IN THE COURT OF APPEAL OF BELIZE AD 2017

CRIMINAL APPEAL NO 10 OF 2016

LINSBERT BAHADUR Appellant

v

THE QUEEN Respondent

BEFORE
The Hon Mr Justice Sir Manuel Sosa President
The Hon Madam Justice Minnet Hafiz Bertram Justice of Appeal
The Hon Mr Justice Murrio Ducille Justice of Appeal

O Selgado for the appellant.
S Smith along with J Chan for the respondent.

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9 June 2017 and 9 January 2018.

HAFIZ-BERTRAM JA

Introduction

[1] On 4 July 2016, Linsbert Bahadur ('the appellant') was convicted of murder following a jury trial before Moore J. He was sentenced on the 13 July 2016 to life imprisonment. On 14 July 2016, the appellant appealed against his conviction and sentence. The appeal was heard on 9 June 2017. The Court reserved its judgment

after hearing oral arguments and requesting the parties to file additional written submissions.

[2] On 24 September 2007, Linsbert Bahadur Jr., Benjamin Peters and Samuel Neal Jr. were jointly indicted for murder contrary to section 117 read along with section 106 (1) of the Criminal Code, Chapter 101 of the Laws of Belize (Revised Edition) 2000. They were accused of murdering Albert Wade ('the deceased') on 14 April 2006, on Negroman Road, in Benque Viejo Town, in the Cayo District. The deceased died as a result of gun shot wounds.

[3] On 17 December 2008, the Director of Public Prosecutions entered a *nolle prosequi* in favour of Benjamin Peters and Samuel Neal. On 2 March 2009, a new indictment was laid against the appellant and he was tried on 19 August 2010. On 2 September 2010, a *nolle prosequi* was entered in favour of the appellant and he was discharged. The reason being that one of the witnesses for the prosecution was <u>out of the jurisdiction</u>. On the same day, the appellant was re-arrested and re-indicted for the murder of Albert Wade. The appellant was tried for a second time on 17 November 2015 before Moore J but the trial was aborted because a <u>juror fell ill.</u> The appellant then had a third trial on the 27 January 2016 before Moore J which resulted in a <u>hung jury</u>. On 18 April 2016, the appellant was re-indicted and his fourth trial commenced on 28 June 2016 before Moore J with a jury. This resulted in the conviction for murder and the appellant was sentenced to life imprisonment.

The pertinent evidence for the prosecution

[4] The case for the prosecution was that on 14 April 2006, the appellant with the use of a shotgun, shot and killed Albert Wade on Negroman Road in Santa Elena Town, by firing two shots into his body, without any lawful justification. At the time of the shooting Samuel Neal Jr, Benjamin Peters and Gustavo Mendez were present. The prosecution relied substantially on the witness statement of Neal Jr to secure a conviction.

[5] The Crown called seven witnesses to prove its case: (a) Carol Tennyson (b) Samuel Neal Jr (c) Superintendent Hilberto Romero (d) Antonio Manzanero (e) Inspector Francis Zuniga (f) Cheryl-Lynn Vidal and (g) Alberto Ciego.

[6] Carol Tennyson is the mother of the deceased. She testified that she went to the Karl Heusner Memorial Hospital morgue where she identified her son's body to the police and Dr. Estrada Bran.

[7] Samuel Neal Jr was subpoenaed to court but was not willing to testify because he feared for himself and family. The court ruled for the prosecution to bring the evidence of Neal under section 105 of the Evidence Act and amendment 10 of 2009, because of his concerns that there is nothing in place in the system to protect himself and his family. Despite that ruling, the court said that Neal can identify his statement. Neal said he recalled giving a statement to the police but could not remember the exact date. He was shown a statement but said he does not recognize the first part of the statement and he does not remember giving a statement on 26 August 2010. He further testified that he saw his name on the statement along with Linsbert Bahadur and Benjamin Peters. However, he did not recognize the signature on the statement. He testified that he knows Bahadur (the appellant) for about 10 years as he was his brother-in-law and he would see him twice a month. Neal identified the appellant in the dock as Linsbert Bahadur.

[8] Superintendent Romero of Crimes Investigation Branch, Belize City testified that in August 2010 he was attached to the said Branch. He said that on 26 August 2010 he recorded a witness statement from Samuel Neal Jr at the Queen Street Police Station in relation to a murder investigation. Justice of the Peace Modesto Madrill was present. He identified the statement because it was recorded in his writing and on the last page he placed his signature. He testified that Neal's name and signature are on the statement. He saw Neal sign the statement. There was no objection to the identification of the statement. The statement was marked HR-1 for identification purposes.

[9] Neal was recalled to the witness stand. He said he recalled telling the police that he took the appellant and Peters to Punta Gorda to Negroman Road. When he was questioned about the 2010 statement he denied making it. He said he gave a statement on 24 December 2008 when he left the Kolbe Foundation. Neal was shown HR-1 to refresh his memory. He testified that he cannot recall giving that statement. He was questioned about the pertinent parts of the witness statement by the prosecution but he could not recall anything. Under cross-examination he testified that he did not at any time tell the police that he saw who killed Albert Wade. Further, that he does not know who killed him.

[10] Superintendent Romero was recalled to the witness stand. The prosecutor thereafter made an application pursuant to section 73(a) (b) of the Evidence Act to tender the statement marked HR-1 for identification. Mr. Selgado had no objection to the tendering of the statement. The statement was accepted and marked as Exhibit HR-1. Spt. Romero read portions of the statement into evidence.

[11] Antonio Manzanero testified that he was a Crime Scene Technician and on 14 April 2006 he went to Negroman Road where he saw a Toyota Camry car in which he saw the motionless body of a male creole person with a wound on the left side of the cheek area. He also observed dark red substance on various parts of the car. He also saw a white colour object which appeared to be an expended cartridge. He testified that he took photographs and swab samples of the dark substance. He further testified that on 15 April 2006 on the request of Corporal Zuniga, he accompanied him to Linda Vista area, Santa Elena Town where he took photographs of a bushy area and also of a short pump action shotgun bearing Serial no. L699394, Model No. 500 A Mossberg brand. He packed the firearm in a gun box which he labeled and sealed. He took the firearm and the expended shell to the National Forensic Science Services. On 19 April 2006, the body of the deceased was retrieved from Negroman road and taken to KHMH where a post mortem examination was conducted by Dr. Estrada Bran. He tendered 19 photographs which were entered into evidence as exhibits AM – '1 to 19.'

[12] Inspector Francis Zuniga testified that on 19 April of 2006, he was attached to the Benque Viejo Town Police Station. As a result of information received he visited Negroman Road where he saw a Toyota Camry car and a male person behind the steering wheels, apparently dead with two wounds to the forehead and left side of the cheek. He said that Mr. Manzanero was taken to process the scene. Later, the body was removed and taken to San Ignacio Hospital where the deceased was pronounced dead by Dr. Betancourt in his presence. The body was then transported to KHMH where Dr. Mario Estrada Bran conducted a post mortem examination on the body. He testified that at the conclusion of the post mortem examination the doctor handed over the original copy of the post mortem examination form to him along with his report. He testified that he investigated the matter and charged Linsbert Bahadur, Benjamin Peters and Samuel Neal for the crime of murder.

[13] Inspector Zuniga further testified that on 17 May 2006, he visited the office of Dr. Estrada Bran in Ladyville and recorded a statement from him. The statement was written down by him (Zuniga) in respect to the post mortem examination that the doctor conducted on the body of Albert Wade. He said the statement was signed by Dr. Estrada Bran as the witness. Also, that he (Zuniga) signed the conclusion of the statement as the recording officer. The statement was tendered and admitted into evidence as exhibit "FZ 1" with no objections from Mr. Selgado. Inspector Zuniga read the statement into evidence. – page 120 of transcript. The evidence shows that the opinion of Dr. Estrada Bran was that the death of the deceased was as a result of traumatic shock due to gunshot injuries to the head.

[14] Cheryl-Lynn Vidal testified that she is an attorney-at-law and holds the post of Director of Public Prosecutions (DPP). She testified that having looked at the file she was of the view that there was no evidence against Samuel Neal for the offence of murder and as such the charge against him was discontinued. She considered the possibility of having Neal assist the Crown because of the information disclosed in his statement. The DPP contacted Mr. Dickie Bradley who was Neal's attorney-at-law to inform his client of her request. She later made arrangements to meet with Neal at the Belize Central Prison.

She met with him on 24 December 2008 in the presence of Mr. Bradley and informed him that the charge of murder was discontinued against him and it was entirely his choice if he wished to assist the prosecution. She testified that Neal agreed to assist and the terms of the agreement was that he had to give a truthful statement and if the said statement disclosed the commission of any offence, Neal would not be prosecuted for that offence. An agreement was signed to that effect by Mr. Neal, Mr. Bradley and the DPP.

[15] The DPP testified that a statement was later recorded from Mr. Neal by then Inspector Hilberto Romero and it was provided to her. The 'Immunity Agreement' signed on 24 December 2008 was tendered and admitted into evidence by the court as Exhibit "CLV 1". There was no objections by Mr. Selgado to the admission of this agreement.

[16] Mr Selgado cross-examined the Director in relation to whether Neal had a personal interest to serve. The DPP testified that there was no personal interest to serve because there was no evidence against Neal in relation to the offence of murder and as such the charge had to be discontinued.

[17] Albert Ciego testified that he was a past Armourer in the Police Department. His duties include inspection and examination of firearms, repairs of fireman, examination of firearm caliber. Mr. Selgado had no objections to Mr. Ciego being deemed an expert witness. He testified that on 19 April 2006, he was asked by Manzanero to examine a firearm to see if it was capable of firing and if so, whether it can fire shot gun shells and if it had been fired. Upon inspection, he found that it was a 12 gauge pump action shotgun which was in working condition and had gunshot residue indicating that it had been fired prior to his examination. Mr. Ciego then prepared his report and gave it to Corporal Zuniga. In cross-examination he said the gun is not a sawed off shotgun.

Statements – 2008 and 2010

[18] The prosecution made an application pursuant to section 109 of the Indictable Procedure Act to recall Superintendent Romero in relation to the statement dated 24 December 2008 from Samuel Neal which was not put into evidence. A 2010 statement was put into evidence by Spt Romero.

[19] Spt Romero testified that on 24 December 2008, he visited the Prison where he recorded a statement from Samuel Neal Jr. Further, that he recorded another statement from Neal on 26 August 2010 because the first statement was misplaced at the office of the DPP. The first statement was requested by DPP Vidal and the second statement was requested by Cecil Ramirez from the office of the DPP.

[20] On cross-examination by Mr. Selgado, Spt Romero testified that he did not keep a copy of the 2008 statement for himself and he has no notes of the statement. When asked whether the 2008 statement contained the same information as the second, Romero testified that he recorded both statements so he is aware of the contents of the first and second statements.

No evidence from defence

[21] The Court explained the three options to the accused but he called no witness. He remained silent. He chose not to testify or give unsworn evidence from the dock.

Grounds of appeal

[22] The appellant appealed against his conviction and his sentence. The grounds of appeal are:

1) The trial was unfair because of failure of the judge to:–

(a) Stay the proceedings on the grounds that to proceed would amount to an abuse of process due to unjustifiable delay in the trial;

(b) Reject prejudicial evidence;

(c) Recuse herself from the proceedings.

2) Give a good character direction to the jury;

3) No proper warning on the weight to adopt on the evidence of the DPP and the immunity agreement made between Neal and the DPP;

4) The mandatory statutory minimum sentence of life imprisonment is unconstitutional.

<u>The ground on unfair trial</u>

[23] This ground raised three issues, namely, unjustifiable delay, prejudicial evidence and recusal from proceedings.

Unjustifiable delay

[24] Mr. Selgado submitted that the trial process for the appellant amounts to an abuse of process since the appellant was charged on 17 April 2006 and he was not tried until November 2015, which is 9 years and seven months later. The trial was aborted and a retrial was held in January 2016 which resulted in a hung jury. Counsel submitted that the hung jury should be held to be an acquittal on the principle that the prosecution has not discharged its burden to prove the case beyond a reasonable doubt.

[25] Mr. Selgado further submitted that during the ten years the appellant spent in prison he had to endure mental and physical suffering which is inhuman and degrading. He argued that the ten years wait before trial is unconstitutional and contrary to **section 6(2)** the **Belize Constitution** which provides that any person charged with a criminal offence should be afforded a fair hearing within a reasonable time by an independent and impartial court. He argued that the trial judge erred by not exercising her judicial discretion to stay the proceedings knowing that the matter was ten years old and she had sat on the

matter previously. He relied on **Beckford v Queen [1996] 1 Cr. App. R 94** and **Vishnu Bridgelall v Hardat Hariprashad [2017] CCJ 8 (AJ).**

[26] Ms Smith for the prosecution submitted that an application for a stay ought to have been made before the trial judge and that was not done in this case. Further, it is a matter within the discretion of this Court to decide whether it would entertain this ground of appeal. Counsel relied on **Charles Steve Carter and Leroy Carter v The State [1999] UKPC 24** at paragraph 8.

[27] In relation to the issue of delay, the prosecution agreed that the time between the arrest of the appellant and his conviction is approximately 10 years and 2 months, a period which is presumptively prejudicial. Counsel submitted that the appellant received his first trial four years after his arrest which is the average period a prisoner in Belize awaits trial for murder. Further, the appellant in his last trial did not assert the disappearance of any witness or indicate that he would be prejudiced as a result of the lapse of time. As such, the delay was not unjustifiable.

Discussion

Whether hung jury should be an acquittal?

[28] There was only one hung jury in the instant case. Further, the issue of stay of proceedings was not raised before the trial judge on the basis that there was a hung jury. The DPP was entitled to come to a decision to re-try the appellant after the hung jury in the interest of justice. See **Bell v DPP [1985] 32 WIR 317**.

The delay

[29] The delay of 10 years commenced from the date the appellant was charged and the date of the fourth trial. The appellant relies on **section 6(2)** of the **Belize Constitution** which provides:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[30] The relevant factors which this Court has to consider in determining whether the rights of the appellant had been infringed are as stated in **Bell,** namely (a) length of delay; (b) reasons given by the prosecution to justify the delay; and (c) prejudice to the accused.

[31] The prosecution has conceded that the length of delay, 10 years and 2 months is presumptively prejudicial. It is therefore necessary to consider the reasons given by the prosecution for the delay.

[32] The Court accepts the prosecution's position that in Belize the delay of 4 years (first trial) is an average period to wait for a trial of murder. The first trial in September 2010 ended when the DPP entered a *nolle prosequi.* The appellant was tried for a second time on 17 November 2015 but the trial was aborted because a juror fell ill. This is no fault of the prosecution. Also, the third trial in February of 2016 which resulted in a hung jury cannot be blamed on the prosecution. On 18 April 2016, the DPP re-indicted the appellant which resulted in the conviction for murder and the appellant was sentenced to life imprisonment. The dates between the trials cannot be considered undue delay in Belize taking into consideration the economic conditions and the amount of prisoners awaiting trial for murder in this jurisdiction. In the opinion of the Court, there was no abuse of the process by the prosecution and as such the ground of breach of *section 6(2)* of the *Belize Constitution* (unfair trial) has not been made out by the appellant.

Prejudice to the appellant as a result of delay

[33] The appellant had remained silent and called no witnesses. There was no submissions in relation to prejudice suffered by the appellant as a result of delays in his trials. The ground of prejudice has not been made out by the appellant.

Recusal of the trial judge

[34] The third and the fourth trial was heard by Moore J. The third trial ended in a hung jury and on the fourth trial the appellant was convicted. The trial judge in both trials was Moore J. Mr. Selgado submitted that the trial judge erred by not exercising her judicial discretion to stay the proceedings at the fourth trial since the matter was ten years old and she had sat on the matter previously. In **Beckford** it is shown that the power to stop a prosecution arises when it is shown there is an abuse of process of the court. In the instant case, there is no evidence that the prosecution misused the process of the court so as to deprive the appellant of a protection provided by law. Also, the appellant led no evidence to show that he had been prejudiced in the preparation of his defence as a result of the delay. Further, no application for a stay was made before the trial judge by the appellant to show that he would not have received a fair trial. See **AG's Reference (No. 1 of 1990) 1 Q.B. [1992] 1 Q.B. 630.** Lord Lane at pages 634 – 644 stated that, " …*no stay should be imposed unless the Defendant shows on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held : in other words, the continuance of the prosecution amounts to a misuse of the process of the court."* In the opinion of the Court, the trial judge had no reason to exercise her discretion to stay the proceedings before her as a result of the delays. Further, the fact that she sat on the third trial is no reason for her to recuse herself on the fourth trial. There must be some legitimate reason to show why she could not sit at the trial.

Good character direction issue

[35] Mr. Selgado submitted that the trial judge failed to give a good character direction to the jury so that they may consider that the accused was never before the court on any crime of a similar nature and therefore consider that he would not likely commit the crime for which he is charged.

[36] Ms. Smith submitted that the appellant never raised his good character and therefore should not be allowed to raise it on appeal. See **Mark France and Rupert Vassel v The Queen [2012] UKPC 28** at paragraph 42. The Court agrees that the appellant's good character was not raised by direct evidence or given on his behalf or elicited through cross-examination of prosecution witnesses. The trial judge was therefore, under no duty to raise the appellant's good character.

[37] This Court had discussed in numerous judgments the two limbs of the good character direction. In the instant case, the appellant had not testified and therefore was not entitled to the credibility limb of a good character direction. He would have been entitled to a propensity limb direction if it was raised during the trial. Mr Selgado has not given a reason to this Court as to why the appellant's good character was not raised in the court below. This Court will therefore consider whether the lack of propensity direction affected the fairness of the appellant's trial and the safety of his conviction.

[38] The Court has considered the evidence in this appeal and it is our opinion that even if the propensity limb direction had been given the jury would inevitably have arrived at the same conclusion. The jury heard the evidence of Neal Jr which shows that the appellant was armed with a shotgun and went to Negroman Road where he shot and killed the deceased. The accused had told Neal Jr that he heard the deceased wanted to kill him so he decided to kill him first. The absence of the propensity limb direction did not deprive the appellant of a favourable verdict based on the evidence of his actions that night at Negroman road. See **France and Vassel** and **Norman Shaw v The Queen PC Appeal No 58 of 2000.** In **Shaw** the Board at paragraphs 30 and 31 said:

> "**Character**.
>
> 30. The appellant is a man without any previous convictions. The trial judge reminded the jury of the appellant's statement to that effect, but did not give the standard direction on good character and its bearing on credibility and propensity. Mr Fitzgerald argued that the judge should have given such a direction, even in a qualified form. He relied on *R v. Vye [1993] 1 WLR*

471 and argued that Lord Steyn's qualification in *R v. Aziz [1996] AC 41* at 53B was only expressed to apply where "a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment".

31. This submission did not impress the Court of Appeal and it does not impress the Board. The jury knew that the appellant had never been convicted before. They also knew, from his own admissions, that he had dealt in a substantial quantity of cocaine and had been a member of an armed posse which had set out to obtain reparation from the deceased in Dangriga. Had the judge given the jury a full direction it could properly have been so qualified as to do the appellant more harm than good. The absence of such a direction cannot possibly have deprived him of a favourable verdict."

[39] Likewise, in the instant appeal, even if a propensity limb direction had been given this would not have an impact on the guilty verdict. In the opinion of the Court, the absence of the propensity limb direction did not affect the fairness of the trial and the safety of the conviction.

<u>The ground on the weight to adopt on the evidence of the DPP and the immunity agreement made between Neal and the DPP</u>

[40] Mr Selgado submitted that the learned trial judge erred in law when she allowed the statement of Samuel Neal made on 24 December 2008 to be used as reference by Superintendent Hilberto Romero and the DPP since that statement was not admitted into evidence. Neal accepted he made a statement dated 24 December 2008 but denied that he made a statement in August 2010.

[41] Counsel further submitted that section **173A** of the **Evidence Act** makes the evidence of a hostile witness *prima facie* admissible but does not bring the weight of that evidence into perspective. He contended that the trial judge failed to give such direction to the jury which was left to believe that the statement was admitted as the truth of the

matter. Mr. Selgado submitted that the contents of the 2010 statement ought not to have been accepted into evidence because Neal disclaimed it and the original 2008 statement was available before the court for admission. As such, the conviction of the accused was gained by evidence which was not properly admitted by the court and upon which the DPP relied for the immunity agreement in consideration for the co-accused to be relieved from the perils of prosecution.

[42] Ms. Smith for the prosecution submitted that the evidence of the DPP as shown at pages 124 to 138 of the record did not show that Neal gave a statement in 2008. At page 125 of the record she said that, "*a statement was later recorded from Mr. Neal by then Inspector of Police Hilberto Romero and the statement was provided to me.*" There was no mention of the year the statement was recorded.

[43] In relation to Romero's evidence, Counsel argued that the rule of self corroboration would have prevented him from giving evidence that Neal had given two statements to similar effect and the matter would have been compounded if the 2008 statement had been admitted. However, since the defence was suggesting that the 2010 statement was fabricated, Romero's evidence that the two statements were the same was entirely permissible. See **In Beattie (1989) 89 Cr. App. R. 302.**

[44] Ms. Smith contended that the 2010 statement was properly admitted since Neal's behavior on the witness box demonstrated that he was adverse to the prosecution and that formed the basis of the application under section 73(A) of the Evidence Act to have his statement admitted through Romero.

Discussion

[45] The Court has perused the evidence of the Director and found that she had not given evidence about a 2008 statement from Neal. She gave evidence of the Immunity Agreement which was dated 24 December 2008. Mr Selgado was incorrect in his argument that the Director used the 2008 statement as a reference and as such the trial

judge erred in allowing her to do so. The 2008 statement was not admitted into evidence at all as will be seen below.

[46] Romero gave evidence of a 2008 statement (not the contents) and the 2010 statement. He testified that on 24 December 2008, he recorded a statement from Samuel Neal Jr. at the prison and he recorded another statement from Neal on 26 August 2010, because the first statement was misplaced at the office of the DPP. The first statement was requested by DPP Vidal and the second statement was requested by Cecil Ramirez from the office of the DPP. As this point, he did not testify as to the similar effects of the two statements.

[47] It was during cross-examination by Mr. Selgado of Mr. Romero when he testified that he did not keep a copy of the 2008 statement for himself and he has no notes of the statement. It was Mr. Selgado who in further cross-examination asked whether the 2008 statement contained the same information as the second one. Mr. Romero in response testified that he recorded both statements so he is aware of the contents of the first and second statements. In the view of the Court, under the circumstances of this case, where Mr. Selgado was obviously challenging the 2010 statement, Mr. Romero was entitled to speak of the similarity of the statements. **In Beattie**, relied upon by the prosecution, the Lord Chief Justice of England said the following at page 306:

> "The general well-known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with his testimony before the Court in order to lend weight to the evidence. There are three well-known exceptions to that rule. The first one is where it has been suggested to the witness that the evidence he or she has given on oath is a recent invention, that the witness has just made it up. If that suggestion is made, then it is obviously a rule of common sense as well as law, that a previous consistent statement can be shown in order to demonstrate that the evidence has not recently been fabricated."

[48] It was Mr. Selgado who was suggesting under cross-examination that the 2010 statement was fabricated. As such, it is the opinion of the Court that it was competent for Mr. Romero to give evidence as to the similarity of the statements.

[49] Mr. Selgado submitted that the trial judge failed to give a direction to the jury in relation to section **173 (A)** of the **Evidence Act** which makes the evidence of a hostile witness *prima facie* admissible but does not bring the weight of that evidence into perspective. As such the jury was left to believe that the statement was admitted as the truth of the matter. Further that the 2010 statement should not have been admitted. The prosecution disagreed and submitted that it was properly admitted pursuant to section 73(A) of the Evidence Act. Further, that the trial judge properly directed the jury how to approach the statement. It is the opinion of the Court that the 2010 statement which was given by Neal Jr was properly admitted by the trial court pursuant to **section 73(A)** of the **Evidence Act** through Sergeant Romero who recorded the statement. See paragraphs 51 – 63 below).

[50] The learned trial judge properly directed the jury as to how they were to approach the evidence of Neal in relation to the 2010 statement. See pages 197 – 198 of the transcript where Moore J directed the jury that it was for them to decide whether they believed that Neal gave the statement or not, and that they can act on it if they believed that he gave it and it was true. The trial judge said:

> "*You heard Mr. Neal testify, you saw him on the witness stand, you must determine if you believe him or not when he says he did not give the police a statement in August, 2010 and when he says he does not recall saying the many detailed things that are in the 2010 statement now in evidence in this trial. If you believe him and do not accept that he made the statement to the police … then you cannot feel sure that it was the accused who shot and killed the deceased. If on the other hand, you accept that Neal made the statement to the police and you accept what he said in the statement as*

true this may help you conclude that the accused shot the deceased to death."

Section 73A of the Evidence Act

[51] The parties were requested by the Court after the hearing of the appeal, to address in written submissions, whether **section 73(A)** of the **Evidence Act** is applicable to a situation where a police recorded a statement from an accomplice and the prosecution then seek to prove and adduce such statement in evidence against another participant in the crime. **Section 73(A)** of the Act provides:

> "Where in a criminal proceeding, a person is called as a witness for the prosecution and–
>
> (a) he admits to making a previous inconsistent statement; or
> (b) a previous inconsistent statement made by him is proved by virtue of section 71 or 72;
>
> the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case."

[52] Mr. Selgado submitted that the section is inapplicable in this case since the statement of an accomplice is introduced as evidence against another co-accused or an accomplice because it would be prejudicial to the defendant whom it is intended against. Further, it is established by common law that evidence from an accused is evidence against himself and not against his co-accused. Counsel relied on **Lobban v Queen [1995] 2 Cr. App. R. 573.**

[53] Mr. Selgado argued that the statement gained by the police from Neal Jr against the appellant was obtained by them through the actions of the DPP going to the prison and offering immunity in consideration of that statement. He contended that this was an

act of bad faith since the DPP was seeking a conviction of the appellant rather than a fair trial of him. He relied on **R v Mason [1988] 1 WLR** and submitted that such evidence of bad faith was inadmissible. He further relied on **R v Turner [1975] 61 Cr. App. R. 67** to show that where a witness has received an inducement to give evidence for the prosecution, such evidence has been described as distasteful. Counsel contended that the unlawfulness of the manner in which the statement was obtained must be considered as overwhelming and that it is inconsistent does not arise since the witness was in fact saying he did not make the 2010 statement rather than saying *"I forgot that I made it or don't remember the contents* …." He contended that section 73 is inapplicable in this case."

[54] Ms. Smith submitted that both the literal and purposive approach of interpretation of section 73 would apply to anyone who is called as a witness for the prosecution. She argued that the section applies literally to anyone who is called as a witness for the prosecution without exception. Purposively, it applies to anyone who is called as a witness for the prosecution and who refuses to give evidence in accordance with a statement previously given by that witness. As such, counsel argued that if an accomplice gives a statement to the police and later gives evidence inconsistent with that earlier statement, the statement is admissible against him providing the preconditions of either subsections (a) or (b) of section 73 are satisfied.

[55] Ms. Smith further submitted that Neal Jr was not an accomplice as he could not have been regarded as such on the evidence. Although he was jointly charged with the accused for the murder of Albert Wade, there was no evidence that he was an accomplice to that murder. Counsel relied on Lord Hobhouse of Woodborough in **Dean Tillet v The Queen [1999] UKPC 27** at paragraph13. See also **Jeremy Harris and Deon Slusher v The Queen, Criminal Appeal Nos 1 and 2 of 2004,** paragraphs 24 and 25.

Discussion

[56] In the view of the Court, section 73(A) should be given its literal meaning. There is certainly no ambiguity in this provision. There are three prerequisites. The first requirement is that "*a person is called as a witness for the prosecution."* In the instant case Neal Jr was called as a witness for the prosecution. Thereafter, either the prerequisites (a) or (b) has to satisfied before a statement is admissible as evidence and relied upon by the prosecution to prove its case.

[57] The question is whether Neal Jr who was once a co-accused could have been called as a witness for the prosecution. When Neal Jr gave the statement he was no longer a co-accused. A *nolle prosequi* was entered against him and other co-accused as shown above. A new indictment was issued against the appellant. There was no trial of Neal Jr as in the case of **Lobban** relied upon by Mr. Selgado, where the co-accused was discharged as a result of the statement given by him. The interest of the implicated co-defendant was protected by directions of the trial judge in that case that the statement of once co-defendant is not evidence against the other one. There was no joint trial in the instant matter because the appellant was ultimately tried alone for the offence of murder for the deceased, Wade.

[58] Further, there was no evidence of bad faith on the part of the DPP as argued by Mr. Selgado. He submitted that the Director was seeking to convict the appellant instead of giving him a fair trial. This is an unfair statement against the Director who was cross-examined by Mr. Selgado on this issue. The evidence from her was that Neal had no personal interest to serve because there was no evidence against him of murder. The Director testified that "*having looked at the file she was of the view that there was no evidence against Samuel Neal for the offence of murder and as such the charge against him was discontinued.*" She considered the possibility of having Neal assist the Crown because of the information disclosed in his statement to the police. When she visited the prison to speak to Neal this was done in the presence of Mr. Bradley (Neal's attorney) and she informed him that the charge of murder was discontinued against him and it was

entirely his choice if he wished to assist the prosecution. The Director testified that Neal agreed to assist and the terms of the agreement was that he had to give a truthful statement and if the said statement disclosed the commission of any offence, Neal would not be prosecuted for that offence. A statement was recorded from Mr. Neal by Inspector Romero and the 'Immunity Agreement' signed on 24 December 2008 which was tendered and admitted into evidence by the court. There is nothing distasteful about the actions of the Director. The statement was properly taken from Neal Jr who was not a co-accused at the trial of the appellant. (That 2008 statement was not the same statement admitted into evidence on behalf of the prosecution at the trial of the appellant since it was misplaced. Neal gave another statement in 2010 and this was admitted by the court as evidence for the prosecution as will be shown below).

[59] Although Neal was jointly charged with the accused for the murder of Albert Wade, there was no evidence that he was an accomplice to that murder. Hence the reason the case was discontinued against him. See Lord Hobhouse of Woodborough in **Dean Tillet,** at paragraph13 - "…..*accomplice" means a person who was an accomplice of the defendant in the commission of the crime with which the defendant is charged."* See also **Jeremy Harris and Deon Slusher** paragraphs 24 and 25.

[60] Based on the foregoing discussion, it is the opinion of the Court, that the first pre-requisite was satisfied and Neal was properly called as a witness for the prosecution. The second or third prerequisite had to be satisfied. It is either (a) or (b). The applicable prerequisite in this case is (b) as a previous inconsistent statement was made by Neal which he denied making. The statement was proved through Inspector Romero who recorded the statement from Neal in the presence of a Justice of Peace.

[61] When Neal was called as a witness for the prosecution, he began his testimony but stopped. He testified that he feared death for himself and family. The judge ruled that the prosecution bring the evidence of Neal through amendment 10 of 2009 of the Evidence Act, amendment of section 105, which provides for a document to be admitted into evidence where a witness fears death of himself and his family. Neal was called

back to the stand after that ruling so that the application could be made if Neal refuses to further testify.

[62] This is the stage where things took a turn. Neal was questioned about the statement dated 26 August 2010 which he denied making. He was shown the statement which had his name and signature but denied it is his signature. Inspector Romero who recorded the statement was called as a witness to identify the statement. Neal was then recalled to the stand in the absence of the jury. The statement was read to him but he continued to deny making the statement. He testified that he made a statement on 24 December 2008 and not in 2010. He was treated as a hostile witness (section 71 of the Evidence Act) and later cross-examined on the statement but his answers to pertinent questions were, "I don't recall" or "I don't remember".

[63] An application was thereafter made by the prosecution to have the statement admitted into evidence pursuant to section 73(A) (b) of the Evidence Act. There was no objection by Mr. Selgado (page 82 of transcript). The prosecutor recalled Inspector Hilberto Romero and the statement was admitted as Exhibit HR-1. It was read aloud into evidence by Inspector Romero in open court with the exception of parts of the statement that was marked out as prejudicial to the appellant. Based on the foregoing, it is the opinion of the Court, that the statement from Neal was properly admitted by the court which was relied upon by the prosecution to prove its case.

Applicability of sections 36 and 106 of the Evidence Act to statement from Dr. Estradabran

[64] The parties were also requested by the court to put in written submissions in relation to the applicability, if any, of **sections 36** and **106** of the **Evidence Act, Chapter 95** to the admission of the statement recorded by Inspector Zuniga from Dr. Estrada Bran. The statement recorded by Inspector Zuniga was admitted into evidence to prove cause of death.

Section 36 (1) and 36(3) of the Evidence Act

[65] Section 36(1) of the Evidence Act as amended by Act No. 1 of 2012 provides:

> "Any document purporting to be a post-mortem report, **under the hand** of a registered medical practitioner or the Government Pathologist … or any document purporting to be a report under the hand of the Government expert, upon any matter or thing duly submitted to him for examination or analysis and report, for the purposes of any trial on indictment, or in any preliminary inquiry before a magistrate in respect of any indictable offence … shall be receivable at that trial, inquiry or proceeding as *prima facie* evidence of any matter or thing therein contained relating to the examination or analysis: provided that where the report of any of the aforesaid experts is produced in any trial, such expert shall if within the country be called if the defence so requires."

[66] Section 36(3) provides:

> "(3) The provisions of this section shall, with the necessary modifications, apply in the case of a document purporting to be a report by a registered medical practitioner on any injuries received by a person which are the subject of a prosecution in any trial on indictment, in any preliminary inquiry or in any proceeding in a summary jurisdiction court:
>
> Provided that the report purports to have been written on the same day as, or on the day following, that on which the examination was made by the medical practitioner."

[67] Section 106 of the Evidence Act provides:

> "106.(1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the

purpose of those proceedings by or on behalf of the prosecution or the defence, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.

(2) An admission under this section:-

(a) may be made before, at, or during the proceedings;
(b) if made otherwise than in court, shall be in writing;
……..

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purposes of any subsequent criminal proceedings relating to that matter, including any appeal or retrial."

[68] Mr. Selgado submitted that an admission referred to in **section 106** of the **Evidence Act** does not apply to the conduct of *post mortem* examinations conducted by a pathologist. Admissions in the context of section 106 is indicative of an act done by a witness whose evidence is not of an expert nature and which the law requires that the evidence of such be made contemporaneously with the event of which is the subject matter.

[69] Counsel submitted that **section 36** is specific that medical evidence has to be recorded on the same day or on the following day of the event. He argued that this stringent requirement distinguishes this form of fact from those intended under section 106. The effect being that the statement recorded by Zuniga from Dr. Estrada Bran cannot be admitted into evidence if it is read by a third party. The evidence has to come from the doctor under oath.

[70] Ms. Smith submitted that the statement recorded from Dr. Estrada Bran by Cpl Zuniga on 17 May 2006, could not have been admitted under section 36 of the Evidence

Act as it did not satisfy the requirements of section 36(3) since the examination was conducted on 19 April 2006.

[71] In relation to section 106, counsel contended that the statement was admitted under this section, even though no express mention was made of the section in the record. She argued that the practice and procedure of admitting agreed evidence was encouraged by the **Criminal Procedure Rules** effected on 11 January 2016 in order to affect delays in trials. See **Rules 10.1** to **10.5**. Ms. Smith also submitted that this is further reflected in the Supreme Court Case Management Form which provides a section for defence attorneys to list the names of witnesses whose evidence will be agreed.

Discussion

[72] The Court agrees with the submissions of both sides that section **36** of the **Evidence Act** is inapplicable to the statement recorded from Dr. Estrada Bran by Cpl Zuniga on 17 May 2006. **Section 36(1)** is not applicable because the statement from the doctor was not a *post mortem* report under his hand. **Section 36(3)** is also inapplicable since the statement given by the doctor was not written on the same day or on the following day. The post mortem examination was conducted on 19 April 2006 and the report was recorded by Cpl. Zuniga from the doctor on 17 May 2006 (almost one month later). (According to the evidence of Cpl Zuniga, the Doctor had given him "the original copy of the *post mortem* exam form" along with his report on 19 April 2006. However, there was no reason given as to why that *post mortem* report was not available).

<u>Admission of doctor's statement by trial judge</u>

[73] Dr. Estrada Bran's witness statement was admitted by the trial judge through Inspector Zuniga as shown at paragraph 13 above. The question is whether the admission could have been done pursuant to **section 106** of the **Evidence Act.** The trial judge did not rely on any legislation and counsel on both sides did not refer the court to any applicable section of the Evidence Act. Inspector Zuniga recorded the statement

from the doctor which was tendered by the prosecution and admitted into evidence by the trial judge as exhibit "FZ 1". There were no objections from defence counsel, Mr. Selgado. Inspector Zuniga read the statement into evidence which shows the opinion of Dr. Estrada Bran was that the death of the deceased was as a result of gunshot injuries to the head. Before such admission, evidence was led which showed that Dr. Estrada Bran signed the statement and Inspector Zuniga signed the statement as the recording officer.

[74] Ms. Smith submitted that the statement was admitted under **section 106**, even though no express mention was made of the section in the record. She argued that even though the doctor's statement contained opinion evidence, the defence by agreeing to its admission without challenge was accepting the opinion as to cause of death as a fact. Also, counsel argued that it is not a novel or unique situation to have opinion evidence admitted through a statement since it could have been admitted under **section 123** of the **Indictable Procedure Act, Chapter 96** (IPA) and **section 105** of the **Evidence Act.** The question is whether the admission of the statement was proper taking into consideration that defence counsel, Mr. Selgado, did not make an admission as to the nature of the injuries suffered by the deceased and an admission as to the cause of death of the deceased. He merely said to the trial judge that, "*I have no objections, My Lady,*" when he was asked whether he had any objections.

[75] In the opinion of the Court, **section 106(1)** of the **Evidence Act** is not comparable with **section 105** of the **Evidence Act** and **section 123** of the **IPA which** allow for the admission of a witness statement in criminal proceedings, providing that certain conditions are met. Section 105 provides:

> '105.-(1) Notwithstanding anything to the contrary contained in this Act or any other law, but subject to subsections (4) and (5), a statement made by a person in a document shall be admissible in criminal proceedings (including a preliminary inquiry) as evidence of any fact of which direct or oral evidence by him would be admissible if –

(a) the requirements of one of the paragraphs of subsection (2) are satisfied; and

(b) the requirements of subsection (3) are satisfied.

(2) The requirements mentioned in subsection (1) (a) are –

(a) that the person who made the statement is dead or by reason of his bodily or mental condition unfit to attend as a witness;

(b) that –

(i) the person who made the statement is outside Belize; and

(ii) it is not reasonably practicable to secure his attendance; or

(c) that all reasonable steps have been taken to find the person who made the statement but that he cannot be found.

(3) The requirements mentioned in subsection (1) (b) are that the statement to be tendered in evidence contains a declaration by the maker and signed before a magistrate or a justice of the peace to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that if it were tendered in evidence he would be liable to prosecution if he wilfully stated in it anything which he knew to be false or did not believe to be true."

[76] **Section 123** of the **Indictable Procedure Act, Chapter 96** provides as follows:

"123. (1) Where any person has been committed for trial for any crime, the deposition of any person may, if the conditions set out in subsection (2) are satisfied, without further proof be read as evidence at the trial of that person, whether for that crime or for any other crime arising out of the same

transaction or set of circumstances as that crime, provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence.

(2) The conditions hereinbefore referred to are that the deposition must be the deposition either of a witness whose attendance at the trial is stated by or on behalf of the Director of Public Prosecutions to be unnecessary in accordance with section 55, or of a witness who is proved at the trial by the oath of a credible witness to be dead or insane, or so ill as not to be able to travel or is absent from Belize."

[77] Both of these sections (105 and 123) concern admission of a witness statement in a trial providing that the conditions are met. In the opinion of the Court, **section 106 (1)** is not a provision for the admission into evidence of a witness statement in the course of a trial. It provides that, "……. ***any fact of which oral evidence may be given*** *in any criminal proceedings* ***may be admitted*** *for the purpose of those proceedings* ***by or on behalf of the prosecution or the defence****, and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted."* It is a provision for the admission by the parties (prosecution or defence) of facts of which oral evidence may be given in a trial. The admission may be made before, at or during the trial and if made out of court shall be in writing. Dr. Estrada Bran's statement as to cause of death of the deceased was not an admission of a fact but an expert opinion.

[78] However, the Court is not ruling out an admission by counsel for the defence under section 106(1) on cause of death itself. In such a scenario there will be no need for the prosecution to tender a witness statement from the doctor. The defence counsel could inform the court during trial that the defence was admitting the facts in relation to the nature of the injuries and cause of death. This admission could also be made to the prosecution. In these scenarios the trial will obviously be shortened. In the instant matter, defence counsel, Mr. Selgado did not make such admissions as to the facts.

[79] The Court is also cognizant that section 106(1) had often been used by defence counsel when Dr. Estrada Bran had been called to give evidence to admit the fact that he is an expert. It is during the trial that the court is informed by counsel that there will not be a challenge to the doctor's expertise as a forensic pathologist. This admission of a fact also shortens trial.

[80] Dr. Estrada Bran's statement could not have been admitted into evidence pursuant to **section 105** of the **Evidence Act** and **section 123** of the **IPA** because the conditions were not met. Further, the Court is not in agreement with the prosecution that the statement was properly admitted by the trial judge pursuant to section 106(1) of the Evidence Act. In the opinion of the Court, for the reasons discussed above, the admission of Dr. Estrada Bran's statement by the trial judge was misconceived and wrong.

[81] It follows that the trial judge's direction to the jury in relation to the statement was also flawed. At page 186 – 187 the trial judge directed the jury in the following manner:

> "Ordinarily, Dr. Estrada Bran would have appeared in person to testify in court so that questions could have been asked of him. But there are times (and this was one of them) where a witness is unable to come to court. If both sides agree to accept the witness' statement made to the police as their evidence, the statement may be read at the trial for you to consider as evidence in the case. As the judges of what evidence you accept, you still decide if you accept the doctor's evidence given through his police statement or not.

[82] Dr. Estrada Bran's statement could not have been admitted by an agreement for reasons discussed above. **Section 106(1)** speaks only of admission of a fact of which oral evidence may be given. Hence the reason the direction to the jury was flawed.

[83] Despite the error of admission of the statement and the flawed direction by the trial judge, the Court is of the view that the proviso is applicable as there was circumstantial

evidence to prove the cause of death of the deceased (discussed below). The proviso to **section 30** of the **Court of Appeal Act,** provides as follows:

> '… the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

Circumstantial evidence as to harm and cause of death

[84] Ms. Smith submitted that if the Court finds the statement of Dr. Estrada Bran inadmissible, the question as to proof of cause of death arises. She argued that in the absence of a *post mortem* report there was sufficient circumstantial evidence to prove cause of death.

[85] The Court agrees with this argument since the absence of a *post mortem* report itself or evidence from a forensic doctor showing cause of death is not fatal to a prosecution's case. There are cases where persons are convicted of murder although the body of the victim was never found and the case depended entirely on circumstantial evidence. See **para 19-9 Archbold 2001** and **Attorney General's Reference (No. 4 of 1980)**. In the present appeal, there was circumstantial evidence which showed the nature of the injuries and cause of death. This evidence came from the witnesses, Neal Jr, Inspector Zuniga and Scenes of Crime officer, Manazanero who took photographs at the scene and at the *post mortem.*

[86] The evidence of Neal Jr showed that he saw the appellant approach the driver's side of the car driven by the deceased. They were in a conversation when Neal heard two loud bangs. Thereafter, Neal said that the appellant joined him in his car and he (the appellant) had the shot gun which he had seen him with earlier. The appellant then informed Neal that the deceased wanted to kill him so he had to kill him. Neal Jr said

the interior light of the deceased's car was on and when he drove past it, he saw the deceased leaning inside his car motionless.

[87] Antonio Manzanero, Crime Scene Technician, testified that he saw the motionless body of a male creole person with a wound on the left side of the cheek area at Negroman road. He observed a dark red substance on various parts of the car. He also saw a white colour object which appeared to be an expended cartridge. He testified that he took photographs and swab samples of the dark substance. He also testified that he took photographs of a bushy area and a short pump action shotgun which he packed in a gun box, labeled and sealed. Manzanero testified that on 19 April 2006, the body of the deceased was taken to KHMH where a post mortem examination was conducted by Dr. Estrada Bran and he took photographs of the *post mortem*. He tendered 19 photographs which were admitted into evidence as exhibits AM – '1 to 19'. The jury was given these photographs for their deliberation.

[88] Inspector Francis Zuniga testified that on 19 April of 2006, he saw a Toyota Camry car and a male person behind the steering wheels, apparently dead with two wounds to the forehead and left side of the cheek. He said that Mr. Manzanero was taken to process the scene. He testified that Dr. Mario Estrada Bran conducted a *post mortem* examination on the body.

[89] In the opinion of the Court, the circumstantial evidence proved without a doubt that the deceased, Albert Wade died as a result of gunshot wounds he received from the hands of the appellant. So even if the statement from Dr. Estrada Bran had not been admitted into evidence, the jury would inevitably have convicted the appellant of murder. The circumstantial evidence proved the nature of the injuries and cause of death independently of Dr. Estrada Bran's statement. As such, the proviso is applied and the appeal against the conviction is dismissed.

Conclusion

[90] The appeal on the conviction is dismissed for the reasons discussed above. The conviction is affirmed.

<u>The Appeal on sentence</u>

The ground on the unconstitutionality of the mandatory statutory minimum sentence of life imprisonment

[91] The appellant was found guilty for the crime of murder. At the mitigation hearing and sentencing, Mr. Selgado did not present any mitigation. He cannot be blamed for not doing so because of the state of the law at the time. The trial judge sentenced the appellant to life imprisonment. The trial judge indicated to counsel that she had limited options with respect to sentencing.

[92] Mr. Selgado contended that the mandatory minimum life sentence is unconstitutional. He relied on the Court of Appeal judgment of **Gregory August v R** Cr. App No 22 of 2012, which is now under appeal before the Caribbean Court of Justice (CCJ).

[93] Ms. Smith submitted that this issue has been address by the passing of Act No. 22 of 2017. However, the constitutionality of the sentence is still a live issue to be determined by the CCJ.

Discussion

[94] In a majority judgment of this Court in **August,** dated 4 November 2016, the Court found that the mandatory minimum sentence of life imprisonment imposed on the appellant without the possibility of parole prescribed in the proviso to section 106(1) of the Criminal Code, violates both sections 6 and 7 of the Constitution, to the extent that the proviso to section 106(1) of the Criminal Code is mandatory in nature. The life

sentence imposed on the appellant in that judgment was therefore declared unconstitutional. This judgment is under appeal and since judgment is reserved by the CCJ, the Court will refrain from relying on this authority.

[95] However, the Court is not in a state of limbo. On 29 March 2017, the **Criminal Code (Amendment) Act 2017** and the **Indictable Procedure (Amendment) Act 2017** came into force. These amendments introduced a new sentencing regime. Since this is now the current legislation, and is retrospective, it is our view that the Court has a duty to consider the section which is relevant to this appellant and make a determination by applying the amended law.

[96] The Criminal Code (Amendment) Act 2017, (No. 22 of 2017) dated 29 March 2017, is an Act to amend the Criminal Code, Chapter 101, "*to make provision for, among other things, the specification of a minimum term of years, which an offender sentenced to life imprisonment for murder shall serve before the offender can become eligible to be released on parole …..*"

[97] Section 106 was repealed and replaced with section 106 and 106A. Section 106 provides as follows:

> "Murder 106 – (1) Subject to subsection (2), a person who commits murder shall be liable, having regard to the circumstances of the case, to
>
> (a) suffer death; or
> (b) imprisonment for life.
>
> …………
>
> (3) Where a court sentences a person to imprisonment for life in accordance with subsection (1), the court shall specify a minimum term, which the offender shall

serve before he can become eligible to be released on parole in accordance with the statutory provisions for parole.

(4) In determining the appropriate minimum term under subsection (3), the court shall have regard to,

(a) the circumstances of the offender and the offence;
(b) any aggravating or mitigating factors of the case;
(c) any period that the offender has spent on remand awaiting trial;
(d) any relevant sentencing guidelines issued by the Chief Justice; and
(e) any other factor that the court considers to be relevant.

(5) Where an offender or the Crown is aggrieved by the decision of the court in specifying a minimum term under subsection (3), the offender or the Crown, as the case may be, has a right of appeal against the decision.

………

106A – (1) Subject to subsection (2), every person who has previously been convicted of murder and is, at the time of the coming into force of the Criminal Code (Amendment) Act, 2017, serving a sentence of imprisonment for life, shall be taken before the Supreme Court for the fixing of a minimum term of imprisonment, which he shall serve before becoming eligible for parole, or for, a consideration of whether he has become eligible to be considered for parole."

[98] It is the opinion of the Court, that the appellant is entitled to be sentenced pursuant to section 106A of the Criminal Code, which is the transitional provision for existing life sentences for murder convictions. The Court therefore remits the sentencing of the appellant to the Supreme Court pursuant to section 106A for the fixing of a minimum term of imprisonment which he shall serve before becoming eligible for parole.

Disposition

[99] The appeal against the conviction of the appellant is dismissed and the conviction is affirmed. The sentencing of the appellant is remitted to the Supreme Court pursuant to section **106A** of the **Criminal Code** for the fixing of a minimum term of imprisonment.

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SIR MANUEL SOSA P

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HAFIZ-BERTRAM JA

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DUCILLE JA