IN THE COURT OF APPEAL OF BELIZE, A.D. 2022

CRIMINAL APPLICATION NO. 2 OF 2017

THE KING **APPLICANT**

V

CALANEY FLOWERS **RESPONDENT**

BEFORE:

The Hon Madam Justice Hafiz-Bertram	President (Ag.)
The Hon Mr. Justice Foster	Justice of Appeal
The Hon Mr. Justice Bulkan	Justice of Appeal

S. Smith, Senior Crown Counsel, for the applicant/appellant
A. Sylvestre for the respondent

JUDGMENT

16 June 2022 - Promulgated on 4 October 2022

BULKAN JA

[1] On the night of August 28, 2012, Lyndon Morrison was on his motorcycle with his girlfriend, Sochyl Sosa, heading to Dolphin Park in Belize City to go fishing. They stopped en route at a Chinese restaurant to buy a drink, in the process encountering Calaney Flowers ('the respondent'), who was Lyndon's ex-girlfriend and the mother of his 11-month-old son. Some words were exchanged – including a warning to Lyndon that he would stop seeing his child – and on that note they parted. The respondent left first in her red Saturn car, followed by Lyndon and Sochyl on the bike, though along the way Lyndon overtook the respondent. As the journey progressed Sochyl became increasingly paranoid because of the proximity and speed with which the respondent was driving behind them. By the time they were on Freetown Road in the vicinity of Atlantic Bank, the respondent increased her speed significantly, thereupon veering into the back of the motorcycle. The force of the impact sent both persons on the motorbike hurtling into the air, each sustaining extensive injuries upon landing on the ground. Medical services arrived on the scene and the two riders were rushed to the hospital, but Lyndon did not make it and died some hours later in the morning of August 29th. Sochyl survived and was one of the key witnesses at the respondent's trial.

[2] Simultaneously with these events, the police were busy at work. They arrived on the scene shortly after, and two of them noticed an oil trail on the road. Although mocked by the defence, this oil trail led them to Lyndon's home (hereafter 'the deceased'), where the respondent had gone after colliding into the motorbike. There is no evidence of anyone calling the police to that home, so the testimony as to their sleuthing methods in locating the respondent (as the driver of the car that was leaking oil) stands uncontradicted. Meanwhile, on arrival at the deceased's home, the respondent reported to his mother that she had knocked Lyndon down and that the police would soon be on their way. In answer to the shocked mother, the respondent added: "he always de keep push things with this gyal in my face".

[3] These were the core facts accepted by the judge at the trial of the respondent, which was conducted without a jury. She was tried on two counts – one for the murder of the deceased, her ex-boyfriend, and the other for the attempted murder of his girlfriend, Sochyl Sosa, who survived the impact. The trial was conducted between May 10th and 30th, 2016, and the following year, on March 24th, 2017, the trial judge acquitted the respondent on both counts of the indictment. The trial judge accepted the prosecution's version as to how the incident unfolded, specifically finding that the respondent drove her car into the back of the motorbike thereby causing the two riders to be ejected off it, one injuring himself fatally. However, he did not find that the respondent had the specific intent to kill either of the two riders, so he acquitted her of the respective charge in relation to each victim, and did not consider any alternative.

[4] Dissatisfied with this outcome, the Crown filed this application pursuant to s 65C of the *Indictable Procedure Act*, Cap. 96 of the Substantive laws of Belize, which confers on the prosecution a right of appeal when a judge, sitting without a jury, acquits an accused person at the end of a trial. Seeking leave under s 49(2) of the *Court of Appeal Act*, Cap 90, the Crown advanced two grounds in support: one, that the respondent's acquittal was unreasonable and cannot be supported having regard to the evidence, and second, that having acquitted the respondent of murder, the trial judge erred by not considering the alternative offence of manslaughter.

[5] When this application first came on for hearing, counsel for the respondent took a preliminary objection that section 65C aforesaid did not confer upon the prosecution a right of appeal beyond the circumstances outlined in s 49 of the *Court of Appeal Act* (which were

limited to directed acquittals before or at the end of the prosecution's case). After wending its way through the judicial system, the respondent's objection was overruled by the CCJ, which clarified that s. 65C(3) is not in conflict with s. 49(1)(a), but rather confers on the Prosecution an additional right of appeal.[1] Consequently, the Crown's application was remitted to this Court to be determined on its merits.

[6] While the CCJ's decision in this case has settled that the prosecution may appeal the decision of a judge sitting without a jury to acquit an accused person at the end of the case, the legislation introducing this change is silent on essential matters of procedure. In these relatively "uncharted waters", the CCJ has provided some guidance on the appropriate test and the standard to be applied, some of which is taken directly from the extant legislation governing prosecution appeals – namely, s. 49 of the *Court of Appeal Act*. As a starting point, it is accepted that an appeal involving a question of law alone lies as of right, whereas one involving a question of fact, a mixed question of law and fact, or remarkably "any other ground which appears to the Court or Judge to be a sufficient ground of appeal" only lies with leave of the Court or the trial judge in question.[2] The test as to whether a prosecution appeal may succeed is whether, in the opinion of the Court, a "miscarriage of justice" has occurred.[3] Beyond these broad parameters, however, there appears to be some ambiguity regarding the actual meaning of this test, which counsel for the respondent has readily seized on in his submissions.

[7] In particular, the respondent's counsel relied upon two statements of Wit JCCJ in the preceding appeal, the first that 'It would seem that an acquittal cannot be overturned on the ground that the verdict is "unreasonable or cannot be supported having regards to the evidence"'[4] and second that "given, on the one hand, the nature and weight of the evidence as a whole and, on the other hand, the seriousness of the judicial error(s) or procedural flaw(s), it can with a substantial degree of certainty be inferred that had the error(s) or flaw(s) not occurred, the trial would not have resulted in an acquittal of the accused".[5] Counsel extrapolated from this to argue that the Crown's first ground of appeal cannot succeed, since it was based on the unreasonableness of the verdict, nor did it identify any judicial flaw or error.

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[1] *The Queen v Calaney Flowers* [2020] CCJ 16 (AJ) BZ.
[2] *Court of Appeal Act*, Cap. 90, s. 49(2), Substantive Laws of Belize 2011.
[3] Ibid, s. 49(3).
[4] *The Queen v Calaney Flowers* [2020] CCJ 16 (AJ) BZ per Wit JCCJ at [94].
[5] Ibid, per Wit JCCJ at [106].

Respectfully, however, these submissions are misguided insofar as they rely on selective extracts from the opinion of Wit JCCJ.

[8] In attempting to fashion guidelines to govern prosecution appeals, Wit JCCJ did indeed make the statements relied on, but the quoted extracts do not represent the full extent of his views. First, his initial statement on the role of evidence in overturning a verdict was tentative, a position that only "*seem[ed]*" so to him based on a superficial comparison of a prosecution appeal (in s. 49) with an appeal from a conviction by an accused (in s. 30). Later, after a thorough examination of the jurisprudence on this subject, he ended up by conceding that the phrase "miscarriage of justice" is, in effect, "something like a catch-all",[6] covering both errors of law and of fact or evidence. Ultimately, Wit JCCJ makes this pellucidly clear by concluding explicitly that "Serious mistakes in the reasoning concerning the facts will, among other things, depending on the circumstances, certainly qualify as a miscarriage of justice."[7] Accordingly, counsel's preliminary objection to the first ground of appeal is not sustainable, and as directed by the CCJ, this Court is required to "revisit the *evidence* of this case to determine the correctness of the trial judge in acquitting the accused."[8]

[9] Turning, then, to the Crown's appeal, we find it convenient to begin with the second ground, namely that the learned trial judge erred in law by not considering the alternative offence of manslaughter, as directed by s. 126 of the *Indictable Procedure Act*. In support, counsel for the Crown noted that the trial judge had made a positive finding that the respondent caused the death of the deceased, so having concluded that she had no intention to kill, he was then required to consider whether she had an intention to harm. If so, this would constitute manslaughter, contrary to s. 116(1) of the *Criminal Code*.[9] By depriving the prosecution of this possible alternative verdict, the Crown argued, the trial judge's error caused a substantial miscarriage of justice.

[10] In response, counsel for the respondent contended that the applicant failed to identify any error by the trial judge. Counsel pointed first to the judge's reliance on s. 117(1) of the *Criminal Code* which establishes the offence of murder along with the possibility of

[6] Ibid, per Wit JCCJ at [97].
[7] Ibid, per Wit JCCJ at [107].
[8] Ibid (emphasis supplied).
[9] Cap. 101, Substantive Laws of Belize 2011.

manslaughter where extreme provocation or other partial excuse is established, after which the trial judge noted that no issue of partial excuse arose in this case (at paras. 9 & 10 of his reasons). Next, counsel highlighted the judge's conclusion (at para. 24), in which he explicitly found that "the issue of the unlawfulness of the accused act [sic] does not arise in this case". The combination of these findings, counsel argued, meant that section 126(1) of the *Indictable Procedure Act* would not come into operation, as the possibility of a manslaughter verdict in the alternative only arises where the accused person is found to have caused the death of the deceased by "unlawful harm". This line of reasoning is difficult to follow – if indeed it accurately represents what the trial judge meant – because in the paragraph immediately preceding the judge's conclusion, he noted that neither victim exhibited any violence or aggression towards the respondent. This suggests that the judge meant there was no *justification* for the respondent's actions, in which case her actions would by definition be unlawful. Given the opacity of the judge's reasoning on this matter, we will first explore the applicable legislative framework before turning to the evidence in this case, in order to resolve this issue raised by the Crown.

[11] Section 126(1) refers to the offences of murder and manslaughter, so understanding the parameters of these offences is essential to understanding the obligation placed on the trial judge. Generally, at common law, where someone causes the death of another (the actus reus), the resultant crime depends on the accompanying state of mind (or mens rea) of the perpetrator. In this jurisdiction, where the act leading to death was committed with a specific intent to kill, the offence is murder; however, unlike at common law, in Belize an intention to cause really serious harm in not enough for murder. If authority is needed for this principle over and above the statutory provision itself, it is expressly provided by the Privy Council in *R. v Gordon*.[10] On the other hand, there are many routes leading to a conviction for manslaughter, and just as many different categories of manslaughter: to provide just a few basic examples, manslaughter may exist even with an intention to kill where extreme provocation exists,[11] or with an intention to harm,[12] or even with no intention and just negligent conduct.[13] For our purposes, the difference between murder as defined in section 117 of the *Criminal Code* – which is constituted by "intentionally caus[ing] the death of another person by any unlawful harm" –

[10] *R. v Gordon* (2010) 77 W.I.R. 148, per Lord Clarke at [13].
[11] Section 117, *Criminal Code*, Cap. 101, Substantive Laws of Belize, Revised 2011.
[12] Ibid, s. 116(1).
[13] Ibid, s. 116(2).

and manslaughter pursuant to s. 116(1), which is defined simply as "caus[ing] the death of another person by any unlawful harm", lies in the intention. What is required for murder is "intentionally" causing death, meaning nothing less than an intention to kill, a standard or threshold which is conspicuously absent in the definition of manslaughter.

[12] The intention required for manslaughter in s. 116 must therefore be discerned from the reference to "unlawful harm". Belize's *Criminal Code* defines "harm" simply as "any bodily hurt, disease or disorder, whether permanent or temporary",[14] while "unlawful harm" is harm that is "intentionally or negligently caused without any of the justifications mentioned in Title VI."[15] Therefore, if the definition of unlawful harm is merged with that of manslaughter in s. 116(1) of the *Criminal Code*, it would read as follows:

> *"Every person who causes the death of another person by any harm which is intentionally or negligently caused without any of the justifications mentioned in Title VI is guilty of manslaughter".*

To summarize, therefore, while murder explicitly requires "intentionally causing death", manslaughter under s. 116 requires causing death by intentional or negligent harm.

[13] Perhaps it may be the divergence from the common law standard which has produced uncertainty as to the applicable intention, but these principles have long been settled in this jurisdiction. In *Lewis and Penados v the Queen*, where the meaning of s. 113 of the Criminal Code (the precursor to the current s. 116) was in issue, this Court acknowledged that manslaughter includes "cases where death has resulted from an unlawful act as a result of which *some degree of harm is intended* or contemplated as well as cases where death has resulted from a high degree of negligence on the part of the defendant."[16] The Court of Appeal noted both forms of mens rea – intention to cause harm and negligence – fell within the ambit of the two offences created by s. 113 (now s. 116). The court further explained that the introduction of "unlawful harm" in the section was meant to clarify that the act in question that led to death was "not merely accidental or inadvertent, but, is either voluntary and deliberate or the result of a grave lack of care."

[14] Section 96, *Criminal Code*, Cap. 101, Substantive Laws of Belize, Revised 2011.
[15] Ibid, s. 97.
[16] Court of Appeal of Belize, Cr. Apps. Nos. 8&9 of 1983, decision dated 23 Nov 1983 (emphasis supplied).

[14] Thus, it is truly trite law that someone who causes the death of another may be potentially liable for any one of a number of different crimes, varying with the actual mens rea she or he possessed at the time of committing the act. A perpetrator who lacks a specific intent to kill is not wholly blameless if she causes the death of another with some other culpable state of mind. The offence may not be murder, but the law (or society) is not so generous as to grant total absolution where the consequences are so grave, and so final.

[15] Given these permutations in culpability, the terms of s. 126(1) of the *Indictable Procedure Act* ought to make more sense. This provision stipulates as follows:

> *"Upon an indictment charging an accused person with murder, if the prosecution fails to prove that the accused person intentionally caused the death of the deceased, but the jury is satisfied that the accused person caused the death of the deceased by unlawful harm, it shall find the accused person not guilty of murder but guilty of manslaughter."*

A plain reading of this provision indicates that where an accused person has caused the death of another, a conviction for murder – which requires a specific intent to kill – is not the only possible outcome. An accused person acquitted of murder because of the absence of an intention to kill may still be guilty of manslaughter where death results from "unlawful harm", that is, harm which is intentionally or negligently caused. Very obviously, therefore, once the trial judge found it was the respondent who caused the death of the deceased, though without an intention to kill, then indeed he was required to consider – given the express direction of s. 126(1) – whether the respondent did so by intentionally or negligently causing harm.

[16] In light of the misunderstanding that seemed to attend these requirements at trial, it is worth noting that there is nothing unusual about section 126(1), which simply codifies longstanding criminal practice and procedure.[17] Nor is the option of coming to an alternative verdict unique to murder, as this possibility also exists in relation to an extensive range of crimes. Alongside s. 126 are other provisions enabling, upon indictment for one offence, a conviction for a lesser but related offence. Thus, for example, on an indictment for the murder

[17] Dana Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure* 3rd. ed. (NY: Routledge-Cavendish, 2011) 203.

of her newborn child a verdict of infanticide or causing harm may be returned; similarly, a defendant may be found guilty of dangerous, reckless or careless driving in place of manslaughter in the course of driving a vehicle, indecent assault instead of rape, common assault in place of aggravated assault, and so on. The rationale of these various scenarios is that on an indictment for one offence, a conviction may result for a lesser offence included within its definition. This is made pellucidly clear by s. 136, which provides as follows:

> *"…if the commission of the crime charged, as is described in the enactment creating the crime, or as charged in the count, includes the commission of any other crime, the accused person may be convicted of any crime so included which is proved, although the whole crime charged is not proved…"*

The possibility of convicting for alternative offences exists precisely because a specific act might fit across a continuum of prohibited conduct. It also acknowledges the basic principle that the greater includes the lesser.

[17] Section 126 was frontally considered in the local case of *Torres v the Queen* (Cr. App. No. 36 of 2004, decision dated 8 March 2007), where the appellant appealed his conviction for murder on the ground that the trial judge had failed to leave the issue of manslaughter to the jury. The facts of that case were that the appellant had used a machete to cut the throat of the deceased. At the time the two were not involved in any physical or verbal fight, and the only clue as to the appellant's motive was his suspicion, communicated earlier to the eyewitness, that the deceased had stolen his tape recorder. On those facts, particularly the precise nature of the attack which led to death, in circumstances where there was no prior attack or provocation caused by the deceased, there was no possibility at law of a lesser crime arising, and this was sufficient to dispose of the appeal. Nonetheless, the judgment also makes it clear that if there is an evidential basis for it, then the alternative (lesser) crime should be considered. As put by Sosa JA (at para. 14): "… *a trial judge should, if it is in the interests of justice to do so, leave the alternative verdict to a jury where there is a possibility, arising fairly on the evidence, that the accused is guilty only of a lesser offence* …" In other words, once there is an evidential basis for "finding that an [accused] had an intention other than an intention to kill", the obligation to consider the alternative offence of manslaughter arises.

[18] *Torres* is only one of many cases to have considered s. 126. *Castillo v the Queen*[18] provides yet another, more recent instance, where the plain meaning of this provision was implicitly reinforced by this Court. In *Castillo*, the appellant appealed her conviction for manslaughter, which was based on evidence at her trial indicating she had "touched" the deceased, who fell down bleeding and subsequently died. The two had been drinking together in a bar, and following an altercation with a third person, the appellant called on the deceased to join her outside, becoming visibly annoyed when the deceased did not comply. On appeal, the appellant argued unsuccessfully that the trial judge erred by not considering the alternative verdict of manslaughter by negligence, contrary to s. 116(2) of the *Criminal Code*. Importantly for our purposes, the judgment affirmed the principle that having acquitted the appellant of murder because of doubts whether she had an intention to kill, the trial judge was entitled pursuant to s. 126 of the *Indictable Procedure Act* to consider the alternative offence of manslaughter, which would arise if she caused the death of the deceased by unlawful harm. As for manslaughter by negligence, there was no need to consider this alternative since – similar to the *Torres* situation – there was no evidential foundation for such a verdict.[19]

[19] All these authorities clearly establish that there exists flexibility in relation to available verdicts on a single indictment, from which both the accused and victim stand to benefit. While the prosecution may choose the most serious charge, failure to prove a specific element does not necessarily signal the end of the matter as a lesser but related offence may be established. Against this background, it is difficult to understand the trial judge's approach. The only clues as to his rationale are the paragraphs cited by learned counsel for the respondent: in paras. 9 and 10, the trial judge referred to the definition of murder in s. 117(1) of the *Criminal Code* before declaring that partial excuse was not in issue in this case; later on, the judge reviewed the evidence which established that neither victim exhibited any violence or aggression towards the respondent to justify the harm she inflicted on them, concluding in para. 24 that the issue of the unlawfulness of her actions accordingly does not arise. Neither of these explanations, however, can justify his omission.

[20] As regards paras. 9 and 10, the trial judge confined himself to manslaughter only as it arises in the context of s. 117(1). However, as pointed out above, there are several different

[18] Court of Appeal of Belize, Cr App 1/2015, decision dated 2/11/2018,
[19] Ibid, per Hafiz-Bertram JA at paras. [38] – [40].

types or forms of manslaughter. Because of these alternatives, there is no reason to confine the general terms of s. 126(1) to manslaughter under s. 117(1). As regards para. 24, the trial judge seems to have elided the concept of "unlawfulness" in the separate contexts of the offence (whether murder or manslaughter) and their main ingredient (that of harm). Unlawfulness may not have arisen in the former sense, since there was nothing in the victims' conduct that would have partially excused the respondent's response, but the question whether the respondent's action on its own was performed intentionally or negligently (thereby being unlawful) was undeniably a live issue in the case. Put another way, section 126 of the *Indictable Procedure Act* is broadly framed and not limited to the specific parameters of s. 117 of the *Criminal Code*. It speaks to causing death by "unlawful harm", which arises in the context of *both* s. 117 and s. 116. Therefore, as directed by s. 126(1), where the prosecution fails to prove an intention to kill, then the jury (or trial judge) must go on to consider the alternative offence of manslaughter.

[21] Since both *Torres* and *Castillo* stress that there is no need to consider an alternative offence if there is no evidential basis for it, then out of an abundance of caution we must examine the evidence in this case to determine whether it could support an alternative conviction for manslaughter, contrary to s. 116 of the *Criminal Code*. This would depend on whether there is evidence capable of supporting that the harm leading to death was caused either intentionally or negligently, in which case one of the categories of manslaughter under s. 116 would be proved. In reviewing the evidence led by the prosecution, the trial judge recalled that there was eye witness testimony of the speed with which the respondent was driving, admissions by the accused to both the police and the mother of the deceased, as well as pieces of circumstantial evidence such as the oil trail which led the police to the respondent's car. All this, considered together, "compelled" him to the conclusion that it was the respondent who hit the motorcycle with her car. As the judge put it, the car caused the "incident", which led to the death of Morrison and the injuries to Sosa.[20] Despite this, however, the judge disclosed having a "lurking doubt" as to whether the respondent possessed a specific intention to kill. In explaining this position, he reasoned that it is not unusual for vehicles to increase their speed after crossing over a speed bump; as for the oral statement to the mother, it was his view that "without more" it was not evidence of the kind from which it could be inferred that the respondent had an intention to kill. In so finding, the judge did not consider that the oral statement did not, in actuality, stand on its own, nor did he explain why in his view it could not

[20] Para. [98] of the judge's reasons

support an intention to kill or even a lesser intention to harm. Nonetheless, on that basis he acquitted the respondent altogether.

[22] It is perhaps not unreasonable to question whether the respondent intended to kill, though before coming to such a conclusion the judge ought to have elaborated, however minimally, on the nature of his doubts. The statement "he always de keep push things with this gyal in my face" was made after the respondent had sped up behind and veered into her former partner, causing him to catapult into the air and sustain fatal injuries, after which she drove away from the scene. Considered in its full context, why is such a statement insufficient to establish some form of intention? The trial judge was wrong in describing this statement to the deceased's mother as existing "without more", and in the context of all the evidence accepted by him, he should have explained what innocent interpretation could be placed on it, such that it did not or could not indicate some animus.

[23] In our estimation, closer analysis of the evidence reveals a combination of separate pieces of evidence that, taken together, are at least consistent with an intention to harm, if not to kill. Out of an abundance of caution we will refrain from a detailed discussion of this evidence, and note only that the prosecution constructed a case built around eye witness testimony as to the manner and speed with which the respondent was driving – not just when she crossed over the speed bump but from the time the deceased overtook her, her conduct immediately after the collision in refusing to stop, and crucially her statement to the deceased's mother. It is difficult to interpret that statement as exculpatory or even neutral, and considered alongside the respondent's driving and the parties' prior history, the evidence in its totality is certainly capable of supporting an intention to harm, if not an intention to murder.

[24] In light of the above, we therefore agree with the Crown that the trial judge erred in law by failing to consider the alternative of manslaughter, as specifically required by s. 126(1) of the *Indictable Procedure Act*, which led to a miscarriage of justice. Moreover, he also erred in his assessment of the facts, which contained no discussion of the evidential basis to support a verdict of manslaughter. We are satisfied that it can be inferred with a substantial degree of certainty that these failings constitute material errors which, had they not occurred, would not have resulted in an acquittal of the respondent. This is enough to dispose of the Crown's appeal, so in light of this conclusion it would be prudent not to consider the first ground, which would require more detailed examination of the evidence to determine the reasonableness of

the inferences drawn by the trial judge. The remaining issue, then, is the consequences of this finding that the judge erred by failing to consider whether manslaughter arose.

The consequential order

[25] The governing legislative framework for prosecution appeals provides that on any appeal against an acquittal, if this Court thinks that a miscarriage of justice has occurred, it may allow the appeal and order a re-trial.[21] This is a discretionary power, meaning that the Court is not bound to order a re-trial in every case where it thinks that a miscarriage of justice has occurred.[22] Moreover, if the court is minded to allow the appeal, the only relief it may grant is to order a re-trial. This limitation in terms of remedy is clearly an oversight that has remained even after the procedural amendments introducing judge-alone trials. Where a trial is conducted by jury, findings of fact are solely in their province, so in the event of a miscarriage of justice it is obvious that only they can make a fresh determination on the facts. However, where the trial is by a judge sitting alone, there would seem to be no major impediment to an appellate court substituting its verdict based on its assessment of the facts. The advantage a trial judge has in observing witnesses and being able to assess their credibility directly, while valuable, alone cannot justify the time, expense and inconvenience of a new trial in every situation. Where a judge provides reasons, an appellate court need not interfere with findings as to credibility, but it can certainly correct errors of law and in the assessment of evidence, even to the point of substituting a verdict – as indeed occurs in many jurisdictions. Nonetheless, there is no discretion in this jurisdiction and we draw attention to this apparent oversight only because of its negative effects, particularly in terms of time, duplication of effort and waste of scarce resources. For the purposes of this appeal, however, having found that a miscarriage of justice has occurred, the remaining question for us is whether to order a re-trial of the respondent.

[26] Counsel for the respondent has urged that even if this Court were to find that a miscarriage of justice has occurred, the application should nonetheless be dismissed because of the time that has elapsed since the incident in question, now 10 years. Counsel argues that the period is long enough so that there is no need to establish any prejudice, as there are issues such as the uncertainty of when a new trial can or will take place and the availability of

[21] *Court of Appeal Act*, Cap. 90, s. 49(3), Substantive Laws of Belize 2011.
[22] *The Queen v Calaney Flowers* [2020] CCJ 16 (AJ) BZ per Wit JCCJ at [94].

witnesses that necessarily arise. Accordingly, counsel submits that any new trial cannot be assured of a fair hearing in compliance with s. 6(2) of the Constitution and therefore the Crown's application for leave to appeal should be dismissed.

[27] Ms. Smith, Senior Crown Counsel, vigorously took the contrary position, arguing that the time since the incident occurred cannot be looked at in isolation. Ms. Smith submitted that the reason for any delay is relevant, noting in this regard that there has been no delay on the part of the prosecution. Not only was the trial conducted within the normal timelines, but notice of the application for leave to appeal was filed with despatch. Since then, any delays have been due to circumstances wholly outside the prosecution's control, while some of it was in part occasioned by the respondent herself, who could not be located and then filed a preliminary objection. Once the respondent's preliminary point was finally determined by the CCJ in 2020, a once-in-a-lifetime pandemic intervened, which unavoidably dislocated pending trials. Further, Ms. Smith has submitted that from the time the respondent became aware of the appeal, she would have necessarily been aware as well of the possibility that a retrial could be ordered and thus was able to prepare for this eventuality – both in emotional and practical terms.

[28] On the substance, counsel for the Crown urged the Court to have regard to the advice of the Board in *Reid v the Queen* [1980] AC 343, reinforced more recently in *Bowe v the Queen* [2001] UKPC 19. In applying the factors discussed in these cases, Ms. Smith stressed that the offence in question is a serious one, rendering it important for the respondent's guilt or innocence to be properly determined. As to the time which has elapsed since the incident, Ms. Smith noted that the respondent has not pointed to any specific prejudice which she would face at a fresh trial, so merely citing this period is not sufficient to deny the Crown's application.

[29] In determining this issue, we acknowledge at the outset the constitutional requirement that any re-trial must ensure a fair hearing within a reasonable time by an independent and impartial court established by law. Two key aspects arise for consideration: can a re-trial be fair, having regard to the time that has elapsed, and second, having identified errors at the trial, is there space for the court dealing with the re-trial to operate independently and impartially?

[30] On the matter of time, while the period which has elapsed since the incident appears to be long, it is by no means a foregone conclusion that a re-trial is impossible. Quite the contrary,

courts have stressed that the factors bearing upon the delay are relevant, along with any prejudice to the defendant, in determining the way forward. A review of the caselaw demonstrates that a variety of different strategies have been employed to mitigate the effects of delay, such as admitting the defendant to bail, making orders to trial, and even adjusting sentences upon conviction. Ultimately, however, a permanent stay (which is what a dismissal of the Crown's application would amount to) is regarded as an exceptional remedy,[23] and where this has been the outcome, it has been for periods of delay in excess of a decade.[24] Moreover, even for such periods a permanent stay of further proceedings is not automatic, as in in *Aubeeluck v the State*, where despite a delay of more than 11 years, the Privy Council did not consider a custodial sentence off the table and remitted the matter to the Supreme Court to determine the sentence.[25]

[31] The principles that have traditionally guided courts when deciding whether to order a re-trial are also useful in helping to determine this issue. In *Reid v the Queen* their Lordships stressed the seriousness and prevalence of the offence alongside the strength of the prosecution case as relevant factors. As to the latter, it is instructive that the inevitability of a conviction is not a condition precedent for a new trial, as there is a strong public interest in guilt or innocence being decisively settled after a trial.[26] The more recent case of *Bowe v the Queen* advocated a more holistic approach anchored in "the interests of justice in the widest sense". Writing for the Board, Lord Bingham pointed to the need to balance the interests of the accused, particularly where the delay has been long, against the public interest in convicting the guilty, deterring violent crime and maintaining confidence in the efficacy of the criminal justice system.[27]

[32] Detailed explication of the public interest standard has been provided by regional courts mirroring the factors identified above. In the *State v Sattaur and Mohamed* (1976) 24 WIR 157 (CA, Guy) the venerable Haynes C discussed the phrase "the interests of justice" that appears in the applicable Guyanese legislation, which he elaborated as comprising the interests of the

[23] *Gibson v the AG* [2010] CCJ 3 (AJ) at [62]; *Boolell v the State* [2006] UKPC 46, [2007] 2 LRC 483 (PC Mauritius) at [32]; *Queen v Gilbert Henry* [2018] CCJ 21 (AJ) at [41].
[24] *Bridgelall v Hariprashad* (2017) 90 WIR 300 (CCJ Guy); *Fraser v the State* [2019] CCJ 17 (AJ) (CCJ Guy); *Marin v the Queen* [2021] CCJ 6 (AJ).
[25] *Aubeeluck v the State* [2011] 1 LRC 627 (PC Maur).
[26] [1980] AC 343 at 350.
[27] [2001] UKPC 19 per Lord Bingham at [39].

accused, the interests of those responsible for instituting criminal proceedings, and the interests of public welfare. Specific factors impacting on the accused's interests include the familiar ones of the period on of detention on remand (if applicable), the length of time before the retrial materialises, and any difficulty or disadvantage the accused may have to face at a retrial, such as the unavailability of a material witness. These factors must be balanced against the interests of the prosecution, which include the evidential strength of the case and the need not to discourage their efforts at bringing offenders to justice, as well as those of the general public. In relation to the latter, Haynes C prioritised the prevalence of the offence and the need to preserve the appearance of justice in the minds of law-abiding citizens. In *Ibrahim and Chattergoon v the State* (1998) 58 WIR 258 (CA, Guy), Kennard C added that the interests of the public include the need to ensure that those who are guilty of serious crimes be brought to justice and not escape merely because of a technical blunder by the trial judge.

[33] Examining these principles in the context of this case, we start from the premise that this case involves one of the most serious offences in any society, which is in turn an acknowledgement of the sacred nature of human life. The penalty for violating it unjustifiably has always been the most serious under the law, with only offences against the State itself being more serious. The actual circumstances of this case are also especially wrenching. The deceased was a young man of 29 years, whose death would have irrevocably changed the lives of his parents and his infant son, now condemned to grow up without his father. There is unquestionably an important personal *and* public interest in finding the truth of these events that led to Lyndon Morrison's death, not just for the sake of his survivors but also for the society at large, and if culpability is assigned to ensure there is some accountability.

[34] On the other hand, this Court must be mindful of the interests of the respondent, as the time since the incident occurred is relatively long. However, we note the submissions of the Crown, that the prosecution has always proceeded with despatch and much of the delay that occurred has been either unavoidable or through no fault of theirs. The respondent herself delayed the proceedings since she was out of the jurisdiction and it took some time to locate her, and when she was eventually found the substantive hearing was delayed by a preliminary point that was ultimately found to have no merit. Since then, the global pandemic disrupted the work of the courts as it did everything else, and justice cannot be casually dismissed as yet another casualty of such an unprecedented event. Of course, we hasten to add that if there is any prospect of the respondent being materially prejudiced by this delay that would supplant

every other consideration, but no such prejudice in terms of missing witnesses or projected difficulties at trial of any sort were alleged, and this Court should not speculate. Ultimately, we note that having decided the preliminary point in favour of the Crown, the CCJ remitted the case for determination of these issues well-knowing that this court cannot itself re-try the substantive issue, so it necessarily did so knowing that a re-trial could be one possible outcome.

[35] There is also the issue as to whether it is possible for this case to be re-tried before an independent and impartial court, given that the trial judge was found to have erred in both his interpretation of the law and his assessment of the evidence. We recall that the principal error made by the judge was in failing to give effect to the statutory provision requiring consideration of alternative verdicts. In identifying the judge's error, this Court has merely clarified the procedural obligations and established superficially that an evidential basis existed to warrant consideration of the lesser verdict – but it has expressed no opinion as to how such consideration should be resolved. In other words, at a re-trial, it would still fall within the discretion of the trial judge whether or not to find the existence of an intention, and if so, the precise nature of that intention.

[36] In the premises, therefore, after carefully considering the circumstances of this case in light of the applicable principles, we find on balance that the interests of justice demand a re-trial.

Disposition

[37] In conclusion, we reiterate that the trial judge erred in law by failing to consider whether the respondent possessed an intention sufficient to support the alternative offence of manslaughter, as specifically required by s. 126(1) of the *Indictable Procedure Act*. This was a material error that led to a miscarriage of justice. For this reason, we order as follows:

1. The Crown's application for leave to appeal the respondent's acquittal is granted and this application treated as the appeal;
2. The appeal is allowed, the verdict of acquittal set aside, and a re-trial ordered.

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HAFIZ-BERTRAM P (Ag.)

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FOSTER JA

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BULKAN JA