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

CRIMINAL APPEAL NOS. 1, 2 & 3 OF 2017

MATTHEW GENTLE	**FIRST APPELLANT**
SHERLOCK MYVETTE	**SECOND APPELLANT**
TRANSITO RICARDO "RICKY" TZUL	**THIRD APPELLANT**

AND

THE KING	**RESPONDENT**

Before

The Hon. Madam Justice Hafiz-Bertram	-	President
The Hon. Madam Justice Woodstock-Riley	-	Justice of Appeal
The Hon. Madam Justice Minott-Phillips	-	Justice of Appeal

Appearances:

Mrs. Peta-Gay Bradley for the first Appellant
Mr. Leeroy Banner for the second Appellant
Mr. Anthony Sylvestre for the third Appellant
Ms. Sheiniza S. Smith, Senior Crown Counsel, for the Respondent

Heard: 13 March 2023
Date of Promulgation: 27 April 2023

JUDGMENT

MINOTT-PHILLIPS, JA:

[1] The Appellants, Matthew Gentle **("M Gentle")**, Sherlock Myvette **("Myvette")** and Transito Ricardo "Ricky" Tzul **("Tzul")** were indicted on 15 May 2016 for the murder of James Neal (otherwise called James Young) on 28 July 2009. The trial commenced on the 18 January 2017 before a judge (the Hon Madam Justice Moore) and jury and concluded on the 23 February 2017 when the jury convicted the Appellants for the offence of murder.

[2] A sentencing hearing was held on the 23 March, 2017 following which:

a. M Gentle was sentenced to life imprisonment with eligibility for parole after 30 years with effect from 6th August, 2009;
b. Myvette was sentenced to life imprisonment with eligibility for parole after 25 years with effect from 6th August, 2009; and
c. Tzul was sentenced to life imprisonment with eligibility for parole after 30 years with effect from 6th August, 2009.

[3] At the trial there was no dispute that James Neal/Young was dead or that he died from harm. The primary issue was whether it was the three Appellants who jointly caused the harm that resulted in the death of James Neal/Young.

[4] It was clear from the evidence that whoever killed the deceased (who was then 82 years old) did so with an intention to kill him and without justification for doing so. The evidence of the forensic pathologist was that he observed multiple slash wounds on the neck and left chest area of the body and, in his expert opinion, the cause of death of James Neal/Young was exsanguination (i.e. he bled to death). In the opinion of the doctor derived from his post-mortem examination of the body of the deceased conducted on 1 August 2009, the pressure of the stab wounds fractured his 3rd and 4th ribs. He put the date of death as 28 July 2009.

[5] The Crown's case on the primary matter in issue, as against all three Appellants, rested largely upon the hearsay witness statement of Leon Gentle (a cousin of M Gentle) given on the 18 September 2009, and on circumstantial evidence. Additionally, it included the content of an oral admission M Gentle made when interviewed by PC Moreria at the Benque Viejo Police Station on 28 July 2009, and (as evidence against him only) on a caution statement given by him to the police on 3rd August 2009.

[6] Material aspects of the Crown's case that emerge from the witness statement of Leon Gentle are that on 28 July 2009 Leon Gentle and his cousin, M Gentle, together with Myvette were hanging out at Pastor Gentle's (M Gentle's father) yard in Roaring Creek Village when Tzul

arrived and had a conversation with M Gentle. M Gentle then asked Leon Gentle and Myvette if they wanted to go on a move (meaning go on a robbery). Myvette agreed to go on the robbery. Tzul showed Leon Gentle and Myvette an air pistol chrome with Black handle, an ice pick which had a wooden handle about 6 inches long and a blade of about 8 inches long. Tzul and Myvette decided to go on the robbery and walked away together at about 11am. Five minutes later, Leon Gentle and M Gentle walked towards the new gas station located at the corner of the Western Highway and the Valley of Peace Village road and stopped by the bus stop by the gas station. Sometime around 1pm Tzul and Myvette came up in a gold brown colour taxi car Geo Prism, not tinted. They both got into the taxi which was being driven by Tzul. Myvette was sitting in the rear passenger seat. M Gentle got into the car in the rear passenger seat sitting to the right hand side of Myvette, and Leon Gentle got into the front passenger seat. Upon reaching Pook's Hill Resort, and while on the drive, Myvette opened a blue flip phone took out the battery and threw away the cellular phone on the left side of the road and then threw away the battery. At minutes to 2pm they arrived at the bottom of a high hill before Pook's Hill Resort (where a creek is) and parked the car. They all alighted from the car and Tzul went and opened the trunk of the car. An old man was in the trunk of the car and Tzul told him to come out of the trunk. The old man refused and Tzul pulled him out of the trunk and put him to kneel down in front of them. Tzul grabbed the old man by his shirt (a button down shirt, checkers design of a faded sky blue colour). The old man, while kneeling, said to Tzul, *"I have $150 in my pocket and you can take it and take the car but don't do me anything."* Tzul grabbed the old man from the left-hand side of his pants' waist. The old man's pants were a dark blue colour, like silk material pants. Tzul and M Gentle held the old man and Tzul told Myvette to take the license plates off the car and told Leon Gentle to throw away some plastic bags which contained vegetables and fruits which were in the rear passenger seat of the vehicle. Then M Gentle and Tzul took the old man inside the nearby bushes on the right hand side of the road. While they did so Leon Gentle collected the bag with vegetables and fruits, walked to the opposite side of the road and threw them in the bushes. Simultaneously, Myvette screwed off the license plates and threw them away in the bushes along with a dirty white pillowcase containing some of the old man's documents including some of his identification cards. Leon Gentle and Myvette then went to where M Gentle and Tzul had the old man in the bushes. Whilst there the old man said to Tzul *"I know you along time from when you were small"*, and then the old man punched Tzul in his face. Then Tzul stabbed the old man under his left arm by

his chest area with an ice pick and also on the left side of his neck. The old man fell and Tzul got over him and gave him 10 more stabs on the left side of his chest. The old man started acting like he could not breathe good so Tzul stood with his right foot over the old man's right hand and his left foot over the old man's mouth covering it and then M Gentle continued stabbing the old man on the left side of his chest several times more until the old man didn't move anymore. At this time Myvette started vomiting while Leon Gentle just watched what was happening. The old man was a dark skin male person of about 70 or 80 years old, with white hair, partially bald at the top centre of his head. He had a round belly and was about 5' 5" tall. Leon Gentle was seeing him for the first time. After M Gentle had finished stabbing the old man he and Tzul began to pick up some cohune leaves and covered the old man after which they all walked back to the car and got into it in the same manner as they arrived. Tzul started the car and turned it in the opposite direction heading towards Teakettle Village. This was at about minutes to 3pm that same day (28 July 2009). Tzul drove to Benque Viejo Town, Cayo District without stopping anywhere. They arrived there at about 4pm that day. Tzul drove towards the Bus Terminal in Benque Viejo Town, went into a Chinese shop, made a call and returned to the car and told them he'll leave them there and return for them. Tzul drove off by himself leaving Leon Gentle, M Gentle and Myvette waiting at the Chinese shop. This was after 4pm. At minutes to 5pm that same day at the suggestion of M Gentle they made their way to the Western Border by bus arriving there shortly after 5pm. Leon Gentle saw the gold 4 door Geo Prism car that Tzul was driving parked before the border but Tzul was not there. A Hispanic male, who Leon Gentle, M Gentle and Myvette believed to be a taxi man, tried to drive off the vehicle and when asked by them where he is going with the vehicle he answered, *"A man from across the border send me for the car*". The Hispanic man then walked away leaving the car parked at the border. At about 6pm that same day another Hispanic male person came to where the car was parked and drove it across the border through the immigration checking point. At about 6:30pm Tzul came from across the border, met with them and they caught a taxi that took them to the roundabout in front of the police station in San Ignacio Town. Tzul came out of the taxi and the taxi man took Leon Gentle, M Gentle and Myvette to Santa Elena, Cayo District and left them there. From there they hitchhiked to Esperanza village where each went in their own direction. Tzul was to return to the border on 29 July 2009 and get $1,000 and a .9mm pistol with extended magazine and bullets from the car. From the $150 Belize notes

Tzul bought 3 'guineas' for Leon Gentle and the rest was shared between himself, Myvette and M Gentle.

[7] The caution statement of M Gentle was recorded on 3 August 2009 at 2:12pm. The redacted copy of it left with the jury for its consideration, stated as follows:

> *"On the 28th day of July, 2009, whilst at my Dad house, Mr X [name redacted[1]] who I know for a couple years, despite the fact we do not hang out, came to me and told me that something just slip away from him. I ask him what was he talking about? He said that he had to take a vehicle across the border [redaction[2]]. He said that he was already in a taxi for a person in Belmopan. He said that he can call back the man and have him pick him up again. I told him that I didn't want to go on any move. I told him that I don't mind going with you to the border [redaction[3]] but I do not want to go on any move. He then told me that he and someone else is going for the vehicle [redaction[4]]. They left my Dad home and went. This was in the morning between the hours of 11am and 12 midday. I then went to told my sister that I was going to Esperanza Village to see my girl friend, since we both have a little problem. I went to catch the bus on the Road side. I waited for the bus for about forty-five minutes to about a hour. When I left I saw a vehicle coming towards where I was by the bus stop. I got in the said vehicle with one of my cousins namely Leon Gentle. Mr X [name redacted[5]] started to drive towards Cayo side. When he reached at Tea Kettle Village, at the Pook Hill intersection he turn off the Road. He told me he had to go through the back Road because he had to kill someone. I told him I don't want to be involved in that so I will meet you at the border. Me and my cousin Leon Gentle jump out of the car at Pook Hill intersection*

[1] 'Ricky Tzul' is redacted name replaced by 'Mr X'
[2] 'for some guys' are the redacted words
[3] 'for the gun' are the redacted words
[4] 'who was a dark skin male person' are the redacted words
[5] 'Ricky Tzul' is the redacted name replaced by 'Mr X'

and catch the next bus. We went straight to Benque sit at a bar and waited for Mr X [name redacted[6]]. We stayed there for about four to five hours, waiting for him. He never showed up. Me and my cousin jump into a taxi and headed to the border. On reaching there we waited for another two hours for him. After a little over the two hours he come back and said that the Spanish who was dealing with him, since he was going to trade the car he was driving [redaction[7]] said to him, that they won't give [redaction[8]] caused the police impound the vehicle. I told him that I will jump in a taxi and go home. I caught a taxi and come home to Esperanza Village. I did not have any idea that they would have kill that man."

[I have footnoted the words that were redacted from the copy of the caution statement left with the jury.]

[8] The evidence adduced by the Crown against M Gentle also included an oral admission by him made to Police Constable Moreira when interviewed at the police station that he sent the car across the border to be sold.

[9] As pointed out by the trial judge in her summation to the jury, M Gentle, in his caution statement, denied that he had anything to do with the killing of the deceased and also denied being present when it happened. He elected to give an unsworn statement from the dock in which he denied killing the deceased. He said that on the 28th July 2009 he did not plan or agree to kill the deceased.

[10] The appellant Myvette also chose to give an unsworn statement from the dock in which he said that he did not kill the deceased. He also said that he did not plan, agree or assist in the killing of the deceased.

[6] 'Ricky Tzul' is the redacted name replaced by 'Mr X'
[7] 'for the guns' are the redacted words
[8] 'any guns' are the redacted words

[11] The appellant Tzul, also by way of an unsworn statement from the dock, said he did not rob, murder or kidnap the deceased.

[12] All three appellants have appealed their convictions and sentences. Below are the grounds of appeal together with an indication of the appellant(s) to which each ground relates:

a. The learned trial judge (LTJ) erred in admitting the statement of Leon Gentle dated 18 September 2009 who was deemed a hostile witness without first determining whether the hearsay evidence could safely be held reliable; [M Gentle, Myvette & Tzul – the latter as part of his ground at e below].

b. The LTJ ought to have given a warning to the jury in directing them on the "oral admission" to PC Moreria evidence [M Gentle - who conceded at the hearing before us that no warning was necessary in this instance] and further the LTJ erred by admitting "oral admission" of the Appellant without first ensuring compliance with section 90 of the Evidence Act; [M Gentle].

c. The verdict is against the weight of the evidence. [M. Gentle].

d. The LTJ's direction to the jury that, *"I tell you in the law that such irregularities do not mean that the statement could not be put into evidence, had that been the case I would not have allowed it in evidence"*, constituted a material irregularity and denied the Appellant a fair and impartial hearing. [Tzul].

e. The LTJ erred in failing to withdraw the case from the jury at the close of the prosecution's case resulting in a miscarriage of justice in the trial of the Appellant. [Tzul].

[13] The trial of the Appellants commenced in the court below with the holding of a *voir dire* regarding the admissibility of statements given to the police by the Appellants.

[14] At the end of the *voir dire,* and after the trial judge heard and considered the submissions of counsel, the caution statement of M Gentle dated 3 August, 2009 (with redactions by the judge to excise material capable of implicating anyone other than him) was admitted into evidence culled from the unredacted version that was admitted into evidence in the *voir dire*. The statement of Appellant M Gentle is partly incriminatory in that in it he puts himself in the vehicle with his cousin Leon Gentle and an unnamed person on a mission to kill someone on the 28th July 2009.

[15] Leon Gentle, a witness for the Crown and a relative of M Gentle, at the request of Crown Counsel was permitted by the judge to be treated as a hostile witness after he recanted at trial the content of the witness statement he gave. His witness statement that was inconsistent with his oral evidence was admitted in evidence as a hearsay statement pursuant to section 73A of the Evidence Act, which states:

> *73A Where in a criminal proceeding, a person is called as a witness for the Prosecution and—*
>
> *(a) he admits to making a previous inconsistent statement; or*
> *(b) a previous inconsistent statement made by him is proved by virtue of section 71 or 72,*
>
> *the statement is admissible as evidence of any matter stated in it of which oral evidence by that person would be admissible and may be relied upon by the Prosecution to prove its case.*

[16] A point being made by counsel Sylvestre on behalf of Tzul (to which I'll return later in this judgment) was that while the caution statement of M Gentle was only admissible as against him, the statement set out a chronology that would appear to align with what Leon Gentle, the hostile witness, chronicled in his statement. I understood counsel Sylvestre to be saying this alignment was sufficient to allow the jury to use a process of "*marrying"* the two statements to fill in the material redacted from the caution statement of M Gentle. The result of that, counsel

submitted, was (in effect) the legally prohibited use by the jury of the caution statement of M Gentle against his co-accused, Tzul.

Was the LTJ correct in admitting the hearsay statement of Leon Gentle into evidence and in failing to withdraw the case from the jury at the close of the prosecution's case?

[17] Ground *a* of appeal (as set out in paragraph 12 a of this judgment) is common to all three appellants and is conveniently dealt with first. All three appellants relied on the decision of the Caribbean Court of Justice (CCJ) in ***Japhet Bennet v R***[9] as authority for their submission that the admission by the trial judge into evidence of the hearsay statement of Leon Gentle was an error in that she did not, prior to doing so, properly assess whether its prejudicial effect outweighed its probative value, or it was unfair to the appellants in the sense of putting them at a disadvantage by depriving them, unfairly, of the ability to defend themselves.

[18] In the ***Bennet*** case it was the view expressed by the CCJ[10] that,

> *"During a trial, particularly a jury trial, the judge in Belize has basically two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it should be left to the jury. The first occasion occurs when the hearsay evidence is introduced, and the judge must decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurs when at the close of the prosecution case a no case submission is made, and the judge must decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, is clear in his mind that the hearsay evidence cannot in reason safely ever be held to be reliable, the judge must exclude it and, where the prosecution's case, like here, wholly or substantially rests on that evidence, the judge should stop the trial and direct the jury to acquit the accused. If, however, there is a reasonable possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable, the judge should in principle admit the evidence. This is the more so, of course, if at that stage it is already clear that this test is or will be met.*

[9] [2018] CCJ 29 (AJ) 1 (Judgment delivered 17 October 2018)
[10] By majority judgment delivered by the Hon Mr Justice Wit, at paragraphs 27 & 28.

> *Where at the close of the prosecution case a no case submission is made, which, one can assume, will be standard in cases like these, the final test is whether the evidence thus far produced could safely be held to be reliable "as it is for the jury to decide whether in fact the evidence is reliable or not." This is what in the Canadian terminology could be called the "threshold reliability" (although it is there applied to the admissibility issue). If that test is met, the judge will leave the evidence for the jury, after having given them the necessary directions, to consider its "ultimate reliability." If it is not met, the judge should conclude that the evidence is inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge will uphold the submission and direct the jury to acquit the accused.*

The CCJ in that case decided that the reliability threshold was not met and so allowed the appeal and quashed the conviction.

[19] In fairness to the trial judge all counsel have acknowledged that there was no objection to her decision to admit the statement of Leon Gentle in evidence and that, at the time she gave her directions to the jury, the ***Bennet*** decision had not yet been handed down by the CCJ.

[20] ***Bennet*** provides guidance, particularly in a judge and jury setting (such as obtains here) on the circumstances a judge should take into consideration in determining whether the prejudicial effect of a hearsay statement that falls within the exceptions to the general inadmissibility of such statements outweighs its probative value. I do not understand the decision as being exhaustive of the circumstances to be taken into account in that assessment. Rather it identifies the reliability potential of the hearsay statement as a factor to be considered by the judge in determining whether it should at all be left to the jury for consideration as evidence. ***Bennet*** tells us that the reliability potential of the hearsay statement is an important factor in determining the fairness of the judge leaving it to the jury for them to assess its ultimate reliability (i.e. whether it is, in fact, reliable).

[21] In this case the evidence against the three Appellants of murder by common design rested wholly or substantially on the hearsay evidence of Leon Gentle contained in his hearsay witness statement given by him to the police on 18 September 2009. If the statement could not pass the

threshold test for reliability, the case of common design would have been so inherently weak as to warrant it not being left to the jury for its consideration.

[22] It follows both from the trial judge's admission of the statement into evidence, and from the absence of objections from Defence counsel to its admission, that neither counsel nor the Judge were, at the point when the statement was admitted into evidence, of the view that the hearsay evidence could never be held to be reliable. It remained to be seen thereafter whether the judge's assessment of that would change between the time when the hearsay statement of Leon Gentle was admitted in evidence and the close of the case for the prosecution. In the circumstances which happened, her assessment of that did not change.

[23] The ground of appeal (common to all appellants) that the trial judge erred in leaving the hearsay statement of Leon Gentle to the jury succeeds or fails in my view upon a determination of whether the material before her at the close of the case for the prosecution eroded the threshold reliability of the hearsay statement of Leon Gentle.

[24] At the end of the day the point made in ***Bennett*** is that, prior to leaving the hearsay statement with the jury for it to determine whether or not it is reliable, the trial judge must be satisfied (upon the evidence adduced up to the close of the case for the prosecution) that the hearsay evidence in issue is capable of safely being held to be reliable[11]. As there was no express statement by the trial judge saying so, one is left to look at the material before her to determine whether it justified her leaving the hearsay statement of Leon Gentle with the jury for it to determine whether it was reliable and, if so, the extent to which the jurors accepted the content or any part of it as evidence of the facts stated.

[25] In my view there was adequate material before the trial judge at the close of the case for the prosecution to justify her leaving the hearsay statement of Leon Gentle with the jury for it to consider whether it was reliable.

[11] ***Bennet*** at paragraph 18

[26] The following statement from ***Bennett*** [12] was used by counsel Smith for the Crown to underpin her submission to us that one of the ways in which threshold reliability is capable of being established is,

> *"when there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy "substantive reliability"). Whether this is the case may depend on the circumstances in which the statement was made and on evidence (if any) that corroborates or conflicts with the statement."*

[27] At this juncture I must express my appreciation for the detailed comparison analysis provided to us by counsel Smith for the prosecution of the content of the hearsay statement of Leon Gentle with numerous pieces of circumstantial evidence before the court. In my view that analysis shows the material before the Court at the close of the Crown's case would have satisfied the judge that the hearsay statement of Leon Gentle was capable of being considered reliable prior to her leaving it with the jury for it to make that determination.

i. **Hearsay statement**: Leon Gentle tells us that after the killing of the deceased on the 28th July, 2009, Tzul drove the deceased's car to the Belize/Guatemalan border and that he and M Gentle went to the border.

   Circumstantial or evidentiary guarantee of the statement's trustworthiness: That the deceased's vehicle was indeed at the Belizean/Guatemalan border on the 28th July, 2009 was established cumulatively through the evidence of Ronald Young [p. 2519 to 2520 of the Record], Octavio Chan, Ismael Westby and Insp Patt.

ii. **Hearsay statement**: Leon Gentle said that around 1pm on the 28th July, 2009 when he saw Tzul driving the deceased's car it had on license plates and was not tinted. He says further that Sherlock Myvette, the Second Appellant, removed the license

[12] At paragraph 24

plates from the car and threw them out separately in the area where the deceased body was recovered.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Independent confirmation of this was found in the testimony of Inspector Patt [Vol. 6, p. 1903 L 9-13 of the Record] and the SOC technician Manzanero who observed and recovered the license plates at two different locations on the scene . [See also Vol. 1A p. 2504 of the Record.] Ronald Young (son of the victim) confirmed that the license plates found on the scene were those for his father's vehicle : [Vol 1A, p. 2519 of the Record].

Further, the deceased's car was observed without license plates at the border on the 28th July, 2009. On the evidence of Octavio Chan, when the gold car crossed over the border, it had no license plates: [Vol. 5, p.1588 L. 20]

iii. **Hearsay statement**: Leon Gentle' statement said that the license plates were taken off at the scene where the body was left at Pook's Hill. Leon Gentle said that the deceased's body was left in the area of Pooks Hill and was covered with cohune leaves by Tzul and M Gentle.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: The body of the deceased was indeed found where Leon said and covered with cohune leaves as he said: [See Vol 6,P. 1901-1902 of the Record and Vol 1A, p. 2503 of the Record L. 18]

iv. **Hearsay statement**: Leon Gentle said that he threw away, at the scene, a plastic bag with vegetables that was on the rear seat of the car.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Fruits and vegetables were found on the scene about 50 feet from the body of the deceased as testified to by Insp Patt and SOC Manzanero : [See pp. 1903 and 2504

of the Record]. These vegetables matched the same kind of vegetables Ms. Ancinette Twist said she placed in the deceased's car on the 28th July, 2009:[See Vol. 5,p. 1581 L 20-21, p 1582 L 5-6 of the Record]

v. **Hearsay statement**: Leon said that the Second Appellant had put some identification cards belonging to the deceased in a dirty pillow case and that Myvette had thrown these away on the scene some distance from the deceased's body.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: This was also found at the same scene by the police as testified to by Insp. Patt [see. Vol. 6, P. 1903 of the Record] and SOC Manzanero [Vol 1A, p. 2505 of the Record.]

vi. **Hearsay Statement**: Leon Gentle stated that he along with M Gentle and Myvette headed to the Western Border because they knew Ricky Tzul was heading there.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: That Leon Gentle, Matthew Gentle and another dark skin male person were in fact at the Belize/Guatemala border on the 28th July, 2009 sometime after 5 pm was confirmed by PC Morriera. [See Vol 1A]

vii. **Hearsay Statement**: Leon Gentle mentions that he and M Gentle went to M Gentle's father's house in Roaring creek and that M Gentle's father was a pastor.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Insp Patt confirmed that he knew M Gentle's father as a pastor and that he was from Roaring Creek. [See Vol.6, p. 1915 of the Record.]

viii. **Hearsay Statement**: Leon Gentle said Tzul had a chrome pistol and an ice pick.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Forensic examination of the body revealed that the deceased suffered stab wounds by an ice pick. [See: Vol 6, p. 1844 L 13-17, p.1845 L 7-10, p. 1846 L. 14-16]

ix. **Hearsay Statement**: Leon Gentle also said that he saw Tzul stab the old man with an ice pick under his left arm by the chest area and on the left side of his neck and give him about 10 more stabs before handing over the ice pick to M Gentle who inflicted multiple further stab wounds with the ice pick to the left chest of the deceased.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Stab wounds (37), which had characteristics of an ice pick were observed on the left chest of the deceased by the Forensic doctor [see: Vol 6: p. 1842 L. 5-6, p. 1844 L. 13 to L. 10 on p. 1845, p. 1846 L. 14-16 of the Record].

The forensic doctor said that they were multiple stab wounds to the deceased's neck [See Vol.6, p. 1844 L. 8-9 of the Record].

x. **Hearsay statement**: Leon Gentle said that the deceased's car was at the Western (Belizean/ Guatemalan) border.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Mynor Carrias said that he was asked to drive the vehicle over from the Belizean border over to Guatemala: [See Vol. 5 p. 1590 of the Record.]

xi. **Hearsay statement:** Leon Gentle said that at the Belizean/Guatemalan Border he saw a Hispanic male person at the deceased's car. He said that he, Myvette & M Gentle approached the Hispanic male person.

Circumstantial or evidentiary guarantee of the statement's trustworthiness: Through the evidence of Octavio Chan, the jury would have heard confirmatory

evidence that on the same 28th July, 2009, while at the Belizean Border working the barrier, he saw three dark in complexion male persons speaking to "Tentacion" (Mynor's father) in the parking lot on the Belizean side of the border: [Vol. 5, p.1599 of the Record L. 7.] Leon Gentle, M Gentle and Myvette were three dark skin male persons. Further, the evidence of PC Moriera confirms that it was M Gentle, Leon Gentle and another dark skin male person who he saw at the Border on 28th July, 2009 around 5:45 pm [Vol. 1A p. 2488 of the Record] . Also these three dark skin persons were the only persons who fitted the description Chan had given to him.

[28] On the basis of the extent of the circumstantial or evidentiary guarantees of the statement's trustworthiness (of which the above are a selection of examples) the Court is of the view as regards the ground of appeal contending that the trial judge erred in admitting the statement of hostile witness Leon Gentle without first determining whether the hearsay evidence could safely be held reliable, fails because the hearsay statement of Leon Gentle surpassed the threshold reliability test and was properly admitted in evidence by the judge and left to the jury for it to consider whether it was, in fact, reliable. To the extent that appellant Tzul's ground of appeal contending that the trial judge was wrong in not withdrawing the case from the jury at the close of the prosecution's case is based on her admission into evidence of the hearsay statement of Leon Gentle, that ground also fails.

[29] It is clear from her charge to the jury that the trial judge did a remarkable job in making it clear to the jurors that it was for them (not her) to determine the reliability of the hearsay statement of Leon Gentle. This is what she said,

> *"I direct you to treat the statement of Leon Gentle with special caution. I've been saying all along it's only if you accept what's in the statement can you use it as evidence against the three (3) accused, but I'm directing you in law to treat the statement with special caution because it was possible that when he gave the statement if indeed he gave it, it was to help himself and if that is the case then you have to decide if it*

was true, despite everything that I said about the details, you have to put all of this together and decide for yourself if you accept that he gave the statement and if you accept that it was true even and it's possible, even if he was trying to help himself, it is still possible he went to the police and told them the true of what he said that day, but it's also possible that he didn't and so, you have to decide if you accept that he gave the statement and accept the truth of the statement.

Treating the statement with special care does not mean you can't accept it as true that is up to you, but before doing so, you must make sure you have given careful thought about the statement and the circumstances in which Leon Gentle gave it, if you believe he did give it.

The DPP said that the charges were not discontinued by her office in exchange for his statement. So he still had a charge over him when he gave the statement. He was not promised nor given anything in exchange for his statement according to the DPP. Inspector Westby said Leon Gentle gave the statement freely and without hesitation in his office, without any pressure or force. If you accept the testimony of the DPP and Inspector Westby, this may help you accept the contents of the statement as coming from Leon Gentle as being true, but again you must treat it with special caution.

You should apply your everyday experience throughout your entire deliberation, your experiences as people of this society to help you decide who and what you believe. Your heard Leon Gentle testify, you saw him on the witness stand, you must determine if you believe him or not when he says he gave the police a different statement than what was read in court. ***If you believe what he said in court and do not accept that he made the statement to the police in which he details the killing of the deceased by the first and third accused and details going to the***

> ***Western border with the first and second accused, then you cannot feel sure about his evidence, and if you do not feel sure, that you will be unable to convict any of the three accused*** *[my emphasis].*
> *If, on the other hand, you accept that Leon Gentle made the statement to the police and you accept that what he said in the statement is true as to the incidents on the 28th July, 2009 and this may help you conclude that the first and third accused participated in stabbing the deceased and that the second accused participated by helping the third accused bring the deceased to Pook's Hill Road scene where he would be killed.*
>
> *The reason the Prosecution brought Leon Gentle's evidence to you is because they are saying he was an eyewitness when the deceased was fatally stabbed, so it is evidence if you accept it that will help you decide if you believe the three (3) accused jointly participated to cause the death of the deceased or not ...*

[30] On the assumption that they heeded those directions given to them by the trial judge it would follow from the jury having found the three appellants guilty of murder that the jurors considered the hearsay statement of Leon Gentle to be both reliable and accurate.

Did the LTJ err by admitting "oral admission" of M Gentle without first ensuring compliance with section 90 of the Evidence Act?

[31] I next consider whether the trial judge admitted the "oral admission" of M Gentle without first ensuring compliance with section 90 of the Evidence Act and, if so, whether she erred in so doing. This ground of appeal (set out in the second part of paragraph 12 b above) was advanced by M Gentle and, as originally framed, it urged us to determine, additionally, that the trial judge ought to have given a warning to the jury in directing them on the "oral admission" evidence. However, at the hearing before us counsel Peta-Gay Bradley for appellant M Gentle, said that having reviewed the written submissions made on behalf of the Respondent, she was conceding that no warning was necessary in this instance. In the light of that concession, we move along

to consider the limb of that ground that is set out in the heading in bold directly above this paragraph.

[32] Section 90 of the Evidence Act (the codification of an existing rule of English criminal law[13]) states,

> *(1) An admission at any time by a person charged with the commission of any crime or offence which states, or suggests the inference, that he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and voluntarily made.*
>
> *(2) Before such admission is received in evidence the prosecution must prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority.*

[33] In giving her directions to the jury the trial judge said,

> *"According to PC Godfrey Moreria, who was posted at the Benque Viejo Police Station in July 2009, he saw the first accused, Matthew Gentle at the Western border sitting at a bar named Champon on the 28th of July with two other dark skinned males.*
>
> *PC Moreria said he had been told certain things about a vehicle…you also know that Mr Chan said he told certain things to PC Moreria, and*

[13] ***Ibrahim v R*** [1914] AC 599 at 609, [1914-15] All ER Rep 874 at 877, Per Lord Sumner: "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE."

PC Moreria said he was also given a description of three (3) persons by the border patrol officer, Octavio Chan.

PC Moreria testified that the three (3) men he observed sitting at the bar were the only dark skinned at the bar and this is why he thought they were the persons described to him. When the first accused and two other men left the bar, if you accept that the first accused was one of these persons PC Moreria asked them to come to the police station where he searched the person he said was Matthew Gentle and the two (2) others. ***He said Matthew Gentle mentioned that he sent the car across the border to be sold*** *[my emphasis] but nothing came of it at the time. PC Moreria had known Matthew Gentle previous to the 28th July and he identified him in court.*

…

Ms Shoman, the lawyer for the first accused suggested to PC Moreria that the first accused made no such comment about sending the car to be sold *[my emphasis]. PC Moreria however stuck to his testimony that this was indeed said by her client…*

The Prosecution is asking you to draw several conclusions to make several inferences from these testimonies, they're asking to draw the conclusion that the three accused, but at least the first accused was at the Western border on the 28th of July, 2009. They're also asking you to draw the conclusion that on the 28th of July, 2009, the three accused but especially the first accused were at some point in possession of the gold brown Geo Prism car that belonged to the deceased.

They're asking you to infer this, to conclude that the three accused met up at the border and had brought the vehicle to the border in order for

it to be traded or sold, this is the vehicle that belong to the deceased. The Prosecution is asking you to reach these conclusions based on what Ronald Young said, identifying the vehicle, PC Moreria said in terms of having seen Matthew and Leon Gentle at the border in connection with the vehicle, in connection with what Mynor Carrias said and Octavion Chan said about the vehicle passing over the border.

If you believe what each of these witnesses said, then you must decide if the conclusions the Prosecution wants you to reach are the only reasonable conclusions you can reach based on the evidence. If so you are free to draw those conclusions. If you can draw an inference as I said earlier favourable to the accused it is your obligation to do so."

[34] The words in bold that are underlined in two places within the extract above refer to the oral admission that is the subject of this ground of appeal.

[35] In responding to this ground of appeal counsel Smith pointed out that there was no objection by the counsel for M Gentle at the trial to the admission of the utterance in evidence and submitted, further, that the oral admission did not contravene the requirements of section 90 of the Evidence Act. She relied upon this court's decision in the case of ***Veola Pook v The Queen***[14]**.**

[36] In that case (as here) the court was considering whether the trial judge erred in law when he accepted into evidence the alleged oral confession made by the appellant to the arresting officer without first adverting his mind to section 90 of the Evidence Act to ensure that it was freely and voluntarily made. The circumstances were similar in that, in that case (as here):

a. The appellant denied saying the words comprising the oral confession;

[14] Judgment delivered on 14 March 2014.

b. there was no challenge to the voluntariness of the self-inculpatory statement relied upon by the prosecution,

c. the prosecution did not lead evidence regarding the circumstances surrounding the making of the alleged statement for the purpose of establishing to the judge's satisfaction, as section 90 (2) requires, it was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of any person in authority, and

d. no *voir dire* on the admissibility of the statement was held at the trial.

[37] In delivering the judgment of the Court of Appeal (Sosa, P., Morrison & Mendes, JJA) Morrison, JA said the following:

> *"It therefore seems to us to be clear that, in the absence of a challenge to the voluntariness of a self-inculpatory statement which is relied on by the prosecution, it is not necessary for the trial judge to conduct a voir dire in order to determine the admissibility of the statement. But section 90(2) makes it equally clear, it nevertheless remains the duty of the prosecution, before the statement is received in evidence, to "prove affirmatively to the satisfaction of the judge that it was not induced by any promise of favour or advantage or by use of fear, threat or pressure by or on behalf of a person in authority". So how then, in a case such as this, in which there was no challenge to the voluntariness of the statement, is the judge to be satisfied that the requirements of section 90(2) have been met? The answer to this question will depend, in our view, on the particular circumstances of each case.*
>
> *In the usual case, it will be for the prosecution to lead evidence in examination-in-chief regarding the circumstances surrounding the making of the alleged statement, for the purpose of establishing to the*

judge's satisfaction that, as section 90(2) requires, it was not induced by any promise or favour or advantage or by the use of fear, threat or pressure by or on behalf of any person in authority. It is by this means, in our view, that what Mottley JA referred to in ***Matu***[15] *as "the appropriate evidential foundation for the receiving of [the] statement into evidence" will have been laid, prior to the introduction of the statement in evidence. In the absence of any such challenge to the statement's admissibility, no formal ruling will be required, once such evidence has been given in a manner that enables the judge to be satisfied that the requirements of section 90(2) have been met.*

There can be no question (and the Director did not suggest otherwise) that this is the preferred approach and the one which ought to have been adopted in this case. But we are also clearly of the view that, despite the fact that counsel for the prosecution did not adopt this approach..., this was a case in which affirmative proof of the voluntariness of the statement allegedly made by the appellant was available from all the circumstances described by him. [The police officer] gave evidence of exactly what had taken place immediately before the admission was made; and it was clear from that evidence that there was nothing done by him that could amount to an inducement or intimidation of any kind. On that evidence the statement attributed to the appellant by [the police officer] was plainly unprompted and spontaneous. In these circumstances, in the absence of any suggestion that it was not, [the trial judge] was in our judgment justified in proceeding on the basis that the statutory conditions on its admissibility had been met."

[15] ***Lisandru G Matu v R*** (Criminal Appeal No 2 of 2001) judgment delivered 25 October 2001.

[38] Morrison, JA in ***Veola Pook***[16], alluded to the judgment of the Privy Council (delivered by Lord Bridge) in the Trinidadian case of ***Ajodha v The State***[17] indicating their understanding of the principles applicable in situations in which a question may arise as to the respective functions of judge and jury in relation to incriminating statements tendered in evidence by the prosecution. The Board thought it would be helpful if they indicated their understanding of the principles applicable by considering how the question should be resolved in four typical situations most likely to be encountered in practice. Those four typical situations are:

> *"1. The accused admits making the statement (orally or in writing) but raises the issue that it was not voluntary. This is a simple case where the judge must rule on admissibility, and if he admits the evidence of the statement, leave to the jury all questions as to its value and weight.*
>
> *2. The accused… denies authorship of the written statement but claims that he signed it involuntarily. Again…the judge must rule on admissibility, and, if he admits the statement, leave all issues of fact as to the circumstances of the making and signing of the statement for the jury to consider and evaluate.*
>
> *3. The evidence tendered or proposed to be tendered by the prosecution itself indicates that the circumstances in which the statement was taken could arguably lead to the conclusion that the statement was obtained by fear of prejudice or hope of advantage excited or held out by a person in authority. In this case, irrespective of any challenge to the prosecution evidence by the defence, it will be for the judge to rule, assuming the prosecution evidence to be true, whether it proves the statement to have been made voluntarily.*

[16] At paragraph 29 of the judgment
[17] [1981] 2 All ER 194 at 201 (letter h) to 202 (letter c)

> *4. On the face of the evidence tendered or proposed to be tendered by the prosecution, there is no material capable of suggesting that the statement was other than voluntary.* ***The defence is an absolute denial of the prosecution evidence. For example, if the prosecution rely on oral statements, the defence case is simply that*** *the interview never took place or that* ***the incriminating answers were never given*** *[my emphasis]; in the case of a written statement, the defence case is that it is a forgery. In this situation no issue as to voluntariness can arise and hence no question of admissibility falls for the judge's decision. The issue of fact whether or not the statement was made by the accused is purely for the jury."*

[39] Given the suggestion of counsel for M Gentle to PC Moreria that he made no such comment about sending the car to be sold, it seems to me (based on the words I've emphasized in bold in situation number 4 above) that the circumstances of this case fall squarely within the fourth of the typical situations adumbrated by the Privy Council in ***Ajodha.*** Indeed, that is the category referred to by Morrison, JA in this court's judgment in ***Veola Pook***. Having referenced that fourth situation, however, Morrison, JA stopped short of indicating how it lined up with the issue in that appeal and, instead, went on to determine that appeal by finding the trial judge justified in proceeding on the basis that the statutory conditions of the admissibility of the oral statement had been met.

[40] As is demonstrated by her direction to them on this issue, in this appeal the trial judge left the alleged oral admission of M Gentle with the jury as an issue of fact for it to consider whether it was made by the accused.

[41] Whether the statutory conditions were met because the voluntariness of the statement made by the appellant was affirmatively proved from all the circumstances described by the police officer (in the same way as Morrison, JA said they were in paragraph 33 of ***Veola Pook***), or because no issue of voluntariness can arise in this situation (as stated by the Privy Council in situation number four in ***Ajodha***, - my personal preference on these facts), the end result is the

same; with the consequence being that the oral admission was properly admitted into evidence by the trial judge and that ground of appeal, accordingly, does not succeed.

Did the LTJ's direction to the jury that, *"I tell you in the law that such irregularities do not mean that the statement could not be put into evidence, had that been the case I would not have allowed it in evidence",* constitute a material irregularity and deny the Appellant Tzul a fair and impartial hearing?

[42] This ground of appeal (as set out at paragraph 12 d above) was advanced before us by counsel Sylvestre for the appellant, Tzul. His submission was that in making this comment, the LTJ committed a fundamental breach of the trial process because it was a cardinal breach for a judge to disclose to the jury that she had considered in a *voir dire* whether the statement was freely given.

[43] Interestingly, the admission into evidence of the caution statement of M Gentle is not a ground of M Gentle's appeal. He has no complaint before us that its admission into evidence was unfair. Notwithstanding that (and I'm not to be understood as saying I can ignore that fact), and (if needs be) for the sake of argument, what I understand counsel Sylvestre to also be urging upon us is that the admission of the caution statement of M Gentle into evidence is unfair as against the appellant Tzul. This, he contended is because:

a. when considered by the jury alongside the witness statement of Leon Gentle (the admission into evidence of which statement he contended was an error because the judge gave no indication of having considered whether it was capable of being reliable prior to doing so) the similarities in the narratives of the documents made it likely that the jury would use the content of the witness statement of Leon Gentle to fill in the redactions made by the trial judge to the caution statement of M Gentle. Those redactions relate to Tzul and ought to form no part of the case against Tzul. [This being the point set out earlier in paragraph 16 above].

b. The judge improperly influenced the jury by revealing to it that she had determined that the caution statement of M Gentle was voluntarily given by him and not extracted by the police through threat or oppression when it fell to the jury to decide whether that was so uninfluenced by the judge's view of the matter.

[44] I find it helpful to consider the context of the directions that the words complained of by appellant Tzul (in bold which I underline below) form a part. This is how the LTJ directed the jury in relation to considering the caution statement of M Gentle:

> *"The prosecution put into evidence the caution statement from the first accused [M Gentle]. It is a statement he gave to the police in San Ignacio on the 3rd of August shortly after he was detained by the police for this offence.*
>
> *The Crown did not present the contents of that statement for you to accept it as true necessarily but rather for you to see how the first accused reacted what he said when he was initially confronted with this crime by the police. It is your duty to decide if you believe any of the contents of the caution statement from the first accused, and how much weight if any to give it.*
>
> *It is important when deliberating over this statement that you know and keep in mind that the evidence of one accused may not be used against his co-accused ….*
>
> *This means that the caution statement of M Gentle to whatever degree you believe it if at all and to whatever weight you give it is only evidence against the first accused, his statement is not evidence in any way against the second or third accused. It is very important that you keep this uppermost in your mind when looking at the caution statement of the first accused. It is the law that the statement of one accused may*

not, cannot and must not be used against his co-accused, it may only be used against himself.
You will have the caution statement with you in the jury room and you will see that parts of the statement have been deleted. When the statement was read to you by Sgt. Bonilla the recording officer of that statement, he said "blank" in certain spots that had been deleted. This was done so that you do not have anything in front of you that is not lawfully admissible in this trial.

I am directing you now in the strongest possible way, not to speculate about what those deleted portions of the statement are or who Mr X may be, because you will see in parts that there is a Mr X, you may not speculate, you may not guess, you may not even consider what the deletions in the statement are or what they are referring to or who they may be referring to.

You may only consider the statement in relation to Matthew Gentle, the first accused and this is the statement from him.

…

The lawyer for Matthew Gentle also stated there were several irregularities in the taking of that caution statement from the first accused and Sgt Bonilla who recorded the statement himself admitted in his testimony that yes, there were some irregularities. I tell you in the law that such irregularities and he took responsibility for it.

I tell you in the law that such irregularities do not mean that the statement could not be put into evidence, had that been the case I would not have allowed it in evidence*, but these problems must be looked at by you, you should certainly consider the irregularities raised*

by the defence, such as the fact that the Justice of the Peace only signed the statement once on the very last page rather than on each page as is the usual practice in recording caution statements.

Read the statement and decide what parts of it, if any, you believe and how much weight you would give Matthew Gentle's caution statement. ***If, having heard all the evidence, and considering all the circumstances in which the caution statement was given, you find that it was, or even may have been, obtained by oppression or any other improper means by the police, then you must disregard the statement, but that is a matter for you to decide if you believe the statement was given because of oppression or otherwise improperly obtained.***

If you don't believe that Matthew Gentle gave the statement because he was being pressured in some way by the police or it was improperly obtained otherwise then you can give whatever weight you think that statement is due, it is a matter for you. You may rely upon it whether you believe it to help reach your verdict as to the first accused only; remember the caution statement from him can only be used in relation to him and I'll also say it here, I've said it earlier it is not for me to accept or reject evidence but for you, so even if you think that I am expressing a view or that I think that certain evidence is acceptable for you to rely upon, you're completely free to disregard, disagree with my view, it is completely up to you with respect to all of the evidence."

[45] It is the first of the statements in bold and underlined above that the appellant Tzul complains of as constituting a material irregularity in his trial. It was the submission of counsel Sylvestre on his behalf that, notwithstanding the correctness of the direction of the trial judge shown in her second statement (in bold and underlined) of the extract above, it was incurably undermined by what he submitted was the revelation of the trial judge shown in her prior statement (in bold and underlined) to the jury of the subject matter of the *voir dire* she held in

relation to the caution statement of M Gentle that she admitted into evidence. He cited the Privy Council decision of ***David Mitchell v The Queen***[18] in support of his submission that the revelation carried with it a significant risk of unfair prejudice to the accused. He quoted the following dicta of Lord Steyn[19]:

> *"… The vice is that the knowledge by the jury that the judge has believed the police and disbelieved the defendant creates the potentiality of prejudice. A jury of laymen, or some of them, might be forgiven for saying: "Well the judge did not believe the defendant, why should we believe him?" At the very least it creates the risk that the jury or some of them, may be diverted from grappling properly and independently with a defendant's allegations of oppression so far as it is relevant to their decision. And such an avoidable risk of prejudice cannot be tolerated in regard to a procedure designed to protect a defendant."*

[46] Counsel Sylvestre pointed out that in the same ***David Mitchell*** case, the Board explained[20] that the appellate court, if it finds that there was indeed an irregularity, must go on to consider the potential impact of the irregularity on the trial process. Lord Steyn put it this way:

> "*It is therefore necessary to consider the potential impact of what was undoubtedly a material irregularity on the trial. The test to be applied in such a case has repeatedly been stated by the Privy Council to be whether, if the irregularity had not taken place, or if there had been no misdirection, the jury would inevitably have come to the same conclusion…*".

[47] The submission on behalf of Tzul was that the caution statement of M Gentle would, dangerously and in consequence of the complained-of direction of the trial judge, be accepted as

[18] [1998] AC 695
[19] At 703 letter H - 704 letter A
[20] At 705 letter H – 706 letter A

true by the jury and then unlawfully used by the jury against Tzul as corroboration of their acceptance of the hearsay witness statement of Leon Gentle.

[48] Counsel for the Crown, in response, took issue with the contention that the complained-of direction of the trial judge informed the jury that there was a *voir dire* to determine the admissibility of a caution statement or the outcome of the said *voir dire*. Her submission before us was that there is not even a hint of a suggestion in the entire summation that at some point in time the judge had to consider the voluntariness of the caution statement. Therefore, she said, there is no possibility that the jury could have understood the judge to be referring to any ruling to admit the caution statement other than the ruling taken in their presence. It follows therefore, she continued, that the principle enunciated in ***Mitchell*** does not apply to the facts of this case, as the trial judge here did not fall into the same error as the trial judge in ***Mitchell***. I set out below how counsel for the Crown developed before us her argument that it was entirely proper for the trial judge to have directed the jury as she did:

> a. *"The words complained of were a mere direction to the jury as to how they should approach the procedural irregularities which occurred during the recording of the caution statement.*
>
> b. *These procedural irregularities were explored by the defence during cross examination of Sergeant Bonilla in the presence of the Jury: Even more specifically the following exchange occurred during cross examination:* ***"Would you agree with me that they were several irregularities with the statement? Answer: "I would be first to agree with you, that there were several irregularities with the statement and I take full responsibility on it"****.*
>
> c. *The Jury would therefore have heard the evidence as to all the procedures that were not followed in the taking of the caution statement from Matthew Gentle and would have witnessed the*

trial judge admitting that statement into evidence during the trial. Therefore, the words of the trial judge seeking to be impugned were not made in relation to the admission of the statement in the voir dire but in relation to its admission in the main trial.

d. *Quite naturally the jury would have wondered why such a statement was before them if the proper procedures were not followed in recording it. The judge was therefore duty bound to direct the jury as to how to approach that evidence and to explain that the law allows such statement to go before them despite irregularities. By so doing, the judge cannot be taken as having expressed any view, even inferentially, on the merits or truthfulness of the caution statement.*

e. *Further, the summation must be read as a whole. The trial judge in this case had a very structured summation. From pages 2305 to 2314 of the Record the trial judge was specifically addressing the caution statement and giving legal directions as per the caution statement. She addressed first, the evidential value of the caution statement that is, that it is only evidence against Mathew Gentle; second, the allegations made by the Appellant [M Gentle] which brought into question the voluntariness of the caution statement and third, the procedural irregularities which occurred during the taking of the caution statement and how they should approach those."*

[49] In going on to submit on the issue of whether there was any risk of unfair prejudice, counsel for the Crown submitted, on the basis set out below, that nothing in the judge's direction was unfair:

"Where a Judge informs a jury of her decision taken on a voir dire held to determine the admissibility of a caution statement, it carries the risk of conveying to the jury that the judge disbelieved the defendant and believed the witnesses for the prosecution: ***Mitchell supra at 703, letter F****. This, naturally would be unfairly prejudicial to a defendant. In informing the jury that the law permitted her to admit the statement into evidence despite the procedural irregularities, the Judge was not thereby conveying that she believed one side over the other. There was no risk here that the jury might have followed the Judge as the Judge expressed no view, expressly or inferentially, on the procedural irregularities, much less the voluntary nature of the statement. On the contrary, the Judge left the issue as to how to treat with the irregularities entirely to the jury. After telling the jury that the law allowed her to admit the statement into evidence despite the irregularities the Judge committed the issue of the weight of the irregularities into the Jury's hands "... but these problems must be looked at by you, you should certainly consider the irregularities raised by the defence…" Later on in the summation the Judge said "…I've said it earlier it is not for me to accept or reject evidence but for you, so even if you think I'm expressing a view or that I think that certain evidence is acceptable for you to rely upon, you are completely free to disregard, disagree with my view, it is completely up to you with respect to all of the evidence."*

[50] As regards the risks to co-accused by admitting caution statement of Matthew Gentle, it was the further submission of counsel for the Crown on that point that:

a. It is legally permissible for a court to admit a statement into evidence made by one accused, outside of Court, which incriminates not only the maker of the statement but also his co-accused. Since there are obvious risks of prejudice to

a co-accused when such a statement is admitted, a trial Judge is duty bound to protect the interests of the co -accused. This can be achieved by:

i. Editing the statement to remove references to the co-accused see: **Lobban (Dennis) v. The Queen** (1995) 46 WIR 291 [PC] at 302, letters b-d and 303, letters d-e;

ii. Directing the jury that they are not to speculate as to the obliterations; and

iii. Directing the jury that the evidence contained in the statement is only good against the maker: **R v. Gunewardene** [1951] 2 KB 600 [CA] at 610-611, *Per* Lord Goddard, CJ

b. The law acknowledges that there are adequate safeguards to protect the interests of co-accused when such a statement is admitted and the law takes confidence in the fact that the jury will hear and follow the judge's directions.

c. The trial judge adopted all the safeguards that were necessary in this case to protect the interests of the co- accused.

[51] I agree with the submissions of counsel for the Crown:

a. on how the complained-of direction of the LTJ is properly to be interpreted;

b. that it was proper for the LTJ to have directed the jury as she did, and that it did not lead to prejudice or risk of prejudice; and

c. That the directions to the jury given by the LTJ contained all the necessary safeguards to protect the interests of the accused.

[52] Additionally, it is the view of the Court that, even if the complained-of direction were to be considered a material irregularity (which we do not consider it to be), when we apply the test of assessing its potential impact, we are of the view that had it not taken place, or if there had been no misdirection, the jury would inevitably have come to the same conclusion it did, based upon the witness statement of Leon Gentle and the circumstantial evidence. This ground of appeal advanced on behalf of appellant Tzul, therefore, fails.

[53] I have already stated earlier in this judgment (at paragraph 28) the Court's reason for finding that the trial judge did not err in admitting the statement of Leon Gentle into evidence. The evidence at the close of the prosecution's case included:

a. The evidence of the expert witness Dr Mario Estrada Bran;

b. The evidence of the deceased's son, Mr Ronald Young, identifying his father and his clothes, vehicle, etc.;

c. The oral testimony of the hostile witness Leon Gentle together with his hearsay witness statement recorded on the 18th September 2009;

d. The oral admission of M Gentle;

e. The caution statement of M Gentle;

f. The circumstantial evidence from the scene of crime technicians, etc.

[54] The contention advanced on behalf of the appellant Tzul (in his ground of appeal at paragraph 12 e above) that the trial judge erred in failing to withdraw the case from the jury at the close of the case for the prosecution is based predominantly on his submission that the hearsay statement of Leon Gentle was wrongly admitted in evidence and that the case against him fails completely if the court accepts that statement was wrongly admitted in evidence. Having determined that the trial judge did not err in admitting that statement in evidence, it follows inevitably that this ground of appeal also fails.

[55] When one considers all of the evidence before the jury as a whole the Court is unable to accept the contention of the appellant M Gentle (in his ground of appeal at paragraph 12 c above) that the verdict against him is against the weight of the evidence. For that reason that ground of appeal also fails.

[56] All grounds of appeal of all appellants having failed, the appeals are dismissed, and the convictions and sentences are affirmed.

[57] I express my appreciation to all counsel involved in these appeals for the very helpful assistance they provided to the court.

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HAFIZ-BERTRAM, P.

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WOODSTOCK-RILEY, J.A.

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MINOTT-PHILLIPS, J.A.