IN THE COURT OF APPEAL OF BELIZE, A.D. 2023

CRIMINAL APPEAL NO 22 OF 2018

ELI AVILA LOPEZ **APPELLANT**

v

THE KING **RESPONDENT**

CRIMINAL APPEAL NO 23 OF 2018

MILTON MAZA **APPELLANT**

v

THE KING **RESPONDENT**

BEFORE:

The Hon Madam Justice Hafiz-Bertram	-	President
The Hon Madam Justice Minott-Phillips	-	Justice of Appeal
The Hon Mr. Justice Bulkan	-	Justice of Appeal

Leeroy Banner for the first-named appellant.
Peta Gay Bradley for the second-named appellant.
Cheryl-Lynn Vidal S.C., Director of Public Prosecutions, for the respondent.

Date of Hearing 29 March 2023
Date of Promulgation 31 May 2023

JUDGMENT

BULKAN JA

[1] In popular or layman's discourse, circumstantial evidence is often portrayed as inferior, but jurists have long acknowledged the contrary. Hewart LCJ was forthright in his description of it, when writing almost a century ago: "…*circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidence, is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say*

that it is circumstantial."[1] Time has not diminished this understanding and one can find similar endorsements in more recent cases. Equally well-settled is the evidential standard that must be reached regarding proof of this nature – namely that the inference of guilt must be the only rational conclusion to be drawn from the proven facts. As articulated by Cummings JA in ***Dos Santos v Approo (1970), 17 WIR 215 (CA Guy) at 228:*** "*'The value of circumstantial evidence depends upon its incompatibility with any other inference other than that which proves the allegation made. It is impossible to draw the line and say where conjecture ends and proof begins. The court should be able to conclude that the accused is guilty of the allegation so that no other reasonable explanation emerges from the fact proved: the fact inferred must be incapable of explanation of solution upon any other supposition than that of the truth of the fact which it is adduced to prove."*

[2] As is often the case, however, stating the legal principle or evidential approach is easy; applying either, on the other hand, can be challenging. How much evidence is enough to raise the presumption of guilt? Where does conjecture end and proof begin? What qualifies as an alternative, *reasonable* explanation of the facts? At what point can it be said that the inference of guilt eclipses all others? These are the practicalities of implementation, requiring some degree of skill and practice. It can be a complicated exercise, and these appeals – brought against two convictions based entirely on circumstantial evidence – are no exception.

[3] The two appellants (referred to hereafter as 'Lopez' and 'Maza' to avoid confusion, given that their order on appeal differs from that at trial) were convicted in October 2018 of the murders of Richard and Maria Stuart and sentenced to 35 years' imprisonment. The crime had taken place 8 years earlier on the night of October 16, 2010, when the couple returned home and interrupted a burglary in progress, only to be savagely stabbed to death by the intruders. The case for the prosecution was constructed around a catena of circumstantial evidence, from which the trial judge inferred guilt as the only reasonable conclusion and accordingly convicted both appellants of murder.

[4] The evidence commenced with the arrest of Maza, who was seen two days after the incident in St. Matthew's village driving a car belonging to the deceased couple. He was tailed by the police and arrested as he exited the car; asked if he owned the vehicle, Maza replied that

[1] *R v Taylor* (1928) 21 Cr. App. R. 20 at 21.

he borrowed it. Maza was thereupon detained until a team came from Belize City, at which point the car was searched, revealing among other items a cap and a blood-stained knife under the driver's seat. The items were photographed and Maza was escorted to Queen St. Police Station, where some hours later he gave a statement under caution in the presence of a Justice of the Peace. In that statement Maza admitted that he and Lopez had gone to the home of the Stuarts on the night in question "to steal and assault". Maza admitted only to stealing items which he placed in a suitcase, denying that he inflicted any injury on either of the deceased persons. Instead, not unusually as happens in these cases, he fingered his confederate as the one who stabbed the two deceased. To explain his possession of the murder weapon, he stated that it was given to him by said accomplice with instructions to wash it, but he omitted to do so and simply placed it under the driver's seat of the Stuarts' car in which they both escaped.

[5] Various items recovered during Maza's arrest were sent for scientific analysis. This revealed that it was blood on the knife, which was found to match the DNA profiles of both deceased, while the cap was found to contain blood matched to Richard Stuart. Rounding out this case was evidence identifying the Toyota Scion (which Maza had been driving) as belonging to the Stuarts. The prosecution also led evidence to show that Richard Stuart would usually park his cars at the University of Belize Campus at night, but on the night in question he had used the Toyota Scion to go out, and soon after his return one of the Campus security guards saw it being driven away.

[6] While Maza's identification of Lopez as the principal in their enterprise is not admissible *evidence* against Lopez, it provided relevant *information* in the investigation. Acting on this lead provided by Maza, three days later the police located Lopez at his home in Cayo. Upon arrest, Lopez was searched and among the items found on his person was a green and white LG phone, subsequently identified as belonging to Maria Stuart by her sister. Lopez also took the police to an area close by his house and showed them a suitcase hidden in some bushes. Inside that suitcase the police found various items including 3 bunches of keys, some of which were stained with a reddish substance. The keys were swabbed and when tested eventually, revealed to contain the DNA of the deceased Richard Stuart.

[7] This, in sum, was the key evidence led against each appellant. It was, indisputably, highly incriminating, calling for an explanation. However, at the close of the prosecution's case Maza opted to give a statement from the dock, in which he denied any involvement in the

crime. Regarding the 'smoking gun', so to speak, of being found in a car belonging to the deceased, Maza claimed that he was in a shop next to the bar, and that when they apprehended him the police took him to a vehicle and put him face down on the ground (with the shoe of one of them placed on his face to restrain him). In other words, by denying that he was driving the Stuarts' Toyota Scion, Maza's defence was that the police framed him for the murder, though for what reason they would have done so he did not disclose or even speculate. Thereafter, Maza claims to have been beaten and forced to sign a paper, the contents of which he was ignorant. Lopez too denied any involvement, raising an alibi and calling his wife to testify in support that on the date in question he was at home all night. Regarding the 'smoking gun' in his case as to the items recovered from under his control, Lopez alleged that suitcase was brought there by Maza and that he did not know what it contained. Further, he denied that any cell phone belonging to the deceased was found on him.

[8] These explanations were disbelieved by the trial judge, who rejected them and, acting on the evidence led by the prosecution, found both appellants guilty of the murder of the Stuarts. From this conviction they have both appealed.

[9] Lopez raised four grounds of appeal, two of which can be taken together as they both amount essentially to an allegation that insufficient evidence was led to support a finding of guilty of murder against him. The remaining two grounds – one based on the late disclosure of the expert's DNA report and the other raising the impact of the delay of 8 years between arrest and trial – were also raised by Maza. In addition, Maza raised three other grounds, of which one was abandoned at the hearing and the other accepted by the DPP, leaving one contested ground solely related to him, namely that the trial judge's directions on joint enterprise were incorrect. Altogether, therefore, four grounds of appeal arise for determination, which we will consider in the following order:

i. Whether the verdict against each defendant can be supported by the evidence (the 'sufficiency of circumstantial evidence' point);
ii. Whether the trial judge misdirected himself on the principles relating to joint enterprise, thereby denying Maza of the possibility of a conviction for the lesser offence of manslaughter (the 'joint enterprise' point);
iii. Whether the appellants were denied a fair trial because of the late disclosure of the expert's report (the 'fair trial' point); and

iv. Whether the appellants' right to trial within a reasonable time was breached by reason of the delay between their arrest and charge and their subsequent trial and conviction (the 'trial within a reasonable time' point).

(i) Sufficiency of circumstantial evidence

[10] Before embarking on this ground of appeal, we must comment on the procedure adopted at trial, where after the accused persons had given evidence, the trial judge allowed counsel for Lopez to make a no-case submission on his behalf. A no-case submission is shorthand for a claim that the defence has no case to answer, so it is puzzling why this would be entertained where a defendant has *already* given an answer. It is conceivable that in a jury trial, renewing a no-case submission after the close of the defence case may be exceptionally done where counsel is of the view that the jury may act on irrelevant, discredited or prejudicial material. The rationale for so doing is obvious – to avoid an unsafe conviction. However, it is entirely unnecessary in a judge-alone trial where the judge determines both legal and factual issues and there is no jury from whom a defendant requires such protection after he or she has given evidence. As it turned out, immediately after the trial judge dismissed the no-case submission, the same arguments were made all over again with nothing new forthcoming, as the defence had already closed its case. The procedure was thus a colossal waste of time, hard to justify in light of the general backlog in trials, not to mention, ironically, the need for dispatch in this particular case which had been so long delayed already. We would therefore urge trial judges in the future to ensure that a no-case submission, if desired, is made at the appropriate stage. For this very reason, there is no need for us to consider Lopez's first two grounds separately for they both require a determination as to whether there was sufficient evidence implicating him in the offence, and as the DPP herself wisely did in her written submissions, we will consider Lopez's grounds 1 and 2 together.

[11] In support of his first two grounds, counsel for Lopez argued that the evidence was in turn speculative, equivocal, and altogether insufficient to support the conviction. Mr. Banner noted that there was no direct evidence to place Lopez at the crime scene or anything to support a joint enterprise. He questioned the identity and integrity of the items retrieved from Lopez on the basis of gaps in the evidence (related to the cell phone, for example) and inconsistencies in the testimony of Antonio Manzanero (as regards the photographing and custody of the items). And he submitted that the explanation given by Lopez, that the suitcase was brought by Maza

and that he (Lopez) was unaware of its contents, were reasonable inferences which should have been drawn in Lopez' favour. At the highest, Mr. Banner argued, Lopez might have been involved in receiving stolen property. Counsel also noted (as accepted by the DPP) that no evidence was led that any buccal swab or hair sample was taken from his client, rendering useless any statement identifying Lopez' DNA as being on any of the exhibits.

[12] The learned DPP contested this position, submitting that the evidence, considered in its entirety, was sufficient to prove Lopez' guilt beyond a reasonable doubt. Ms. Vidal SC went even further, relying on dicta from ***August and Gabb v The Queen***[2] to posit that unless it could be said that the trial judge was irrational in accepting a piece of evidence, this Court is precluded from interfering with the verdict. In light of these opposing positions, the issue we must determine is whether the evidence relied upon by the trial judge was of a sufficient quantity *and* quality to establish Lopez' guilt conclusively.

[13] It would be useful to begin by reiterating the key principles regarding circumstantial evidence. As stated at the outset of this judgment, it is well-settled that in a case based on circumstantial evidence, the proven facts must point only to guilt in order to found a conviction.[3] This means that when the evidence is considered in its totality, the only inference arising must be that of guilt. If some other explanation consistent with innocence is reasonably possible on the facts, then guilt has not been established. In ***August and Gabb*** an analogy was made to a tapestry[4]: individual pieces of evidence may create suspicion at best but woven together they form a complete picture of guilt.

[14] Establishing proof by way of circumstantial evidence involves two stages: first, identifying what facts are proved, and second, determining what conclusions are to be deduced from the proven facts. In ***Sookraj Evans***, Haynes JA helpfully explained the process. The first stage requires assessing the credibility of the witnesses to determine what is believed; the second entails

[2] [2018] CCJ 7 (AJ) at [39]-[40].
[3] *Dos Santos v Approo* ((1970), 17 WIR 215 (CA Guy); *The State v Sookraj Evans* (1975) 23 WIR 189 (CA Guy); *Latchman Outar v the State* (1982) 36 WIR 228 (CA Guy); *August and Gabb v the Queen* [2018] CCJ 7 (AJ) (CCJ Bel).
[4] Ibid, at para. [33].

'...weighing ... the probative value of the facts and the probabilities in the light of human experience. Sometimes a little commonsense is all that is needed to reach the right conclusion, which stands out obviously. At other times, it calls for more insight and selectiveness. The question for the juror to ask himself is: "Is guilt the only reasonable explanation of these facts?" If it is not, then guilt is not proved beyond reasonable doubt. "Reasonable doubt" exists if in the evidence there is a reasonable explanation of the facts, other than guilt.'[5]

[15] Some expansion is necessary to better understand and apply these principles. First, the requirement that there must be only one inference of guilt relates to the conclusion which must be reached upon a consideration of *all* the proven facts and not upon each individual piece of evidence. The CCJ made this pellucidly clear in ***August and Babb***, noting that the "nature of circumstantial evidence is such that while no single strand of evidence would be sufficient to prove the defendant's guilt beyond reasonable doubt, when the strands are woven together, they all lead to the inexorable view that the defendant's guilt is proved beyond reasonable doubt… The cogency of the inference of guilt therefore was built not on any particular strand of evidence but on the cumulative strength of the strands of circumstantial evidence."[6]

[16] Second, for another inference or explanation to pose an obstacle to proof, it must arise reasonably or rationally from the evidence. There is no limit to the human imagination and all sorts of scenarios can be conjured up in relation to any set of facts. There is, however, a standard to be reached, which is that of *reasonableness*. Only an explanation consistent with innocence that arises reasonably on the evidence is sufficient to break the chain of circumstantial evidence. One illustration of how this has been applied can be found in ***R v Nash (1911) 6 Cr App R 225***. The appellant left home one morning with her child, who was then in perfect health, ostensibly for another home. She later returned without the child, claiming to have left it elsewhere, which was false, as the body of the child was found much later in a well near to where she had been staying. The child had been born out of wedlock and there was evidence that the appellant had been previously trying to get rid of it. At the trial, Rayner Goddard – who would later become Lord Chief Justice Goddard – submitted in her defence that she may have given the child away to gypsies. The appellant was convicted of murder.

[5] (1975) 23 WIR 189 at 200.
[6] *August and Gabb v the Queen* [2018] CCJ 7 (AJ) at [38].

The court rejected this explanation as pure conjecture, insisting that the jury could not "assume such a hypothesis without evidence". What this case demonstrates is that not because a particular outcome is possible in theory means that it qualifies as a reasonable explanation. To arise as a reasonable inference of innocence, the explanation must be based on the evidence and amount to more than mere speculation or conjecture. ***Nash*** has stood the test of time and the principle has been reiterated in more recent cases. In ***Outar***, for example, Massiah JA said, in a similar vein: "An inference, to be reasonable, must rest on some logical foundation as distinct from being a mere theoretical possibility or dogmatic certitude. What is required is reference to certain aspects of the evidence which when closely examined make the hypothesis contended for a reasonable one."[7]

[17] Relatedly, where facts are aligned against an accused raising an inference of guilt, the need for an explanation may be unavoidable. This does no violence to a person's constitutional right to remain silent and is simply an acknowledgement that the facts left uncontradicted may be enough to establish guilt. When that happens, a reasonable explanation from the accused becomes more of a strategic move than a legal requirement. ***Nash***, once again, illustrates this reality. There the appellant had given different explanations as to her child's whereabouts – that the child was sick, or left someplace else, and that she had packed up clothes for the child – all proven eventually to be false. Haynes JA in the Court of Appeal of Guyana referred to ***Nash*** and similar cases at length, observing that false explanations in those cases played a decisive role in the guilty verdicts. As Haynes JA went on to explain: "In cases of circumstantial evidence, no explanation of proved incriminating facts or a false one can be a very powerful consideration to strengthen an inference of guilt which a credible explanation might have weakened or destroyed."[8] Obviously, a person cannot be convicted because of lies. The relevance of this, however, is that in the absence of a believable explanation, the proved, incriminating facts provide a basis for guilt.

[18] Finally, before assessing the evidence led in this case, we must address the DPP's submission, based on ***August and Gabb***, that "unless [the Court of Appeal] is of the view that the learned trial judge's acceptance of a particular piece of evidence was irrational, it is not for this Court to interfere". This is a misapprehension of what the CCJ meant, for its comments

[7] *Latchman Outar v the State* (1982) 36 WIR 228 at 270.
[8] *The State v Sookraj Evans* (1975) 23 WIR 189 at 208.

were directed to the evidence as a whole in that case, which they viewed as strong and thus providing a rational basis for a finding of guilt. It certainly does not mean, as the DPP suggests in her written submissions, that this court is confined only to examining the rationality of individual pieces of evidence (or, as she phrased it, "a particular piece of evidence"). On the contrary, appellate courts are required to review the evidence – both "particular pieces" and their cumulative effect – to determine issues of sufficiency and the safety of convictions. Indeed, this was precisely what the CCJ itself did most recently when it overturned the jury's conviction of Jarvis Small on the basis that the circumstantial evidence was insufficient to support a finding of guilt.[9] Thus, far from being confined to an examination of the rationality of the judge's admission of particular pieces of evidence, and in light of the objections raised by Lopez, this court can and must review the sufficiency of evidence underpinning his conviction.

[19] Turning then to the evidence led, counsel raised several arguments to discredit the prosecution's case against Lopez, some of which involve no dispute. For example, while the samples of reddish substance found on various items were tested for DNA, we cannot consider the results insofar as they may have implicated Lopez (or Maza) – because no evidence was led by the prosecution of having taken swabs or samples from either appellant for the purposes of comparison. Clearly, samples were taken from someone during the investigation, because the analyst did in fact make comparisons, but in the absence of testimony confirming from whom such samples were taken, this court cannot fill the gap in the prosecution's case by assuming it was the appellants. We will return to this shocking omission in due course, but for now will observe it was but one of several errors committed in what was overall a slipshod prosecution. As to counsel's submission that there was no evidence that Lopez was ever at the scene, we agree with this only partially – there was no *direct* (as in eyewitness) evidence to this effect. But the prosecution's case was built on circumstantial evidence that pointed to his presence on the scene, which we will review and evaluate in due course.

[20] Mr. Banner sought to diminish the value of the keys and cell phone found when Lopez was arrested – the former by arguing that they were not linked to any premises or vehicle and the latter by attacking the cogency of the identification of the cell phone, which ASP Chan testified was found on the person of Lopez. It is true that the police did not carry out the most

[9] *Small and Gopaul v the DPP* [2022] CCJ 14 (AJ) GY.

basic exercise of testing any of the keys to see if they fit any of the locks at the deceased's premises (or if they did, the prosecutor omitted to lead that evidence). That would have been a logical and simple exercise, but the failure to do so does not detract from the prosecution's case given that the reddish substance found on the keys was tested and found to be blood matching the profile of the deceased Richard Stuart. The latter is powerful evidence that the keys came into contact with the deceased, for how else would his blood come to be on it? As such, finding the keys in Lopez' possession is a circumstance of great significance, and Mr. Banner's attempt to discredit it therefore fails.

[21] There is marginally more merit in Mr. Banner's criticism of the cell phone. Indeed, the witness Lourdes Fernandez positively identified it as the cell phone given to her by her deceased sister, Maria Stuart, when Lourdes was visiting Belize in June 2010, and it is not clear why the trial judge in his reasons diluted this evidence by saying that Lourdes said it "resembled" her sister's phone. In fact, Lourdes did not say "resembled", but identified the phone shown to her by Supt. Martinez as her sister's phone. Nonetheless, despite this positive assertion, the issue is one of *reliability*. There is nothing unique about a cell phone and the witness did not describe it in detail or explain why the one she was shown is identical to the one lent to her earlier that year. This raises an issue of the weight to be attributed to this item of evidence, to which we will return when assessing the sufficiency of evidence led against Lopez.

[22] Mr. Banner also challenged the evidence of Antonio Manzanero, the crime scene technician who photographed the items recovered from Lopez when he was arrested. Counsel suggested that because the exhibits were pictured in a tiled room, whereas Manzanero claimed to have photographed the items at the scene, they must have been subsequently tampered with. At first blush, this submission seems weighty. However, the cross-examination did not delve into any detail and there is insufficient material to raise doubt as to the integrity of the items recovered. Evidentially, a break in the nexus is not fatal,[10] and it is a matter for the trier of fact to determine whether there is reasonable doubt as to an exhibit's integrity. In this case, the trial judge had the benefit of seeing the photographs and hearing the testimony of the witnesses (including cross-examination) as to how the items were recovered. His decision to accept that

[10] *Hodge v R* (HCRAP 2009/001), [2010] ECSCJ No. 295 (ECSC BVI) per Baptiste JA at [12], cited in *Rigby v R* (2022) 100 WIR 633 (CA TCI).

evidence was one within his domain, and no sufficient reason emerges from the evidence to undermine that conclusion. Our remaining task, therefore, is to assess the evidence as a whole to see if, indeed, it points conclusively in one direction. In the imagery of *August and Babb*, is the tapestry of Lopez' guilt fully woven?

[23] The trial judge itemized a long list of evidence as implicating Lopez beyond a reasonable doubt in the murder of the deceased.[11] This list can be distilled into a few key items. Upon arrest Lopez was found with two cell phones on his person. One of these was a green and white LG phone, which was later identified by the witness Lourdes Fernandez as owned by her sister Maria, one of the deceased. As stated above, this evidence is not wholly reliable as the witness did not explain why a mass-produced phone shown to her was the identical one lent to her by her sister some months before. She ought to have described the phone by reference to its unique characteristics or any specific feature justifying the conclusion that it was the same one her sister had lent her. This omission was compounded by some doubt raised during cross-examination as to its colour. Nonetheless, the evidence is not valueless and it must be borne in mind, as mentioned above, that not every piece of evidence must prove guilt beyond a reasonable doubt. At a minimum, Lourdes' evidence raises a strong possibility that the cell phone recovered from Lopez belonged to the deceased, and it thus forms an important link in the circumstantial chain.

[24] In the course of his arrest, Lopez took the police to an area some 90 feet away from his house. Hidden among the bushes was a suitcase which, when opened, was found to contain items linked to the deceased. Among those items were several bunches of keys, one of which was stained with a red substance. That substance was swabbed and analysed, revealing it to be human blood matching the profile of the deceased Richard Stuart. Distilled in practical terms, this tells us conclusively that items (in particular, keys) came into contact with one of the victims *at a time when he was bleeding*. Since we know that Richard Stuart had been stabbed multiple times a few days' earlier, leading to profuse bleeding, and that during the incident the babysitter heard the sound of keys dropping on to the floor, it can be safely and reliably concluded that these keys, which were stained with Richard Stuart's blood and found in Lopez' possession, must have been obtained in the course of the robbery and stabbing of the Stuarts.

[11] See pages 524-5 of the record.

[25] A few observations about the strength of this evidence are apposite. The DNA evidence was not shaken or even attacked by the defence. It is therefore uncontradicted that these keys are linked to the deceased Richard Stuart. The *source* of the DNA is also important. It did not come from hair or skin or anything innocuous and easily obtained. Rather, the DNA was extracted from blood. Richard Stuart was killed by stabbing – more precisely, during a frenzied attack involving 25 stabs, in the course of which he bled profusely. This occurred only 5 days before the keys were recovered. Putting all these facts together, the inference is irresistible that these bloody keys were stolen from Richard Stuart during the attack on him which led to his death.

[26] Significantly, it was Lopez himself who led the police to the suitcase containing the keys. Lopez testified in his defence that he was beaten by the police upon arrest, but not only did the trial judge fully consider and ultimately reject these allegations, even if true they do not diminish the *weight* of the evidence itself. In other words, the issue of admissibility is distinct from that of weight; having rejected the appellant's allegations, the question is what weight is to be put on the evidence in question.[12] Unlike a confession, physical evidence cannot be manufactured, even if the suspect is faced with threats or violence.[13] A suspect being illegally pressured by the police can *say* anything, including a false confession of guilt, to save himself in the moment. He cannot, however, conjure a suitcase or keys or blood out of thin air. Here, that suitcase with its damning contents is thus evidence of formidable weight. It shows beyond doubt that Lopez knew of items recovered during the robbery and killing and given that they were on or near to his property, indicates his possession of or control over them. Combined with all the other circumstances, such as the proximity in time to the crime, the nature of the items – some of which like keys have no value (rendering them unlikely to have been purchased or otherwise received for resale) – and the phone recovered on Lopez' person, the evidence in this case raises a compelling inference that Lopez participated in the murder of the Stuarts.

[27] As the authorities above stipulate, proved incriminating facts call for an explanation. A credible one can raise reasonable doubt as to guilt. If false, the conclusion of guilt remains as the only reasonable outcome. In this case, what did Lopez have to say? His defence was a denial, and in support he called his wife, who testified that he was at home on the night in

[12] *Allie Mohammed v The State* (1998) 53 WIR 444 (PC T&T).
[13] *Adams and Archer v The State* (1994) 54 WIR 220 (CA Guy); *King v R* (1968) 12 WIR 268 (PC Jam).

question. The trial judge wrote that he considered this testimony carefully and concluded based on everything he observed that neither Lopez nor his wife was truthful. This was a conclusion he was perfectly entitled to make, and there is no reason to question it when one considers what Lopez had to say, aside from that flat denial.

[28] At trial Lopez sought to distance himself from the items hidden on his property by claiming that the suitcase was taken to his home by Maza and that he did not know what was inside. Lopez added that Maza said the suitcase belonged to his (Maza's) sister and that he would be taking it to Cayo. Under cross-examination, Lopez also distanced himself from Maza, saying that in 2010 he did not know him very well. It takes only common sense (as Haynes JA predicted) to deduce how implausible this explanation is. It is not unusual to store things for relatives or friends, but the ordinary place for doing so is a storeroom, garage, or similar room. Here, the suitcase was not stored, it was hidden, and that fact is at odds with any innocent purpose. Lopez must have been aware of its nefarious source to have hidden it in the first place. What makes Lopez' explanation even more unlikely is his claim that he did not know Maza well at the time – if so, why would Maza involve him and why would he agree to hide something unknown on his property?

[29] Counsel of his own accord suggested that Lopez could have merely been involved in receiving stolen property and not burglary and murder. This is true, but a major impediment to this suggestion is that it is sheer speculation. Not unlike Rayner Goddard's hypothesis that his client may have given her child to gypsies, there is no basis here – especially in light of what Lopez himself actually said – to conclude that this was merely a case of receiving. Had Lopez really been involved in fencing stolen goods (and it is difficult to imagine the market for bloody keys, so the explanation is not really plausible anyway), he should have said so. Instead, he denied having anything to do with the suitcase or even knowing Maza well, and in that case, it is not for counsel to come up with alternative explanations from his imagination.

[30] There being no reasonable explanation for the proved facts, the circumstantial evidence stands uncontradicted. As discussed above, it is more than sufficient to implicate Lopez in the robbery and murder of the Stuarts. The trial judge's rejection of Lopez' explanation was also perfectly reasonable, and in light of the evidence not a finding we can properly disturb. The proved facts were highly incriminating and sufficient to support the finding that Lopez was guilty of murder. This ground of appeal accordingly fails.

[31] It would be convenient to consider at this juncture the same issue in relation to the appellant Maza. While Ms. Bradley did not raise sufficiency of evidence on his behalf as a ground of appeal, she did submit that no evidence was led of any bodily sample being taken from Maza for the purpose of analysis. This was the same omission that occurred in relation to Lopez, and as indicated above, the DPP had no choice but to concede this point. Since the trial judge included evidence purporting to identify DNA obtained on items as matching that of Maza's in his assessment of the strength of the circumstantial case, we are bound to consider whether, in its absence, there is a sufficient case against him.

[32] The circumstantial case against Maza was constructed around a series of facts. Maza was positively identified as an employee of the Stuarts at the material time, proving that he was acquainted with their premises, its layout, and possibly even their movements. Less than 2 days after the burglary and murder of the couple, Maza was seen driving a car belonging to them in St. Matthew's Village, some 38 miles away from Belize City. The police followed him and when he stopped, they arrested him as he exited the vehicle. When questioned, he said that he borrowed it, but that could not have been possible. Richard Stuart used to park his car in the neighbouring compound of the University of Belize campus, but that night he did not as he drove it to go out with his wife to a function. The campus guard testified that he observed when they returned, and shortly after that the guard saw the car being driven away. What the guard did not know was that upon their return the Stuarts interrupted a burglary in progress and were both savagely murdered. They were therefore no longer able to lend anything, and clearly their car was stolen by the perpetrators. *That was the very car which Maza was driving 2 days later*.

[33] It is worth noting that the vehicle in question was a Toyota Scion, bearing a Dealer's Licence Plate # 01191. The prosecution led evidence that Richard Stuart bought it in Houston and had a dealer drive it from there to Belize City just a few months before, though he evidently had not yet completed the registration process. Nonetheless, the dealer identified the car, along with Richard's brother and the said security guard, as belonging to him; that was the very car identified by the arresting officer and other members of the investigative team as the one driven by Maza. The markers they all used to do so was its make, namely a Toyota Scion, and its Licence Plate number.

[34] After Maza's arrest, the car was searched by a crime scene technician. A knife stained with a dark red substance was found under the driver's seat. Samples were taken and subsequently analysed, and it was found to contain the DNA profiles of *both* deceased persons. Additionally, a cap found in the car was also tested and this had DNA matching that of Richard Stuart. For the sake of completeness, it should be noted that given the depth of some of the stabs sustained by both deceased, as measured by the pathologist, the weapon(s) used to inflict them had to be at least 5 ½ inches, which matched the knife found in the car driven by Maza.

[35] Rounding out the prosecution's case was a statement taken from Maza under caution, but that will be analysed separately. The facts and circumstances recounted above stand on their own, and by even the most exacting standards add up to a watertight case against Maza. His explanation was that he was not driving the car but that the police arrested him at a bar and forcibly positioned him next to the car. Unsurprisingly, the trial judge disbelieved him, given how implausible this explanation is. It raises questions as to how the police came into possession of the Toyota Scion, where they were keeping it in the interim, and most of all, why they would have let the driver go and choose to position Maza next to the car? There is no reason for the police to frame an innocent person, and none was proffered by the appellant. Moreover, it was Maza who squealed on Lopez, which in turn facilitated the discovery of the physical evidence (the suitcase containing bloody keys) that was conclusively linked to the deceased (via DNA). While Maza's statement is no evidence against Lopez, its accuracy in leading to highly incriminating physical evidence is another circumstance linking Maza to the crime. We can therefore conclude with certainty that even without any testimony to link Maza's DNA to the items recovered, the remainder of the evidence as recounted above is sufficient to establish Maza's guilt. Thus, the ground of sufficiency of evidence fails in relation to *both* appellants.

(ii) Joint Enterprise

[36] We turn now to the ground of appeal submitted on behalf of Maza alone, namely that the trial judge's summation to the jury (sic) on joint enterprise was insufficient and incorrect in light of the Privy Council's decision in ***R v Jogee and Ruddock*** **[2016] 2 All ER 1**. Quoting at length from this decision, Mrs. Bradley argued that the learned trial judge wrongly identified the common design as that of murder. Expanding on this, she submitted that the facts in the caution statement do not reflect that Maza acted with the requisite intent to commit murder.

Further, because the trial judge directed himself that a plan to steal and assault is capable of evolving into murder, Mrs. Bradley argued that he acted upon the lower (and since ***Jogee***) discredited standard of foresight instead of intention. Instead, she argued, it was incumbent on the trial judge to have assessed the facts to determine whether Maza had an intention to kill.

[37] In response, the learned DPP disputed the applicability of *Jogee* to Belize in light of its rejection in Guyana by the CCJ in ***The State v Hyles and Williams***,[14] arguing that the ***Chan Wing-siu*** test of foresight[15] still governs secondary liability in this jurisdiction since both countries share the same apex court. Ms. Vidal S.C. also relied on previous interpretations of this standard by this Court, citing ***Robateau and Pipersburgh v The Queen*** where Morrison JA said "in a case such as this, in which the secondary party contends that, while he was party to a common design to commit the lesser offence of robbery, he did not intend to kill anyone, the jury must be satisfied that the secondary party knew or foresaw that the principal offender would or might use a weapon with the intention of killing and that, with that knowledge or foresight, he continued to take part in the joint enterprise."[16]

[38] ***Jogee*** seems to have produced considerable anxiety, perhaps because of its apparently more exacting standards, but any such worry seems misplaced. This long overdue decision rationalised the law as to secondary participants, removing the anomaly produced by ***Chan Wing-siu*** whereby a lower mental threshold was required for guilt in the case of an accessory than for a principal. The standard articulated in ***Chan***, as quoted by Ms. Vidal SC in her written submissions, set the bar for criminal liability of a secondary party as participation in a venture with mere foresight – an incongruous position given that at common law, liability of the principal actor is based on actual intention. What ***Jogee*** did was to correct this imbalance, establishing that foresight is not to be equated with intent to assist. This does not mean that foresight is now irrelevant; rather, it is to be treated as *evidence* of intent. In other words, while foresight is not to be inevitably equated with intent, it can certainly provide strong evidence thereof.

[39] That being said, it does not follow, as urged upon us by the learned DPP, that because Wit JCCJ doubted the applicability of ***Jogee*** in Guyana the same position holds for Belize. In

[14] [2018] CCJ 12 (AJ) GY per Wit J at [122].
[15] *Chan Wing-Siu v R* [1984] 3 All ER 877, [1985] AC 168, [1984] 3 WLR 677, PC
[16] Cr. Apps. #14 & 16/2011, dated 14 March 2014 (CA Bel), per Morrison JA at [78].

the first place, this issue was treated as obiter in ***Hyles and Williams*** and reinforcing that is that the felony-murder rule still applies to Guyana, so there the arcane nuances of parasitic accessorial liability are probably of academic interest only. In any event, there can be no automatic application of this passing comment to Belize, given that the statutory framework in this country is so radically different.

[40] Regrettably, neither party to this appeal referenced the statutory provisions governing criminal liability, as these are relevant to resolving this issue. In this jurisdiction the mens rea for murder is an intention to kill, nothing less.[17] Whereas at common law an intention to cause grievous bodily harm also suffices, in Belize a higher, more exacting standard, applies. Similarly, in cases where there is a deviation from the common plan leading to an undesired (or unusual) consequence, the mens rea required for accessorial liability is that of intention. Section 21 of the ***Criminal Code*** of Belize stipulates (*inter alia*):

> *"(1) Where a person abets a particular crime, or abets a crime against or in respect of a particular person or thing, and the person abetted actually commits a different crime, or commits the crime against or in respect of a different person or thing, or in a manner different from that which was intended by the abettor, the following provisions shall have effect, namely-*
>
> *(a) If it appears that the crime actually committed was not a probable consequence of the endeavour to commit, nor was substantially the same as the crime which the abettor intended to abet, nor within the scope of the abetment, the abettor shall be punishable for his abetment of the crime which he intended to abet in the manner provided by this Title for the punishment of crimes which are not actually committed.*
>
> *(b) In any other case the abettor shall be deemed to have abetted the crime which was actually committed, and shall be liable to punishment accordingly."*

[17] *R. v Gordon* (2010) 77 W.I.R. 148, per Lord Clarke at [13].

[41] This provision governs the situation where, in the course of carrying out a common plan, there is an escalation by one of the parties and another (undesired) crime is committed. Three scenarios are envisaged – where the crime committed was not a probable consequence or substantially the same as the crime planned nor within the scope of the common plan. In any of those situations, section 21(1)(a) explicitly stipulates that the accomplice is only liable for such crime as s/he *intended* to abet. In any other scenario, presumably in cases of minor variations, the accessory would be liable for the crime actually committed. However, the accessory can only be held liable for the different crime where s/he intended to assist in its commission. The threshold set here is not foresight but intention. Thus the "wider principle" asserted in ***Chan Wing-Siu***, by which "a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend",[18] is at odds with the legislative framework governing criminal liability in this jurisdiction.

[42] This being the standard, did the learned trial judge misdirect himself as Mrs. Bradley submitted? Counsel's precise complaint is that he did not pay attention to the caution statement, insofar as his conclusion that "a plan to steal and assault is capable of evolving into murder" actually imports a degree of foresight on the appellant to have foreseen that his accomplice would have committed murder. This, counsel argued, was the incorrect test, as what is required is an intention to kill or to assist in the murder, and not mere foresight that it could occur. However, the reasons articulated by the trial judge do not support counsel's interpretation. To illustrate, the trial judge's reasons on this issue are set out in full:

> *"The Prosecution's case was one of joint responsibility on the part of both Defendants. Each may have played a different part, however if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The caution statement of the First Defendant is that he and another wanted to steal and assault. The suggestion is that murder was not the intention. The plan to steal and assault however is capable of evolving into murder and both can form an agreement or plan to murder on the spot. It does not have to be something longstanding. A plan or agreement does not require any formality, since an agreement to commit an offence may arise on the spur of the moment. Indeed, nothing need to be said at all. Experience of the courts has shown that it can be made with a nod and a wink, or a knowing look. An agreement can be inferred*

[18] [1984] 3 All ER 877 per Sir Robin Cooke at 880.

from the behaviour of the parties. The essence of joint responsibility is that each defendant shared the intention to commit the offence and took some part in it, however great or small, so as to achieve that aim."

[43] The phrase objected to – that a plan to steal and assault is capable of evolving into murder – is simply an acknowledgement of a (common) reality. In this case, as in many others, individuals may set out to achieve one purpose, and in the course of so acting events may escalate and something undesired (or unusual) may also occur. Bank robbers set out to rob a bank, and in the course of the robbery a guard is killed; a jilted lover sets fire to the home of her rival, intending to scare her out of town, but the fire goes out of control and the rival's child dies; etc. In these scenarios, the actors may still be responsible for the unusual occurrence, even though they did not desire it. In the passage objected to, the trial judge was simply stating this reality, that events can evolve (i.e., change) and escalate – the key word used by him is *"capable"*, which signals a possibility. But at no time does the trial judge "import" or suggest that the test for determining liability where plans evolve is that of foresight. In fact, quite the opposite, for the judge maintained that where plans evolve, there is still need for an "agreement" between the parties.

[44] Having acknowledged the reality that plans can change, but that an agreement is still needed, the trial judge then notes that there is no need for a pre-arranged plan if the actors are there taking part in its execution. In his words: "A plan or agreement does not require any formality, since an agreement to commit an offence may arise on the spur of the moment." Here again, the trial judge was perfectly correct, merely re-stating a longstanding principle for which there is copious authority. The clearest illustration of this principle is found in ***Mohan v R [1967] 2 All ER 58***, a decision of the Privy Council on appeal from the Trinidad and Tobago Court of Appeal. The appellants, a father and son, were involved in a fight with another group of men, in the course of which the deceased was injured and died. Both father and son were armed with cutlasses but the prosecution could not prove which one inflicted the fatal injury. This did not matter, and the convictions of both for murder were upheld. The Board reasoned that since they were both present on the scene, similarly armed, attacking the same persons, each was present aiding and abetting the other and were guilty as principals, and there was no need to prove that they were acting in pursuance of a pre-arranged plan. While all the facts of the present case may not be identical, the key factors of presence and participation at the same time are, and as such the larger principle is applicable. As Lord Pearson put it succinctly: "A

person who is present aiding and abetting the commission of an offence is without any pre-arranged plan or plot guilty of the offence as a principal in the second degree."[19]

[45] Notably, the ***Mohan*** principle has endured and was recently reaffirmed by the Privy Council. In ***Jogee***, the Board reiterated it plainly: "Secondary liability does not require the existence of an agreement between the principal and the secondary party to commit the offence. If a person sees an offence being committed, or is aware that it is going to be committed, and deliberately assists its commission, he will be guilty as an accessory."[20] Of course, if events escalate then the precise liability of each party may differ depending on their intention, as discussed above, but the point here is that by noting that a plan can evolve on the spot, the trial judge was perfectly correct.

[46] Another critical point made by the learned trial judge in the passage quoted above is that "An agreement can be inferred from the behaviour of the parties." Once again, there is nothing objectionable about this, which merely reflects an evidential approach common to criminal practice and procedure. Since persons do not usually announce or explain their reasons for acting, there is no choice but to deduce their intention from the surrounding circumstances. What is important, however, is that at all times the trial judge remained mindful that in order to establish guilt, the prosecution had to prove the existence of an agreement between the perpetrators. Further, as to the required mental element, he ended this passage by asserting that "essence of joint responsibility is that each defendant shared the *intention* to commit the offence". Intention, not foresight, was the threshold he deemed necessary. Having regard to the entirety of the judge's reasons, therefore, counsel's criticism that he misdirected himself on the principles of joint enterprise is without merit.

[47] As to the application of these principles to discern Maza's intention, here too Mrs. Bradley complained about the trial judge's approach. She contended that the judge did not assess the facts to determine whether the appellant had an intention to kill, for had he done so it would have shown that he no such intention. In support of this submission, Mrs. Bradley argued that Maza did not take part in the murder as the principal and that at no point prior to or during the commission of "the offence" did he encourage or assist his accomplice. The

[19] [1967] 2 All ER 58 at 62.
[20] *R v Jogee and Ruddock* [2016] 2 All ER 1 at [17].

assistance he rendered with the knife took place after the murder and therefore does not count. We unhesitatingly reject this submission. First of all, it is incorrect to say that the trial judge did not assess the facts, for at several points in his reasoning the trial judge considered the evidence led by the prosecution and at the end he specifically recounted those facts which led him to conclude that each accused person was individually responsible. This necessarily would have involved consideration of each participant's respective intention. In any event, as discussed below, the facts led in evidence – both the surrounding circumstances and what Maza admitted to – were sufficient to establish that Maza had an intention to kill.

[48] The error Mrs. Bradley has fallen into is to dissect the entire transaction, creating an artificial division in the periods before and after the murder of the Stuarts. In actuality, these periods merged seamlessly into one event, which was the enterprise of burglarizing the home that escalated into the murder of the Stuarts. Far from being irrelevant, the assistance that Maza admitted rendering, that of accepting the knife from his confederate to wash it, was integral to the enterprise that had, seconds before, involved the murder of the couple.

[49] Further, and considering only what Maza admitted to in his caution statement, there was evidence beyond foresight involving a plan to restrain the householders if they interrupted the objective of stealing; alternatively, as the plan evolved in the moment, Maza's admitted conduct demonstrates full acquiescence in what unfolded and, by extension, an intention to assist his partner. When he supposedly came upon the couple, Maria lay on the floor not moving but shouting, while his partner was then fighting with Richard. Maza stood there and watched his partner stab Richard multiple times, and continued watching as the partner then turned his attention to Maria. Maza did not suggest that he disagreed or was even surprised, nor was he frozen or incapacitated by the horror that was unfolding. Though claiming to be afraid, he demonstrated the presence of mind to return upstairs and complete the job. This reaction strongly suggests a prearranged plan to subdue the householders if interrupted (one was armed with a knife after all) so that they could finish what they started. In other words, Maza – for all his claimed fear – did not run away once violence entered the picture. Instead, he deliberately and clinically continued with the enterprise of stealing, which demonstrates either that the turn of events had been envisaged, hence the continued pursuit by him of his own role, or alternatively, that he was fine with this development which enabled him to continue with the enterprise.

[50] There are several other facts which support the existence of a joint enterprise between the two and Maza's critical role therein. The choice of premises was no accident, as having worked there before Maza was acquainted with the layout well. They set out together and operated in tandem throughout, scoping out the premises, entering together, taking off their shoes to remain quiet, sharing possession of the knife, and leaving together. One or both were armed, indicating that they were prepared for violence to achieve their objective. Nothing fazed either one, nor were they deterred by the arrival of the homeowners, resolutely sticking to their purpose despite the interruption. And though Counsel for Maza would minimize his claimed acceptance of the knife as an act occurring after the murder and of no relevance to his intention, as stated above it is in fact integral to demonstrating his involvement in the enterprise as a whole and his continued participation *after* it had escalated. It was only because his accomplice was incapacitating the homeowners that he could continue stealing, and this he readily did. Thus, on considering these facts as admitted by Maza, we are satisfied that this submission is without merit, and that the evidence supports the inference that Maza intended to kill or to assist in the execution of the plan, even as it escalated into murder.

[51] Finally, as regards assessing what Maza admitted to in his caution statement, it is important to note that the trial judge could properly act on as little or as much of the statement which he accepted as true. Given Maza's efforts to downplay his role, this statement could be considered to be a 'mixed' one, containing what Maza perceived as both inculpatory and exculpatory information. There is no obligation to accept everything in a mixed statement and it is up to the tribunal (whether judge or jury) to do so based on what is believed by them. The trial judge was fully aware of this principle, and cited Lord Lane CJ's well-known comments to this effect in ***R v Duncan*** **(1981) 73 Cr. App. R 395**. The learned trial judge also noted specifically that the incriminating parts of the statement are more likely to be true, otherwise there would be no need to say them, and thus could carry more weight than the exculpatory parts. This means that Maza's account of how the incident unfolded, in which he placed the blame for the stabbing entirely on his accomplice, need not be treated as true. In fact, it is contradicted by the hard evidence, in particular the facts that it was Maza who was in possession of the car and who had possession and control of the bloody knife found under the driver's seat. Indeed, one may question how come the knife ended up there if Maza had been given the knife by his accomplice who was allegedly driving, as it would have made more sense for him to place it under the passenger's seat where he claimed to have been sitting. There are other facts which would suggest a greater role for Maza, such as his familiarity with the

victims and the layout of their house, which he said he knew well. Considered as a whole, therefore, the evidence clearly pointed to both appellants as joint participants in this enterprise as it unfolded, which was the conclusion reached by the trial judge. As the DPP submitted, and we agree, this was a justifiable conclusion. Ultimately, then, whatever view is taken of the caution statement, the trial judge did not misdirect himself on the issue of joint enterprise. Moreover, irrespective of the status of ***Jogee*** in this jurisdiction, the evidence strongly supports Maza's liability as an accessory assisting in the execution of the enterprise and even as a direct principal.

(iii) Fair Trial

[52] Both appellants complained that they did not obtain a fair trial because of the belated disclosure of the DNA report prepared by the expert, Dr Beecher. Although the report was concluded in May 2012, it was not shared with the defence until the trial was well underway in 2018. The appellants submitted that this delay prevented them from obtaining an independent expert to review the findings and guide the cross-examination. This, they argued, prejudiced their defence and prevented them from having a fair trial.

[53] The DPP readily conceded that the delay in furnishing the appellants with the DNA report was "unacceptable". Her explanation was that the report was obtained after the preliminary inquiry, but nonetheless the Crown's intention to call Dr Beecher at trial was no secret as his name was noted at the back of the indictment. The failure to disclose the report was an oversight, as different state counsel had responsibility for the case at different times, and at the case management conference neither defence Counsel alerted the Crown or the Court that they did not have it.

[54] We pause here to observe that this is yet another in a long list of failures that attended this prosecution. We fully accept Ms. Vidal's explanation that the non-disclosure was not deliberate. But that is simply not good enough. Where the liberty of persons is involved, prosecutorial inattentiveness can have devastating consequences – indeed, for a defendant who suffers as a result, that the prosecutors meant well is no consolation. Ultimately, the onus was not on the defence to request the report; rather, it was the Crown's duty to disclose it to the defence in a timely fashion.

[55] That said, the claims of prejudice as a result of this oversight are unsustainable. Scrutiny of the record reveals that once the judge was apprised of the late disclosure, the trial was adjourned to give the defence time to seek an alternative opinion. A lengthy discussion ensued as to how much time was appropriate, in the course of which reference was made to ***Frank Gibson v The State [2010] CCJ 3 (AJ)*** **(CCJ Bar)**, indicating that all the parties were fully aware of the State's responsibility in facilitating a second opinion where evidence of great scientific technicality is involved. As it turned out, Dr Beecher did not testify until August 23, 2018, which was more than a month after the defence had received the report. As regrettable as the delay was, therefore, the defence requested and obtained extended time during the trial to study the report and seek an independent review of it.

[56] Once the trial resumed, however, neither defence counsel indicated an interest in calling an alternative DNA expert, nor did they make an application for the State to fund one for the appellants. In fact, in his closing address Mr. Selgado, who was then appearing for Maza, said to the Court:

> *"It is indisputable that the items found carry DNA traces of blood from both deceased. I am accepting on behalf of the First Defendant that the DNA evidence found on the items retrieved including the bunch of keys, the vehicle, the trace of blood on the brakes pedal, the knife that was allegedly found inside the vehicle and the cap that was found inside the vehicle do bear DNA traces which links those items to the deceased persons. That is showing to the Court that these items could be linked to the scene of the crime and to the deceased persons and there is no argument with that."*

Mr. Selgado's strategy, such as can be gleaned from these statements, was that while the DNA evidence could be linked to the crime scene and even to the deceased, it could not be linked to the appellants themselves.

[57] In the face of this explicit concession, claims at this stage that the appellants were prejudiced by the delay are not persuasive, for not only were they given the time they requested to seek an alternative opinion, they ultimately *chose* not to lead any evidence of that nature. Once the trial resumed, the trial judge could hardly have contradicted counsel and insisted on them pursuing this angle, as he had to operate from the vantage point that counsel was mounting the best defence according to their instructions. This strategy was eventually confirmed by

Counsel for Maza, who in his closing address accepted the accuracy of the DNA evidence. However, that strategy having failed, the appellants cannot now revive a defence not pursued by them at the trial. In light of these considerations, therefore, we are fully satisfied that the prosecution's belated disclosure, unacceptable as it was, did not prejudice the defence.

[58] Also related to the DNA evidence is the issue of whether the trial judge erred by allowing the expert witness to refresh his memory from his report while giving evidence. This objection was raised at the trial on the basis that the report was not made contemporaneously with the analysis, and having been rejected then it has been renewed on appeal by counsel for Lopez. In support of this submission Mr. Banner relied on ***s. 76 of the Evidence Act***,[21] which allows a witness to refresh his memory while testifying, provided that the document used for this purpose was "made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the judge considers it likely that the transaction was at that time fresh in his memory". Ms. Vidal S.C. responded cursorily that the issue of refreshing memory was one in the trial judge's discretion, which she submitted was properly exercised in light of the detailed evidence given by the witness as to how the Report was prepared.

[59] The evidence led, while not altogether precise, indicates that various exhibits were received on March 13 and 21 and then again on April 13, while the report is dated 15 May, suggesting that some 4-8 weeks elapsed in between. When this objection was raised at trial, one of the arguments pressed on the court was that while a delay of a fortnight in writing up a report might not be fatal, anything of 4 weeks and more loses the element of contemporaneity and thus becomes inadmissible under the statute. It appears that some authority was cited in support, though the record is incomplete on this point and those details are missing.

[60] As discussed in ***Francis v The Queen*** **[2009] CCJ 9 (AJ) (CCJ Bar)**, the statutory rule as to refreshing memory – set out in s. 76 and its equivalent in other jurisdictions – is the codification of a common law rule, which emphasised contemporaneity to ensure "freshness". Notably, s. 76(1) does not specify a time period within which the record must be made, stipulating only that it must be done "at the time" or "so soon afterwards", with the objective being that the events being recorded are "fresh" in the maker's memory. In other words, what the provision stresses is the objective of the rule (contemporaneity to ensure freshness) and not

[21] Cap.95, Substantive Laws of Belize 2000.

a pre-set time period. Admissibility is thus left in the discretion of the trial judge, whose yardstick in determining this is whether the writing was done so soon afterwards as to be accurate. Approached with this understanding, the testimony on how the report was generated is therefore crucial.

[61] The witness's testimony on this point was indeed very detailed, as the DPP noted. Dr Beecher explained that the report was prepared from tables, which were appended to it. Significantly, these tables are generated by the computer at the time of the analysis. As the witness described, the sample for analysis is inputted into the computer, which then generates a DNA profile. The resultant information is contained in a table, which is then used subsequently to prepare the report. Critically, therefore, the report is not prepared from memory, but from computer-generated records, which themselves form part of the report and are available for scrutiny. This being the process, there is no margin for human error as the report depends on information generated by a computer *at the time* of the analysis. In these circumstances, the condition of contemporaneity is satisfied, and the trial judge properly exercised his discretion in permitting the witness to refresh his memory from the report.

[62] In sum, despite the delay in furnishing the expert's report, the defence was given time as requested to study it, and not only did they not challenge the findings or seek to have an alternative examination, one of the defence counsel explicitly accepted the results and explored a different line of defence. Moreover, in light of how the report was prepared, the trial judge did not err by allowing the witness to refresh his memory from it. Accordingly, this ground of appeal fails.

(iv) Trial within a reasonable time

[63] The final ground, raised by both appellants, is that their right to a trial within a reasonable time, enshrined in s. 6(2) of the Belize Constitution, was breached by reason of the eight-year delay between their arrest in 2010 and trial in 2018. They were indicted in August 2012 but apparently could not afford legal representation and members of the Belizean Bar were reluctant to assist given that one of the victims was a lawyer and colleague of many. A further problem was the retirement of the judge before whom the matter was assigned, and with these various challenges some six years elapsed after the indictment before the trial got underway. On the face of it, there is no question that this is an unacceptably long time.

However, whether this period amounted to a violation of the appellants' right under s. 6(2) to trial within a reasonable time is an issue of greater subtlety.

[64] Regrettably, given the systemic problem it indicates, there is considerable authority on assessing the impact of delay on the right to a fair trial within a reasonable time. Fortunately, however, this means that we need not belabour the applicable principles, which are now well-known. It is sufficient to note that delay in and of itself does not automatically result in an unfair trial and as both the Privy Council and the CCJ have cautioned, in considering whether there is a breach, the right must be balanced against the public interest in securing justice.[22] In ***Bell v The DPP (1985) 32 WIR 317***, the Privy Council identified the relevant criteria in determining whether an accused person has been deprived of his right to a speedy trial as being: (i) the length of the delay, (ii) the reason advanced for the delay, (iii) the efforts by the defendant to assert his rights, and (iv) the prejudice to the defence, factors they adopted from the US Supreme Court in in ***Barker v Wingo 407 US 514 (1972*)**. Essentially the same factors have been identified by the CCJ, which has also added the important qualification that ultimately, the responsibility for ensuring a timely trial is that of the State.[23]

[65] Where there has been a breach, the court must consider, in granting an appropriate remedy, the stage of the proceedings and the steps that the accused took to complain as against the nature of the crime and the public interest.[24] A permanent stay of further proceedings is wholly exceptional. More recently, in ***Marin v The Queen [2021] CCJ 6 (AJ)***, the CCJ stressed that the remedy for a breach of this right is discretionary, reiterating the same factors previously identified. In a separate judgment, Barrow JCCJ added that it is not the normal course to reduce or suspend a sentence for breach of this right, which would only be exceptionally done to vindicate the constitutional right and uphold the Rule of Law.[25]

[66] In this case, the delay in trying the appellants has been unquestionably long. The affidavits filed by the respondent to explain the delay detailed the efforts to bring them to trial and the obstacles posed by their inability to secure legal representation and the packed trial schedule of the judge before whom the matter was assigned. Even though these explanations

[22] *Flowers v the Queen* [2001] 1 WLR 2396 (PC Jam); *Gibson v AG* [2010] CCJ 3 (AJ) Bar at [57].
[23] *Gibson*, ibid, at [58].
[24] Ibid at [68].
[25] *Marin v the Queen* [2021] CCJ 6 (AJ) per Barrow JCCJ at [110]-[111].

were unchallenged by the defence, they raise more questions than answers. For instance, while there is some indication that the State encountered difficulties in providing counsel (as the appellants themselves could not afford to pay for this), there is no explanation of why the trial did not start at various points from 2012 to 2015 when there were court appointments. By the time this obstacle was overcome, one of the Affidavits filed on this issue listed a series of cases which were prioritised thus precluding this trial for the period 2015 to 2016, but without indicating whether those cases concerned defendants who had been in custody for longer or charges which were more or equally serious. By the time the judge retired, case management took place at the beginning of 2017 but no judge appears to have been assigned for another year. In the face of these serial failings, prosecuting counsel deposed in his affidavit that the delay was not occasioned by the Prosecution, as if that absolves the Crown of responsibility. However, as Wit JCCJ noted in ***Joseph and Boyce v R*** **[2006] CCJ 3 (AJ), 69 WIR 104** (at para 13) "it is for the State to organise their domestic legal system in such a way that it can effectively ensure the right of every person charged with a criminal offence to be tried without undue delay or within a reasonable time". Indeed, obstacles arose following the appellants' indictment, but they were hardly novel. There is no indication that the matter was treated with sufficient urgency after the years began to pile up, and we cannot find otherwise given that the proffered explanations did not elaborate on the specifics of the cases that were prioritised. Having regard, therefore, to the delay having lasted some six years before they could be tried, or eight if one starts counting from the time of arrest, we find that the appellants' right to be tried within a reasonable time was breached.

[67] In determining the appropriate remedy for this breach, the guidelines laid down by previous cases require consideration of the nature of the crime and the public interest involved. As to the former, this was a double murder of exceptional savagery. Each victim was stabbed 25 times, some of which were so serious that death followed swiftly. Reinforcing the brutality of the perpetrators, they took advantage of the weaker and smaller victim, who was brutalised to the degree that her ribs and jaw ended up being broken. The murder of the couple left their four children orphans, irrevocably shattering the family to pieces and traumatising the children forever. As for the impact on society, this is immeasurable, though there is no question that it will reverberate indefinitely given that the degree to which the children will be affected and whether they will ever be able to function normally are as yet unknown.

[68] On the other hand, the evidence in this case was compelling and not affected by the delay. Key elements, such as the Maza's possession of the deceased's car and the bloody knife, and Lopez's possession of the deceased's cell phone and other items belonging to the family, alongside the DNA connecting the items in their possession to the deceased, incontrovertibly point to guilt. Other than being in limbo, the appellants suffered no prejudice from the delay and claimed none in terms of the quality of the evidence led against them.

[69] Accordingly, in balancing these competing factors, we are of the view that any inconvenience the appellants endured by reason of the delay is overwhelmingly eclipsed by the gravity of their crime and its consequences. There is an overriding public interest in meting out an appropriate sanction for a crime of these proportions, which involved the violent murder of two innocent persons in their home, and as by-products, four orphans being left to the mercy of relatives and a society impoverished by the loss of two productive citizens. Weighing all these considerations, it would be unjust to interfere with the custodial sentence. Accordingly, we grant a declaration that the appellants' right to be tried within a reasonable time was breached. We note that when they were sentenced, the appellants were fully credited with time spent on remand. In all the circumstances of this crime, that credit, together with this declaration, comprise a sufficient and appropriate remedy for that breach they suffered by reason of the delay.

Conclusion

[70] Before leaving this appeal, we are constrained to comment on the poor quality of both the investigation and prosecution in the court below. The trial judge in his reasons detailed what he kindly described as "gaps" in the prosecution's case. That turned into a long list of investigative and prosecutorial failings: items recovered during the investigation which were not linked to the deceased or their premises; a cell phone that was identified by its generic features such as make and colour – but not by its sim card or number; a mythical ring that was spoken of but whose relevance was never explained; a slew of physical items that were only shown by way of photographs and not tendered in court. There were conflicts in the evidence that were never addressed, the most puzzling being that of the different items discovered in the car after successive searches. And key participants never testified, such as the lead investigator.

[71] Additionally, we have already discussed in this judgment the impact of other slippages, such as the failure to lead evidence of DNA samples being taken from the appellants, necessary to link up the findings of the expert analysis. It rendered useless the evidence as to the latter – evidence which undoubtedly cost the State to obtain in the first place, as it involved a highly specialised procedure that had to be conducted in another country. Yet, it was formal evidence which would have required little effort to lead. And, once the prosecution had the findings of that expert analysis, there was the delay of six years in furnishing the report to the defence.

[72] Five years ago, in a case originating from this very jurisdiction, Wit JCCJ said in frustration: "Having seen quite a lot of criminal cases coming from the Commonwealth Caribbean, it strikes me how often these investigations seem to be marginal and minimalistic, at least so far as is reflected in the records of the trial courts. They regularly leave many important questions unanswered."[26] His lament fell on deaf ears, for here the minimalistic investigation was coupled with a seemingly less than optimal prosecution.

[73] Nevertheless, despite these failings, the trial judge was able to arrive at guilty verdicts because of the strength of the remaining evidence, a conclusion with which we agree for the reasons outlined in this judgment. We accept only the appellants' contention regarding the delay in bringing them to trial, for which we hereby grant a declaration that their constitutional right to trial within a reasonable time was violated. However, all remaining grounds of appeal bearing upon the conviction having failed, the appeals of both appellants are dismissed, and their convictions and sentences affirmed.

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BULKAN, JA

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HAFIZ-BERTRAM, P

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MINOTT-PHILLIPS, JA

[26] *August and Gabb v the Queen* [2018] CCJ 7 (AJ) (CCJ Bel) per Wit JCCJ at [159].