IN THE COURT OF APPEAL OF BELIZE AD 2016

CRIMINAL APPEAL NO 8 OF 2015

KRISMAR ESPINOSA Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal

___

A Sylvester for the appellant.
C Vidal SC, Director of Public Prosecutions, for the respondent.

7 June 2016 and 22 June 2018.

AWICH JA

[Majority Judgment]

[1] Krismar Espinosa, the appellant, was tried in the Supreme Court before the learned judge, Lord J, and a jury, on an indictment which charged the appellant with murder, contrary to s. 117 read with s. 106(1) of the Criminal Code, Chapter 101, Laws of Belize. The particulars were that: he, Krismar Espinosa, between the 14 and the 15 days of September 2007, in Orange Walk Town, in the Orange Walk District, murdered Rachel Chun. On 3 June 2015, the appellant was convicted of manslaughter, an

alternative verdict, instead of murder. On 18 June 2015, the learned trial judge sentenced the appellant to 16 years imprisonment, "less 7 years and 9 months", which the accused, now the appellant, had spent on remand.

[2] The appellant appealed against the conviction and sentence, by a notice and grounds of appeal dated 5 June 2015. This Court heard the appeal on 7 June 2016, and reserved judgment. It has taken long for the Court to render judgment. The Court apologizes for the delay.

[3] For the reasons given below, we dismiss the appeal and confirm the conviction. There has been no appeal against sentence.

The grounds of appeal

[4] The appellant originally filed a notice and grounds of appeal stating nine grounds. He abandoned five of them, including the ground that, the sentence of 16 years imprisonment was excessive. The four grounds that learned counsel, Mr. Anthony Sylvester for the appellant, argued are the following:

> "(2) The learned trial judge erred in failing to direct the jury to disregard the identification parade evidence of Adriana Cal, in light of the evidence of the egregious conduct of the identification parade as revealed by defence witness Marcel Cardona.
>
> (3) The learned trial judge erred in admitting into evidence the purported oral confession of the Appellant (as conveyed by witnesses Anthony Young and Antonette Young) as said witnesses were persons in authority and as a consequence, the purported oral

confession was obtained in breach of the Judges Rules and admitted into evidence contrary to section 90 of the Evidence Act.

(4) The learned trial judge erred in failing to direct the jury properly and adequately on how to treat the purported oral confession.

…

(8) The learned trial judge erred in leaving the alternative verdict of manslaughter to the jury as this verdict did not arise given the way the case was presented in the court below."

The evidence

[5] Although the record of the proceedings in the Supreme Court, the trial court below, was very long, the story in the evidence adduced by the prosecution, and acted upon by the jury was short. The first part was that, on 14 September 2007, between 10.45 pm and 11.00 pm the appellant, Kirsmar Espinosa, was in the company of Rachel Chun, the deceased, at Hi 5 on Aurora Street, Orange Walk; he was the last person seen with the deceased alive. She was crying. The appellant and Ms. Chun walked away together that night. On the second day the body of Ms. Chun was located in a house under construction on Santa Familia Street, Orange Walk. It was in an advanced stage of decomposition. Dr. Mario Estrada Bran, PW 10, stated that, "the skull showed multiple and irregular blunt injuries". The cause of death was, "trauma shock due to multiple head trauma, blunt instrument type". In his opinion, the death occurred on 14 September 2007.

[6] The second part of the story in the evidence was that, on 16 September 2007, Pastor Ramclam and Pastor Kerr took the appellant to Pastor Anthony Young and his wife, Pastor Antonette Young, at their house in Orange Walk about 9.00 pm. The appellant was said to have confessed orally to having, "murdered", his girlfriend to the Youngs. They advised that, it was a police matter, Ramclam and Kerr should take

Espinosa to the Police. About 9.30 pm all dispersed; the Youngs went to Orange Walk Police Station and reported the discussion. From the report made by the Youngs, some police officers of the Orange Walk Police Station and the Youngs went to a building under construction on Santa Familia Street. There they found and collected the body of the deceased, Rachel Chun. It was "half naked". There was a pool of blood around it. Meanwhile, Pastor Ramclam and Pastor Kerr took the appellant away from the Youngs' home. At 10.55 pm, the appellant, in the company of Mr. Marcel Cardona, an attorney, reported to the Orange Walk Police Station. The appellant was detained by the police. On the advice of Mr. Cardona, the appellant did not make any statement to the police.

[7] The appellant's case was a denial. He denied that, he was in the company of the deceased on 14 September 2007; he denied that, he made any confession; and he denied that he went to the house of Pastors Anthony and Antonette Young. In an unsworn statement in court, the appellant stated that, on 14 and 15 September 2007, he stayed home with his father Albert Chulo all day and night; on 16 September 2007, about 6.00 pm he took food to his brother at a Shell filling station where the brother worked, and he remained there with his brother until Mr. Cardona came and took him to the Orange Walk Police Station a few minutes after 10.00 pm. The appellant saw Pastors Anthony Young and Antonette Young at the Police Station. The appellant was detained. A police officer, "boxed", him and, another, "punched", him; they demanded that he admit having murdered Rachel Chun. The appellant did not admit. An alternative defence was that, the alleged confession was erroneously admitted in evidence.

Determination

Ground number (2): the identification parade, and other evidence of identification

[8] The first answer to the ground of appeal number (2), a complaint about evidence of the identification of the appellant at an identification parade by Ms. Cal Corbin, is that,

there was some other evidence of identification of the appellant on which the jury could rely to return a verdict of guilty anyway. When formulating the ground of appeal, learned counsel Mr. Anthony Sylvester who is usually thorough in his track, overlooked that other important evidence of identification. As the result, he overlooked the point that, even assuming that, the trial judge erred in not directing the jury to disregard the evidence in the testimony of Ms. Cal Corbin about the identification of the appellant at the identification parade, there was still in the record some other good and independent evidence of identification of the appellant at "Hi 5" in Orange Walk Town, connecting the appellant to the deceased on the evening of 14 September 2007. It was in the testimony of Mr. Shawn Flowers, PW1.

[9] Mr. Flowers testified as follows. He was a boyfriend of Ms. Chun. About 10.30 pm on 14 September 2007, he walked with Ms. Chun from Piccame Cool Spot on Jamaica Street, Orange Walk, to Hi 5 on Aurora Street, Orange Walk, where Ms. Chun stopped to speak to some people, while Mr. Flowers walked on and stopped about 15 feet away, "to give her space". Then Mr. Flowers saw Ms. Chun and Espinosa, the appellant, move apart from the rest. Mr. Flowers turned round and saw Ms. Chun and Espinosa kiss. Mr. Flowers was upset and left. He had known Espinosa, for about seven years, they had met at church prayers and at church youth group meetings. Mr. Flowers saw the appellant once or twice a week in those seven years.

[10] An important matter to note in connection with the evidence of the identification in Mr. Flowers' testimony is that, a proper and appropriate direction regarding it was given to the jury. The learned trial judge, besides giving direction to the jury on other items of evidence of identification, such as the evidence of the identification parades, gave a specific and accurate direction, including **Turnbull direction**, to the jury on this evidence of identification in the testimony of Mr. Flowers. That ensured that the jury would approach that evidence of identification well aware of the special danger inherent, and with the special need for caution required.

[11] The direction commenced on page 562 by this explanation by the judge:

> "I now go to the third element – that it was the accused Krismar Espinosa who caused the harm which resulted in the death of Rachel Chun. Members of the jury, the Prosecution is endeavouring to prove this element by alleging that the person who caused the harm to the deceased, Rachel Chun, was the accused Krismar Espinosa.
>
> …
>
> The Prosecution called its first witness in the person of Shawn Flowers …"

[12] Then the judge summarized the evidence regarding the identification of Krismar Espinosa in the testimony of Mr. Flowers. He then proceeded on pages 602 to 604 to give the following direction:

> "Now members of the jury, you have heard the evidence of the Prosecution witnesses, (eg) Sharwn Flowers, Keisha Parham and Adriana Cal Corbin who identified the accused.
>
> Now I must warn you of the special need for caution before convicting the accused in reliance on the evidence of identification here made.
>
> Members of the jury, a witness who is convinced in his/her own mind may as a result, be a convincing witness; but may nevertheless be mistaken.
>
> Mistakes can also be made in recognition of someone known to a witness or even a close friend or relative, and you may note that also a number of such witnesses can all be mistaken.
>
> You members of the jury, should therefore examine very carefully the circumstances in which the identifications were made in this case now before the court, of the accused Krismar Espinosa.

I will therefore ask you to bear in mind the following questions as you recall the testimonies of the Prosecution witnesses.

1. How long did the witness Shawn Flowers have the person he says was the accused under observation?

Here the complainant stated he saw Mr. Espinosa call Rachel Chun to one side and they began to talk; 'that is what was happening for about 5 to 10 minutes, and when I turned around to look I saw Mr. Espinosa and Rachel kissing'.

2. In what light did he see them?

The witness stated the lighting conditions would be bright like this room more or less (witness pointing to lights in the court room). He also stated under cross examination there was a light post infront and directly on the same building there were fluorescent lights so you could see clearly.

3. At what distance:

The witness stated when questioned in cross examination:

Q: You said to the court you were a little bit ahead?
A: Yes.
Q: How far was it?
A: About 15 feet.

4. Did anything interfere with the observation of the person?

Members of the jury, here the witness has not stated whether anything/objects was interfering with his observation of the person.

5. Had the witness ever seen the person he knew before?

The witness said yes. He stated – 'I knew Krismar Espinosa for about seven (7) years and I would see him about once or twice per week. I would see him at church and youth group meetings.'

6. If so how often?

He stated I would see him once or twice per week. I would see him at church and youth group meetings."

[13] The Prosecution's purpose for leading the evidence of the identification parade at which Ms. Cal Corbin was asked to identify whoever she said she had seen talking to and kissing Ms. Chun at Hi 5, was to prove that the appellant was the person, and so he was the last person seen with Ms. Chun alive on 14 September 2007. He went away with her; she was crying.

[14] The evidence in the testimony of Mr. Flowers equally served that prosecution's purpose. If believed by the jury, Mr. Flowers' testimony would also prove that, the appellant was the last person seen with Ms. Chun at Hi 5 on 14 September 2007. So, if the identification of the appellant at Hi 5 was of important probative value to the jury in connecting the appellant to the death of Rachel Chun, the jury could well have acted on that evidence in the testimony of Mr. Flowers, besides the evidence of the identification parade. Mr. Flowers' testimony was good evidence of identification for the jury to have acted on, one way or the other, and they had been properly directed on it. The jury could properly convict on that evidence. There has been no appeal about the evidence of identification in Mr. Flowers' testimony or about the direction on it.

The circumstantial evidence built

[15] Apart from the evidence of identification in the testimony of Mr. Flowers serving as good additional and independent evidence of identification of the appellant, it also served as one item of evidence in a series that together could be regarded as circumstantial evidence – see ***DPP v Kilbourn [1973] AC 729 HL****, and* ***McGreevy v DPP [1972] 1 WLR 276***. The appellant was the last person in the company of the deceased on the evening of 14 September 2007. He walked away with her. She was crying. She died that night of 14 September, according to expert's evidence. She died

from multiple injuries to the head. The prosecution evidence left no indication about where the appellant and Ms. Chun might have departed that night, and there was no clue in the evidence as a whole that, the appellant and the deceased might have departed before she died. On this circumstantial evidence it was open to the jury to convict the appellant of murder or manslaughter.

[16] So, even if this Court were to decide ground number (2), a complaint about the identification parade, in favour of the appellant, nothing would render the conviction on the rest of the evidence unsafe; so as to occasion miscarriage of justice. This appeal cannot succeed on ground number (2).

The identification parade

[17] Given our view that, the evidence of the identification of the appellant in the testimony of Mr. Flowers was enough to support the verdict of guilty returned by the jury, I need not examine the complaint against leaving to the jury the evidence in the testimony of Ms. Cal Corbin regarding the identification of the appellant on the identification parade. However, in deference to the much effort made by both counsel, we shall give reasons for which the complaint should be rejected.

[18] The submission by Mr. Sylvester was that, the evidence given by Mr. Cardona, "cast doubt on the fairness of the identification parade, and consequently, on the outcome of the identification parade"; and further that, the evidence given by the prosecution witness, Inspector of Police, Federick Gordon, "by itself cast some doubt as to fairness of the conduct of the identification parade …". Mr. Sylvester argued that, the judge should have directed the jury to disregard the evidence that Ms. Cal Corbin picked out the appellant from the identification parade. Counsel proceeded to argue and propose that, "the trial judge should have given the jury a strong warning to disregard the identification evidence".

[19] Mr. Sylvester based his submission urging exclusion of the testimony of Ms. Cal Corbin regarding the identification at the identification parade, on only one matter of fact. It was in the testimony of Mr. Marcel Cardona, namely, that Krismar Espinosa was, "the only non-Latino looking person…", "the only Creole descent person", on the identification parade.

[20] Mr. Cardona testified for the defence on pages 458 to 459 as follows:

> "… Mr. Krismar Espinosa was the only non-Latino looking person in the line-up. I mentioned this to then Sergeant Gordon, and Sgt. Gordon responded to me that that was the best that he or the police could do in the circumstances. So, they couldn't put other people of Creole descent on the line-up because they couldn't locate other people to put on the line-up … But again the constant was kind a stood out from the Crown (sic) because the rest of the people were, maybe like straight-haired people or some of them had loose long hair and then he doesn't have straight hair, and perhaps he did not look Latino as compared to the rest."

[21] Further, in cross-examination the answer that Mr. Cardona gave on pages 471 to 472 were the following:

> "Q: Did you note your objections on the identification parade form?
>
> A: Honestly, once again if I am not mistaken the ID parade for this gentleman was the first ID parade I had actually witnessed in my career as an Attorney-at-law, the first time I had seen an ID parade actually take place in actuality/reality and that is the reason why I believe I mentioned last I told the Sergeant, I brought it to his attention because we deal with the police everyday so we cannot appeal to be unduly confrontational with the Police. So very professional I raised my objections to the police and I

informed him: you know Sarge, I think that that is a little unfair bit man, you got all Latinos up there and you got like Mr. Krismar Espinosa up there appearing to be the only like creole looking up there and then I remember the good Sergeant said to me Mr. Cardona I agree but I have no control because I sent the Police Patrol out there to pick up people".

[22] The law that Mr. Sylvester espoused is that, there must be fairness when an identification parade is held. He argued that the appellant was the only dark-skinned person, the only Creole, among the nine persons on the parade, so the parade was unfair. He cited ***Albert Guy v R – Criminal Appeal Case No. 8 of 2004 (Court of Appeal of Belize)*** in support.

[23] The learned Director of Public Prosecutions, Ms. C. Vidal SC, did not contest the law. She contested the submission that, there was unfairness in the identification parades viewed by Ms. Cal Corbin and the other two witnesses. Then she argued that, the trial judge properly directed the jury on the fairness (or unfairness) of the identification parade, and on the testimonies of Inspector Gordon and of Mr. Cardona. She submitted that, the matter was in the end, for the jury to decide on the evidence in the testimonies of Inspector Gordon and of Mr. Cardona.

[24] The need for fairness in carrying out identification parade has been the common law, and now is statutory law in Belize. **The Police (Identification Parades) Regulations, 2006**, **Statutory Instrument No. 118 of 2006**, is part of the statutory law. It provides at regulation 2 as follows:

> **2. The purpose of these regulations is to ensure that the evidence of identification is obtained in a fair and transparent**

manner so as to eliminate any risk of misidentification and consequent miscarriage of justice.

[25] The rest of the regulations are directions imposing steps and other actions on police officers when carrying out identification parade. So, what is fair and transparent is determined largely from the facts of the particular case, and taking into account the requirements in the Police (Identification Parades) Regulations, 2006.

[26] While bearing in mind fairness and transparency, it is important to note that, holding an identification parade is a very important step in the investigation of a crime. It is held when a police officer considers it to be useful in the investigation, and the suspect consents to participating in the parade; moreover, it must be held when a suspect has demanded that it be held.

[27] It is also important to bear in mind for the sake of fairness and transparency that, holding an identification parade is beneficial to both the prosecution and the defence, not just to the prosecution. A positive identification of a suspect by a potential witness is powerful inculpatory evidence for the prosecution. On the other hand, failure by an intended witness to pick out the suspect, or any other inconclusive ending to an identification parade, confers enormous advantage to the defence – see – ***R v Graham [1994] Crm. L. R. 213, C.A*.** Where it is desirable to hold an identification parade but, it is not held, the jury must be told that, advantage accruing to the accused in the event that the accused was not picked out, or of an inconclusive parade has been lost to the accused.

[28] In this appeal case, the complaint of unfairness was limited to “unfairness” resulting from the allegation in the testimony of Mr. Cardona that, the appellant was “the only non-Latino looking person”, “the only Creole descent person”, on the identification

parade. The complaint that, "the testimony of Inspector Gordon (who held the parade), by itself, cast doubt as to the fairness of the conduct of the identification parade, was about the same allegation that the appellant was, "the only non-Latino looking person", "the only Creole descent person". We are therefore not directly concerned with the rest of the requirements in the Regulations.

[29] The evidence in the testimony of Inspector Gordon was aimed at presenting to the court that, the requirements of the Police (Identification Parades) Regulations, 2006, were complied with when the identification parade was held. The prosecution's objective was to establish that, by complying with the requirements of the Regulations, the investigators, in particular, Inspector Gordon, observed fairness and transparency when he held the identification parade at which the appellant was picked out.

[30] Inspector Gordon testified as follows: He was requested by Sergeant Cantun, the officer in charge of the investigation, to carry out an identification parade so that witnesses would be afforded opportunity to identify the person who they said they had seen with Ms. Chun at Hi 5 on the evening of 14 September 2007. Espinosa, the suspect at the time, was in police custody. Inspector Gordon informed Espinosa of his intention to carry out the parade. Espinosa consented that, "he had no problem with it". Inspector Gordon then informed Espinosa that, "it was his right to have someone present", during the conduct of the parade. Espinosa requested the presence of his attorney, Mr. Cardona, who the police informed. Mr. Cardona attended at the parade. Inspector Gordon, with the help of other officers, had obtained 8 persons who together with Espinosa, the ninth person, formed the parade. Inspector Gordon, stated: "We tried to get persons as close as possible in resemblance." Espinosa was asked if he objected to any of the persons. He said he did not object to any. He was asked to choose a number, and a position on the parade, he did. Numbers were assigned to each person on the parade, and the parade was photographed. A justice of the peace was brought and attended.

[31] Three intended witnesses were invited one at a time, to pick out the person they said they had seen at Hi 5. They were told that the person may or may not be on the parade. Each witness picked out Espinosa by his number. Ms. Cal Corbin was the last witness to be invited. After the first witness had picked out Espinosa, he was asked if he wished to change position on the parade and number. He changed position and number. After the second witness had picked him out by the number he had changed, Espinosa was asked again if he wished to change position and number again. This time he chose not to. Ms. Cal Corbin whose evidence is the subject of the ground of appeal, picked out Espinosa. At the end of the parade, Inspector Gordon filled out three forms, one in respect to each witness, and asked Espinosa to sign them. He signed.

[32] In cross-examination Inspector Gordon stated that, Mr. Cardona (attorney for Espinosa then) was present all along when the identification parade was being conducted; he did not object to the parade; he did not complain that Espinosa was the only Creole or dark-skinned person on the parade. Defence counsel put to Inspector Gordon the names of four persons who counsel suggested were light-skinned Latinos. The witness stated that, he did not remember the first three, but that he knew the fourth who he said was dark-skinned. He also said that, he did not remember whether there were any light-skinned persons on the identification parade.

[33] On this evidence, Mr. Sylvester urged this Court to find that, the appellant was the only dark-skinned and Creole person, also described as: “non-Latino looking person”, “Creole descent person” on the identification parade. He argued that as in ***Albert Guy v R***, where the appellant was described as the only “Coolie descent man, like East Indian”, the identification parade in this appeal case was not fair, the trial judge should have directed the jury to disregard the evidence of the identification parade in the testimony of Ms. Cal Corbin.

[34] The difficulty in accepting that submission is that, the point has been raised by the appellant only at the appeal stage, and with hindsight. It is far too late. The jury had already heard the testimonies of Ms. Cal Corbin, and of Mr. Cardona and Inspector Gordon, regarding the identification parade. During the trial learned counsel Mr. Leo Bradley for the accused, Espinosa, did not object to the evidence of the identification parades. This was even when he sought to produce a photograph of the appellant to witness Cardona, and learned Counsel Mr. Javier Chan prosecuting, magnanimously suggested in passing, a *voir dire* instead, to determine the fairness of the parade. It was not taken up.

[35] It would have been hopeless at the summing-up stage for the judge to direct the jury to disregard the evidence given by Ms. Cal Corbin regarding the identification parade. The jury would still be left assessing in their mind, the testimony of Inspector Gordon against that of Mr. Cardona, and also the testimony of Ms. Cal Corbin. The case had been left to progress to the point where it was then a matter for the jury to weigh the testimonies for the prosecution while taking into consideration the testimonies for the defence and the unsworn statement of the accused, and decide where the fact laid; and then decide whether the identification parade was held in a fair and transparent manner and in fair and transparent circumstances.

[36] Whether an identification parade has been held in a fair and transparent manner and in fair and transparent circumstances depends, largely on the facts of the case, and taking into account ***The Police (Identification Parades) Regulations 2006***. In ***Albert Guy v R***, the complainant had described her assailant as, "a Coolie descent man, like East Indian". She picked out the appellant out of an identification parade. He was convicted. This Court allowed his appeal. The Court observed that:

> *"Sgt. Florentine Salam, who conducted the parade said that, 'he went out and located eight male persons of similar features and heights to Albert*

Guy who is of East Indian descent' … It is clear that Sgt. Salam appreciated the importance of having persons of East Indian descent on the parade."

[37] The Court then reviewed answers given by Sgt. Salam to questions in cross examination. It concluded that, Sgt. Salam, "was uncertain as to whether the eight persons placed on the parade were of East Indian descent", and that, he was clearly unwilling to state that the participants on the parade were of East Indian descent. The Court held that:

"*13. The evidence relating to the conduct of the identification parade was in our view unsatisfactory. It is uncertain whether any of the eight were in fact of East Indian descent. To have an identification parade in circumstances where the appellant was the only person of East Indian descent is to ignore the basic principle that the parade must be conducted in a manner that is fair to the suspect. It may well be that the purported identification of the appellant at the parade led to his conviction.*

…

17. If the appellant was the only person on the parade who was of East Indian descent, then the parade was unfair to the appellant. We cannot be satisfied in the circumstances that there were more persons of East Indian descent on parade…"

[38] To support its decision, the Court cited a Guyanese case, ***The State v Ken Barrow, 22 WIR 267***, in which the appellant was the only person on the identification parade who had a scar on the left side of his face. The Court of Appeal of Guyana held that, the identification parade was not fair, "it was a farce". The reason for the decision

of the Court of Appeal of Guyana in the case **(*The State v Ken Barrow*)** was stated as follows:

> "*It is most essential therefore, that the parade must provide a fair and just test. And to my mind, it is impossible to hold a test fair if only the suspect in a line can possibly completely fit the description of the criminal given to the police and elected in the memory of the witness.*"

[39] This present appeal case is distinguishable on the facts, from ***Albert Guy v R***, where the appellant was or may have been the only person who was, "a Coolie descent man, like East Indian". In this appeal case, Inspector Gordon said that he knew Danilo Navarrete, one of the persons on the parade, he was a dark-skinned person. The appellant was a dark-skinned person too. So, the appellant was not the only dark-skinned person on the parade. Inspector Gordon also did not remember whether there were any light skinned persons on the parade. Further, the appellant in this case was asked, in the presence of his attorney, whether he objected to any of the intended participants on the parade, and he answered that he did not object. The present case is also distinguishable from **The State v Ken Barrow** where the appellant was **the only man with a scar on the left side of his face** on the parade. No peculiar mark or feature of the appellant in this case was adduced in evidence.

The summing up and direction on identification parade

[40] Mr. Sylvester's submission on the summing up and direction on the identification parade was that, the direction that the judge should have given to the jury was that, the jury should disregard the evidence of the identification parade in the testimony of Ms. Cal Corbin because the identification parade was not fair. We have rejected the submission that the identification parade was not fair, for the reasons we have given

above. Nevertheless, once the identification parade was in evidence, the judge had to give direction on it to the jury.

[41] In all, the trial judge gave the proper direction. He went to great length in warning the jury about their duty to ensure that, the identification parade was fair. He instructed them to determine whether the identification parade provided, "a fair test", for the identification of the suspect, and that if it did not, the jury should give it, "little or no weight". We cannot quote all the passages in the summing up where the judge's warnings were stated. We shall merely quote from pages 656 to 682 of the record for example.

[42] The judge was well aware that, if there was to arise any complaint about unfairness regarding the parade, it would arise from the divergence in the testimonies of Inspector Gordon and of Mr. Cardona. He reviewed the two testimonies in detail, and perhaps more critically, that of Inspector Gordon for the prosecution. Then he properly directed the jury on pages 656 to 682 as follows:

> "So members of the jury, you must compare the evidence of Sergeant, now Inspector Gordon and that of the witness for the defence, Marcel Cardona, and then start with these evidences to ascertain whether there was any similarity between the persons in the lineup on the 17th September, 2007 when the three identification parades were held by then Sgt. Gordon, and Krismar Espinosa was picked out.
>
> Look carefully at the evidence and see if there was similarity as described above to you as is required when the police conduct an identification parade with a suspect.
>
> Look to see if there was similarity between the participants and the accused, the participants and the accused who were in that lineup or look

and see if there was a vast disparity where in the accused Krismar Espinosa stood out as the only person who was not similar and therefore stood out and was easily picked out as the person who the witnesses identified. Look and see if this was because of the disparity of appearances between him and the other persons/participants in the lineup on 17th September, 2007.

Look carefully and finally decide if having considered Sgt. Gordon's evidence if you accept his evidence or if you accept the evidence of Marcel Cardona as to the lineup and identification parade involving the accused Krismar Espinosa on the 17th September, 2007.

Now then members of the jury, again I say to you having heard all the evidence presented by both sides and particularly that of Sgt. Gordon and Marcel Cardona you are now required to decide if the evidence of the Prosecution has satisfied you that the other persons who were on the parade, were of similar skin colour, complexion, race, resembling the suspect in age, height, general appearance and position in life; or were they Latino/Hispanic races and therefore in no way similar to the accused.

Members of the jury, you should remember that it is necessary for you to decide whether the Prosecution has satisfied you that the other persons who were on the parade were also of Creole descent as was the accused.

Now then members of the jury, if you are not satisfied that there were other persons of Creole descent on the parade then members of the jury, you ought to conclude that the parade did not provide a fair test of the identification of the suspect on the 17th September, 2007.

Therefore if you reach that conclusion then in the given circumstances little or no weight ought to be given to the evidence of the result of the identification parade of the 17th September, 2007.

However, if you accept that the parade was fair and that the composition of the parade was such of persons of similar skin colour, complexion,

race, resembling the suspect in age, height, general appearance and position in life then in those circumstances you can accept the identification parade and give it what weight you deem fit. This decision I leave to you to decide as you deem fit from all the evidence before you."

[43] This direction was an appropriate one, and in accordance with the law, given the divergence in the two testimonies. We, reject the complaint in ground number (2).

Ground of appeal number (3), confession; and number (4), direction on confession

[44] For convenience, I restate ground of appeal number (3) here. It states:

> *"(3) The learned judge erred in admitting into evidence the purported oral confession of the Appellant (as conveyed by witnesses Anthony Young and Antonette Young) as said witnesses were persons in authority and as a consequence, the purported oral confession was obtained in breach of the Judges Rules and admitted into evidence contrary to section 90 of the Evidence Act."*

[45] The ground of appeal is a complaint against the decision that the judge made relevant only to the alternative defence that, the appellant advanced in the trial. The main defence was that, the appellant never went to the home of Pastor Anthony Young and Pastor Antonette Young, so, he never made "the confession" that, the Youngs testified that he had made at their house. So, ground number (3) is based on an assumption, without conceding that, the appellant went to the house of the Youngs and confessed.

The law applicable to ground number (3)

[46] I start examining the law applicable to this ground by explaining what is meant by a confession. For the purpose of the law of evidence in a criminal case in Belize, a confession is a voluntary admission of facts at any time by a person charged with the commission of any offence, which states or suggests the inference that he committed the offence. I took that from **section 90(1) of the Evidence Act, Cap. 95, Laws of Belize**. It states:

> ***Confessions***
>
> **90-(1) An admission at any time by a person charged with the commission of any crime or offence which states, or suggests the inference that, he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and voluntary made.**

[47] So, a confession, for the purpose of admission in evidence, need not be an admission of all the facts that constitute the offence charged. It is now acceptable to describe a confession simply as, any statement wholly or partly adverse to the person who made it whether made in words or otherwise. A very important element in ***s. 90 (1)*** is that, the statement must be ***freely and voluntarily made.***

[48] ***Subsection (2) of s. 90*** is also important in the meaning and proof of a confession, and is important in the determination of the question in this ground of appeal. The subsection requires that, if a confession is made to a person in authority it must be made voluntarily, if it is to be admitted in evidence, and that this must be proved affirmatively beyond reasonable doubt, to the satisfaction of the judge. Again the element that the statement must be made freely and voluntarily is included. The subsection states:

> **(2) Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.**

[49] It records what was the common law that emerged in ***Ibrahim v R [1914] AC 599*** and ***R v Thompson [1893] 2 Q B 12***. In ***Ibrahim v R***, Lord Summer, at page 609, stated the common law as follows:

> *"It has long been established as a positive rule of English criminal law that, no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that, it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression."*

[50] By referring to s. 90, particularly s. 90 (2), counsel sought to contend that, because the Youngs were persons in authority, and they did not comply with Judges Rules by cautioning the appellant, it must be presumed that, any confession made by the appellant to the Youngs could have been made as the result of a promise of favour or advantage, or as the result of the use of fear, threat or pressure by the Youngs; the prosecution did not prove affirmatively beyond reasonable doubt that, the confession was voluntary. We must determine whether that was the case.

[51] A confession is very important in a criminal case trial because, if it is admitted in evidence; it may suffice as proof of the truth of what it states; and may be sufficient to have the person charged convicted of the offence charged – see **s. 91(1)** which states:

> **91-(1) Subject to the provisions of this section, where the voluntary nature of the accused person's confession or admission of guilt has been established beyond reasonable doubt, such confession or admission shall be sufficient to warrant a conviction without any confirmatory or corrobrative evidence.**

The confession in the trial

[52] The corpus identified in this appeal as a confession is what the appellant is said to have related orally to the Youngs. It found its way into the evidence this way. In the trial, counsel for the appellant raised an objection to the intended testimonies of Pastors Anthony and Antonette Young regarding what they intended to say the appellant had told them on 16 September 2007 at their house. The judge held a *voir dire* and ruled that, the intended evidence was admissible as evidence of a confession in the trial. The Youngs testified and were allowed to recount what they said the appellant had related to them.

[53] The relevant part of the testimony of Pastor Anthony Young is the following:

> "…I started asking some questions. Krismar in return said that while he was in the bar at Hi 5, he thought somebody had put something in his drink. At the same time the young lady, a friend told him, the young lady was asking for him. He said he proceeded outside to meet the young lady, and they proceeded on to Santa Familia Street to a shell of a building. So I asked him, how do you know the young lady is dead. He said he hit her with a stone. And I was thinking if he hit her with a stone, there shouldn't be anybody there. But he said he knew there was one. In return I told him he would have to hand in himself. I repeated that several times.
>
> [Did Krismar respond when you told him he needed to hand himself in?]

He responded by saying that he cannot do it right away, that he would do it in the morning. The reason why, he wanted to see his girlfriend who had a young child for him, he wanted to see his father, and he also wanted to talk to a lawyer…"

[54] The relevant part of Pastor Antonette Young's testimony was to the same effect; it is this:

"Pastor Ramclam said … I then looked at Krismar and I asked him, I said, tell us what happened. He then confessed … [The Court: Just tell us what he said].

Ok. He said, 'I murdered a young woman'. I said, how do you know she is dead? He then said that he was at a bar and met a young lady and they had a bit of back and forth disagreement. After a drink he did not feel like his normal self, so he left the bar. And later on that same Friday night he met up with the same young lady at the Hi 5 Disco. He said they spoke a little bit, and then walked on to Santa Familia Street to an incomplete concrete building. He said that is where he murdered her. I asked him how? He said, 'I used a cement block, and I smashed her in her head.' I then looked at him and said, this is a police matter, we will have to report this. [Prosecutor: Did he respond to you?]. Yes he did. He asked if he could have gone home to his girlfriend and his two weeks old baby. I suggested, no, that it was best for him to go directly to the Police Department. I even suggested that I could arrange for his girlfriend to come at the Police Station to see him."

[55] The jury might have returned their verdict of guilty of manslaughter, an alternative verdict, based on the above utterance that the Youngs testified that the appellant had made to them. So, it is important to determine whether what was said to have been related by the appellant to the Youngs was admitted in evidence erroneously by the trial

judge; and if the confession was not erroneously admitted, whether the judge properly directed the jury about how they were to approach the confession in their deliberation.

[56] If the appellant made the utterance freely and voluntarily, it would be an admissible confession because it stated that he committed the offence of murder that he was charged with, or manslaughter. It was not an issue at the trial, and still is not an issue on appeal that, the utterance attributed to the appellant was in the nature of a confession for the purpose of admitting in evidence. But it was an issue that, it was obtained without the Youngs, persons in authority, having cautioned the appellant, and so the utterance was not freely and voluntarily made.

The submissions on s. 90 of Evidence Act and Judges Rules

[57] The appellant's submission was that: the Youngs must be regarded as, "person[s] in authority" referred to in section 90(2) of the Evidence Act, and for any confession made to them by the appellant to be admitted in evidence, ***rule 15 of Judges Rules, 2000***, shoukd have been invoked. The rule required that, the Youngs should have cautioned the appellant prior to the appellant making the confession (if he then chose to make it). The Youngs did not, so the confession could not be regarded as made voluntarily. The judge should not have admitted in evidence the confession said to have been made by the appellant to the Youngs, counsel argued.

[58] Counsel for the respondent submitted that, "Mr. and Mrs. Young were not persons in authority [referred to in subsection 90(2) of Evidence Act] nor were they persons charged with the duty of investigating offences or charging offenders under rule 15 of Judges Rules, and so were not bound by Judges Rules." Further, counsel submitted, "[i]t was therefore not incumbent upon the prosecution to prove the voluntariness of the admission made, on a voir dire, particularly in circumstances in

which the appellant's position was that he had never met with the Youngs and had never made any admission to them."

Determination of ground number (3).

[59] The evidence in the *voir dire* disclosed that, the Youngs were not police officers, but that they were pastors, and also members of a group of volunteer residents of Orange Walk Town known as Citizens On Patrol, COP. It was not a group created by statute. Could that make them be regarded as, "person[s] in authority", under s. 90(2**)** of Evidence Act, or as, "persons other than police officers, charged with the duty of investigating offences, or charging offenders", under rule 15 of Judges Rules? If so, then they would be under a duty in the common law, and also specifically, under **rule 15** read with **rule 1.2 of Judges Rules, 2000**, to caution the appellant prior to receiving the utterance, the confession, from him.

[60] In full the two rules of Judges Rules state as follows:

> **Rule 1.2:** **A person whom there are grounds to suspect of committing an offence must be cautioned before any questions about it (or further questions, if it is his answers to previous questions that provides grounds for suspicion) are put to him for the purpose of obtaining evidence which may be given to a court in a prosecution. The person need not be cautioned if questions are put to him for other purposes, for example, to establish his identity, or the ownership of any vehicle, or the need to search him in the exercise of powers to stop and search.**

Rule 15: Persons other than police officers charged with the duty of investigating offences, or charging offenders, shall, as far as may be practicable, comply with these Rules.

[61] Mr. Sylvester's submission was pegged on the phrase, "a person in authority", and the clause, "persons charged with the duty of investigating offences or charging offenders". He argued that, the Youngs were persons in authority for the reason that, they were pastors, and also for the reason that, they were members of Citizens On Patrol. He also argued that, they were, "persons charged with the duty of investigating offences or charging offenders", under rule 15 of judges Rules, for the reason that they were members of Citizens On Patrol. The DPP's submission was to the contrary as stated above.

[62] Both counsel used the two expressions, a person in authority, and a person charged with the duty of investigating offences or charging offenders, interchangeably in their submissions, with justification, in our view. Both narrowed their arguments for admitting, or not admitting the utterance attributed to the appellant, to answering the single question, whether the Youngs who received the utterance, were persons in authority (under s. 90(2) of the Evidence Act), or alternatively, whether they were persons charged with the duty of investigating offences, or charging offenders under rule 15 of Judges Rules. Both counsel proceeded on the footing that, if the Youngs were not persons in authority, or not persons charged with the duty of investigating offences or charging offenders, then they were not under a duty to caution the appellant prior to receiving or obtaining the utterance from the appellant on 16 September 2007. We interpolated that, the confession would then be admissible in evidence without the need for prior caution.

[63] In our view, the expression, "persons other than police officers, charged with the duty of investigating offences or charging offenders", in rule 15 of Judges Rules, is

included in the expression, “a person in authority” in s. 90(2) of the Evidence Act. The reason is that, a person charged with the duty of investigating offences or charging offenders is a person who must necessarily have some *authority* in the criminal matter; the expression thereby fits into the phrase, a person in authority, and is part of it. Further, persons of both descriptions are required to caution a suspect, the law regards them the same way.

[64] The phrase a person in authority is a common law phrase. It was notably used in the early days by Parke. B. in ***R v Baldry (1852) 2 Dec. 430***. The statutory law regarding confession in **ss. 90 and 91 of the Evidence Act of Belize** merely recorded the common law of England as developed up to when the Act was legislated.

[65] In 1914, much earlier than the Evidence Act of Belize, the common law regarding admission of a confession in evidence in criminal cases had been definitively stated by the Privy Council in ***Ibrahim v R [1914] AC 599,*** in their judgment delivered by Lord Sumner, at page 609 quoted earlier as follows:

> *"It has long been established as a positive rule of English criminal law that, no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that, it has not been obtained from him either by fear of prejudice or hope of advantage exercise or held out by a person in authority, or by oppression"*

[66] That statement of the common law was quoted with much praise by the House of Lords in ***Commissioners of Customs and Excise v Herz and Power [1967] AC 760 (HL) DPP v Ping Lin [1976] AC 574 (HL); Regina v Mustaq [2005] UKHL 25,*** and several other notable judgments.

The questions in ground of appeal No. (3).

[67] So much about the law, we now pose the question: Did the trial judge err in admitting in evidence what the appellant related to the Youngs? For this Court to decide that, the learned trial judge erred, it must be shown that, the judge erred on a question of law, that is, he applied the wrong procedure leading to his decision, or misunderstood the law regarding admission of confession, or erred in applying the correct law to the evidence (in the *voir dire*); or further that: he erred on a question of fact in that he misunderstood the evidence led in the *voir dire*; or his decision was absurd having regard to the evidence led in the *voir dire*. This Court reviews a case, it does not retry a case. We cannot reject a finding of fact by the trial judge simply because we would have decided otherwise.

[68] In an effort to identify errors, we ask a further question: did the judge apply the correct procedural approach in order to enable him to inquire into and obtain all the facts and circumstances relevant to determining whether to admit those portions of the testimonies of Pastor Anthony Young and of Pastor Antonette Young, regarding the confession?

[69] The judge held a *voir dire* from which he determined that, the confession was admissible. Holding a *voir dire* was the correct procedure for the purpose. In ***Pipersburgh and Another v R [2008] UKPC II***, an appeal from this Court to the Privy Council, one of the questions was the admissibility in evidence of certain admissions of the facts of the offence said to have been made by Pipersburgh, one of the appellants. In the trial, defence counsel had objected to admitting in evidence part of a testimony about a discussion between the appellant and the ambassador of Belize to Mexico at a Mexican immigration detention centre.

[70] The ground of the objection was that the ambassador was a person in authority, and the confession was not voluntary because the ambassador did not caution the appellant. The trial judge did not hold a *voir dire*; he ruled on the evidence so far adduced in the full trial that, the admissions in the discussion were voluntary and admitted them in evidence.

[71] The Privy Council made it clear that, before ruling on admissibility of the conversation that the ambassador had with the appellant, the trial judge should have held a *voir dire* in which the various issues raised could have been fully explored in evidence, and in which the appellant could have given evidence, if he wished. By not holding a *voir dire*, their Lordships stated, the judge did not only deprive himself of this potential assistance, but deprived the appellant of the opportunity to have the admissibility of the evidence determined on a proper footing. They held that, the trial judge erred in the procedure. Their Lordships preferred not to express a concluded view on the question of admissibility in evidence of the discussion because they decided to remit the case back to this Court, to consider ordering a retrial. This Court ordered a retrial – see also ***R v Mustaq v R [2005] UKHL 25***. In this appeal case, the learned trial judge was spot on as far as the procedure was concerned. He held a *voir dire*.

A person in authority

[72] Regarding the subject matter in this appeal case, the learned judge decided that, the Youngs were not persons in authority, and were not persons charged with the duty of investigating offences or charging offenders, so they were not obliged under the Judges Rules, to caution the appellant prior to them obtaining a statement from the appellant. In our view, the judge was right.

[73] The phrase, a person in authority, used in s.90 (2) of Evidence Act, is an important integral part of the law regarding admissibility of a confession in evidence in

Belize. When the phrase mattered in England in the past, several judgments in England explained what it meant. The established common law definition was that, a person in authority was anyone whom the prisoner might reasonably suppose to be capable of influencing the course of the prosecution. He was a person having some control or influence in the criminal prosecution. A prison chaplain and doctor were not accepted as persons in authority in ***R v Gibbons (1823) 1 C & P. 97.*** Admissibility of a confession in England is now regulated by the Police and Evidence Act, 1984 (UK).

[74] The common law definition of a person in authority still matters and applies in Belize. But the discussion now quickly drifts to the discussion of the related expression used in ***rule 15 of the Judges Rules, 2000 (Belize)***, namely, "[a person] other than a police officer, charged with the duty of investigating offences or charging offenders." – see ***Phillip Tillet v R [2001] UK PC 21*** , an appeal from this Court, the Court of Appeal of Belize, to the Privy Council (UK), and ***Patrick Robateau and Leslie Pipersburgh v The Queen, Criminal Appeals Nos. 14 and 16 of 2011 (Court of Appeal of Belize).***

[75] In ***Tillet,*** Their Lordships of the Privy Council, mentioned that, counsel for the appellant had conceded that, it would be difficult to persuade them to overturn the ruling by the trial judge that, the prison officer on duty when the murder, the subject of the charge in the indictment, took place, and who was a witness to whom a confession had been made, was not, a person charged with the duty of investigating offences or charging offenders.

[76] It must, however, be noted that, given the definition of the phrase, a person in authority, and of the expression, a person charged with the duty of investigating offences or charging offenders, and precedent, generally the answer to the question whether a witness is a person in authority or a person charged with the duty of investigating or charging offenders must depend each time on the particular facts and

circumstances proved in the particular case, although sometimes it may involve interpretation of a statute or a document where they are applicable.

[77] In this appeal case, the decision depended solely on the facts proved. The trial judge stated that, "a person in authority generally refers to someone engaged in the arrest, detention and *prosecution* of the defendant, and includes representatives and agents of such persons." Although he did not use the established expression of the common law, the judge stated a description which conveyed the common law statement of the law. He did not misunderstand the law; he did not err in the law.

[78] The judge's decision that, the Youngs were not persons in authority was based on his findings of fact from the evidence adduced in the *voir dire* that: Pastor Anthony Young and Pastor Antonette Young did not seek out the appellant, he was brought by two other pastors to seek advice; and the Youngs gave advice that, the matter was a police matter, the two pastors and the appellant should go and report to the police. The judge concluded, "the Youngs were not acting in a position of authority".

[79] On the evidence, it was reasonably open to the judge to make those findings of fact and come to that conclusion. There was evidence that the Youngs discussed the matter brought to them by Pastor Ramclam and Pastor Kerr, as pastors who were more senior to Pastor Ramclam and Pastor Kerr. There was no evidence indicating that, the Youngs said anything or acted in a manner that could cause the appellant to suppose that the Youngs were capable of influencing the prosecution of the case: compare ***Patrick Roaeteau and Leslie Pipersburgh v The Queen, Criminal Appeals Nos. 14 and 16 of 2011,*** where the witness, an ambassador, even took photographs of the appellant and sent to the police.

A person charged with the duty of investigating offences or charging offenders.

[80] Regarding the decision that, the Youngs were not, persons other than police officers, charged with the duty of investigating offences or charging offenders, the judge stated: "even though the Youngs were members of Citizens On Patrol, they did not exercise any power of, or engage in the arrest, detention and prosecution of the defendant, and were not acting as representatives or agents…" Further, the judge stated: "the duties of COP did not include investigating or charging offenders". Again on the evidence in the *voir dire*, it was reasonably open to the judge to make those findings of fact and come to that conclusion. In reaching all the above decisions, the judge pointed to items of evidence, and gave reasons for accepting the evidence for the prosecution, and rejecting that for the accused. The learned judge did not err.

[81] The question whether a person is charged with the duty of investigating offences or charging offenders was decided at high level in the two cited notable cases in Belize, namely: ***Phillip Tillet v R [2011] UK PC 21***; and ***Patrick Robateau and Leslie Pipersburgh v The Queen, Criminal Appeals Nos. 14 & 16 of 2011 (Court of Appeal of Belize).*** Counsel C. Vidal SC, DPP, was counsel for the Crown in the latter case, her submissions were accepted. So, she was on very familiar territory in arguing the present appeal.

[82] In ***Tillet,*** there were two grounds of appeal: (1) that defence counsel failed to challenge the testimony of a witness which included a confession; and (2) the trial judge erred in admitting the evidence of the confession. The Board dismissed the appeal.

[83] In the case, the appellant, an inmate at Sir Colville Young Foundation Prison, Hattiville, Belize, was indicted and convicted for the murder of another inmate. The evidence adduced was that, he stabbed the deceased with a knife that he dropped when confronted. He denied the stabbing. He said he had picked up the knife when the culprit dropped it. One of the prison officers on duty testified that, when he asked the accused, why he went through that for, the accused replied that, the deceased had

disrespected the appellant's mother, the appellant would not allow anyone to disrespect his mother. The trial judge ruled that, on the evidence, the Prison Officer was not a person charged with the duty of investigating offences or charging offenders, and was not obliged to caution the accused under the Judges Rules before the evidence of the confession could be received from him, the evidence of the confession was admissible in evidence.

[84] Despite the ruling, the witness statement which contained the confession was never put in evidence. That was because in cross-examination the witness admitted that, parts of his written statement differed from his oral testimony in court, and the oral testimony was the correct version. The judge in summing up directed the jury to exclude the evidence of the confession altogether. He exercised the general exclusionary discretion of a trial judge. This Court dismissed the appeal of ***Tillet***. The Privy Council also dismissed the appeal.

[85] For the purpose of this appeal case, the important point in ***Tillet*** is that, the Privy Council made a statement of the law at paragraph 15 regarding identifying a person charged with the duty of investigating offences or charging offenders as follows:

> *"Whether a person is charged with the duty of investigating offences or charging offenders is a question of fact, although it may involve a question of law if the duty involves the construction of a statute or some other document: see* ***R v Bayliss [1993] 98 Cr. App. R 235*** *at* ***238****. No material has been placed before the Board which suggests that, the judge's finding was not one that was reasonably open to him."*

[86] ***Pipersburgh*** was a judgment of this Court on appeal from the trial court, the Supreme Court, against a conviction for murder and a sentence of life imprisonment in a

retrial. In the appeal this Court upheld the ruling of the trial judge that, the ambassador of Belize to Mexico to whom Pipersburgh confessed was not, a person other than a police officer, charged with the duty of investigating offences or charging offenders, and upheld the admission in evidence of the confession received by the ambassador without prior caution.

[87] The ground of appeal in the case was that, "failure by the trial judge to exclude the evidence of alleged confession by the appellant to Mr. Salvador Figueroa, the ambassador of Belize to Mexico, was a material irregularly amounting to a miscarriage of justice." The evidence complained about was in the testimony of the ambassador. It was as follows:

> "I told him that you're such a polite young man, youre so humble, you're so soft spoken, it's hard for me to believe you did such a terrible thing; and he replied to me something to the effect, ' I don't know how I did it. It all happened so fast. I did not know what I had done until it was over, and then we panicked and just tried to get out of Belize…' I asked him if he understood the pain that he had brought upon the families of the victims, and he replied that he did."

[88] Counsel for the appellant in the case submitted that, the ambassador's role was clearly that of someone who was carrying out investigation in the offence, he was aware of the multiple murders, and aware that the appellants were suspects; he had spoken to the police in Belize; he took pictures of the suspects intending to send them to the Police in Belize. "The ambassador fell within rule 15 of Judges Rules and ought to have cautioned the appellant and informed him of his right to an attorney;" the ambassador did not, so, the judge should have excluded the appellant's confession to the ambassador, counsel argued.

[89] Counsel for the Crown, C. Vidal SC, DPP, submitted that: (1) Judges Rules did not apply to the ambassador, his role was not of a person investigating the offence; (2) in the circumstances of the case, even if Judges Rules applied to the ambassador, his failure to comply with rule 1.2 which required prior cautioning did not render his evidence regarding the confession in the case inadmissible; and (3) even if Judges Rules applied, the ambassador would not have been required to caution or inform the appellant of his right to an attorney in the specific circumstances of the case.

[90] In deciding the point, this Court in a sterling judgment prepared by Morrison JA, (now President, Court of Appeal of Jamaica), cited with approval the judgments in, among others, ***Phillip Tilllet v R; R v Baylis, [1993] 98 Cr. App. R. 235; R v Seelig, R v Spens [1992] 1 WLR 148;*** and ***Doncaster v R [2008] EWCA Crim 6.*** Guided by the judgments in those cases, Morrison JA restated at paragraph 54 of the judgment the principle to be applied in deciding whether a person is to be regarded as, a person other than a police officer, charged with the duty of investigating offences or charging offenders, for the purpose of rule 15 of Judges Rules as follows:

> *"[54] From this short series of citations, it is possible to state the following conclusions:*
>
> 1) *Whether someone other than a police officer is a person charged with the duty of investigating offences or charging offenders is in general a question of fact, to be considered on the basis of the evidence before the judge in a particular case. The matter may however, involve a question of law if the duty falls to be discerned from the construction of a statute or some other document.*
> 2) *Where the matter turns entirely on a question of fact, clear evidence as to the terms of employment and scope of the duties of the person*

involved should normally be placed before the court to enable it to make a determination.

3) *Where, on the evidence before the court, the finding of the trial judge was one which was reasonably open to him or her, this court will not interfere in the absence of any material to suggest otherwise. "*

[91] The Court, acting on the principle that Morrison JA extracted from the precedent, noted that, in the case, the answers to the question whether the ambassador was a person charged with the duty of investigating offences or charging offenders, was purely one of fact, and that, the only evidence available regarding the duties of the ambassador was for the prosecution in the testimony of the ambassador himself. The court upheld the ruling of the trial judge that, the ambassador was not a person charged with the duty of investigating offences or charging offenders, the confession made to him without a caution was admissible in evidence. The Court dismissed the appeal of Pipersburgh. No further appeal was made this second time.

[92] In this appeal case, based on the evidence, and guided by the principle restated in ***Pipersburgh***, it is my view that, the trial judge was right in ruling that, Pastors Anthony Young and Antonette Young were not, persons other than police officers, charged with the duty of investigating offences or charging offenders, for the purpose of rule 15 read with rules 1.2 and 3 (regarding a minor) of Judges Rules. So, the evidence of the confession made by the appellant to the Youngs was admissible in evidence without the need for the Youngs cautioning the appellant and informing him of his right to an attorney. Guardians took the appellant to the Youngs anyway.

Voluntary confession

[93] Even though the voluntary nature of the confession was raised only indirectly, it is such an important element in a confession, it deserves full consideration here. A

confession which is not voluntary is not admissible in evidence whether the trial is before a judge and a jury, or before a judge alone. Where a confession is challenged in a trial before a judge and a jury, the judge must investigate (in *a voir dire*), the circumstances in which the confession was made, and may admit it only when he is satisfied beyond reasonable doubt that, the confession was made freely and voluntarily. That is the common law, and now the statutory law in ***ss.90*** and ***91 of Evidence Act, Laws of Belize***. The sections do not mention a *voir dire*.

[94] There are several levels of consideration of voluntariness in the admissibility of a confession in evidence. First where the judge rules in a *voir dire* that, a confession was not free and voluntary and therefore not admissible in evidence, the jury will not hear about it at all; the so called confession must, and will be excluded from the full trial. This rule dates back to ***R v Baldry (1852) 2 Den. 450***. It has been much developed- see ***Regina v Mustaq [2005] UKHL 25***, in 2005. But where the judge rules that, a confession was free and voluntary, the prosecution may (and usually will) adduce it in evidence in the full trial. The jury will hear it.

[95] Secondly, where the judge decides that, a confession was voluntary, but was obtained by a person in authority or a person charged with the duty of investigating offences or charging offenders, without complying with Judges Rules, he may refuse to admit it in evidence or he may exercise discretion to admit it, depending on whether the circumstances proved warrant it. See ***Mohammed v The State (Trinidad and Tobago) [1998] UK PC 49***; ***Robert Hill v The Queen Crm. Appeal 5 of 2000***; and ***Pipersburgh's Case***.

[96] Thirdly, the judge may not admit a confession in evidence, as a matter of the exercise of the general exclusionary discretion of a judge when he considers that, admitting a particular item of evidence will be unfair to the accused in the circumstances. Generally the discretion is exercised on the ground that, the prejudicial

effect of the item of evidence outweighs its probative value. In ***R v Sang [1980] AC 402***, the House of Lords gave that answer to a question certified by the Court of Appeal (England); and held that, it was no ground to exclude evidence, that it was obtained as the result of the activities of *an agent provocateur*.

[97] There are three reasons for the rule that, a confession must be voluntary regardless of to whom it is made, for it to be admitted in evidence. 1. A confession which is not voluntary, that is, obtained by oppression or such other improper conduct is unreliable. 2. The public attaches importance to proper behavior by police officers and other officials. 3. Deriving from the judgment in ***Regina v Mustaq***, admission in evidence of a confession obtained by oppression or such other improper conduct is inconsistent with the constitutional right against self-incrimination, implied in the right to a fair hearing, guaranteed in ***s.6 (1) and (2) of the Constitution of Belize***, and the constitutional right of an accused not to be compelled to give evidence at his trial, guaranteed in ***subsection (6)***. Also see ***Lam Chi-ming v The Queen [1991] AC 212 at page 220, Lord Griffiths***.

[98] In this appeal case, the question whether the confession was voluntary was raised on appeal only indirectly, at the level that, if the confession appeared generally voluntary, nevertheless, the judge should have regarded it as not voluntary because it was made to, “persons in authority who were charged with the duty of investigating offences and charging offenders”, without cautioning the appellant. Yet, Mr. Sylvester argued the point about the nature of the confession as if it was raised at all levels of consideration, and thereby made the hearing unnecessarily long.

[99] The trial judge, at page 208 making a ruling in the *voir dire*, posed the question whether the admission by the appellant to the Youngs was, “induced by any promise of favour, or by use of fear, threat or pressure.” He answered: “the accused did not complain to the Youngs that he [had been] threatened or forced or beaten by anyone…

The prosecution has proved beyond reasonable doubt that the admission made by the accused to Pastors Mr. and Mrs. Young was free of any inducement."

[100] In the *voir dire* the appellant testified that, at the Police Station, one police officer "boxed" him and another "punched" him. He denied having been to the Youngs' home. The beating would have been after the confession at the Young's home. There was no evidence of any confession at the Police Station, or after the arrest of the appellant. On the evidence, the judge was entitled to rule that the confession to the Youngs was free and voluntary.

[101] From all the above, our conclusion is that, the confession made by the appellant to the Youngs without prior caution was not erroneously admitted by the learned trial judge in evidence. The judge admitted the appellant's confession on the evidence in the *voir dire* that, the judge considered proved affirmatively beyond reasonable doubt that, the appellant made the confession freely and voluntarily to the Youngs who were not persons in authority, or persons who were charged with the duty of investigating offences or charging offenders. The Youngs were not required to caution the appellant prior to receiving the confession from the appellant.

[102] The complaint that, the appellant, a minor was interviewed without a guardian being present, is baseless; it is not borne out by the evidence. The appellant was taken to the Youngs by Pastor Ramclam and Pastor Kerr, acting as guardians. Later he was taken to the Police Station by his attorney, Mr. Cardona. He was also present at the identification parade. On 17 September 2007, the police made effort to get the appellant's mother, father and Mr. Cardona. The mother was said to be in the USA, the father and Mr. Cordona were not available. The police then invited Ms. Martha Lopez, a senior justice of the peace. She was present when a police officer interviewed the appellant.

The direction by the judge to the jury regarding the confession.

[103] Mr. Bradley for the accused, the appellant now, raised again in the full trial, the question of voluntariness of the confession, and lack of caution by the Youngs. An accused is entitled to raise again in the full trial, the admissibility of a confession and, or alternatively, the circumstances in which the accused made the confession which are merely matters for the weight to be attached to the confession – see ***R v Murray [1951] 1KB 391;*** and ***Regina v Mustaq*** cited above. Counsel cross-examined the Youngs only on their role as members of COP, and cross-examined the police officers on whether they beat the appellant. The cross-examination of the police officers was irrelevant to the confession to the Youngs, and there was no other confession in the evidence.

[104] On the cross-examination, Mr. Sylvester submitted again that, "the Youngs were persons in authority charged with the duty of investigating offences or chagrining offenders." His reason was that in the cross-examination, Pastor Anthony Young admitted that, as members of COP, they were assigned duties by Inspector of Police Mariano, and they reported to him; they were, "the eyes of the Police Department." A further reason was that, Pastor Antonette Young said: "I looked at the appellant and said, 'tell us what happened';" the Youngs probed the appellant to give the oral statement; there was compelling evidence that, the confession was not voluntary, Mr. Sylvester argued. He submitted that, the judge should have directed the jury to disregard the confession given without prior caution.

[105] The submission by Vidal SC, was: first that, the summing up on pages 613 to 616 of the record was adequate. Secondly that, the Youngs were not persons in authority; the description in the evidence, of their duties as members of COP did not fit the description of persons charged with the duty of investigating offences and charging offenders. Thirdly that, the Mustaq direction was unnecessary.

[106] The passage in the summing up on pages 613 to 616, quoted by Mr. Sylvester, and referred to by Ms. Vidal SC, and which Mr. Sylvester submitted was an inadequate direction, is the following:

> " So members of the jury, you will be required to look very carefully at the evidence of the Prosecution (eg) that of Pastor Anthony Joel Young and Pastor Antonette Young, and you will be required after very careful consideration to determine and decide if indeed you can accept that these oral confessions were ever made to the Pastors on the 16th September 2007 between 9:00 – 9:30 a.m. at their home by the accused Krismar Espinosa, and also if you so accept it was made, then finally you will have to also decide what weight you will give to these statements or oral admissions as regarding the death of Rachel Chun on the 14th September, 2007 at Orange Walk Town.

Members of the jury, in deciding whether you can safely rely upon these oral statements you will have to decide two (2) issues.

1. Did the defendant/accused in fact make the oral admission, if you're not sure that he did, you should ignore it, if you are sure that he did make the oral admission then are you sure that the oral admissions is true?

   When deciding this you should have regard to all the circumstances in which it came to be made as it comes out from the evidence; and consider also whether there were any circumstances which might cast doubt upon its reliability, you should decide whether it was made

voluntarily or was it or may it have been made as a result of oppression or other circumstances.

If you consider that the confession was or may have been obtained by oppression or in consequence of anything said or done which was likely to render it unreliable you should disregard it."

[107] From the quoted passage we are able to say that, the submission by Mr. Sylvester was mistaken to the extent that, the judge indeed in the last paragraph, directed the jury to disregard the confession, if they considered that it was obtained by oppression or in consequence of anything said or done which was likely to render it unreliable.

[108] The judge was rather generous to the accused. Only oppression and such other improper conduct should invite a direction to disregard a confession. Anything else which might render the confession unreliable is a matter for a direction about the weight to be attached to the confession.

[109] Since the judgment of the House of Lords in ***Regina v Mustaq,*** a direction to disregard a confession, rather than a direction to give it little or no weight, has been the correct direction where the jury find that there had been oppression or such other improper conduct in obtaining a confession, even if they may be of the view that the confession is true. The reason given was that, it was the direction which was not incompatible with the right against self-incrimination implied in ***article 6 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, (Treaty Series No. 71 of 1953) (UK Cmd. 8969),*** which applied to the United Kingdom.

[110] ***Article 6 (1) of the Convention*** states as follows:

(1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[111] The article guarantees the right to a fair trial. It was held by the House of Lords following its earlier judgments, that the right against self-incrimination was implied in the article – see ***Regina v Mustaq*** at paragraph 49, Lord Roger.

[112] The provisions of ***article 6 (1) of the Convention*** are similar to the provisions of ***s.6 (1) and (2), of the Constitution of Belize, Chapter 4, Laws of Belize,*** which guarantee a fair hearing by an independent and impartial court. They are the following:

6 – (1) All persons are equal before the Law, and are entitled without any discrimination to the equal protection of the law.

(2) 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.

[113] ***Subsection (6)*** complements subsections ***(1) and (2)*** as follows:

(6) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

[114] The right against self- incrimination is similarly implied in ***s. 6(1) (2) and (6), of the Constitution of Belize***. So, a direction to disregard a confession (which the judge gave), rather than a direction to give it little or no weight, if the jury are of the view that the confession was obtained by ***oppression*** or such other improper conduct, is the proper direction in Belize as well. There was, in fact, no evidence of oppression or threat of it prior to or during the confession to the Youngs.

The Mustaq Direction

[115] Mr. Sylvester's additional submission was that, the judge erred in that, he did not give a ***Mustaq direction*** which he argued must be in the words of Lord Carswell at paragraph 75 of the ***Mustaq judgment***. Mr. Sylvester quoted the words as follows: "*I therefore consider that the judge should direct the jury in more prescriptive terms than the Bass direction, to the effect that unless they are satisfied beyond reasonable doubt that the confession was not obtained as the result of oppression, they must regard it."*

[116] Lord Carswell expressly stated that, the direction should be in more prescriptive terms, than the Bass direction, "***to the effect***, ***that"***, unless they [the jury] are satisfied beyond reasonable doubt that, the confession was not obtained as the result of oppression, they must disregard it. He did not command the use of his exact words.

[117] In this appeal case, it is our view, that the passage in the summation by the trial judge quoted above met the requirements in the direction indicated by Lord Carswell in ***Regina v Mustaq***. The trial judge directed the jury to be sure in the first place that, the

admission was made, and if not sure, they should ignore “the admission”. Then he directed that, the jury should consider whether they were sure that the admission was true; they were to take into consideration, “all circumstances in which it came to be made ...and whether there were any circumstances which might cast doubt upon its reliability”. Then the judge further, directed the jury to decide whether the admission was made as a result of oppression or other circumstances, and if so, to disregard it. Although the judge referred to these as two issues, he actually directed on three issues. We reject the submission that the judge did not give ***the Mustaq direction***.

The alternative verdict of manslaughter

[118] Assuming that, the trial judge erred in leaving the issue of manslaughter to the jury, it caused no prejudice to the appellant, and should be no cause for an appeal. The practice is that, a trial judge will leave the issue of an alternative verdict to the jury where on the evidence, whether for the prosecution or for the defence, the issue arises, and whether or not the issue has been specifically raised by the defence. This has been stated in several case authorities such as: ***Norman Shaw v The Queen, Privy Council Civil Appeal No. 58 of 200 (from Belize); Warren v The State (Trinidad and Tobago) [1998] UK PC 48; Joseph Bullard v The Queen [1957] 3 WLR 656;*** and ***DPP v Bailey (Michael) 44 WIR 327***. It is a right of the accused, or at least a matter in his favour that, the issue of an alternative verdict for a lesser and cognate offence be left to the jury where it arises on the evidence.

[119] In this case, there has been no evidence of factors such as excessive self defence, diminished responsibility and provocation, that would have raised the issue of manslaughter. Rather, the evidence of the nature of the injury that caused the death could be strong indication of an intention to kill. The jury decided that, there was no intention to kill; it was perhaps generous. It is no cause for complaint by the appellant. If prejudice was occasioned, it might have been against the Respondent, the Crown. The Crown has not appealed.

[120] The order that we make is: the appeal against the conviction is dismissed. The conviction is confirmed. There was no appeal against sentence.

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SAMUEL L. AWICH JA

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MINNET HAFIZ BERRAM JA