however, it is clear that the jury rejected what she had said on the witness stand and what Dr. Maharaj had said about the husband's dominance over her and her fear of him.

21 As regards her written statement, she challenged the voluntariness of it on two planks – (i) that her husband had forced her into giving it and (ii) oppression on the part of the police officers in whose charge she was. Kenrick, she asserted, had told her to take the blame for the murder and to go along with what he had told the police. Further, she asserted that he was allowed to be present when the police interviewed her and he coerced her into giving the statement. This raised an issue of fact and it is obvious that the jury (not unlike the Judge at the *voir dire*) rejected her version of events, placing little, if any, weight on Dr. Krishna Maharaj's evidence. The verdict itself demonstrated that the jury rejected the plea of diminished responsibility, an issue counsel for Chandrouti abandoned at the hearing of the appeal.

22 We now turn to the appeals. Several grounds were raised on Kenrick's behalf. There was an application to adduce fresh evidence in the form of a medical report by Dr. Hutchinson, a Consultant Psychiatrist. That report dealt with Kenrick's intellect, cognitive functioning and reading ability. The report was admitted *de bene esse* to allow the Court to hear counsel's submissions on whether it should be adduced as fresh evidence.

Ground 1 - (Kenrick's Appeal).

23 *A miscarriage of justice occurred when:*

- (i) *The State failed to disclose to the defence the Report of Dr. Krishna Maharaj dated March 19, 2001.*
- (ii) *This evidence was vital to the issues of common law unfairness (Ground 2) and to the appellant's mens rea in the alleged joint venture (see Ground 5).*

24 The ground was predicated on the success of the application to adduce fresh evidence and that in itself turned on the alleged failure of the State to disclose the report of Dr. Krishna Maharaj. Basically, two things were contended – (i) that had the report been disclosed it could have been used at the voir dire or on the general issue to show that Kenrick may not have understood the caution given to him before making the statement or the certificate he signed at the end of the statement; or (ii) it may have led to further inquiry which might have resulted in Dr. Hutchinson's report which could have been used at the trial to show the absence of *mens rea* in the alleged joint enterprise.

25 It is necessary to delve into a bit of history in order to show how the report of Dr. Krishna Maharaj came about. This was not the first murder charge against the appellants. They had been indicted for another murder, that of a baby daughter. At the commencement of that trial, the judge directed that they be medically examined as to their fitness to stand trial. Dr. Krishna Maharaj and Dr. Hari Maharaj examined Kenrick and both submitted a report to the Court. Both found that Kenrick was fit to stand trial.

26 Dr. Krishna Maharaj made findings as to Kenrick's intellect and reading ability. His report showed that Kenrick was a man of *low average intelligence*, with a *reading age of an eight year old..... manipulative, tendency to obstinacy and unable to maintain a job for very long...living in a fantasy world consisting of occult practices and beliefs. His relationship with his wife is one of possession and control through intimidation.*

27 Dr. Hari Maharaj found that Kenrick was not suffering from any mental disorder. He described him as *a pathological liar with a history of story telling in his village. He was an eccentric person with an Antisocial Personality Disorder....with a pervasive pattern of disregard for and violation of the rights of others occurring since an early age.....deceitfulness as conformed by lying and conning others for personal profits, reckless regard for the safety of others...lack of remorse and indifference for behaviour. It is evident that if Kenrick did commit the murders, he was reckless, did so intentionally and would have foreseen that death was a highly probable consequence of his actions.*

He has also utilized culturally sanctioned beliefs to control others and to fulfill his design. He is fit to plead

28 Both reports were produced at that trial. Given the prejudicial remarks and adverse opinions expressed in Dr. Hari Maharaj's report one can understand the reluctance to avoid having that produced for a jury's consideration. What the report does demonstrate however, is that, whatever the level of Kenrick's intellect and reading ability, he was a rather cunning and deceitful person, quite versed in story telling and, at least, a person capable of foreseeing the consequences of his actions, a capability apparently denied by Dr. Hutchinson.

29 The governing principles in relation to the admissibility of fresh evidence which guide the Court in the exercise of its discretion are well known (see *R v Parks* (1961) 46 Cr. App. R. 29 Lord Parker CJ). In exercising this discretion the Court considers and must be satisfied of four things viz., that the evidence (i) was not available at the trial; (ii) is relevant to the issues; (iii) is credible i.e, capable of belief; and (iv) if it had been given at the trial it might have created a reasonable doubt in the minds of the jury as to the guilt of the appellant.

30 These principles are not cast in stone in that if one is absent the application need not necessarily fail. The evidence must be looked at in the round and even if the applicant is unable to provide a satisfactory excuse for not having adduced it at the trial it does not necessarily follow that the application will be refused. Much depends on all the circumstances and in the final analysis the test is whether the appellate Court thinks that the evidence, if given at the trial, might have affected the decision of the jury to convict. (See *R v Pendleton* [2002] 1 WLR 72).

31 At the trial, the subject matter of this appeal, it cannot be said that Kenrick did not know of the existence of both reports. They were obtained at the Court's insistence in his first murder trial and he was physically present when the doctors examined him. There is no dispute that the reports were produced at that trial and it was on that basis the trial Judge was satisfied that he was fit to plead. It is not open to Kenrick therefore to contend that they were not available to him. He has made no reference to the genesis of the report in his affidavit in support of the motion nor does he suggest, at the very least, an awareness of them but did not think them relevant. Instead, the application has been delicately perched on the rather tenuous ground that the correspondence passing between the state and attorneys for Kenrick (in this trial) does not disclose that the report of Dr. Krishna Maharaj had been sent to the appellant's attorneys. This suggests that it might have been sent but the correspondence does not so disclose. We are not told what the correspondence does disclose but, apparently, much had been disclosed before and during the trial but the state had no written record of that particular report being sent to the attorneys. One may inquire whether Dr. Hari Maharaj's was sent. We think that it was not sufficient to make absolutely no reference to the production of the report in the previous trial (a fact he must have been aware of) and attempt to gain some advantage by what may or may not be a *default* on the part of the state. Kenrick's failure to disclose, at the very least, what he knew of the report at the previous trial certainly suggests a lack of

bona fides on his part in making the application. This is not to suggest any misconduct on the part of counsel (in this appeal) who would have acted on his instructions.

32 Further, Kenrick opposed the admissibility of the written statement at the voir dire and on the general issue on the grounds of oppression and specific instructions were given to his attorneys as to the nature of that oppression. So much so that in giving evidence at the voir dire, he highlighted the incidents of oppression encountered by him before he succumbed to the demands of the police. Implicit in the challenge to the admissibility of the statement is the awareness on the part of Kenrick of the consequences of signing the statement. In other words, he resisted because he knew it would implicate him in the commission of the offence, the very purpose of the caution itself. To contend now that he did not understand the caution would seem to be somewhat contradictory of his original stance. Moreover, when he was examined in chief he was given the opportunity to deal with the issue of understanding the caution (he was asked if he understood the caution) but he responded that he had not been shown it. Again, that suggests that he knew what a caution was. At this stage to permit the addition of another (or alternative) approach to the challenge, where the evidence itself suggests that an opportunity to deal with it had been given but not grasped, seems a rather desperate but futile attempt to turn back the clock.

33 Additionally, while not a ground of objection to the admissibility of the statement, Kenrick claimed not to be able read properly nor to understand certain words e.g. *to alter*, *to correct*, *been* etc. Chandrouti, however, in cross-examination, stated that he was an ardent reader of the Bible and other spiritual books, a fact that was not challenged. The issue therefore was basically one of fact for the judge and jury respectively. Both clearly rejected his claim to illiteracy or low intellect. In the result, it is unlikely that either report (Dr. Krishna Maharaj or Dr. Hutchinson) would have bolstered his case in any material way. Neither report suggests that Kenrick was unable to read altogether and, significantly, neither report indicates whether Kenrick ever disclosed that he read the Bible and other books, a fact that would have been material to any proper assessment, thereby rendering the report less than credible. Remarkably, Dr. Hutchinson suggests that his reading ability and comprehension (which in 2004 he found to be at the level of between a seven to a ten year old) *may have improved somewhat over the years since his incarceration in 1997, given his interaction with various lawyers and the courts in the course of his trials and appeals*. He had not examined Kenrick until 2003 (post trial) so, without more it is difficult to understand this finding.

34 At the trial, the issue of his understanding and reading ability would have been basically a question of fact and not a medical issue. Dr. Hari Maharaj's report certainly did not paint a picture of a man who was handicapped in any way and the likelihood of Kenrick's grounds for opposing the admission of the written statement at the voir dire being any different was therefore highly improbable in the circumstances. Contrary to counsel's submission, it is more than likely that Dr. Hari Maharaj's report would have deterred further inquiry at that stage.

35 The jury would have seen and heard Kenrick in the box, would have been able to assess the quality of his intellect from his answers and draw, as they eventually did, the strong inference that he was not speaking the truth on that issue. His evidence and his ability to give it certainly did not reflect a man who suffered from poor intellect or inability to read and that certainly was not his case. Rather, his was a direct challenge to the written statement on express and unambiguous grounds of oppression and he readily identified the *pain, frustration* and *confusion* he was undergoing as the reason for signing the statement, not a lack of understanding or inability to read.

36. In all the circumstances, in addition to Kenrick not providing any satisfactory explanation for the unavailability of the evidence at his trial, the report itself does not seem to us to be relevant to the issues raised at the trial and, had the evidence been led, it is highly unlikely that it would have created a reasonable doubt in the minds of the jury, given those issues. Significantly, in his report, Dr. Hutchinson begins by stating that when he interviewed Kenrick, he maintained that he was *forced* to sign the statement and that the contents were not entirely accurate. He also maintained that he was not involved in the murder of Meena and was unaware of the circumstances surrounding the offence. Such an assertion on the part of Kenrick, in our view, suggests not only an awareness of what occurred and what did not occur, including an ability to differentiate between what was accurate and what was not but, also, a reassertion of the very defence he ran at the trial, one that was clearly an issue of fact for the jury.

37. The report that the appellant seeks to have admitted as fresh evidence also deals with the issue of *mens rea*. Dr. Hutchinson was asked to direct his opinion to the issue of *basic accessory* liability and *parasitic accessory* liability, viz., presence at the scene and encouraging and assisting in the commission of the offence and foresight that the primary party's action would cause death or serious bodily harm to the victim respectively. Given Kenrick's low intellect and cognitive facilities he expressed the view that the jury should accept that (i) he would not have been aware that by his inactivity in the pasture, he could be taken to be willfully encouraging the acts of the wife; and (ii) on the assumption that he was aware that gamoxone was a deadly poison, he would not necessarily have known when the wife took up the bottle containing the gamoxone on leaving the house, she might do an act of the kind which would result in causing death or grievous bodily harm to Meena unless the wife had explicitly so stated.

38 Counsel has referred us to no authority on the point and it may be that the law in this area is somewhat unsettled. Nonetheless, it seems that the question of *mens rea*, whether it be foresight or otherwise, is an issue for the jury and one well within its competency to decide. Significantly, the report does not suggest that Kenrick was suffering from diminished responsibility or insanity or, for that matter, any abnormality of mind. In fact, it was quite specific that his was a personality disorder and someone of low intellect and *IQ*. While expert evidence is admissible to prove an abnormality of mind, as in insanity or diminished responsibility, it is not necessarily so where there is no abnormality present. In the latter case, whether a subjective or objective test is to be applied, it is for the jury to decide what the accused foresaw and what he did not and how he might have been expected to behave in the particular circumstance of the case.

Accordingly, while it may be that the jury would require expert evidence to assist them where the accused is suffering from an abnormality of mind there is no need where it is otherwise. In the absence of any suggestion of abnormality of mind, therefore, it seems to us that the proposed fresh evidence would be inadmissible

39. In any event, it is not clear to us from the report whether the doctor took into account several pertinent factors in arriving at his opinion viz., the fact that the evidence showed that (i) Kenrick knew of his wife's intention to get rid of Meena, (ii) he actually brought her into the house for that single declared purpose, (iii) he assisted his wife not only in tying Meena to the bed (the first salvo in the demise of Meena) but actively assisted in taking her to the pasture, (iv) he saw his wife pick up the bottle of gramoxone on leaving the house, (v) he again assured Meena that he would keep her free from harm (a hollow promise) and (vi) he hid the body afterwards. While he does qualify his opinion by accepting the truth of certain facts, in expressing his opinion his isolation of events in the pasture leaves the impression that the above factors may not have been considered in drawing the necessary inferences. Therein lies the danger of asking experts to draw inferences from a series of circumstances where no abnormality of mind is involved. That is the function of a jury and in this case it certainly was not a question of drawing inferences from Kenrick simply *standing, apparently, idly by* in the pasture while Chandrouti took Meena's life. It was a great deal more, as we have already demonstrated. The apparent omission makes the opinion less than credible and one that would be unlikely to create any doubt in the mind of the jury.

40 Kenrick's original line of defence was non-involvement in the commission of the offence. He was not there when the act was committed and the statement purporting to be in his hand was obtained by oppression and therefore inadmissible. If the jury accepted that the statement was his and true it was open to them to convict him. That would mean a rejection of the oppression issue and his defence of non-involvement. The effect of the doctor's report, if admitted as fresh evidence, would add another dimension to the oppression issue (we have already dealt with that issue in paragraph 32) and to his defence. As regards the latter, it would have the effect of putting an *alternative* defence for the jury's consideration. In other words, if the original line of defence were rejected, i.e. he was not involved, then his *cognitive impairment* would have prevented him from appreciating the consequences of his actions in the house and in the pasture on the day in question. We find this approach difficult to comprehend. Alternative defences may be commonplace in civil litigation but not in the criminal jurisdiction. One is not permitted to assert that he was elsewhere when the offence was committed but in the event that the jury reject that story a plea of, say, diminished responsibility would be relied on. Those *defences* are mutually exclusive. The latter is only available where there is involvement in the commission of the offence. Kenrick however, seems to be doing just that. He maintains his original line of defence, one of non-involvement but, if that defence is rejected (and his application to admit fresh evidence is successful) he seeks to fall back on *cognitive impairment* as an alternative line of defence. That certainly could not be permissible.

41 Accordingly, for the several reasons given, particularly in the absence of any abnormality of mind, we would refuse the application and reject the ground of appeal.

Ground 2

42 *A miscarriage of justice occurred when the learned trial Judge admitted into evidence the alleged written confessional statement of the Appellant in that to do so was an improper exercise of his discretion not to exclude the same, at common law, which was unfair to the Appellant.*

43 This ground was tied somewhat to the first in that counsel submitted that had the report of Dr. Hutchinson been adduced into evidence it would have created some doubt in the minds of the Judge (at the voir dire) and the jury (on the general issue) as to whether Kenrick understood the caution and the certificate appended to his statement.

44 We have dealt with this latter issue in ground 1 so there is no need to repeat it here. As to the question of unfairness, Counsel contended that the Judge, in dealing with common law unfairness, could not have been sure that (i) the caution had been given; or (ii) that he had been read his constitutional rights; (iii) that he had been effectively cautioned; (iv) that he had understood the meaning of the caution and the certificate and (v) that the Justice of the Peace had effectively carried out his responsibilities under the Judges' Rules 1964 when authenticating the statement.

45 Counsel reminded the Court of what Davis JA had said in *Attorney General v Whiteman* ((1991) 39 WIR 397, 407) as to the ease with which the police could say that they had *cautioned* the accused and *offered* him his constitutional rights which he declined to take up. Counsel submitted that the evidence given by the police in this trial was of a general nature and there were inconsistencies at times between the evidence of one officer and another. The issue, he submitted, should have been resolved against the State.

46 In *Whiteman*, the challenge was directed to the failure of the police to caution and inform the prisoner of his constitutional rights and it was in that context that Davis JA made his observations. In this case there was no challenge at the voir dire as to whether the caution or rights were properly described or understood by Kenrick. The trial Judge had to decide whether the statement in question had been given voluntarily or as a result of force used on the appellant. He found that it had been given voluntarily. In his assessment of the evidence he cannot ignore a failure to caution a prisoner or to inform him of his constitutional rights simply because it has not been identified by counsel as one of the objections to the admission of the statement. He would take these matters into account in looking at the evidence in the round and that is precisely what the trial Judge did.

47 Counsel referred to several instances where the evidence of the State appeared to be inconsistent as to precisely when Kenrick was informed of his constitutional rights and the marked absence of this fact from the cautionary paragraph of the “caution” statement. Had these matters formed part of the specific objections at the voir dire we have no doubt that the trial Judge would have identified and dealt with them in his written reasons. But they did not so they would have been considered in the round when arriving at his decision. We note that the trial judge took into account that errors were made by the police in recounting their evidence and he considered that there would be a measure of inconsistency at times between the evidence of one officer and another. He described this as a *normal feature in human behaviour*. Accordingly, the instances to which counsel referred do not really advance his case.

48 Counsel was also critical of the fact that the police recorded the statement in the absence of the Justice of the Peace. The JP had authenticated it only after its completion. That was certainly a factor to be considered by the trial Judge in determining the voluntariness of the statement but the fact that the JP did not witness the actual taking of the statement did not automatically disqualify it from being voluntary. There was evidence from the JP that he had asked Kenrick certain pertinent questions before he authenticated the statement and the trial Judge would have considered that evidence against what Kenrick was alleging in determining the issue, viz., that the JP never interviewed him (as the JP had alleged) and that he had simply put his signature to the statement and left, a fact denied by the JP.

49 We see no merit in this ground as we are not persuaded that the discretion of the trial Judge was improperly exercised. To interfere with the exercise of discretion, Counsel would have had to demonstrate that it was ‘*Wednesbury*’ unreasonable or palpably wrong. Counsel has not been able to do so.

Ground 3

50 *The learned trial Judge erred in the exercise of his discretion to admit the deposition of Neela Pooransingh.*

51 The gist of the submission was that the State had not satisfied the onus of proving that Ms. Pooransingh could not return to Trinidad on short notice and the evidence led was mainly hearsay and inadmissible. The State called her father to show that she had left Trinidad to pursue a course of studies in New York and, from a recent telephone conversation with her, he was satisfied that she would not return on short notice as she was still attending classes. It was in these circumstances that the trial Judge exercised his discretion to admit into evidence her certificate and deposition. There had been limited cross-examination at the preliminary inquiry and the trial Judge gave the jury adequate and proper directions on this score.

52 Counsel submitted that the application was based on hearsay and that the State did not prove that she could not return to the country to give evidence. Applications of this kind will at times generate a certain amount of hearsay evidence, unlike applications

where a witness has died and a death certificate is generally sufficient. In the former, someone, preferably a member of the family, may inform the Court that the witness is in a particular country, having seen that person depart on board an aircraft, and is unable to return on short notice to attend court because of certain commitments. The trial Judge, if satisfied that the witness is abroad and is unable to return on short notice, will then decide whether in the interests of justice he will admit the deposition. The absent witness may be the only one who can give direct evidence as to whether she can return on short notice and that would make nonsense of the provision in the law if the other side could insist on her attendance to give that evidence.

53 The proper approach, we think, is that the Judge hears evidence as to why the witness cannot return on short notice (which will inevitably be hearsay). If there is any other evidence to show that the reason is untrue then, maybe, more is necessary, but if there is not, the Judge is entitled to come to the conclusion that the witness cannot return on short notice based on the hearsay evidence given. This the trial Judge did and it was a matter for his discretion. In light of the evidence led we cannot say that he erred in the exercise of that discretion.

54 Counsel also submitted that the admission of the deposition was prejudicial to Kenrick's case because his counsel was deprived of cross-examining Ms. Pooransingh on the cause of death (by paraquat poisoning). The way the State's case was presented, he argued, was that paraquat poisoning was one of the two causes of death; the other was mechanical asphyxiation. If the former were relied on against Kenrick, the State had to show that paraquat was the cause of death and not simply that paraquat was found in the stomach and liver samples taken from Meena's body, as Ms. Pooransingh had found. He submitted that it was important to know for example, how long after ingestion paraquat would take to enter the blood stream before death resulted. In this case the test showed that due to contamination it was not possible to determine whether the blood sample contained any paraquat. The defence had attempted to ascertain this time frame from Dr. Chandulal but was prevented from doing so as he claimed that it was not within his expertise.

55 It was in this setting that counsel submitted that this worked to the disadvantage of Kenrick because, as he put it, the State's case against Kenrick was predicated entirely on the assumption that because Kenrick knew that the wife had picked up the bottle containing the paraquat as she left the house, he would have had the foresight that she was going to use it on Meena with the intention to kill her or cause her grievous bodily harm and continued in the joint enterprise. Accordingly, counsel submitted, the state's failure to prove that death was as a result of chemical asphyxia meant that there was no case for Kenrick to answer.

56 If the State were relying on paraquat poisoning as the sole cause of death to prove Kenrick's involvement, an assertion we do not accept, proof of death by paraquat poisoning was necessary and counsel's argument is that the bare finding of the presence of paraquat in the stomach and liver might not have been conclusive of death by poisoning.

57 The State's case against both appellants, however, did not rest solely on paraquat poisoning as the cause of death. Death was equally consistent with mechanical asphyxiation and it more likely than not that the jury found that Meena had met her death by the latter means. There was compelling evidence before the jury that after forcing the paraquat into her mouth, Chandrouti had sat on Meena's chest, preventing her from inhaling until she finally succumbed to suffocation. Mechanical asphyxia therefore would have been a substantial cause of death and this would have been sufficient to render both appellants responsible for the death as long as the other elements of murder were proved and the requisite foresight on the part of Kenrick was established. We do not accept the argument that the case against Kenrick turned simply on the cause of death being as a result of paraquat poisoning. Given the circumstances of this case, the fact that Meena may not have died from paraquat poisoning would not have made any difference to Kenrick's liability but we shall deal with this and the issue of foresight in ground five.

58 Accordingly, we do not find that any miscarriage of justice would have resulted by either the admission of the deposition or the report as to the cause of death by chemical asphyxiation.

Ground 4

59 *The learned trial judge erred in law when he rejected the submission of no case to answer at the close of the case for the prosecution.*

60 As we have already noted, at the end of the case for the prosecution, if the jury accepted that Kenrick had made the written statement and that it was true, there was a strong case for him to answer. Subject to what we say in ground 5 on the issue of paraquat poisoning, in spite of counsel's attempt in his submissions to compartmentalise the evidence, the clear inference to be drawn from the statement was that Kenrick knew that his wife wanted to get rid of Meena, had promised to assist her in that connection and had brought Meena into the house in circumstances that made it appear that she had entered *willingly*. He then assisted his wife in the enterprise by following her directions, first by tying her up to allow the wife to sexually assault her and then assisting her in taking Meena to the pasture where the murder was committed. When his wife picked up the bottle of paraquat he must have fully appreciated the use she might make of it. It was open to the jury to infer that his presence in the pasture was not by chance and that he was actively encouraging her in the enterprise. When it appeared to him that Meena was dead he hid the body at his wife's request.

61 Subject to what is said in Ground five, the trial Judge obviously considered that there was evidence, if believed, from which the jury could draw the conclusion that Kenrick had willingly encouraged and assisted his wife in the murder and in those circumstances, should be called upon for his defence. This was not a case in which there was a submission that there was an absence of any evidence to support the commission of the offence. We see no merit in this ground of appeal.

Ground 5

62 *The learned trial Judge's directions on joint enterprise were wrong in point of law and/or misleading and he failed to isolate the evidence against the first appellant and assist the jury in applying to it the relevant principles of law.*

63 It is accepted that the State's case against Kenrick turned on what the jury made of his statement and not what Chandrouti had said on the witness stand. Further, the case was premised on joint enterprise and if the jury considered that Kenrick's presence there was by chance and not one of participation i.e. assisting or encouraging, they would have to acquit him.

64 Counsel submitted that, at best, on Kenrick's statement the state's case could have been only that the jury *might* have inferred that he was aware that Chandrouti had taken up the bottle of paraquat to poison Meena and that by his accompanying her to the pasture he was in some way or the other participating with Chandrouti in her act to poison her. But death, he submitted, was not proved to have been by poisoning.

65 He submitted that to be guilty by virtue of *basic* accessory liability, the State had to prove that Kenrick committed the *actus reus* of the offence i.e. participated or carried out acts done in pursuance of the joint enterprise, or intended to and willfully encouraged the crime. On the other hand, counsel submitted, his statement simply showed that (i) Kenrick saw Chandrouti pick up the bottle of poison; and (ii) he merely walked with Chandrouti and Meena to the pasture. He did nothing whatsoever until after Meena died and he simply obeyed Chandrouti's instructions to hide the body in the bushes. This, counsel contended, did not provide any basis for Kenrick having committed the *actus reus* and the state, in any event, had failed to prove an intention to aid.

66 Counsel further submitted that the directions of joint enterprise were misleading when the Judge referred to the joint enterprise of assaulting Meena, i.e. to intentionally inflict force on her. Counsel contended that there was no evidence from which the jury could infer that Kenrick at that stage had entered into a common design with Chandrouti to so act. The previous acts of unlawful violence i.e. pulling Meena into the house and tying her up to facilitate the wife's sexual assault, he submitted, were at an end and therefore irrelevant to a consideration of this indictment. The only relevant aspect was an analysis of what happened from the moment Kenrick saw Chandrouti pick up the bottle of paraquat and that, in any event, would reveal that he did nothing to show that he was participating in an unlawful joint enterprise.

67 We do not agree with the way in which counsel has construed Kenrick's statement. The pasture scene does not require *isolation* as counsel suggests nor does the statement require much explanation. It is self-explanatory to great extent. We have already commented on the inferences that were open to the jury based on his written statement to the police but it may assist to repeat them here. It was open to the jury to find as a fact that Kenrick knew beforehand that his wife wanted to be rid of Meena and that he was prepared to assist her. Also, the single purpose of bringing her into house that

evening was to allow his wife to get her revenge. The joint enterprise began from the moment he presented Meena to Chandrouti and his tying of Meena to the bed and the sexual assault on her was the first salvo. When his wife directed him to take Meena into the pasture and she picked up the bottle of paraquat the strong inference any reasonable jury would have drawn was that Meena was going to be killed or, at least, suffer grievous bodily harm at the hands of Chandrouti and Kenrick would have foreseen that event. Paraquat is a poison that has the potential to kill and usually does kill. His compliance with her request to take Meena to the pasture was indicative of that foresight.

68 Kenrick's readiness to satisfy Chandrouti's wish to get rid of Meena would have led any jury to conclude that he foresaw or realized that Chandrouti would probably kill her, most likely by use of the paraquat. The fact that death was more likely caused by mechanical asphyxia, as we have already demonstrated, did not in any way detract from that foresight. The distance alone to the pasture would have revealed that his assistance was crucial to the enterprise. His presence therefore could not have been by chance and no reasonable jury would have concluded that he just happened to be there. He had promised Meena that no harm would come to her. His standing by while his wife forced the paraquat down her throat demonstrated not simply the hollowness of the promise but that his presence there served a critical purpose viz., making difficult if not impossible for Meena to escape.

69 We do not agree therefore with counsel that the statement merely showed Kenrick's presence to be that of an innocent bystander. Whether death was due to mechanical or chemical asphyxia was a lesser issue because he knew from the outset of his wife's declared intention to get rid of Meena and he did not withdraw from the enterprise. The paraquat had been forced into her mouth and had death not ensued as a result of mechanical asphyxia it would have more than likely occurred as a result of the poisoning. Further, contrary to counsel's submission, Kenrick's *promise* to Meena that he would see that no harm came to her when he took her to the pasture required no particular direction from the trial Judge because any reasonable jury would have had no hesitation in drawing the inference from his actions (or inaction) that it was simply a hollow promise.

70 Counsel's further argument was that the Judge wrongly directed the jury along the lines of *parasitic* accessory liability and this would have confused the jury. He maintained that the State's case could have been based on willful encouragement and assistance only (*basic* accessory liability) and not on *parasitic* accessory liability because there was no proof of death by paraquat poisoning. For the purposes of the latter, he submitted, the parties had to embark on an unlawful enterprise (the first crime) and the secondary party had to have the foresight that (in this case) the primary party might kill and that death did occur as a result of the foreseen act.

71 Counsel submitted that there was no basic crime committed which could be identified from the moment Chandrouti picked up the bottle from which Kenrick might foresee that his wife would kill Meena. In other words, the Judge had to identify the acts (contained within the relevant portions of Kenrick's statement) which were capable of

amounting to the *actus reus* of the basic crime in which both appellants were participating, before inviting the jury to consider if Kenrick had the mens rea for another non-intended, but foreseen crime, by virtue of *parasitic* accessory liability.

72 Not having identified those acts, counsel argued, it could not be said that Kenrick had embarked on an unlawful joint enterprise, far less that he '*continued to so participate.*' Having proceeded in that direction, counsel argued, the Judge's further directions, i.e. *in those circumstances Kenrick would have lent himself to the enterprise and by so doing, he would have given assistance and encouragement to Chandrouti in carrying out the enterprise which he realised might include murder*, were erroneous in point of law.

73 We do not agree with counsel's submissions. This was clearly a case of joint enterprise involving *parasitic* accessory liability, an issue apparently discussed between counsel and the trial judge (in the absence of the jury) before the commencement of his summation. The trial Judge explained the meaning of joint enterprise to the jury in these words: "*where a criminal offence is committed by two or more persons, each of them may play a different part but if they are in it together as part of a joint plan to commit it, they are each guilty*". He then explained that the plan or agreement required no formality; it could arise *on the spur of the moment* and nothing need be said. An agreement could be *inferred from the behaviour of the parties*. He then gave an example to illustrate his point – that of two persons setting out to burgle a house. One goes into the house and the other stands guard outside. Both are guilty because they both played their part in the plan.

74 The trial Judge then amplified the meaning by describing the one who entered the house as the *primary* party and the other as the *secondary* party and explained that the liability of the secondary party extended to anything that was contemplated or foreseen as a possible consequence of the plan. He then cautioned that the secondary party would have had to foresee the relevant act of the primary party as a possible incident of the plan and with that foresight participated (or continued to participate) in the enterprise. The criminal liability, he said, lay in participating in the venture with that foresight. He then explained that if one of the participants went outside the scope of the plan and did something which was not contemplated by the other then that other party would not be liable for the un-contemplated or unforeseen act. He concluded that it was for the jury to determine whether what was done was part of the joint enterprise.

75 The trial Judge then embarked on an analysis of the evidence and, after dealing with the case presented for and against Kenrick, he returned to the question of joint enterprise. He put it this way:

".....if looking at the case in respect of Kenrick...you are sure that he embarked on an unlawful joint enterprise with another person to assault Meena, i.e. to intentionally inflict unlawful force to Meena, and he contemplated or foresaw as a real risk that the other person might kill Meena, with the intent to kill.....in the course of carrying out that unlawful joint enterprise, but, nevertheless, he continued to participate in the joint enterprise

with that foresight, and if you are sure that Meena was so killed by the other person with the intention to killthen you will find Kenrick guilty of murder. In those circumstances ...Kenrick would have lent himself to the enterprise and by so doing, he would have given assistance and encouragement to the other person in carrying out an enterprise which Kenrick realized might include murder.”

The trial Judge concluded by telling the jury that if the other person went outside the scope of the plan and that was not contemplated by Kenrick he would not be guilty of the murder.

76 On the state’s case Chandrouti had delivered the fatal blow which caused the death of Meena. It is true that in her evidence at the trial she attempted to lay blame squarely on Kenrick but, as counsel pointed out, it was obvious to all that the jury rejected that evidence altogether.

77 Accordingly, on both her statement and Kenrick’s, Chandrouti delivered the fatal blow. The trial Judge described her therefore as the primary party and Kenrick as the secondary party to the extent that he was a party to the enterprise but did not actually deliver the fatal blow. In joint enterprise there may be two different scenarios but the principles involved are the same. In one instance the parties may set out to kill the victim but while one party only does the actual killing the other may have assisted and/or willingly encouraged him in the act. The other instance would be where the primary object of the participants was to do some kind of physical injury to the victim and while one (primary) party actually inflicts the injury the other (secondary) foresees that that party might, with the requisite intent, inflict either grievous bodily harm or kill the victim but that other party nevertheless continues in the unlawful enterprise (see Archbold 2004).

78 In the first example both participants are equally liable for the death of the victims. In the second, the secondary party would be liable only if he had the requisite foresight. In those circumstances he would have lent himself to the enterprise and by so doing he would have given assistance and/or encouragement to the primary party in carrying out an enterprise (i.e. the infliction of some physical injury, which he realized might involve murder or grievous bodily harm). In the final analysis, the lending of encouragement and and/or assistance would have been present in both scenarios.

79 It is in the latter circumstances that the trial Judge directed the jury that if in carrying out the unlawful enterprise of assaulting Meena, Kenrick foresaw that in the course of so doing, Chandrouti might kill or cause grievous bodily harm to Meena, he too would be guilty of murder. As earlier observed, the assault on the bed was the first salvo in an ongoing episode. Kenrick knew of his wife’s intention to get rid of Meena. Accordingly, when she picked up the bottle containing the paraquat and requested Kenrick’s assistance in taking Meena to the pasture immediately after the first assault in which he had played a part, it was then he would have foreseen the possible killing of or, grievous bodily harm to, Meena and he continued to lend himself to the enterprise.

Without his assistance it is highly unlikely that Chandrouti alone would have been able to get Meena to the pasture.

80 In the final analysis, we do not think that the directions would have led to any confusion in the minds of the jury or that there was any miscarriage of justice. We would reject this ground of appeal.

Ground 6

81 *Continuity of the stomach wall and contents and liver samples taken from the deceased, was not proved between Professor Chandu Lal and Neela Pooransingh, save through the medium of a leading question asked of the Complainant, by the learned trial Judge, immediately prior to the close of the case for the State. Moreover, notwithstanding the means by which this evidence was obtained, the basis upon which it was given: hearsay or first-hand, was not investigated.*

82. The complaint in this ground of appeal is that there was no evidence to show that the samples of liver and stomach taken from the body of Meena by Dr. Chandulal were the same samples examined by Ms. Pooransingh. What happened was this – Dr. Chandulal handed the samples to Sgt. Housend for delivery to the Forensic Centre. Sgt Housend gave them to Mr. Emanuel Walker who placed the markings on them. He delivered them to Ms. Pooransingh who examined the samples. Her report was delivered to Dr. Chandulal. In that report, which was admitted into evidence by the trial Judge in her absence, the samples were identified by the relevant markings made by Mr. Walker. No objection was taken at the trial to the fact that Mr. Walker did not identify the markings he had placed on the samples. At the hearing of this appeal Counsel submitted that in light of Mr. Walker’s failure to identify the markings in court, continuity was not proved and the method adopted by the trial Judge to do so did not advance the state’s case. The trial Judge had apparently recalled Sgt. Housend and asked him to confirm that the numbers on the exhibits were in fact the numbers placed on them. Sgt. Housend obviously was not the person to do so unless he had seen the maker place them on the samples, which he did not.

83 While we can understand counsel’s anxiety over the manner in which the trial Judge elicited the information from Sgt. Housend, it is unlikely to have caused any miscarriage of justice. The trial Judge was not responding to any objection to the admissibility of the report of Ms. Pooransingh but appears to have been carrying out what he considered mere *housekeeping*. It is more than likely that had he not recalled Sgt. Housend the issue would never have arisen. No one contended that the samples were not those taken from Meena’s body and if there were serious objection (there was not) it would have been open to the state to call Mr. Walker to resolve the issue. Accordingly, we would reject this ground of appeal.

84 The transcript of the trial shows that, in the absence of the jury and before the summation began, counsel on all sides accepted that Dr. Chandulal found that death was due to both mechanical and chemical asphyxia. Counsel has contended, as we have

already set out, that it was essential for the state to prove that death was caused by chemical asphyxia in order for Kenrick to be *parasitically* liable as a secondary party, hence the importance of this ground of appeal to his case. We have already shown however, in ground 5 that this was not so. In the absence of death by chemical asphyxia, there was sufficient compelling evidence from which the jury could conclude that Meena had died by mechanical asphyxia, as we have already demonstrated.

Ground 7

85 *The learned trial Judge's directions on poisoning were not in accordance with the evidence of the toxicologist, but rather in respect of the evidence of the pathologist, which, in this regard, was wholly inaccurate hearsay.*

86 Again, we do not think that we need to add anything else to dispose of this ground in light of what was said in grounds three and six.

Ground 8

87 *The learned trial Judge failed to direct the jury adequately or at all on the approach to be taken with regard to inconsistencies in the evidence of Ramkissoon and Housend against one another, also between them and the Justice of the Peace, which were the central plank of the defence attack on the credibility of these principal prosecution witnesses.*

88 The trial Judge gave proper and adequate directions on the question of inconsistencies and in our view the jury would have understood how to deal with such inconsistencies. He first dealt with the evidence of Sgt. Housend as regards the taking of the statement from Kenrick and, in particular the cross-examination by his counsel. The learned Judge pointed out the inconsistencies between what he had said in the witness stand and at the preliminary inquiry. He then directed the jury that where a *witness has admitted or had previously made a statement, which conflicted with his evidence, you may take into account the fact that he has made such a statement when you consider whether he is believable as a witness.* The Judge then explained that *the contents of the statement are not part of the evidence in the trial except for those parts of it which he has told you is (sic) true.....* The trial Judge proceeded to deal with the evidence of Sgt. Ramkissoon who was also present at the taking of the statement and directed the jury to certain areas of the cross-examination. Again, he highlighted the inconsistencies in Ramkissoon's testimony and repeated the directions given above. He dealt with the evidence of the Justice of the Peace in a similar fashion.

89 At the end of his summation, before sending the jury out to deliberate, he highlighted a main inconsistency between the police officers and the JP in respect of the JP's assertion that he had spoken to Kenrick in the absence of the officers and left it to the jury to deal with that evidence *in light of that conflict.*

90 From his directions on inconsistencies the jury would have understood their task in dealing with such evidence. We would reject this ground of appeal also.

Ground 9

91 *The learned Judge's directions on previous inconsistent statements, by omission, were inadequate.*

92 We have covered this ground in what is said in ground eight and need add nothing more.

Ground 10

93 *The imposition of a mandatory sentence of death was unconstitutional.*

94 This ground was deferred to await the outcome of the decision in *Charles Matthew v The State, (Privy Council Appeal #12 of 2004)*. That decision has now been delivered. The Privy Council held that the imposition of a mandatory death penalty for murder remains valid and that *Roodal v The State of Trinidad and Tobago* [2004] 2 WLR 652 was wrongly decided. The constitutionality of the death penalty was therefore upheld. This ground is therefore rejected.

95 We note however, that the Privy Council ordered that the sentence of death imposed on those persons awaiting execution pending the determination of *Matthew* be set aside and, in its place, their Lordships directed that a sentence of life imprisonment be imposed on such persons. Kenrick obviously falls within this category of prisoner and would be entitled to the benefit of that ruling.

Chandrouti's Appeal

96 We now turn to the appeal of Chandrouti. Four grounds of appeal were filed but the third ground was withdrawn with leave at the hearing. The others were as follows:

Ground 1

97 *The failure to adduce the psychiatric evidence relating to the co-accused (Kenrick) resulting in a miscarriage of justice.*

98 To understand this ground of appeal it is necessary to revert to what transpired in the previous murder trial. As explained already, both appellants were medically examined as to fitness to plead in that trial and the reports were produced in court. The reports of Dr. Krishna Maharaj and Dr. Hari Maharaj, both dated March 19, 2001 were tendered to show that Kenrick was fit to plead. Likewise, a similar report in respect of Chandrouti was produced. Chandrouti would have been aware of Dr. Hari Maharaj's report since it was produced at that trial and, as is customary, copies would have been passed to counsel on all sides. Counsel for Chandrouti at that trial did not seek to rely on either report in

respect of Kenrick although she had maintained throughout that trial that her mental responsibility had been impaired because of their relationship.

99 We have already set out (in ground one of Kenrick's appeal) details of the contents of Dr. Hari Maharaj's report. It describes the personality of Kenrick. It specifically states that he suffered from no mental disorder; it was simply a personality disorder.

100 Chandrouti, shortly after her arrest, allegedly confessed to her involvement in the killing of Meena. There was no other evidence to implicate her in the murder except that confession. According to counsel, her mental state became relevant at two separate distinct periods of time. Firstly, at the time of the death of Meena and then at the time she made the confessional statement. The essence of her defence was the dominating influence of her husband, Kenrick. She alleged that at the time of the offence Kenrick had drawn a circle in the pasture and commanded her to stand in it and not move until he so directed. After she was arrested he ordered her to take the blame for the murder and when she was actually giving the statement he was present, intimidating her. These were all issues of fact for the jury's determination.

101 Nonetheless, counsel submitted that had Dr. Hari Maharaj's report been produced at the trial it would have shown Kenrick's psychopathic tendencies and this would have bolstered her case by allowing a reasonable and properly directed jury to understand her claim of coercion and domination. Those issues had been ably supported by Dr. Iqbal Ghany and Dr. Krishna Maharaj who had testified as to her mental state.

102 Two issues arise. Firstly, counsel did not address the point but the hearsay content of this report gives rise to some concern. Dr. Hari Maharaj's findings would have been based on information given to him by Kenrick (or others) and, unless Kenrick was prepared to testify as to what he told the doctor, the opinion would be worthless. As de la Bastide CJ said in *London v The State* Cr.App. #24 of 2001(unreported) (p.17):

“when hearsay evidence of this kind is permitted to be given by a doctor in a criminal trial, the jury should be warned against using it improperly if or to the extent that it is unsupported by direct evidence from the patient himself. This is particularly important when, as here, the hearsay evidence is prejudicial to a co-accused. In fact, in such circumstances the Judge should be much stricter in not permitting the doctor to give any hearsay evidence in the first place unless it has been, or will be, supported by admissible evidence.”

103 Counsel for Chandrouti therefore would have had to satisfy the trial Judge that the doctor's evidence would have been supported by admissible evidence and it is hardly likely that he would have been able to give such an undertaking. In any event, the report was particularly prejudicial to Kenrick himself so it is unlikely that the trial Judge would have allowed the report into evidence without that assurance. That Kenrick would supply the material evidence was highly unlikely, in any event.

104 Secondly, there is the issue of relevance. We have already indicated that the issues raised by Chandrouti were essentially issues of fact viz., whether Kenrick played any part in the making of Chandrouti's statement or coercing her into taking the blame. The jury, by its verdict, rejected that she had been coerced or intimidated into giving it. Further, it was also a question of fact for the jury to determine from what Chandrouti and her two experts had told them whether her mind had been affected by Kenrick's alleged dominance and aggression. They obviously rejected this evidence. Again, counsel did not address the issue but it is of some concern whether Chandrouti could seek to prove this dominance by introducing expert evidence to show that Kenrick possessed such a personality. It seems to us that the issue of fact for the jury was whether her mind had been affected by what she alleged was done by Kenrick to her and not whether Kenrick had such qualities.

105 Counsel for Chandrouti also made an application to adduce fresh evidence in the form of two medical reports from Dr. Krishna Maharaj dated January 19, 2004 and from Dr. Iqbal Ghany dated January 13, 2004. We have already outlined the guidelines in respect of the admission of fresh evidence.

106 We would disallow the application for the following reasons. The onus is on Chandrouti to show by credible evidence that the fresh evidence was not available at the time of her trial. There is no evidence filed on her behalf to show that the report of Dr. Maharaj in relation to Kenrick dated March 19, 2001 was not so available or, for that matter, that she was unaware of its existence. She was present in Court when the order was made that both appellants be medically examined and also when the reports were produced in Court. There should be at least some explanation from her why she was claiming that it was not available to her at this trial.

107 Similarly, the application for leave to adduce reports from Dr. Iqbal Ghany, of January 13, 2004 and Dr. Krishna Maharaj dated March 19, 2004 was not supported by the requisite evidence on affidavit. Evidence on affidavit on this issue was critical because both doctors had testified at the trial on behalf of Chandrouti and both testified that Chandrouti had been controlled, dominated, manipulated and frightened by Kenrick to such a degree that she became a battered wife. The *fresh* evidence would have been available to her and no explanation has been advanced as to why the doctors did not deal with this *fresh* evidence from the inception. Nor has counsel been able to say in what way the proposed *fresh* evidence would have made a difference to the verdict. She had been through the first trial with him (the murder of her daughter) and there was no suggestion of intimidation or fear.

108 As earlier indicated, we note that a major hurdle confronting Chandrouti was that it was a question of fact for the jury whether Kenrick was indeed present when she gave the written statement to the police. It was unlikely that the police would allow Kenrick to be present and they denied that he was. She had admitted that she was taken to the Chaguanas Police Station while Kenrick remained with the police in the Couva station. By the time she returned to that station Kenrick had given or was giving his statement

and afterwards there was little time or opportunity for him to brief her on what he had said. Accordingly, apart from telling her to take the blame (which he may have done from the outset after their arrest) her story was highly unlikely. The jury, like the trial Judge, obviously rejected it and, as we said, it was principally a question of fact for the jury. In that event the *fresh* evidence of Drs. Ghany and Maharaj would have been of little or no assistance to her defence.

109 In all the circumstances we do not think that the evidence, if admitted, would have affected the decision of the jury so as to render the conviction unsafe.

Ground 2

110 *The learned trial Judge wrongly exercised his discretion in allowing the written statement of the Appellant to be admitted in evidence. He misdirected himself on the relevance and weight of the psychiatric evidence of Dr. Krishna Maharaj during the voir dire in relation to the appellant when determining whether the confession was obtained voluntarily.*

111 Dr. Maharaj's evidence showed the alleged dominance of the husband over Chandrouti but it was relevant only to the extent that Chandrouti could show that Kenrick's alleged dominance played a part in the giving of the written statement to the police. The trial Judge, in his written reasons for admitting the statement, rejected her story that Kenrick was with her when she was in police custody and further, that he had been present when she was actually giving the statement to the police. In light of the former finding, it is unlikely that she would have known details of what Kenrick had given in his statement to the police and this made her story all the more implausible. We see no merit in this ground of appeal.

Ground 4

112 *The learned trial Judge wrongly exercised his discretion in refusing to order separate trials. He failed to take into account relevant considerations causing unacceptable prejudice to the appellant, which led to a miscarriage of justice.*

113 The basis for the submission was that the trial Judge failed to take into account the defence that Chandrouti was suffering from *marital coercion* from her *domineering, violent, tyrannical, controlling and abusive* husband. In failing to do so, counsel submitted, he failed to balance the advantage of a single trial against the prejudice of the confession of the co-accused, which was highly prejudicial towards Chandrouti and only went to implicate Kenrick as a secondary party to the murder. Further, he failed to consider how far an appropriate direction to the jury would ensure that they only considered the confession of Kenrick purely for the purpose of proving the case against him.

114 The case for the prosecution, if believed by the jury, showed a deliberate plan on the part of the appellants to kill Meena. Both written statements implicated them in the

murder and it was in the interests of justice that they should be tried together. While the medical evidence may have shown that Chandrouti was someone who could be easily influenced and was dominated by an aggressive husband, as it turned out the question whether Kenrick influenced her into giving her statement was one of fact. It was obviously determined against her so the force of counsel's submission is considerably diminished. The fact that Kenrick could have been considered a secondary party to the murder did not mitigate the fact that he could be found guilty of murder with the same penalty imposed on him.

115 In any event, the trial Judge gave adequate directions to the jury (repeatedly) that they should consider the case against Chandrouti separately and that they should disregard what Kenrick had said in his statement when dealing with her case. The trial Judge therefore ensured that her case was considered fairly.

116 If anyone had reason to complain of the joint trial it was Kenrick, given the cutthroat defence run by Chandrouti against him. Her defence put both of them in the pasture at the material time and while her evidence was evidence against Kenrick it made it a question of fact for the jury to determine what part she played in the death of Meena. The jury obviously considered her defence an afterthought and rejected it.

117 The fact that Kenrick was sitting near to her in court at times was not an issue and while it may be that she experienced some fear or discomfort because of his presence there was no complaint that she was deprived of a fair trial. She was represented by competent counsel and allowed to give her evidence without fear, so much so that counsel for Kenrick reminded the jury of her bold assertions in cross-examination. We see no merit in this ground of appeal.

118 Accordingly, we would dismiss her appeal and confirm the conviction. As regards the sentence imposed (death by hanging), Chandrouti, like Kenrick, falls within that category of prisoner whose appeal was pending while awaiting the decision in *Mathew* (referred to above) and would therefore be entitled to the benefit of the ruling of the Privy Council to have her sentence varied to one of life imprisonment.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

W. Kangaloo
Justice of Appeal.

Addendum:

We delivered our decision on July 29, 2004 and informed counsel that we would give our reasons later. This was done simply to let the parties know the result of the appeals before the commencement of the long vacation. Counsel for Kenrick made a request through the Clerk of Appeals to have the Court reconvene to hear him on the question of sentence, given the ruling in *Mathew* (above). We did not respond to the invitation because we saw the ruling as one that involved an administrative act on the part of the executive in respect of all prisoners who fell within the stated category of persons awaiting execution. We have no reason to believe that the appellants will be treated otherwise.