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Caribbean Appeals

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Welcome to the first edition of *The Appellate Brief,* the 5KBW Criminal Appeals Unit Newsletter – Caribbean Appeals

Welcome to the first edition of ***The Appellate Brief,*** the 5KBW Criminal Appeals Unit newsletter covering appeal judgments from the Caribbean.

We send our warm wishes to our Caribbean readers affected by Hurricane Beryl and hope that you are safe.

In this edition there are summaries and expert commentary from Paul Taylor KC, the General Editor of *Taylor on Criminal Appeals*, on recent judgments from the Judicial Committee of the Privy Council, the Eastern Caribbean Supreme Court (appellate jurisdiction) and the Caribbean Court of Justice.

There is a separate newsletter – of "The Appeal Brief" - covering appeal cases from England and Wales and Northern Ireland.

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Visit the Criminal Appeals section of our website for more information on our Criminal Appeals Unit including details of future seminars, links to our podcasts, articles on appellate matters and resources for those considering or involved in an appeal.
If you would like to discuss instructing the barristers at 5KBW in an appeal, or for advice on a specific issue, please contact our Senior clerk Lee Hughes-Gage.

Paul Taylor KC specialises in criminal appeals and has developed a particular expertise in cases involving fresh expert forensic evidence (including GSR/CDR, DNA, CCTV), homicide, and offenders with mental disorders. Paul has represented appellants before the English Court of Appeal (Criminal Division), Northern Ireland Court of Appeal, Privy Council, Eastern Caribbean Supreme Court, and the Court of Appeal of Trinidad and Tobago. Paul is head of the 5KBW Criminal Appeals Unit and general editor of *Taylor on Criminal Appeals*. Chambers and Partners described him as "One of the foremost appeals lawyers…"

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In this edition:

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

By Paul Taylor KC

Investigation of jury irregularities – late retirement of jury – undue pressure – need for local appellate court to consider arguments raised before the Board

Shawn Campbell and others v The King (No 2)
[2024] UKPC 6
On appeal from the Court of Appeal of Jamaica

Summary:
In 2014 the appellants were convicted by a majority of 10:1 of murder. A fifth defendant, SW, was acquitted. The appellants were sentenced to imprisonment for life with hard labour, with minimum terms of 25 years, 30 years and 35 years.
The defendants appealed to the Court of Appeal of Jamaica. The grounds included:
(1) The trial judge erred in admitting the CD Rom JS2 into evidence because it had been obtained in breach of the Interception of Communications Act and the Constitution. [*The CD Rom contained material downloaded from mobile phones linked to the defendants.*]
(2) The trial judge failed properly to enquire into allegations of juror misconduct.
(3) The trial judge departed from standard practice in inviting the jury to retire to consider their verdict so late in the day, putting undue pressure on them to reach a verdict.
The Court of Appeal dismissed the appeals against conviction.
The appellants appealed to the Privy Council. The appeals were allowed and the convictions quashed.
The Board stated that it proposed "to follow in this case its usual practice of remitting to the local courts the question whether a retrial should be ordered."

The jury investigation ground
The Board considered the judge's approach to incidents concerning the jury.
On the last day of his summing up the judge convened a hearing in chambers which was attended by counsel. The defendants were not present. The judge told counsel that it had been brought to his attention that a juror (X) had attempted to bribe other members of the jury.
The forewoman was invited into the judge's chambers:
(a) She was questioned at length by the judge as to the circumstances in which the offers were made. She had recorded an exchange between herself and Juror X. It was of poor sound quality.
(b) On the forewoman's account, although the direct contact with her was made when a bribe was offered, contact had been made by Juror X "over a period of time with other jurors and they confessed it to me". Over time Juror X had started going to jurors and telling them what "we need to do". She would ask if he was listening to the evidence and he would say, "No - wi jus need to leggo di man dem".
(c) When asked by the DPP how many jurors Juror X had spoken with, the forewoman answered, "Eleven of us. He spoke to nine persons first."

The forewoman left. The judge asked rhetorically, "Can we possibly continue or we have to bring it to an end? That is the decision I have to make."

After a short break, the DPP indicated that the prosecution was prepared to proceed, but suggested that the judge should "[j]ust warn [the jury] again about their oath". However, the members of the defence teams expressed serious reservations about proceeding. Counsel for J expressed concern that the jurors, being aware of the alleged attempt at bribery, might overcompensate against that threat by ensuring that a guilty verdict was returned. The judge replied that he was going to complete his summing up that afternoon.

The trial judge resumed his summing up and immediately directed the jury as follows:

> "… may I remind you that when we started this case, I told you, you must keep before you the oath or the affirmation that you took that you are going to hear the case, try the case, based on the evidence that you hear within this Court. You must remind yourselves of that oath, that affirmation that you took. That is your function; that is why you are here; that's why you have been here right throughout this trial."

The jury retired at 3.42 pm and returned at 5.35 pm when the forewoman informed the court that they had not reached a unanimous verdict and were divided 10:1. The judge told the jury that the time at which he could accept a majority verdict had not yet arrived and he sent them out to resume their deliberations. At 6.08pm, they returned and by a majority of 10:1 they convicted all four appellants of murder. It appears that no majority direction had been given. They acquitted SW by a unanimous verdict.

Juror X was immediately arrested in the precincts of the court. He was prosecuted for attempting to pervert the course of justice and convicted.

The Board noted that:

(a) There was no evidence to connect any of the defendants with the activities of Juror X.
(b) If Juror X had attempted to bribe all eleven other members of the jury, "….It follows that the attempts to bribe jurors had been going on for well over a month before they were drawn to the judge's attention on the last day of the summing up."
(c) It "appears from the forewoman's account that, instead of reporting this to the judge as soon as it came to her attention, she had set about investigating the matter herself, involving other jurors in her investigations… This was unfortunate…"

The Board stated that:

> "Once the matter was drawn to the attention of the judge, he was required to focus his attention on whether a fair trial remained achievable. To this end, it was necessary for him to investigate what had occurred and to establish the relevant facts as best he could. It was necessary to establish the extent to which the contamination had spread. Once the facts had been established, the judge would be in a better position to exercise his powers in order to secure that the trial remained fair."
>
> …He should have interviewed each juror individually – with the exception of Juror X – as opposed to

> relying on the account of the forewoman...
>
> …The judge was placed in an unenviable position. This had come to light only on the sixty fourth and final day of a long and complex trial. He had already lost one juror. He could not discharge Juror X and continue with ten jurors because section 31 of the Jury Act provided that a murder trial could not proceed with fewer than eleven jurors. He had either to continue with those eleven jurors or to discharge the jury. He decided to continue with the eleven jurors and to give them a further direction as to their function in the trial.

While the Board had considerable sympathy with the judge's dilemma, it considered that the course followed by the judge was a material irregularity in the course of the trial giving rise to a miscarriage of justice within section 14(1) of the Judicature (Appellate Jurisdiction) Act.

(a) First, the direction to the jury was inadequate to save the situation. [*when it was appropriate to give a direction as opposed to discharging the jury*] … the direction… would have to be clear, apposite and emphatic and sufficient to neutralise the possibility of any prejudice which may have arisen. (See, generally, *Taylor (Bonnet) v The Queen* at paras 23-25.)

(b) In the present case the direction given by the judge… was not sufficient to rectify the situation…. There was nothing to relate it to the particular mischief which was alleged to have arisen – the tainting of the proceedings by the apparent offering of bribes…In any event, a direction, however focussed and firm, could not rectify the damage to the integrity of the trial which had been caused here.

(c) Secondly, the trial continued with the allegedly corrupt juror, … In the Board's view, allowing Juror X to continue to serve on the jury is fatal to the safety of the convictions which followed. This was an infringement of the defendants' fundamental right to a fair hearing by an independent and impartial court in accordance with section 16 of Chapter III of the Jamaican Constitution.

The Board then considered the Respondents' submissions as to the <u>potential impact on the safety of the convictions</u>:

> "…Mr Knox submitted that, since Juror X could be expected to argue for and to vote for the acquittal of the defendants, it was the prosecution and not the defendants who were likely to be prejudiced as a result of allowing the miscreant juror to continue to serve. However, the prosecution had approved of the course which the judge followed…. In those circumstances, Mr Knox submitted, the prosecution may be regarded as having waived the irregularity and the judge was entitled to allow the trial to continue. The Board is unable to accept this submission.
>
> Even on its own terms, it fails to take account of the wider implications of the mischief which had arisen… More fundamentally, however, it fails to appreciate what is at stake here. We are not concerned solely with the rights of

the prosecution but also with the right of the defendants to a fair hearing before an independent and impartial court. The fact that the prosecution might be prepared to waive an irregularity does not absolve the court from its responsibility to ensure a fair trial. In order to maintain public confidence in the administration of justice it is necessary to do justice to both prosecution and defence so that the guilty may be convicted and the innocent acquitted.

(d) Thirdly, the judge should have considered whether there was a real risk that the surviving jurors, other than Juror X, might as a result of the approach and whether consciously or unconsciously have become prejudiced for or against one or more of the defendants…." [See the judgment of Bingham LJ in *R v Putnam* (1991) 93 Cr App R 281 in which the appellants submitted that they were entitled to a fair trial by an untainted jury and that in the circumstances they did not receive it. Allowing the appeal, Bingham LJ observed (at pp 286-287):
"We cannot know whether M's approach swayed W for or against the appellants nor whether the bare majority which convicted the appellants Putnam and Lyons would have existed without it. We should not make our own, necessarily superficial, assessment of the merits. A jury tampered with, as (we assume) this one was, is liable to give an uncertain sound. The high regard in which juries are held depends on their collective integrity and on the individual integrity of their members. If a source of poison is identified in time it may be (and often is) possible for the poison to be isolated and neutralised. But we cannot view without grave unease verdicts reached by a jury when we know that there was a source of poison which (because its presence was unknown) could not be isolated and neutralised, when we do not know how far the poison may have spread and when we do not know what effect it may have had. There is in our judgment a real danger that the appellants may have been prejudiced and we cannot regard the verdicts as other than unsafe and unsatisfactory. It was not suggested that we should apply the proviso to section 2(1) of the Criminal Appeal Act 1968, and this would in our view be plainly inappropriate. We accordingly feel bound to allow these appeals and quash the appellants' convictions."

(e) Two points emerge with great clarity from the *Putnam* judgment.
- an improper approach to a juror may influence that juror for or against a defendant. ... In the Board's view, there was here a real danger that jurors may have been influenced, consciously or unconsciously, against the defendants by the knowledge that someone was willing to bribe jurors to secure the defendants' acquittal.
- the efficacy and fairness of trial by jury depend upon the collective integrity of juries and the individual integrity of their members. In the present case, quite apart from the objectionable continued presence of Juror X as a member

> of the jury, there was a real risk that the contamination emanating from his improper approaches had spread and had influenced the other jurors.

The time of the jury retirement

The Board was informed during the hearing of the appeal that no provision is made in Jamaica for a jury, once retired, to be sent to a hotel overnight and to resume its deliberations the next day. The appellants submitted that what occurred placed unacceptable pressure on the jury and that there was a real possibility that as a result the jury failed to consider the evidence with the attention it required.

The Board stated that [59]

> "In the light of the conclusion that the appeals against conviction must be allowed on the ground of juror misconduct, the Board does not propose to address this ground in any detail. We would emphasise that a jury must be permitted to deliberate and to return its verdicts free from any pressure. This is admirably expressed in the Supreme Court of Judicature of Jamaica Criminal Bench Book (2017) which states at section 25-2, para 5:
>
> > "The jury should not be placed under any pressure to arrive at a verdict. It is for that reason that the summation should not be concluded close to the end of the court day; the jurors should not have any anxiety, for example, about getting home etc, affecting their deliberations. For that reason a 3.00 pm benchmark has been adopted. Only in the simplest of cases would it be not unreasonable to send the jury to deliberate after that time. But the time is not an inflexible one. In more complex cases, it may well be unreasonable to conclude the summation during the afternoon session. In such cases, it is best to delay concluding the summation until early the following day in order to give the jury adequate time to consider all the issues before it."

[60] It does appear that there was an unfortunate departure from best practice on this occasion. However, we note that the Court of Appeal took the view that this departure was justified in the unusual circumstances of this case. In the view of the Court of Appeal the allegations against Juror X required the earliest deliberation and this justified the late retirement. The Board would usually defer to the view of the Court of Appeal on an issue where its superior understanding of local practice and conditions is relevant. However, in the light of the Board's conclusion on the jury misconduct issue, it is not necessary to express a concluded view on this ground of appeal."

Evidence obtained in breach of the Charter – Was it inadmissible?

The Board noted that [62]

(a) The appellants had presented "elaborate submissions both orally and in writing as to the correct approach to constitutional issues

surrounding the admissibility of illegally obtained evidence.

(b) The Board has been invited to lay down new principles and extensive reference has been made to comparative jurisprudence in a number of jurisdictions.

(c) It is unfortunate that these submissions were not canvassed before the Jamaican courts in the proceedings below. Rather, before the Court of Appeal these issues were argued and decided on the basis of conventional Privy Council jurisprudence from which we are now invited to depart.

(d) As a result, the Board does not have the benefit of the views of the Jamaican courts on these important matters.

(e) In circumstances where the convictions are to be quashed on other grounds, the Board takes the view that consideration of these constitutional issues should be deferred to another occasion on which the Board may be assisted by the views of the Jamaican judiciary.

<u>Comment:</u>

Investigation of jury irregularities: For an analysis of the approach of the English Court of Appeal (Criminal Division) to the investigation of jury irregularities see *Taylor on Criminal Appeals* paras 9.409 onwards.

The time of the jury retirement: In deciding whether the time of retirement may have put the jury under undue pressure, much will depend on the type and length of the case, as well as accepted local practice. See for example *Holder v State of Trinidad and Tobago* [1996] UKPC 27; *Brown and Stratton v R* [2018] 4 WLR 84 (English Court of Appeal); *Smith (Joseph Henry) v R* [2018] NICA 10 (Northern Ireland Court of Appeal).

The potential impact on the safety of the convictions: The prosecution submissions raised two fundamental points.

(1) Firstly, as the Judicial Committee stated "The fact that the prosecution might be prepared to waive an irregularity does not absolve the court from its responsibility to ensure a fair trial. In order to maintain public confidence in the administration of justice it is necessary to do justice to both prosecution and defence so that the guilty may be convicted and the innocent acquitted."

(2) Secondly, there are significant dangers in seeking to quantify the impact of an identified irregularity on the jury. As Lord Bingham stated in *Putnam:*

> "…we cannot view without grave unease verdicts reached by a jury when we know that there was a source of poison which (because its presence was unknown) could not be isolated and neutralised, when we do not know how far the poison may have spread and when we do not know what effect it may have had. There is in our judgment a real danger that the appellants may have been prejudiced…"

Similar concerns were expressed by Lord Bingham in <u>*Pendleton*</u> [200] in relation to attempts by an appellate court to identify the basis of a jury's decision to conviction when considering the potential impact of fresh evidence on the safety of the conviction.,

The need for local appellate court to consider arguments raised before the Board: In its civil jurisdiction the Judicial Committee is generally opposed to considering any point not raised and considered in the Court below. However, it has taken a more generous approach to this issue in criminal matters – and particularly those involving appeals in capital cases. See for example, *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 PC; and generally *Taylor on Criminal Appeals*, paras 18-66-18.69.

Retrial – interests of justice: Section 14(2) of the Judicature (Appellate Jurisdiction) Act permits a retrial where a conviction is quashed if that is in the interests of justice. As to the approach to factors should be taken into account in determining whether a retrial is in the "interests of justice" see for example, *Maxwell v R* [2011] 1 WLR 1837 (United Kingdom Supreme Court); *DPP v Largesse* [2020] UKPC 16 (Mauritius); *Stubbs v The Queen* [2020] UKPC 27. See also *Taylor on Criminal Appeals* paras 11.31 - 11.48.

Misdirections - specific intention for murder and armed robbery in joint enterprise - failing to leave issue of fact - failing to leave alternative counts - failing to adequately differentiate between separate cases – proviso – remission to local appellate court – need for written directions on the law at trial

Anton Bastian v The King (Bahamas)
[2024] UKPC 14

On appeal from the Court of Appeal of the Commonwealth of The Bahamas

Summary

In 2015, AB, CJ and MW were each convicted by unanimous verdicts of the murder of KB and two counts of armed robbery. JD was acquitted of murder but convicted by majority verdicts on two charges of robbery, the lesser alternatives to the counts of armed robbery he faced.

AB and was sentenced to a term of 40 years' imprisonment on the count of murder and 12 years' imprisonment on the counts of armed robbery, the sentences to run concurrently.

The prosecution case was that:

(a) JR and HS were robbed of their iPhones, cash and purses. It was alleged that the appellant and the other four defendants were in a car, driven by JD, and that whilst they were in the car, one of the defendants noticed two women within a group of people and they agreed to snatch the women's purses.

(b) MW, CJ and AB exited the car. MW and AB snatched the purses and ran off. KB witnessed the robberies and became involved in an altercation with CJ. KB shoved CJ backwards onto a car, whereupon CJ produced a handgun and shot and killed him.

(c) AB, who was 19 years of age at the time of the incident and who had surrendered voluntarily to the police when he heard that he was being sought, was essentially that he had made two oral statements to the police acknowledging that he had been present at the incident, that he had taken the purse of one of the women and that he had witnessed CJ shooting KB.

(d) The two oral statements amounted to a confession of robbery or theft and evidenced the appellant's knowledge that CJ had a gun.

(e) After making the oral statements, the appellant took police officers to where he had discarded the purse he had snatched from one of the women.

AB had been interviewed under caution and made a signed statement, which had been video recorded. However, following a voir dire, the record of interview and caution statement were ruled inadmissible and excluded at trial on the ground of oppression and police brutality.

The appellant gave evidence on oath at trial denying all charges and denying having made the two oral statements. He testified that police officers had beaten and tortured him while in detention and that the second oral statement allegedly given was unreliable and an untrue product of oppression and police brutality. He called his father who had accompanied him to the police station when he surrendered himself, to rebut the allegation that he had made the oral statement alleged. He also adduced evidence of a medical examination by the prison doctor, who had diagnosed myalgia secondary to trauma and some redness to the throat.

The defence case included submissions that if the appellant was present at the incident there was no evidence that he knew that CJ was in possession of a gun before he produced and used it and, moreover, there was no shared intention to shoot and kill KB.

The judge rejected a submission by counsel on behalf of the appellant that she should direct the jury that it was open to them to convict the appellant on the lesser offences of manslaughter and robbery. The judge did, however, leave to the jury the possibility of an alternative verdict of robbery in the case of JD.

Following conviction and sentence, the appellant, CJ and MW appealed against conviction to the Court of Appeal. The Court of Appeal dismissed the appeals.

The grounds of appeal before the JCPC:

Ground 1: The Court of Appeal erred in holding that the trial judge gave adequate directions to the jury as to the specific intention required for murder and armed robbery in the course of a joint enterprise.

Ground 2: The judge erred in failing to leave and present an issue of fact to the jury to determine and/or in failing to leave to the jury lesser alternative counts of robbery and/or manslaughter in the appellant's case.

Ground 3: The trial judge failed adequately to differentiate between the separate cases and evidence, including alleged out of court confessions, that the jury was required to consider in each defendant's case.

The JCPC decision

1. The law relating to joint enterprise in The Bahamas:

   [21-22] The law of The Bahamas appears to have avoided the wrong turn taken in *Chan Wing-Siu*.

   Farquharson v The Queen [1973] AC 786, an appeal to the Privy Council from the Court of Appeal of the Bahama Islands in 1973, applied entirely orthodox principles of joint enterprise. [*Rodney Johnson v The Queen* SCCrApp No 100 of 2012: Dame Anita Allen P, delivering the judgment of the Court of Appeal of The Bahamas, considered (at para 91) that *Farquharson* established that knowledge that one's associates had a weapon and foresight that the common plan entailed the use of whatever force was necessary to achieve the object of that plan was evidence, in the event that fatal results ensued from the use of such force in executing

that plan, from which it might be inferred that the appellant intended those results in common with the shooter. She concluded (at para 96):

> "The requirement of intent in cases of common design and extended common purpose, to which their Lordships returned in *Jogee* and *Ruddock* and which was the position in England prior to *Chan Wing-Siu*, has always been the position in The Bahamas, at least since *Philip Farquharson*."

As a result, she considered, *Jogee* and *Ruddock* did not affect the law of The Bahamas relating to common design which always had been that to be guilty the secondary party must share the intention of the shooter where the common purpose is extended to murder or another offence requiring specific intent (para 101).

2. Misdirection on the issue of foresight and intention

[29.] In the law of The Bahamas, in order to establish joint enterprise liability for a crime it is necessary to prove an intention to encourage or assist the commission of the offence coupled with an intention that the principal should act with the requisite mental element for the offence. In the case of murder, in the law of The Bahamas the necessary mental element is an intention to kill. Accordingly, in the present case the jury should have been directed that nothing would suffice short of a shared intention that Johnson should act intending to kill, which would include a conditional intention that he should act in that way if necessary if there was resistance to the robbery. Not only did the judge fail to give such a direction, but she erred by directing the jury at a number of points that it was sufficient in law to found a conviction for murder that the appellant realised, foresaw or knew that Johnson might use the gun to kill or use the gun with an intention to kill….

[30] These defects are not cured by the general directions in relation to intention given earlier in the summing up. The earlier directions were given in the context of the principal's liability. The jury was not told that they applied to secondary liability and, in any event, if they were so understood they were expressly contradicted by the later directions referred to above.

3. Misdirection and/or failure to direct as to the scope of the agreement

[37]. "…The judge should have invited the jury to decide what precisely had been agreed between the appellant and his co-defendants. They should have been invited to decide the scope of any common purpose or design beyond a plan to rob. In particular, they should have been asked to decide whether any agreement was an agreement to commit robbery as opposed to armed robbery and whether a common intention extended to the use of lethal force if the circumstances arose or to do so with intent to kill. There was no such direction.

[38]. Furthermore, in the summing up the judge herself attempted to describe the content of the agreement (which should have

been a matter for the jury) and did so in terms which obscured the real issues…."

4. Misdirection and/or failure to direct as to fundamental departure
[39]. "…While a more elaborate direction as to fundamental departure or overwhelming supervening event will sometimes be required, the Board considers that in the circumstances of this case this would not have been necessary, provided that appropriate directions were given in relation to the intention of secondary parties and the scope of any common agreement, on the lines indicated above…"

5. Misdirection as to the proper approach to the presence of weapons
The judge incorrectly directed the jury as to the effect in law of the presence of, and the appellant's knowledge of the presence of, the firearm possessed by CJ
[41] First, the fact that a secondary party is aware of the presence of a firearm before the time of the commission of the offence is evidence to be considered when determining whether an inference of the specific intent necessary to prove guilt is made out. However, in a number of passages in the summing up knowledge of the gun was presented not as evidence from which an inference of intention might be drawn but sufficient of itself to prove guilt of armed robbery or murder. Knowledge was erroneously equated with intention..
[42]. …the judge erred in failing to direct the jury as to the necessity of determining when the appellant became aware that Johnson was in possession of a gun. Knowledge of the gun could have probative value only if the appellant was aware of it before it had been fired. This failure is a serious deficiency in respect of what should have been a critical issue. Furthermore, this failure gives rise to broader concerns relating to the evidence on which the prosecution case of joint enterprise was founded which will be considered under Ground 2.

6. Conclusion in relation to joint enterprise
[43]. In the Board's view, the judge's directions on joint enterprise were seriously defective. Furthermore, while the Court of Appeal acknowledged the principles which it stated so clearly in *Rodney Johnson*, it failed to apply them to the summing up in this case. The Board would therefore allow the appeal on this ground.

7. Ground 2: The judge erred in failing to leave and present an issue of fact to the jury to determine and/or in failing to leave to the jury lesser alternative counts of robbery and/or manslaughter in the appellant's case.
[44]. A trial judge bears the responsibility of keeping under consideration whether it is necessary to leave to the jury the possibility of returning an alternative verdict to a lesser offence. In *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154

[45.] [51] The Board accepted the appellants submissions that:

(a) The judge erred in failing to leave to the jury in his case the possibility of returning a verdict of guilty of manslaughter in the alternative to murder and verdicts of robbery in the alternative to armed robbery.

(b) The failure to leave these matters to the jury renders the convictions obtained on an "all or nothing basis" unsafe and unsatisfactory.

(c) Both manslaughter and robbery were obvious alternative verdicts within Lord Bingham's formulation in *Coutts*.

8. Ground 3: The Board rejected this ground.

9. The proviso
[56] In the Board's view, there can be no question of applying the proviso in the present appeal. First, the errors in the summing up identified under Ground 1, in particular in relation to foresight and intention, were so fundamental as to make it impossible to conclude that, had the jury been correctly directed, the appellant's conviction would nonetheless have been inevitable. Secondly, the judge's failure to leave to the jury the issue of when the appellant may have become aware that Johnson was in possession of a gun, considered under Ground 2, was equally fundamental. Thirdly, … the view the Board takes as to the judge's failure to leave alternative verdicts to the jury, also considered under Ground 2, would make the application of the proviso impossible.

10. Observation by the Board
[57] The trial … raised complicated issues of law and fact, … In the Board's view the jury would have been assisted and clarity would have been promoted had the judge reduced the necessary directions of law to writing and, after hearing (and where appropriate responding to) any submissions about them from counsel, provided copies to the jury during the summing up. This procedure has now become the norm in most criminal trials in Crown Courts in England and Wales. This course has the advantage of allowing counsel to make submissions in advance of delivery of the summing up on what may be disputed points of law. It encourages clear and concise explanation of complex issues. It is likely to reduce the risk of repetition or contradiction in directions. It assists the jury in understanding and retaining the legal directions and can provide a sound basis for discussion when they retire to consider their verdict. The Court of Appeal may wish to consider whether such a procedure should be followed in The Bahamas.

11. Appropriate disposal
[58] … the errors in the judge's summing up identified under Grounds 1 and 2 undermine the safety of the appellant's convictions for murder and armed robbery which must be quashed.

[59] The directions on joint enterprise are so flawed as to make it impossible for the Board to substitute a conviction for manslaughter on a joint enterprise basis.
[61] No retrial for murder or armed was ordered. But remitted to the Court of Appeal with a direction that it consider whether it is appropriate to order the retrial of the appellant for manslaughter. Substitution of a conviction for robbery and matter remitted to the Court of Appeal for sentence on that charge.

THE EASTERN CARIBBEAN SUPREME COURT

Summing up unbalanced – Section 30 Sexual Offences Act of Dominica – Cross-examination on previous sexual history – Unsworn statement from dock – Trial judge's interruptions – minor complainant testifying on oath – Section 38 (1) Eastern Caribbean Supreme Court (Dominica) Act – Proviso – retrial

Joseph Senhouse v The State
DOMHCRAP2015/0009

ECSC- Court of Appeal
Commonwealth of Dominica

Summary
JS was indicted under the Sexual Offences Act of the Commonwealth of Dominica for certain sexual offences committed on an 8 year old girl in 2013.
At the trial, the principal witnesses for the prosecution were the virtual complainant [VC] and her mother, SG. The evidence of VC was that on four different occasions, JS called her into his home where he engaged in sexual conduct with her. She testified that on the last occasion, her mother met her at JS's home and it is then that she told her mother what had occurred on the three previous occasions.
SG gave evidence that one day she met VC in JS's home with him. She said that, in the presence of JS, VC told her what transpired between her and the appellant on that day. She took VC to the Health Center, then to the Police Station where they met WPC Bellot.
WPC Bellot gave evidence that VC's mother made a report against JS for having unlawful sexual intercourse with her daughter. She went with the VC and her mother to the Hospital where Dr. HLB examined VC and wrote his findings on a medical form filled out in the name of VC.
WPC Leblanc testified that she met VC and her mother at the Police Station where they told her certain things. She was handed the medical examination form which was filled out in the name of VC and contained the doctor's findings.
JS denied the allegations against him.
JS was found guilty of the offences of buggery, unlawful sexual intercourse and indecent assault, and sentenced to 25 years imprisonment for the offence of buggery, 25 years imprisonment for the offence of unlawful sexual intercourse and 10 years imprisonment for the offence of unlawful assault; with the two 25-year sentences to run concurrently, but consecutively with the 10-year sentence.

The appellant appealed against his convictions and relied on 10 grounds.
(1) The trial judge misdirected himself when he advised the jury that they should not be unduly concerned about the timelines of the

investigation into this matter because Dominica is not a rich country with limited resources and they should not make heavy weather of that fact.

(2) The trial judge's exercise of his discretion was "Wednesbury unreasonable" when he denied the application of the appellant to cross-examine the virtual complainant on prior sexual activity under section 30 of the Sexual Offences Act.

(3) The trial judge wrongly interrupted the appellant when he was giving his statement from the dock after he advised him of his [options] and the appellant chose to remain in the dock and gave his statement.

(4) The trial judge wrongly interrupted trial counsel for the defence when she was addressing the jury by repeatedly interjecting into her address, thereby stultifying her presentation of the appellant's case to the jury.

(5) The trial judge wrongly exercised his discretion to allow the virtual complainant to testify on oath when on the voir dire she was unable to tell the court what it means to tell the truth.

(6) The trial judge misdirected himself when he directed the jury that unlawful sexual connection meant the introduction to any extent into the vagina or anus of any person any part of the body of the other person to mean the penis into the vagina. For unlawful sexual connection it is not penis but hand, fingers tongue etc."

(7) The trial judge erred in law and misdirected himself when, in exercising his discretion to give the jury a corroboration warning, he failed to assist the jury in determining why it was necessary to look for corroboration in this matter and to give them a full corroboration warning.

(8) There was a material irregularity when the trial judge commented adversely on

(a) relevance of the appellant's statement about him lending money to the virtual complainant's mother and

(b) by discrediting the appellant's dock statement when he said to the jury that the appellant said "I believe". The trial judge told the jury – "But in this Court you don't go with what you believe", thereby discrediting the appellant's statement and removing it from the jury's consideration.

(9) The entire trial was unfair in that the defence of the appellant was not put to the jury at all or where put was discredited at every phase by the trial judge thereby resulting in the conviction being unsafe and unsatisfactory.

(10) There was a material irregularity when the trial judge at the empanelling of the jury openly mocked the appellant by making sarcastic remarks to him as he stood in the witness box causing the jurors, both panel and empanelled to laugh at him much to his distress.

(11) The sentence of 60 years imprisonment is severe and excessive in all the circumstances of this case.

The respondent wholly conceded grounds 1, 2, 3, 6 and 8, and partially conceded ground 9.
The Court dismissed Grounds 4, 5, 6, 7 and 10, but allowed the appeal on grounds 2, 3, 8 and 9.

Held: allowing the appeal, quashing the convictions, setting aside the sentences and ordering that the appellant be discharged, that:

(a) Unbalanced summing up: A trial judge must refrain from presenting an unbalanced summation to the jury and must not embellish a case for either the prosecution or the defence. In determining whether this was done, the court is enjoined to consider the trial judge's summation as a whole. In this case, the trial judge explicitly told the jury that they ought not to give much consideration to the delay in the investigative process, when this was indeed part of the appellant's case. This statement by the trial judge was improper and amounted to an irregularity, on the basis of which ground 1 of the appeal is allowed. This finding however is not sufficient on its own for a finding that the appellant's trial was unfair.

(b) Previous sexual history: Pursuant to section 30 of the Sexual Offences Act[1], a trial judge may, upon an application made by or on behalf of the accused in the absence of the jury, allow cross examination of a complainant on previous sexual history if such evidence is necessary for the fair trial of the accused. A primary consideration by the court when determining such applications is the nature and relevance of the questions which are proposed to be put to the virtual complainant. The questions which were proposed to be put in this case did not go towards the credibility of the virtual complainant but were more relevant to the guilt or innocence of the appellant. The application was made in relation to the fact that the medical examination form which was referred to by WPC Bellot in giving her evidence was in respect of another individual who was prosecuted and convicted for sexual offences against the virtual complainant. There was a significant overlap between the dates of the offences for which the appellant was charged and those for which the other man was convicted. This conviction was relevant to the defence of the appellant, which was a complete denial of any sexual contact with the virtual complainant and a claim that the accusations against him were fabricated. Ground 2 of the appeal is therefore allowed.

(c) Unsworn statement: The right of an accused to give an unsworn statement from the dock is circumscribed by the relevancy of the statement's content. In order to ensure that an accused does not

[1] 30.(1) In proceedings in respect of an offence under this Act, evidence shall not be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless the Court, on an application made by or on behalf of the accused in the absence of the jury, thinks such evidence is necessary for a fair trial of the accused.
(2) Save as provided in subsection (1), evidence of sexual reputation is not admissible for the purpose of challenging or supporting the credibility of the complainant."

give a purely irrelevant unsworn statement, the trial judge has the authority to limit the scope of the unsworn statement from the dock which may in some cases only be achievable by interrupting the accused. In this case, the appellant was prevented from completing his unsworn statement, the content of which was relevant to his defence; and even what the trial judge allowed him to say was discredited by the judge in his summation to the jury. The trial judge ought to have allowed the appellant to make his unsworn statement and left entirely to the jury the question as to what weight is to be given to it and his failure to do so effectively prevented the appellant's defence, advanced in his unsworn statement, from being adequately put to the jury. In the circumstances, grounds 3 and 8 of the appeal are allowed.

6. <u>The absence of a medical report</u>: While a medical report is not required in law for the prosecution of a sexual offence, in this case there was no medical examination form tendered into evidence at the trial of the appellant, yet one of the witnesses gave evidence in relation to a medical form and a medical examination, neither of which though was in relation to the charges against the appellant, and the trial judge failed to address this in his summation to the jury. This cumulatively would have caused the trial of the appellant to be unfair.

7. <u>Proviso:</u> The Court may, notwithstanding that it is of the opinion that the point raised in the appeal may be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred. The test is whether the appellate court is satisfied that any jury acting properly must inevitably have convicted the defendant if the flaws in the proceedings had not occurred. In this case, much of the grounds of appeal which have been allowed concerned the appellant's defence and its ventilation at trial. Based on the overall conduct of the trial by the learned judge, it cannot safely be said that there was no miscarriage of justice. Therefore, the proviso ought not be applied and the appellant's appeal should be allowed and his conviction and sentence quashed.

8. <u>Retrial:</u> The test for determining whether the Court should order a retrial is whether it is in the interest of justice that such an order be made. In this case, justice will probably not be served to either the appellant or the virtual complainant if they and their families have to relive the sordid events which occurred between January and August 2013. Among other considerations, a new trial would also mean that the virtual complainant would have to undergo a third trial of this nature in her young life. Furthermore, witnesses may be unavailable or unwilling to testify to matters which occurred as many as 11 years prior, while others may simply not recall relevant details. A new trial resulting in a verdict being given over 8 years later than would have been the case if the trial judge had not fallen into error also swings the pendulum away from the grant of a retrial. There is an 11-year gap between the commission of the offences and the

date by which a new trial may be held. The appellant has also already spent over 8 years in prison between the date of conviction in 2015 and the date of this judgment. In all the circumstances, a new trial will not be ordered.

Grounds rejected:

(a) Judicial interventions: The essential question to be asked when considering judicial interventions in a criminal trial is whether the nature and extent of the interventions have resulted in the defendant's trial becoming unfair. The question whether the interventions have denied the accused a fair trial depends on a qualitative evaluation of the effect the interruptions had on the fairness of the trial process. In this case, there is nothing which shows the learned judge's interruptions of counsel in her address to the jury prevented her from advancing the appellant's defence. Further, the judge's interruptions do not warrant a finding of bias so as to have caused the appellant's trial to be unfair. Ground 4 of the appeal is accordingly dismissed.

(b) Minor and the oath: A minor in respect of whom an offence is alleged to have been committed or any other minor of tender years who is called as a witness at a trial may give evidence on oath if, in the opinion of the court, he or she understands the nature of an oath. A belief in God and an understanding of the significance of the divine sanction provides a reasonable basis for concluding that the child understands the nature of an oath. In this case, the virtual complainant was able to distinguish between the truth and a lie and that there would be divine punishment if she told a lie. She was able to say that she was in court to tell the truth and that the truth means telling the court exactly what happened in the matter. The virtual complainant therefore understood the solemnity of the occasion and the duty to tell the truth. Ground 5 of the appeal is therefore dismissed.

Comment

This judgment provides a very helpful analysis of an appellate court's approach to several important grounds of appeal. In addition, it serves as an important reminder that the Court is the ultimate arbiter of whether a ground succeeds, and that it is not bound by the prosecution's concession in relation to any particular ground.

Murder – Self-defence – Whether the judge failed to properly direct the jury on the issue of pre-emptive strike as it relates to self-defence – Provocation – Whether the trial judge failed to properly direct the jury on the issue of provocation

Marshall Phillips v The King
SVGHCRAP2016/0005

ECSC-Court of Appeal
St. Vincent and Grenadines

MP was convicted of the murder of TJ (also known as "Hot skull")("the deceased"). MP was sentenced to 19 years imprisonment.
The prosecution's case was based on the evidence of three main witnesses. W1 testified that she heard the appellant and the deceased arguing. She heard the deceased say to the appellant that he could not buy gas and the appellant then stabbed

the deceased in his back. She saw the deceased's brother approaching, went inside her home and shortly thereafter, she observed the deceased bleeding on her porch. Ms. Eleno Thomas testified that she heard someone bawling. She observed the appellant and asked him what had happened. The appellant responded, "bawl for murder, bawl for murder, go up and see wha' me do Hot Skull." Mr. Romario Rawlins testified that he ran to the area where the deceased (his brother) and the appellant were. The appellant looked in his direction, said, "oh two alyuh" and then stabbed the deceased in his neck.

The appellant's case was that he had left his home that morning and was angry after a disagreement with his uncle. He passed the deceased man, he had an argument with him, and the deceased taunted him by telling him he does bull for money. The deceased man also threw two stones at him. He had a pair of scissors in his hand and he stated that his hand collided with the deceased and he received the fatal wound to his neck.

The appellant appealed on the grounds that the learned trial judge erred in failing to properly direct the jury on:

(1) the issue of pre-emptive strike as it relates to self-defence, and

(2) the issue of provocation.

Held: dismissing the appeal against conviction, that:

(1) Self-Defence: A trial judge is duty bound to provide a direction on self-defence and leave that issue for the jury to consider as long as that defence arises from any evidence or material during a trial. It does not matter whether it emerges from the evidence or material adduced by the defence or by the prosecution. A trial judge, applying common sense to the evidence in the particular case, makes the determination as to whether or not the evidence is sufficient to raise self-defence.

(2) There are no prescribed words to convey to the jury the concepts of self-defence or pre-emptive strike. All that is needed is a clear exposition, in relation to the facts of the case. In this case, the judge clearly appreciated that the appellant was alleging, among other things, that he was acting in self-defence and left that defence to the jury. She clearly set before the jury the meaning of self-defence and directed the jury to the appellant's evidence that he was fending off an attack by the deceased and his brother, as evidenced by the transcript. When the learned trial judge made reference to a "threatened attack" in the context of her direction on self-defence, the jury were made aware that the appellant could act in self-defence prior to the actual attack. That is the essence of a pre-emptive strike. The jury hearing this direction would have been left in no doubt that the appellant could have struck before he was attacked if he reasonably believed that an attack was imminent. The trial judge therefore did not err in her direction on the issue of pre-emptive strike as it relates to self-defence and the first ground of appeal failed.

(3) Summing up: Where a summation is criticised on the ground that it lacks fairness and balance one has to consider the criticisms in the context of the summation as a whole and the several issues which arose for decision. An appellate court is enjoined to look at the

thrust of the directions and consider whether they have adequately put the several issues before the jury and given them a proper explanation of their task in relation to those which they have to decide.

(4) Provocation: On a charge of murder, where there is evidence on which the jury can find that the accused person was provoked, whether by things said or things done or by both and lost his self-control, the question whether the provocation was enough to make a reasonable man of the age and with the characteristics of the accused react as the accused did shall be left to the jury for determination. There are no precise words to give a direction on provocation, only a clear explanation to the jury of the legal principles to be applied and an indication of the evidence which is supportive of the legal principles is necessary.

(5) On the facts, the issue of provocation arose as the appellant's evidence alleged that the deceased taunted him by throwing words at him. The judge rightfully explained what provocation was and directed the jury to the appellant's evidence of the provocative behaviour. She went even further and addressed the issue of provocation on the respondent's case. The judge directed the jury on the burden on the prosecution to disprove provocation, she properly told the jurors that provocation did not only have to come from the words or actions of the deceased, but also the words and actions of his brother Romario, and she also directed them that if they found the accused was indeed provoked, they were to go on to consider whether a reasonable man would have responded as the appellant did. She explained who the reasonable man was and properly directed the jury that if a reasonable man would have so acted, they were to return a verdict of manslaughter. Having considered the totality of the directions given by the learned judge, the summation was fair and balanced. There was no error on the judge's part and this ground of appeal also failed.

Comment:

As to a trial judge's duty to leave all reasonably available defences to the jury see *Von Starck v R* [2000] 1 WLR 1270; *Hunter and Moodie v The Queen* [2003 UKPC 69; see also generally *Taylor on Criminal Appeals*, paras 9.375-9.378. As to the trial judge's duty to leave alternative verdicts see *Coutts v R* [2006] 1 WLR 2164 HL, and *Taylor on Criminal Appeals*, paras 9.392- 9.399.

Appeal against conviction and sentence - Joint enterprise – Intention - Section 56 of the Criminal Code of Saint Lucia

Ezra Phillip v The King
SLUHCRAP2022/0001

ECSC- Court of Appeal
St. Lucia

Summary

In March 2019, Mr. St. Marie went to a karaoke bar where a fight broke out. Mr. St. Marie was attacked by a group of men estimated by witnesses to be between 8 to 15. The appellant, Mr. Ezra Phillip, was arrested and charged for intentionally causing dangerous harm to Mr. St. Marie,

contrary to section 99(1) of the Criminal Code of Saint Lucia.

The prosecution led evidence by eyewitness Mr. Mickaish King ("Mr. King") who claimed that he saw the appellant stab Mr. St. Marie in his stomach and pull out an object with a long black blade from Mr. St. Marie's belly. Mr. St. Marie also gave evidence that he saw the appellant approach him just before he was attacked and that he did not see the appellant with a sharp object in his hand.

The appellant's case was that he did not participate in the attack, but that he tried to separate the fight. He said he was not armed and denied stabbing Mr. St. Marie and denied also that he was a part of the group that attacked Mr. St. Marie.

The jury found the appellant guilty of causing dangerous harm to Mr. St. Marie.

The trial judge sentenced the appellant to 5 years imprisonment and ordered him to pay $6,000.00 compensation, in default to serve a term of imprisonment for six months to run consecutively to the five-year sentence ("the Compensation Order").

The appellant appealed against his conviction on the grounds that:

(1) The trial judge failed to put his case fairly to the jury and

(2) the trial judge failed to adequately put to the jury that the appellant's mere presence on the scene is insufficient.

The appellant also challenged the Compensation Order.

Held: dismissing the appeal against conviction and allowing the appeal against sentence to the extent only of setting aside the Compensation Order, that;

(1) Section 56(1) of the Criminal Code is a general statement of a person's intention in committing a criminal act. Section 56(2) lists five matters that the jury can consider in determining whether the prosecution has established the necessary level of intention for the commission of the crime charged. In directing a jury on intent, a judge is not required to direct the jury on each and all of the matters mentioned in section 56. What is required is that the trial judge directs the jury on the substance of the requirements in the section and explains to the jury contemporaneously, how to apply the principles to the facts of the case. In doing this, the trial judge should keep his or her directions simple and intelligible so that the jury can clearly understand how to assess the law and apply it to the facts.

(2) In this case, a consideration of the trial judge's summing up as a whole shows that he gave adequate directions on the substantive requirements of section 56 of the Criminal Code insofar as they are relevant to this case and that he related those requirements to the evidence in the case. His directions on intention were concise and clear and the jury must have been satisfied beyond reasonable doubt with the intention of causing him dangerous harm, or that he participated in the fight with the other men by helping or encouraging them with the intention of causing dangerous harm to Mr. St. Marie, for example, by contributing to the force of numbers in a hostile confrontation. Accordingly, the first and second grounds of appeal are dismissed.

(3) The appeal against sentence is however allowed to the extent that the compensation order is set aside.

Comment

The appellate court's approach to interpreting the basis of a jury's decision to convict – and which elements of the prosecution case they must have been sure of – has long been seen as challenging. See *Pendleton* [2002] 1 Cr App R 441, HL [19 in which Lord Bingham cautioned the appeal courts to approach this issue with caution. See also *Dial and another v State of Trinidad and Tobago* [2005] 65 WIR 410; *Taylor on Criminal Appeals,* [6.300].

THE CARIBBEAN COURT OF JUSTICE

Practice and Procedure – Appeal – Leave to Appeal – Special Leave – Criteria for granting Special Leave to appeal – Sentence –sexual activity with a child - life imprisonment - Whether sentence manifestly excessive – Whether sentencing process met acceptable fair hearing standards – Sexual Offences Act, Cap 8:03.

AB v The Director of Public Prosecutions
[2023] CCJ 8 (AJ) GY
CCJ Application No GY/A/CR2023/001
Criminal Appeal No 25 of 2018

CCJ on appeal from the Court of Appeal of Guyana

Summary:

AB was charged and convicted of two counts of sexual activity with a child contrary to the Sexual Offences Act of Guyana. It was alleged that he engaged in sexual penetration with the child. At the material times, the child was seven and eight years old respectively. Upon conviction, he was immediately sentenced by the trial judge to two concurrent life sentences without the possibility of parole before the expiry of twenty (20) years.

On appeal to the Court of Appeal, he contended that the sentences imposed, including the non-eligibility for parole requirements, were manifestly excessive. The Court of Appeal affirmed the imposition of his sentences.

AB applied for special leave to appeal the judgment of the Court of Appeal to the CCJ. He contended that the combined effect of manifestly excessive sentences and a flawed approach to the sentencing process including the Court of Appeal's failure to review and correct them, amounted to a serious miscarriage of justice and justified the granting of special leave.

The principal question for determination by the CCJ was whether the Applicant satisfied the requirements of special leave. The questions to be answered to a standard of arguability were:

(1) was the sentence imposed manifestly excessive? and
(2) did the judicial sentencing process sufficiently meet acceptable fair hearing standards to avoid any serious miscarriages of justice?

[13] This Court has explained that the grant of special leave is discretionary. This Court in *Fraser v The State* [[2019] CCJ 17 (AJ) (GY), [2020] 1 LRC 457] reaffirmed the test for special leave in criminal appeals such as this one, referring to the dicta of Hayton J in *Cadogan v R (No 2)*[[2006] CCJ 4 (AJ) (BB), (2006) 69 WIR 249] and Nelson J in *Doyle v R*. [[2011] CCJ 4 (AJ) (BB), (2011) 79 WIR 91]. The test requires an applicant to show that (a) there is a realistic possibility that a (potentially) serious miscarriage of justice may have occurred, and/or (b) a point of law of general public importance is raised (that is genuinely disputable) and the

court is persuaded that if it is not determined, a questionable precedent might remain on the record. [See *Pinder*]. The standard to be met for special leave to be granted is that of arguability, and grounds advanced must be supported by relevant and cogent evidence.

[In *Pinder v R* [2016] CCJ 13 (AJ) (BB), (2016) 89 WIR 181 at [4], Nelson J stated that: 'The applicant must therefore persuade this court that a potential miscarriage of justice or a genuinely disputable point of law arises out of the decision appealed from in order to qualify for the grant of special leave.']

Examining the sentencing process of the trial judge, the Court noted that in *Pompey v DPP* [[2020] CCJ 7 (AJ) GY], guidance was provided to trial judges on the best practice approaches to be taken on sentencing in cases involving sexual violence on minors. In *Ramcharran v DPP* [2022] CCJ 4 (AJ) GY, the Court affirmed these best practices with an expectation that they will be applied as and when appropriate. Ideally, this guidance ought to be followed to ensure that constitutional fair hearing standards are satisfied. However, failure to do so was not fatal.

In this case, the trial judge did not receive a victim impact statement, sentenced the Applicant immediately after the verdict was given, and did not consider a social services report. However, it was evident that the trial judge considered the aggravating factors placed before her including the age of the complainant, the special relationship of trust between the Applicant and the complainant, the lack of a guilty plea, the Applicant's attempt to shift blame, the repeated course of conduct, and the consequential emotional damage to the complainant. Based on these, and after having heard and considered the Applicant's plea in mitigation, the trial judge determined that in the exercise of her discretion that she could not be lenient. Her approach demonstrated an intention to consider and balance relevant sentencing factors, though not necessarily as fully as advised in *Pompey* and *Ramcharran*. Her sentencing remarks also showed that the Applicant's rehabilitation and re-integration into society were taken into account.

With respect to the sentence, the Court noted that life imprisonment was the maximum penalty under the relevant section of the Sexual Offences Act and was available within the range of punishment options available to the sentencing judge, where the sexual activity included sexual penetration. The Court noted as well that the circumstances of the crime were well placed before the trial judge, who found no mitigating circumstances. Additionally, what made this case distinct in its severity, was the special relationship of trust between the victim-survivor and the perpetrator and the young age of the victim-survivor.

Considering several precedents in which the crime of sexual activity with a minor was perpetrated by an adult in a position of trust, it was therefore fair to say that the choice of concurrent life imprisonment sentences in this case was neither extraordinary nor manifestly excessive. Indeed, it was reasonably arguable, that life imprisonment in the circumstances of this case was within the starting range of sentences that ought to be considered. Furthermore, it was also fair to say that the imposition of a 20-year period of ineligibility for parole was well within the existing range for similar cases. Considering the guidance in *Alleyne v R*, it was open to the trial judge to conclude that the Applicant deserved a sentence of life imprisonment. The crimes committed were

among the most serious, and in this case included premeditation and involved coercion. The trial judge found no mitigating circumstances capable of lessening such a life sentence, and the Applicant never offered an apology or showed any remorse. The psychological trauma to the victim-survivor, though not investigated, can be presumed. While imprisonment for life was considered sufficient to punish and deter, the opportunity for eligibility for parole after serving twenty years (with the necessary rehabilitation through counselling and therapeutic facilities available in prison) provides the possibility for rehabilitation and reintegration into society within the Applicant's lifetime, and so meets those sentencing objectives.

So, while the sentencing approaches and recommendations made in *Pompey* and *Ramcharran* were not precisely followed, it did not necessarily mean that the trial judge in the exercise of her sentencing discretion and the Court of Appeal in its review of the process, erred in law and in fact so as to create any serious manifest injustice or miscarriage of justice.

Accordingly, the application for special leave was dismissed. Each party was ordered to bear their own costs.

Comment

See CCJ "Special Leave Brochure": https://ccj.org/resources/public-education-materials/

There are similarities between the test for special leave in the CCJ and the test applied by the Judicial Committee of the Privy Council in that:

(1) The first part of the CCJ test requires the applicant to show that "there is *a realistic possibility* that a (potentially) serious miscarriage of justice may have occurred,"

(2) The JCPC test requires the applicant to show that "there is *a risk* that a serious miscarriage of justice may have occurred."

In the JCPC, the test of what actually constitutes 'a miscarriage of justice' is clarified by the constant case law applied by the Board in deciding appeals. This is stated most recently in *Cassel v The Queen (Monserrat)* [2016] UKPC 19 where Lord Hughes stated [28]: "…The test is normally whether the appellate court is, further, satisfied that any jury acting properly must inevitably have convicted the defendant if the flaw(s) in the proceedings had not occurred…"

See *Taylor on Criminal Appeals*, paras 18.54 onwards

Evidence – Admissibility – Role of judge – Role of jury – Summing up – Direction to jury – Whether evidence of witness found to be deliberately lying on oath should be rejected in entirety – Stare decisis – Whether bound by previous decisions of Court of Appeal on witness deliberately lying on oath – Whether direction in Scantlebury v R is proper.

James Ricardo Alexander Fields v The State

[2023] CCJ 13 (AJ) BB

CCJ Appeal No BBCR2023/001

BB Criminal Appeal No 4 of 2020

CCJ on appeal from the Court of Appeal of Barbados

Summary

The appeal was largely concerned with whether the jury was misdirected by the trial judge on how to treat with a witness whom the jury considered may be deliberately untruthful in one or more particulars.

The Appellant argued that the direction to

be given to the jury must follow the direction approved by the Court of Appeal in *Scantlebury v R* (2005) 68 WIR 88 (BB CA) ["the *Scantlebury* direction"]. That direction is to the effect that if the jury finds that a witness was deliberately lying on oath, then they must reject the whole of that witness' evidence because, if the witness lied on one matter, they would be quite capable of lying on another matter.
The Respondent disagreed that this direction was proper and contended that issues of credibility and reliability are within the exclusive competence of the jury, relying on the Eastern Caribbean Court of Appeal decision of *Nelson v R* and also on model directions from various jurisdictions.

The Appellant was convicted by the jury and appealed to the Court of Appeal who rejected the appeal.

The Appellant appealed to the CCJ and was granted Special Leave to argue only one ground: that the learned Justices of Appeal erred in law when they held that the learned trial judge correctly directed the jury on how to treat the evidence of a witness, they, the jury, believed to be deliberately lying on oath.

Counsel for the Appellant asserted that the proper direction to the jury should have been the direction approved in *Scantlebury* and followed both before and since then, by most but not all trial judges.
<u>The CCJ decision (Majority):</u>

(a) A blanket direction requiring the discarding of the entirety of the evidence of a sworn witness who is found to have lied in one matter under oath, blurs the role and function of the judge and jury to an unacceptable degree. It makes no attempt to convey to the jury that the extent to which the lie is material to the issue for determination at the trial might be a factor for their consideration, introduces an unwarranted distinction between prosecution and defence witnesses and is not consistent with best practice in directions to juries on matters of this nature.

(b) The categories of evidence which are admissible are matters of law for the judge; the weight to be placed on admissible evidence is a matter of fact for the jury. Therefore, it is entirely permissible for the judge to point out that the fact that a witness has lied under oath or affirmation is relevant to the reliability and credibility of that witness, whilst leaving the ultimate decision on the weight to be given to the evidence, to the jury. At the same time, it is also permissible for the judge to direct the jury to guard against assuming that the fact that the witness had lied about one matter *must* mean that the witness must automatically be taken as having lied about something else.

(c) On the question whether the principle of *stare decisis* required this Court to refrain from overruling *Scantlebury* on this issue, the majority noted that the Court was not bound by previous rulings of the Court of Appeal on this issue and neither this Court nor its predecessor, the Judicial Committee of the Privy Council, ever had occasion to examine and pronounce on this direction.

(d) The Court clarified that the direction in *Scantlebury* is not proper and that the direction to the jury on a witness deliberately lying on oath should indicate that they

are entitled to disregard so much of the evidence as they found untruthful and accept so much of it as they found to have been truthful and accurate.

The appeal was dismissed as it was found that the trial judge did not misdirect the jury.

In a dissenting judgment:

(a) The issues in the appeal could be easily decided based on *stare decisis.* The principles of vertical and horizontal *stare decisis* dictated that the trial judge was bound to follow the standard direction laid down in the Court of Appeal precedents and High Court decisions.

(b) Whatever the trial judge's own view, he had no choice but to do so. It was suggested that this Court should not overrule the *Scantlebury* direction because to do so could compromise the advantages of the *stare decisis* doctrine as there was no sufficient basis for overruling the standard direction in this case and there is a procedure available to the Director of Public Prosecutions ('DPP') to seek the opinion of this Court on the standard direction which would not require this Court to ignore breaches of the *stare decisis* doctrine by the Court of Appeal and the trial judge.

Disposition

In light of the opinions expressed, the Court concludes that:

(1) the trial judge did not misdirect the jury,

(2) the *Scantlebury* direction is wrong in law and ought not to be followed,

(3) a trial judge is entitled to direct the jury that the fact that a witness has lied is relevant to the reliability and credibility of that witness; equally, the judge is entitled to direct the jury to guard against assuming that the fact that the witness had lied about one matter *must* mean that the witness must automatically be taken as having lied about something else,

(4) the trial judge should emphasize that the ultimate decision about what weight is to be given to the evidence, is a matter for the jury.

In the instant case, the Court of Appeal was right to hold that there had been no miscarriage of justice.

Comment

The CCJ (majority) decision reflects the approach taken by English Court of Appeal in relation to grounds of appeal based on alleged inconsistent verdicts where the counts were based on the same complainant's evidence. See *Taylor on Criminal Appeals: 9.424:*

"The disputed guilty verdict does not, however, become irrational in light of an acquittal on another count simply because both counts depended on the evidence of the same person, where that person's credibility was in issue and the acquittal indicated that the jury had rejected her evidence in relation to that count.][*Eldridge and Salmon v R*; 12th June 1998] It is well established that a witness' credibility need not be regarded as a homogenous whole, one and indivisible. A jury might accept part of a witness' evidence and reject other parts. [*A(B)* [2011] EWCA Crim 869.]"

As to recent examples of *Stare decisis* see the English Court of Appeal decision in

Barton [2020] 2 Cr App R 7 and the Supreme Court decision in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67. See also *Taylor on Criminal Appeals*, para 5.02.

Evidence — Self-defence — Judge alone trials — Findings of fact — Effect of re-examination — Whether judge under duty to recognise and consider third version of evidence — Belize Indictable Procedure Act, CAP 96.

Nevis Betancourt v The King
[2024] CCJ 6 (AJ) BZ
CCJ Appeal No BZCR2023/001
BZ Criminal Appeal No 6 of 2019

CCJ on appeal from the Court of Appeal of Belize

Summary

In 2017, Jose Castellanos was shot inside a restaurant. Nevis Betancourt ('the appellant') was subsequently indicted and tried for murder. He was convicted and sentenced to 20 years imprisonment. The Court of Appeal of Belize dismissed the appellant's appeal and affirmed his conviction for the offence of murder.

The appellant appealed to the CCJ that the Court of Appeal erred in upholding the trial judge's rejection of the defence of self-defence.

The trial judge accepted the case for the prosecution, which was that the appellant entered a restaurant, shot the deceased twice before the deceased chopped him with a machete. The appellant continued shooting at the deceased who exited the restaurant and thereafter died. At trial, the appellant gave evidence that the deceased chopped him, unprovoked. He thereafter pulled his licensed firearm and shot the deceased in self-defence. The trial judge rejected this evidence as it was inconsistent with the rest of the evidence of eyewitnesses which was corroborated by forensic evidence.

At the CCJ, the case turned mainly on the submission by the appellant that after rejecting the defendant's evidence, the trial judge had a duty to apply the principles of self-defence to a third version of the incident which arose due to a response in cross-examination by one of the main prosecution witnesses. The appellant submitted that the third version of events arose out of one of the main witnesses' reply to Counsel's question in cross-examination. The appellant posited that the conviction was unsafe as the trial judge did not expressly extract this third version of the incident to determine whether self-defence arose.

Barrow J found that prior to the witness' single inconsistent response during cross-examination, there were five other times during examination in chief and cross-examination when the same witness would have given a consistent account of the sequence of events. In those five instances, the witness said that the deceased was shot first before he chopped the accused. Barrow J also found that the witness' misstatement was corrected in re-examination. Given the effect of re-examination, the statement did not form part of the evidence, as such, there was no third version of events. Barrow J also reinforced that there was no obligation on the trial judge to single out the third version of events and express that she rejected it. Generally, a judge sitting alone is not under an obligation to expressly spell out every step of the reasoning.

Anderson J in his concurring judgment emphasised a discrete reason for the dismissal of this appeal based on directions to be given by judges sitting in judge alone trials. Anderson J pointed out that the trial judge was not under an obligation to

extract a third version of the incident and subject it to a discrete recount and analysis. A judge sitting alone has some leeway regarding directions and as such it is not necessary for a judge to direct himself or herself on every possible variation of the facts contrary to those found to be true.
The appeal is dismissed, and the decision of the Court of Appeal of Belize upheld.

Comment
As to a trial judge's duty to leave all reasonably available defences to the jury see *Von Starck v R* [2000] 1 WLR 1270; *Hunter and Moodie v The Queen* [2003 UKPC 69; see also generally *Taylor on Criminal Appeals*, paras 9.375-9.378. As to the trial judge's duty to leave alternative verdicts see *Coutts v R* [2006] 1 WLR 2164 HL, and *Taylor on Criminal Appeals*, paras 9.392- 9.399.

Appeal against sentence – Joint criminal enterprise – Murder for pay – Parity principle in criminal law – Power of DPP to appeal against sentence

Roy Jacobs v The State
[2024] CCJ 9 (AJ) GY
CCJ Appeal No GYCR2023/001
GY Criminal Appeal No 48 of 2015

CCJ on appeal from the Court of Appeal of Guyana

Summary
This judgment contains detailed analyses of the nature of a life sentence.
The appellant and his co-accused, OH, CH and KO, were found guilty by a jury of murdering for pay a 72-year-old woman, CF, contrary to s.100(1)(d) Criminal Law (Offences) Act, Cap 8:01, ('the Act').
Murder for pay is classified by the Act as constituting one of the worst types of murder and the Act requires that a person convicted of such an offence be sanctioned either by the imposition of a sentence of death or life imprisonment. It is required by the Act that when imposing a life sentence, the Court must specify the period to be served before becoming eligible for parole, with the minimum period of such service being 20 years.
The appellant and his co-accused were sentenced by the High Court to 81 years' imprisonment, with eligibility for parole after 45 years.
Their appeal against sentence was allowed by the Court of Appeal which imposed a sentence of 50 years' imprisonment without specifying any particular period for eligibility for parole.
OH and CH appealed the Court of Appeal's decision to the CCJ.
In *Hinds v The State*, the CCJ allowed the appeals of OH and CH and imposed a sentence upon them of imprisonment for life, with eligibility for parole after serving a period of 20 years' imprisonment.
The CCJ granted the appellant special leave to appeal the Court of Appeal's sentence.
The appellant argued that the sentence imposed by the Court of Appeal was:

(a) excessive,
(b) wrong in law as it failed to specify when he would be eligible for parole, and
(c) that a fit and proper sentence would be life imprisonment with eligibility for parole after 20 years given that this was the sentence this Court had imposed on his co-accused.

The Director of Public Prosecutions ('DPP') agreed with these arguments and conceded the appeal.
This CCJ allowed the appeal.

Saunders P (writing for the majority) expressed the view that the DPP was entitled and right to concede the appeal:

(1) The sentence imposed by the lower courts did not take account of the legislative regime governing persons convicted of murder for pay. The regime required that the appellant be sentenced to death or to life imprisonment.
(2) The parity principle was relied upon for the proposition that, having committed similar offences as the co-accused, under similar circumstances, it was right that the appellant should receive similar punishment.
(3) Since the Office of the DPP is established under the Guyanese Constitution as a public office, it followed that barring formal challenge to the exercise of discretion on the part of the DPP by way of judicial review, the DPP's decision to concede an appeal was not to be questioned.

The CCJ set out a detailed analysis of the nature of a life sentence:

(1) In *Hinds* [18], Barrow J reiterated that:
…life imprisonment means exactly what it says: it is a sentence of imprisonment for life. The convicted person has no right to be released. The fact that the system of parole may usually result in the convicted person being released and not dying in prison does not alter the nature and duration of the sentence that is imposed.
(2) [7-8] "The fact is that, as the parole regimes in Guyana, and also in Belize, currently stand, even where a life sentencer is released on licence, it still remains the case that, as I indicated in *August v R* [2018] CCJ 7 (AJ) (BZ), [2018] 3 LRC 552 at [141] – [142], for the remainder of his natural life, the offender's autonomy is continually compromised in significant ways aimed at protecting the public and rehabilitating the offender. Moreover, the offender is always at risk of being re-incarcerated to serve out the life sentence imposed upon him."
(3) [14] Leaving aside a death penalty, a life sentence is the most severe sentence a judge can impose. A life sentence in large measure satisfies the goals of punishment and retribution; but sentencing also has other objectives. An efficient system of parole allows the Parole Board and the Executive authority to play a role in addressing such salutary matters as how best to deter a convicted person from re-offending; how best to protect the society from the particular offender; and how to rehabilitate the prisoner so that, if possible, he may yet be reintegrated successfully into society.
(4) These are also important sentencing objectives. A judge-imposed life sentence that carries with it little or no possibility for parole before an inordinately lengthy period of incarceration is spent may be a fit sentence in rare cases, but judges should bear in mind that the lengthier the period before eligibility for parole, the more likely it is that such a sentence confines itself only to satisfying punishment and retribution goals to the exclusion of other goals of sentencing. We do not support the notion that even in the worst forms

of murder, in every case the prisoner should be locked up with little or no prospect of parole. This is inconsistent with modern penological practices that strive to balance such varied concepts as punishment and public safety, rehabilitation and humaneness, restorative justice and care and concern for society, victims, and their families.