CRIMINAL BENCH BOOK

FOR
BARBADOS • BELIZE • GUYANA

FEBRUARY 2023

CARIBBEAN ASSOCIATION OF JUDICIAL OFFICERS
CAJO
CARIBBEAN COURT OF JUSTICE
JUDICIAL REFORM AND INSTITUTIONAL STRENGTHENING (JURIST) PROJECT
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Foreword

Locally, regionally and globally, criminal activity has become more and more complex and, certainly in the region, more pervasive. Criminal justice systems across the Caribbean, and the bodies that support those systems (including the judiciary, prosecutorial and law enforcement agencies, prisons, social and welfare services, criminal defence counsel, as well as the legislature and executive), are facing mounting pressure to cope. The public rightfully demand a criminal justice system that is effective, efficient, and responsive in addressing existing and emerging forms of criminality. Those expectations are well-placed. A properly functioning criminal justice system contributes positively to citizen security, economic and social stability, and national development.

Foreword

Courts are at the heart of the criminal justice system and so, the judiciary's performance significantly impacts the public's perception of and trust and confidence in the justice system. This is the case even though the judiciary does not exercise operational control over the other bodies that comprise the criminal justice system. Each of these bodies has its own leadership structure, goals and priorities, and distinctive agendas. Even so, courts are constrained to develop and implement strategic and operational approaches to positively impact the efficacy of the overall criminal justice system and, as far as possible, ensure fair outcomes.

Judiciaries need every assistance they can get to fulfil this responsibility. Judges at all levels must be fully aware of the current state of the law and have access to resources which allow them to keep abreast of changes. In carrying out their functions, it is crucial that judges appreciate the full range of their discretion and have comprehensive and practical guidance on how to exercise that discretion. Judges should be conversant with good and best practices that exist within and outside of the region.

The publishing of this Criminal Bench Book for Barbados, Belize, and Guyana will undoubtedly render much assistance in this regard to judges within these jurisdictions and across the Region. This publication provides essential and practical guidance to trial judges on how to navigate the various areas of law and evidence that are likely to arise frequently in a criminal case. It addresses common issues that arise in trial and jury management and also in judge-alone trials.

The publication therefore offers a wealth of resources for the newly minted as well as the seasoned judicial officer. The Bench Book's holistic approach, breadth of jurisdictional cover (drawing on case law, good practices and innovations from courts within and outside of the region) as well as the range of subject areas covered are commendable. I especially

welcome and applaud the inclusion of Chapters 24 to 28 which deal with Criminal Case Management; Judge Alone Trials; Procedural Fairness; Therapeutic Jurisprudence; and Human Trafficking, Forced Labour, and Modern Slavery. These are subject areas which are now demanding and will continue to demand keen attention by our courts.

Ultimately, it is hoped that through the use of this Bench Book, judicial officers will be further equipped to be even more proactive and that, with quick and easy access to the materials contained in it, delays can be reduced, and justice delivery enhanced. These are all outcomes in which the Caribbean Court of Justice (CCJ) is fully invested. The CCJ is the only second appellate tier (or apex) court sited in the Caribbean Community (CARICOM) and it has a specific mandate both to further the development of Caribbean jurisprudence and to deepen the regional integration process. Further, each of the three jurisdictions specifically targeted by the text has acceded to the CCJ's appellate jurisdiction.

In all the circumstances, I wish to place on record the CCJ's warmest congratulations and appreciation to the Judicial Reform and Institutional Strengthening (JURIST) Project and the Caribbean Association of Judicial Officers (CAJO) for their work in creating and publishing this Criminal Bench Book. The tremendous assistance of the judicial, technical and administrative officers from the CCJ must also be commended. They contributed in no small measure to the success of the venture.

This initiative represents one of the last to be completed by the JURIST Project. That Project comes to an end on 31 March this year after almost nine years of impactful service to the region. Funded by the Government of Canada and implemented by the CCJ on behalf of the Heads of Judiciary of CARICOM, the JURIST Project has done much to improve the quality of justice delivery, foster gender equality throughout the courts and make

the region more attractive to foreign and domestic investment. The Bench Book is yet another of its signal achievements in fulfilling its mandate.

I again express deep appreciation to those responsible for making this text a reality and commend it as a useful resource to judicial officers.

The Honourable Mr Justice Adrian Saunders
President
Caribbean Court of Justice
January, 2023

Introduction

Criminal justice is essential for peace, stability, and sustainable economic and societal development. Criminal justice systems that function fairly, efficiently, effectively, and expeditiously are integral to public trust and confidence in the administration of justice, and to institutional legitimacy. The constitutional values and standards of the protection of the law, due process, and a fair hearing, taken in the context of rule of law obligations that apply to the Judiciary, demand that all of these performance standards are consistently met for the benefit of all court users. There are also ethical standards that apply to the discharge of the judicial function, such as equality, competence, diligence, and promptitude, and which impose institutional and individual duties and responsibilities for which judicial officers and Judiciaries are accountable.

Introduction

This criminal bench book has been completed in fourteen months, from conception to publication. Substantively, it can contribute to judicial officers meeting both the qualitative and quantitative standards that they are constitutionally and ethically compelled to uphold. Institutionally, it is an invaluable resource for the three states that it is designed for, as well as for all Caribbean jurisdictions with similar laws and practices. Indeed, this bench book improves access to justice for a wide range of persons, because it can also be easily used by attorneys and citizens as a baseline guide for legal principles and procedural best practices.

The process adopted, and as described below, has sought to make sure that each jurisdiction, through its appointed judicial officers and court librarians, has had the full responsibility for their jurisdictional content and accuracy of materials. This inclusive, collaborative, and iterative process intends to ensure that nuances that are unique to each state are covered, and as well to reap the benefits in a single publication of comparative content.

Practically, this publication is unique. The organization and design of the chapters and the inclusion of areas not usually addressed in a bench book, together with the use of in-text hyperlinks and a case management template, give the publication a forward-looking breadth and depth that is intended to sustain its relevance for several years. Being published in electronic form makes it more effectively navigable and user friendly.

The funders, the JURIST Project and Global Affairs Canada, as well as the CAJO and all members of its research, writing, and publication teams (listed in the acknowledgments), have made invaluable contributions to this publication. Without them this project could not have been completed within the timeframes set, to the standards of excellence met, and with the depth and breadth of coverage achieved. The CAJO is deeply appreciative

of their efforts and their commitments to excellence. Special mention however must be made of the core CAJO research and writing team, Elron Elahie, Kavita Deochan, and Shail Pooransingh. They have invested hundreds of hours researching, writing and re-writing, reading and re-reading, and editing drafts, comments, and proofs. As well, Elron Elahie, the Research and Programme Coordinator of the CAJO, has managed and provided all administrative support for this entire project, from start to finish. Barbados, Belize, and Guyana owe all of these contributors a debt of gratitude, satisfied by making consistent and in-depth use of this bench book.

The Honourable Mr Justice Peter Jamadar
Chairman
Caribbean Association of Judicial Officers
January, 2023

Bench Book Development and Acknowledgments

In line with the JURIST Project's goal of strengthening capacity of courts for efficient court governance, case management and case disposition, Heads of Judiciary of Barbados, Belize, and Guyana indicated a desire for a Criminal Bench Book to be developed for their jurisdictions. The CAJO was enlisted to produce this Bench Book over a fourteen-month period. To ensure accuracy and relevance, three jurisdictional teams were established by respective Heads of Judiciary to provide research and expert assistance. Each team comprised a judge of the criminal jurisdiction and a judiciary librarian. Each team was tasked with providing legal principles, judgments, and directions to assist the CAJO's research team with developing content. Teams were asked to provide case law and legislation for the past seven years up to December 31, 2021. Of course, in many instances, case law and legislation past the seven-year period were provided due to availability.

Once the relevant data from the jurisdictional teams was received, the CAJO's coordination and production team converted the data along with additional research, into jurisdiction-specific content. In addition, all general sections for each chapter were updated to reflect general directions, principles, best practices, and references as of December 31, 2021. Jurisdictional teams were asked to review and approve the developed content. As well, the CAJO enlisted the expert support of a CCJ review team to also review the chapters and provide necessary edits. Following the multiple reviews, all recommended edits and changes were made by the CAJO team to produce a final manuscript before being sent to layout and graphic design by Paria Publishing Ltd.

The completion of this Bench Book in a fourteen-month period is no small feat. The CAJO and JURIST Project thus extend sincerest gratitude to all who have contributed to the production and completion of this publication.

Jurisdictional Teams

Barbados: The Hon Mr Justice Randall Worrell, Ms Krystal Scantlebury, Ms Jamila Eastmond, Ms Janene Gibson

Belize: The Hon Mr Justice (Ret) Adolph Lucas, Ms Erollin Grinage

Guyana: The Hon Mme Justice Jo-Ann Barlow, Ms Rhonda Barnwell

Review Team

The Hon Mr Justice Denys Barrow, The Hon Mr Justice Peter Jamadar, Ms Jacinth Smith, Ms Sheryl Washington-Vialva, Ms LeShaun Salandy.

Coordination and Production Team

Ms Kavita Deochan, Ms Shail Pooransingh, Elron Elahie, The Hon Mr Justice Peter Jamadar

Layout and Design

Alice Besson and Dominic Besson of Paria Publishing Ltd

The CAJO also extends gratitude for the contributions made by:

Ms Allison Ali, Regional Project Coordinator and Communications Specialist, JURIST Project;

Mr John Furlonge, Regional Project Coordinator and Capacity Development Specialist, JURIST Project;

The Hon Mr Justice Jacob Wit

The Hon Mme Justice Lisa Ramsumair-Hinds

Mrs Laurissa Peña

Mrs Candace Simmons-Peters

Finally, the CAJO and JURIST Project wish to recognise the contributions from and support of the Government of Canada, the Caribbean Court of Justice, and the Heads of Judiciary of Barbados, Belize, and Guyana.

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Bayley (Barbados CA, Crim App No 2 of 2013)

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Bolden and Cumberbatch v The Queen BB 2010 CA 12

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Burnham (Barbados CA, Crim App No 21 of 2005)

Cadogan (Barbados CA, Crim App No 16 of 2005)

Taitt (Barbados CA, Crim App Nos 13 and 12 of 2008)

Taitt BB 2011 CA 23

Toussaint and Browne (Barbados CA, Crim App Nos 5 and 9 of 2018)

Trotman v The Queen BB 1987 CA 7

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George v The State (Guyana CA, Crim App No 8 of 2013)

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The State v George Mootoosammy and Henry Budhoo (1974) 22 WIR 83

The State v Gowkarran Persaud, Jowalla Persaud and Michael Boodram (1976) 24 WIR 97

The State v Hansraj Ori and Tulsie Persaud (1975) 22 WIR 201

The State v Khan (2012) 80 WIR 407

The State v Mohamed Omar (1987) 40 WIR 207

The State v Rudolph Baichandeen (1979) 26 WIR 213

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Forensic Procedures and DNA Identification Act, Cap 121B

Indictment Act, Cap 136

Juries Act, Cap 115B

Liquor Licences Act 2021

Medical Cannabis Act 2019

Mental Health Act, Cap 45

Offences Against the Person Act, Cap 141

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Juries Act, Rev Ed 2020, CAP 128

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Police Act, Rev Ed 2020, CAP 138

Trafficking in Persons (Prohibition) Act, CAP 108:01

Unsoundness of Mind Act, Rev Ed 2020, CAP 122

Dominica

Sexual Offences Act 1998 Act No 1 of 1998

Guyana

Combating of Trafficking in Persons Act 2005
Constitution of the Co-operative Republic of Guyana, 1980
Criminal Law (Offences) Act, Cap 8:01
Criminal Law (Procedure) Act, Cap 10:01
Evidence Act, Cap 5:03
Kidnapping Act, Cap 10:05
Motor Vehicle and Road Traffic Act, Cap 51:02
Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 10:10
Sexual Offences Act, Cap 8:03

Trinidad and Tobago

Criminal Procedure Act, Chapter 12:02
Sexual Offences Act, Chapter 11:28

United Kingdom

Criminal Justice Act 1967
Criminal Justice Act 2003
Customs and Excise Management Act 1979
Police and Criminal Evidence Act 1984
Water Resources Act 1991

Using the Bench Book

This Bench Book is produced as a tool to provide judges, researchers, and other stakeholders with key principles, practices, and law across various areas of the criminal law jurisdiction. The publication is not meant to provide all the information relevant to an area of law. Rather, users are encouraged to utilise additional sources to ensure a full appreciation of any area of law.

In using the Bench Book, it is important to note that the editorial team has made decisions to both enhance the usability of the publication and meet regional and international standards of respectful and inclusive language. These are highlighted below.

Navigation (e-publication)

Moving through the Bench Book to access or cross reference different areas of law has been made simple. The contents (chapters and sections) can be accessed on the left-hand panel of your reader as well in the Table of Contents. In addition, atop each chapter is a hyperlinked navigation bar that allows you to jump to the section selected.

Inclusive and Respectful Language

Throughout the Bench Book, the use of “accused” has been replaced with “defendant” in keeping with developing international standards. In addition, gendered references such as “he, him, himself, she, her,

herself" have been replaced with the neutral and inclusive terms, "they, themselves". It is important to note that replacements were not made in direct quotations to maintain the integrity of quoted material, and in some illustrations where the use of gendered pronouns was intentional.

Sources

This Bench Book references a number of sources across chapters. However, for ease, provided below are links to Bench Books for further research and/or reference:

Criminal Charge Book (VIC AU)

Criminal Trial Courts Bench Book (NSW AU)

Crown Court Compendium (UK)

Supreme Court of Judicature of Jamaica Criminal Bench Book

Trinidad and Tobago Criminal Bench Book

In this Chapter:

Chapter 1
Summing Up

1. Structure of a Summing-Up

For jury trials, the judge supervises the selection and swearing in of the jury, giving the jurors a direction about their role in the trial of deciding the facts and warning them not to discuss the case with anyone else. Once the trial has commenced, the judge ensures that all parties involved are given the opportunity for their case to be presented and considered as fully and as fairly as possible.

Once all evidence in the case has been heard, the judge's summing up takes place. The purpose of a summing up is to provide members of the jury with the assistance which they need to perform their task. That task,

simply stated, is to determine whether, upon the evidence presented, the Prosecution has proved the guilt of the defendant. The judge therefore sets out for the jury the relevant law on each of the charges made and what the Prosecution must prove to secure a conviction. At this stage, the judge refers to notes made during the course of the trial and reminds the jury of the key points of the case, highlighting the strengths and weaknesses of each side's argument. The judge then gives directions about the duties of the jury before they retire to the jury deliberation room to consider the verdict.

In the Caribbean, and applicable to Barbados, Belize, and Guyana, the Court of Appeal of Trinidad and Tobago in ***Chandler v The State*** **(Trinidad and Tobago CA, Crim App No 19 of 2011)**, referring to the judgment of Ibrahim JA in ***Jairam v The State*** **(Trinidad and Tobago CA, Crim App Nos 35 and 36 of 1988)**, sets out the five main elements that a summing-up must contain:

√ The directions in law, both general and specific;

√ A summary of the facts of the case for the Prosecution and the case for the Defence;

√ An identification of the issues or questions in the case which arise for the jury's determination;

√ An evaluation and analysis of the evidence on each issue or question so identified;

√ The jury's approach to verdict.

2. Summing-up Checklist

The **Judicial Education Institute of Trinidad and Tobago (JEITT), Criminal Bench Book 2015** offers an elaboration of the above, at page 1, in the following categories: (i) General Directions; (ii) Charges on the Indictment; (iii) Summarise the case for the Prosecution; (iv) Deal with issues arising out of the Prosecution's case; (v) Summarise the case for the Defence; (vi) Deal with issues arising out of the Defence's case; (vii) Jury's approach to issues; (viii) Additional points to note.

Further, at page 3 of the **Supreme Court of Judicature of Jamaica, Criminal Bench Book 2017**, a Summing-up Checklist is provided as follows:

General

- Function of judge and jury (jury, where applicable)
- Burden and standard of proof
- Separate treatment of counts
- Separate treatment of defendant
- Elements of each offence including, as appropriate, intention/ recklessness/dishonesty, etc.
- Joint responsibility
- Defences, as appropriate: alibi, self-defence, accident, etc

Various aspects of evidence

- Circumstantial evidence
- Admissibility of evidence where more than one defendant – evidence of co-defendant
- Plea of co-defendant
- Good/bad character

- Hostile witness
- Complainant in sexual cases – child witnesses – video evidence
- Accomplice
- Supporting evidence
- Delay
- Identification
- Lies
- Police interviews
- Inferences from silence at interview
- Inferences from silence at court

Summarise the evidence

- Tell the story
- Beware of the notebook summing-up

Before retirement

- Unanimity of verdicts
- Availability of exhibits

Subsequently

- Dispersal overnight
- Majority direction

In this Chapter:
Guidelines

Chapter 2
Fitness to Plead

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

'Fitness to Plead' is a fundamental principle of criminal justice. It refers to a defendant's ability to understand and participate in the legal process, a prerequisite to a fair trial. It demands the balancing of an individual's right to make autonomous decisions regarding their trial, with their ability to effectively participate in it. The purpose of a fitness to plead inquiry, is to protect the rights of vulnerable individuals who are unable to defend themselves in court and to preserve natural justice in the legal system, while balancing the needs to see justice served and protect the public in prosecuting crimes. The preliminary issue is to determine whether the defendant is fit for trial.

Guidelines

In ***Taitt v The State*** **[2012] UKPC 38, (2012) 82 WIR 468** (TT PC) at [15] and [16], the Privy Council summarised the general tests that apply to all cases where fitness to plead is in issue:

i. Whether the incapacity is genuine;

ii. Whether the defendant can plead to the charge or not;

iii. Whether the defendant has sufficient intellect to comprehend the course of the proceedings in the trial so as to make a proper defence.

The questions which a court should ask itself in assessing the defendant's fitness are:

i. Does the defendant understand the charges that have been made against them?

ii. Is the defendant able to decide whether to plead guilty or not?

iii. Is the defendant able to intelligently convey to their lawyers the case which they wish the lawyers to advance on their behalf, and the matters which they wish to put forward in their defence?

iv. Is the defendant able to follow the proceedings when they come to court?

v. Is the defendant able, if they wish, to give evidence on their own behalf?

If the defendant can do all of the above, then it can be concluded that they are fit to be tried. If however, you are sure, on a balance of probabilities, that they cannot, then it must be concluded that the defendant is not fit to be tried.

In ***DPP v P*** **[2007] EWHC 946 (Admin), [2007] 4 All ER 628,** the court poses important questions at [23] and goes on to address these at [61] as follows:

> (i) The fact that a court of "higher authority" has previously held that a person is unfit to plead does not make it an abuse of process to try that person for subsequent criminal acts. The issue of the child's ability to participate effectively must be decided afresh: see para 60.
>
> (ii) Where the court decides to proceed to decide whether the person did the acts alleged, the proceedings are not a criminal trial: see para 54 above.
>
> (iii) The court may consider whether to proceed to decide the facts at any stage. It may decide to do so before hearing any evidence or it may stop the criminal procedure and switch to the fact-finding procedure at any stage: see para 53 above.

(iv) The DJ should not have stayed the proceedings at the outset as he did without considering the alternative of allowing the trial to proceed while keeping P's situation under constant review.

(v) If the court proceeds with fact-finding only, the fact that the Defendant does not or cannot take any part in the proceedings does not render them unfair or in any way improper; the Defendant's art 6 rights are not engaged by that process: see para 54 above.

Points to Consider

i. Selection of the jury is done prior to a determination of the defendant's capacity to give instructions regarding any challenges. At this stage, jury selection is therefore done without challenge: ***Paling*** **(1978) 67 Cr App R 299** (CA).

ii. The summing up of the evidence will be conventional save that the jury will be concerned only with the act or omission and not with the defendant's state of mind: ***Antoine*** **[2001] 1 AC 340**. This is so since fitness to plead deals with the defendant's mental capacity at the time of trial to determine fitness and, as such, is not the same as the defence of insanity.

Barbados

General Guidelines

A person is capable of standing trial if they are able to comprehend the course of proceedings at the trial and the details of the evidence, and to exercise the right to give evidence themselves, and not merely if they understand the indictment and can plead to it: ***Reid*** **(1961) 3 WIR 404** (GY FSC); ***Pritchard*** **(1836) 7 C & P 303, (1836) 173 ER 135**.

Section 7(1) of the **Mental Health Act, Cap 45** (BB) states, 'Where, in the opinion of a court, an accused person charged before it is, or appears to be suffering from mental disorder, the court may order that person to be admitted to a mental hospital for a period not exceeding 8 weeks.'

Fitness to Plead - Murder

Section 6A(1) of the **Criminal Procedure Act, Cap 127 as amended by Act 35 of 2018** provides for a person who is to be arraigned upon indictment for the offence of murder, to undergo a psychiatric evaluation to determine whether that person is fit to plead: ***Cadogan*** **(Barbados CA, Crim App No 16 of 2005)**.

In ***Bourne*** **(Barbados CA, Crim App No 13 of 1996)**, the appellant sought to adduce fresh evidence that he may have been unfit to plead having suffered from schizophrenia before the offence. The Court of Appeal held that the appellant had not shown that the question of his ability to plead or to instruct counsel was an issue at the trial. However, on his petition to the Judicial Committee of the Privy Council, his conviction and sentence were quashed, and a retrial was ordered.

Burden of Proof

If the issue is raised by the Prosecution, they must prove that the defendant is unfit, beyond reasonable doubt.

However, if the issue is raised by the Defence, the burden is on the Defence to prove on a balance of probabilities that the defendant is unfit (reverse burden).

The jury **must** determine such issues relating to fitness to plead; it is not for the Judge to make this determination.

Mute by Visitation of God or Mute by Malice

Section 7(2) of the **Criminal Procedure Act, Cap 127** (BB) provides that:

> Where any person being arraigned upon or charged with any indictment for any offence stands mute or will not answer directly to such indictment, in every such case it shall be lawful for the High Court, if it so thinks fit, to order the proper officer to enter a plea of "not guilty" on behalf of such person, and the plea so entered shall have the same force and effect as if such person had actually pleaded the same.

The court is allowed to enter a plea of not guilty having arrived at a finding of mute of malice by the jury: ***Hope*** **(1998) 56 WIR 62** (BB CA).

Points to Consider

In considering how this area of law can be further developed, points to note are outlined below:

i. Should the procedure for determining mute by malice be modified or abolished by some statute, Criminal Procedure Act or Rules specifically dealing with this?

ii. Should the same jury trying the preliminary issue of mute by malice be also trying the issue of guilt/innocence? Might there not be prejudice if there is a finding of mute by malice by that jury?

iii. Can someone who has been found to be mute by malice effectively instruct Counsel? For a report on the procedure relating to mute by malice, please see Dr Miranda Bevan, David Ormerod, Samantha Magor, **Time to Dispense with Mute of Malice Procedure** (2020) 10 Crim LR 912.

Belize

Relevant Statutory Provisions

Section 119 of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ) provides:

> If any accused person appears, either before or on arraignment, to be insane, the court may order a jury to be empanelled to try the sanity of that person, and the jury shall thereupon, after hearing evidence for that purpose, find whether he is or is not insane and unfit to take his trial.

Section 2 of the **Unsoundness of Mind Act, Rev Ed 2020, CAP 122** (BZ) defines 'defective' as follows:

> "defective" means-

(a) an idiot, that is to say, a person in whose case there exists mental defectiveness of such a degree that he is unable to guard himself against common physical dangers;

(b) an imbecile, that is to say, a person in whose case there exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that he is incapable of managing himself or his affairs or, in the case of a child, of being taught to do so;

(c) a feeble-minded person, that is to say, a person in whose case there exists mental defectiveness which, though not amounting to imbecility, is yet so pronounced that he requires care, supervision and control for his own protection or for the protection of others or, in the case of a child, that he appears to be permanently incapable by reason of such defectiveness of receiving proper benefit from the instructions in ordinary schools;

(d) a moral defective, that is to say, a person in whose case there exists mental defectiveness coupled with strongly vicious or criminal propensities and who requires care, supervision and control for the protection of others, and includes every person affected by section 19...

Section 23(4) of the **Unsoundness of Mind Act, Rev Ed 2020, CAP 122** (BZ) states:

...(4) Where it appears to any court of summary jurisdiction

> by which a person charged with an offence is remanded or committed for trial that such person is a defective, the court may order that pending the further hearing or trial he shall be detained in an institution for defectives, or be placed under the supervision or guardianship of any person on that person entering into a recognisance for his appearance.

Points to Consider

i. The inadequacy of the number of psychiatrists and professionals who can make such assessments to aid in determining a defendant's fitness to plead, continues to pose a challenge in Belize. At present, there is only one doctor to attend to a hundred inmates in prison in addition to attending to outpatients.

ii. Notwithstanding the above, stakeholders suggest that admitting a defendant patient to bail, who was not indicted for murder, and who does not pose any danger to the public, can assist in temporarily mitigating this challenge.

Guyana

General Guidelines

Section 177 of the **Criminal Law (Procedure) Act, Cap 10:01** (GY) of the Laws of Guyana provides for circumstances where the defendant is found to be insane during a trial. The section states as follows:

> 177. If, during the trial of any accused person, he appears, after the hearing of evidence to that effect or otherwise, to the jury charged with the indictment, to be insane, the Court shall in that case direct the jury to abstain from finding a verdict upon the indictment, and, in lieu thereof, to return a verdict that the accused is insane; but a verdict under this section shall not affect the trial of any person so found to be insane for the offence for which he was indicted, if he subsequently becomes of sound mind.

In ***Brown v The State*** **(Guyana CA, Crim App No 21 of 2014),** the appellant was charged with the murder of his wife. At his trial before a judge and jury, he was found guilty of murder and was sentenced to death. The grounds raised on appeal were that the trial judge erred in not considering the appellant's mental state, and that the judge further failed to adequately direct the jury on the issue of provocation. However, the issue of the appellant's mental state was not raised before the trial judge. In considering the issue of the appellant's mental state, the court granted leave for Counsel to lay over evidence of Brown's mental illness. The medical report prepared by Brown's attending physician revealed that he was diagnosed with substance induced psychotic disorder which was attributed to the abuse of cocaine and marijuana. It showed that he was an outpatient of the psychiatric clinic from 1994 and that since his incarceration, he was diagnosed with schizophrenia, and was seen periodically in the prison's psychiatric clinic. A regimen of anti-psychotics and sedatives were also given to him. One of the issues which this court considered is whether the medical evidence of Brown's mental state should now be admitted. Such evidence was sought to be tendered with the view of supporting

the argument that Brown lacked the necessary mens rea for the offence charged or that he was unfit to plead. The court noted:

> [17] Section 8 of the Court of Appeal Act, Cap 3:01 allows for evidence not called or led at the trial in the Court below to be admitted as fresh evidence. However, the cases highlight the need for a reasonable explanation for the failure to adduce that evidence at the trial. In this case, that explanation seems somewhat lacking. Although present counsel halfheartedly sought to rely on errors of counsel as a possible reason, he did not develop that line of argument.
>
> [18] We considered the observation of counsel for the State that Brown's medical condition was not advanced at the trial and that it being relied upon now, appears to be inconsistent with the case advanced below...
>
> [19] In Pitman and Hernandez v. The State [2017] UKPC 6 and R v. Erskine [2009] EWCA Crim 1425, the Court made the observation that it is unsatisfactory that the mental condition of defendants should be raised for the first time only on appeal, and often many years after the trial. Such observation is well founded in the instant case.

See also the judgment in ***Ramdyal v The State*** **Crim App No 2 of 2011** (GY).

In this Chapter:

Chapter 3
Preliminary Directions of Law

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

The judge plays an active role during the trial, controlling the way the case is conducted in accordance with relevant law and practice. Once all evidence in the case has been heard, the judge's summing up takes place. The judge sets out for the jury the relevant law and how it bears on each of the charges made and what the Prosecution must prove and to what standard of proof to secure a conviction. The judge reminds the jury of the key points of the case, highlighting the strengths and weaknesses of each side's argument. The judge also gives directions on matters of law that jurors must consider if a finding of guilt is to be returned, as well as directions about the duties of the jury before they retire to the jury deliberation room to consider their verdict.

1. Burden and Standard of Proof

Directions

A direction concerning the burden and standard of proof is required in every summing-up whether or not it has been mentioned by Counsel: ***Blackburn* (1955) 39 Cr App R 84** (CCA). No particular form of words is essential. The direction is usually given early in the summing up: ***Chuan Ching* (1976) 63 Cr App R 7** (CA). What is required is a clear instruction to the jury that they have to be satisfied so that they are sure before they can convict: ***Miah* [2018] EWCA Crim 563**.

In ***Nervais (Jabari Sensimania) v The Queen* [2018] CCJ 18 (AJ)**, the CCJ endorsed the learned judge's directions to the jury on the burden and standard of proof and noted that the judge directed the jury that being

fair to both sides, included holding the Prosecution to the higher standard of proof, that is, proof beyond reasonable doubt. The court commented:

> [48] The judge noted that the standard required is not absolute certainty, but it does require that the jury should be sure. She distinguished proof beyond reasonable doubt from proof beyond doubt, and proof beyond a shadow of a doubt, and emphasised the standard was proof beyond reasonable doubt. If the jury were left in reasonable doubt as to whether the accused was innocent or guilty, the jury were told, they must give him the benefit of the doubt and acquit him. Similarly, they were directed, if after considering all the evidence in the case they were satisfied that the Prosecution's evidence was not of such a nature and quality as to make them sure of the guilt of the accused man, they must acquit him. Likewise, the judge directed, it is obvious that if they believed the accused man to be innocent, they also must acquit him.
>
> [49] It was after so directing, that the judge told the jury she was impressing upon them that they were duty bound to return a verdict in accordance with the evidence and the oath they had taken. They should therefore reach a verdict based on the evidence that they had heard in that courtroom and they were bound by the evidence in this case and that evidence alone and they must not speculate about matters on which they have no evidence. The judge expanded on this limitation and told the jury to concern themselves only with what has taken place in their presence in the courtroom. She told

> them they must return a verdict free from any bias and without sympathy for the accused or any other person who may have suffered or may have been affected by this matter.

When the Legal Burden is on the Prosecution

The burden of proving the case rests upon the Prosecution. The defendant bears no burden of proving anything and it is not their task to prove their innocence.

The fact that a defendant has given evidence does not imply that there is any burden upon them to prove their innocence. The jury will, however, need to reach a decision about what reliance they can place on the defendant's evidence. They should, when deciding upon the truth, reliability, and accuracy of the evidence, adopt the same fair approach to every witness.

Standard of Proof

The Prosecution's case is proven if the jury is sure that the defendant is guilty, having considered all the evidence relevant to the charge. Further explanation is unwise. Note the problems a judge may encounter explaining reasonable doubt to the jury, as in ***Majid*** **[2009] EWCA Crim 2563**.

If the jury is not sure, they must find the defendant not guilty. It is important to note that having no reasonable doubt is equivalent to being sure: **Archbold (2023)** at 4-447; **Blackstone's (2022)** at F3.34/F3.37.

When the Legal Burden is on the Defence

The defendant does not have a legal burden. If they raise a defence, an evidential burden of proving the matter in issue is on the defendant.

Where a statute places a legal burden on the defendant to prove particular facts, the burden is called a "reverse burden" because it is an exception to the general rule that the defendant does not bear a legal burden on any of the facts in issue. The facts are proved by the defendant on a balance of probabilities; the tribunal of fact (the jury) are satisfied that it is more likely than not that the relevant facts occurred: ***Carr – Briant*** **[1943] KB 607** (CA). It is for the defendant to prove a negative averment or matters peculiarly within their knowledge on a balance of probabilities: ***Williams*** **(1988) 25 JLR 291**.

Standard of Proof

The defendant proves the matter in issue if the jury conclude, having considered all the relevant evidence, that the matter asserted is more probable (or more likely) than not.

Note: Where an evidential burden is placed upon the Defence (e.g. to raise sufficient evidence of an alibi, self-defence, or duress for the issue to be left to the jury) and discharged, the legal burden remains on the Prosecution to prove their case so that the jury is sure of guilt.

The Trinidad and Tobago **Criminal Bench Book 2015**, at page 9, provides a useful summary of additional authorities on the burden and standard of proof as follows:

Burden of Proof

1. **Ori (1975) 22 WIR 201** (CA Guyana): The direction on the burden of proof was so casual that the circumstances called for a further direction on or reminder about the burden of proof.

2. **Gomes (1963) 5 WIR 46** (CA British Caribbean): With respect to duress, the burden is on the Prosecution to satisfy the jury beyond reasonable doubt that the act of the defendant was a voluntary one. The trial judge's directions on duress were unambiguous.

Standard of Proof

3. If in an exceptional case the jury asks for an explanation of a reasonable doubt as in **Walters [1969] 2 AC 26** (PC Jamaica) and approved in **Gray (1974) 58 Cr App R 177** (CA) at page 183, the Privy Council upheld the following direction by the trial judge: 'A reasonable doubt is that quality and kind of doubt which, when you are dealing with matters of importance in your own affairs, you allow to influence you one way or the other…'

However, this explanation should only be provided in exceptional cases, and it is unwise to attempt any further explanation.

4. **The State v Robinson (1979) 26 WIR 411** (CA Guyana): The word 'satisfied' is not a sufficient explanation of the standard of proof to be met in criminal cases.

5. **Ramdat v The State (1991) 46 WIR 201** (CA Guyana): Explanation of reasonable doubt was unhelpful and may have led to error, but it did not constitute a miscarriage of justice.

6. **Worrell (1972) 19 WIR 180** (CA Barbados): Jury was told that before there can be a verdict of guilt the Prosecution must make the jury sure that the verdict is the right one. This was held by the Court of Appeal to be imprecise as a judge should not introduce concepts which may create doubt in the minds of the jury as to their function. However, there were only 2 possible verdicts— guilty of murder or not guilty on the ground of insanity. No valid criticism could be found on the manner in which insanity was dealt with and this defence had obviously been rejected by the jury. The appeal was dismissed.

2. Specimen Counts

Guidelines

A 'specimen' count is where the defendant is charged with one or more offences occurring on specific occasions, but the Prosecution alleges that such conduct was representative of other criminal conduct of the same kind on other occasions which are not the subject of specific charges.

Specimen counts are included in the indictment in two circumstances:

i. Where the Prosecution relies upon a course of conduct by the defendant, during which the defendant commits several offences, but the Prosecution unable to supply particulars of each offence, they may include in the indictment a 'specimen' count alleging a

single offence committed on a single occasion falling between a span of dates when the course of conduct was taking place.

ii. Where there is a multiplicity of alleged offences which the Prosecution could separately charge if they wish, but choose not to in the interests of a manageable trial, they may select a lesser number of specific offences and charge these offences as "specimens" or "samples".

Where, for example, a child complains of sexual abuse of the same type over a period of years but is unspecific about occasions, the Prosecution may charge specimen offences reflecting the age of the child during each year in which the offences were committed.

Where, for example, a finance director allegedly steals money from a company over a period of time, using the same method on different occasions, the Prosecution may choose to charge specimen offences reflecting the method used throughout the period.

In both examples, the effect of laying a specimen count is to invite the jury to conclude that the single offence of its type charged was committed during the period identified in that count. The Prosecution is relying on evidence of a course of conduct (or system) to prove a single specimen offence.

In ***Greenwell*** **[2020] EWCA Crim 1395**, the Court of Appeal rejected an argument directed toward the form of the indictment where the defendant was charged with misconduct in public office, the count reflecting a number of distinct incidents of assault committed at a Detention Centre over a nine-year period. The Court stated that:

We can see no difference between the way in which this count was charged (and then supported by examples) and the way in which indictments

are framed in cases of, for example, child cruelty or harassment, where several separate incidents might be relied on as examples in order to prove the single charge. In such cases an answer is not sought from the jury in relation to each incident, but the jury must still be sure that there is sufficient evidence to prove the count in question. That is why the directions on a charge of this count of this type are so important.

The judge's directions to the jury should:

i. explain why the specimen counts have been included in the indictment, i.e. either to make the trial more manageable, or because the Prosecution is unable to identify each separate occasion on which an offence was committed, or both; and

ii. inform the jury whether and to what extent the course of conduct evidence is admissible to prove the specimen counts; and

iii. explain that whether or not they accept the course of conduct evidence in its entirety, they must be sure that the offence charged as a specimen (or sample) count, or the further specimen (or sample) offence which they are considering, is proved.

Points to Consider

i. **Blackstone's (2009)** defines specimen counts at D11.33–D11.34 under the rubric "Specimen of Sample Counts":

> Where a person is accused of adopting a systematic course of criminal conduct, and where it is not appropriate to allege a continuous offence or a multiple offending count, the Prosecution sometimes proceeds by way of specimen or sample counts. For example, where dishonesty over a period of time is alleged, a

limited number of sample counts are included so as to avoid too lengthy an indictment.

Procedure for Specimen Counts

The practice which the Prosecution ought to adopt in these circumstances is as follows:

(a) the defence should be provided with a list of all the similar offences of which it is alleged that those selected in the indictment are samples;

(b) evidence of some or all of these additional offences may in appropriate cases be led as evidence of system;

(c) in other cases, the additional offences need not be referred to until after a verdict of guilty upon the sample offence is returned.'

3. Trial in the Absence of the Defendant

Guidelines

In general, a defendant has a right to be present throughout their trial. Exceptionally, a trial may proceed in the defendant's absence because they:

i. misbehave in court;

ii. are too ill to travel/appear;

iii. voluntarily absent themselves from their trial.

Misbehaviour

The judge will usually adjourn until the defendant has had time to reflect and the trial will be resumed when they give an assurance as to their future behaviour. If, for compelling reasons, the trial must continue, the defendant will usually return to court after time for reflection.

Illness

A defendant who is involuntarily unfit to attend trial is entitled to be present and the case should be adjourned until they are fit, or the jury discharged if that is not possible. If, however, the defendant consents, or the trial can proceed without prejudice to the defendant (e.g. in a multi-handed case, by calling evidence which does not affect the defendant), the trial judge has a discretion to proceed, but the discretion should be exercised sparingly: see ***Welland*** **[2018] EWCA Crim 2036** (proceeding in absence of defendant who was too unwell to attend trial was held to be unfair); and ***F*** **[2018] EWCA Crim 2693** (the court found there was a fair trial despite defendant being absent for part of the proceedings by reason of ill health).

Voluntary Absence

In ***Hayward*** **[2001] EWCA Crim 168, [2001] 3 WLR 125,** Rose LJ set out the principles to be followed:

> 22. In our judgment, in the light of the submissions which we have heard and the English and European authorities to which we have referred, the principles

which should guide the English courts in relation to the trial of an accused in his absence are these:

1. A defendant has, in general, a right to be present at his trial and a right to be legally represented.
2. Those rights can be waived, separately or together, wholly or in part, by the defendant himself. They may be wholly waived if, knowing, or having the means of knowledge as to, when and where his trial is to take place, he deliberately and voluntarily absents himself and/or withdraws instructions from those representing him. They may be waived in part if, being present and represented at the outset, the defendant, during the course of the trial, behaves in such a way as to obstruct the proper course of the proceedings and/or withdraws his instructions from those representing him.
3. The trial judge has a discretion as to whether a trial should take place or continue in the absence of a defendant and/ or his legal representatives.
4. That discretion must be exercised with great care and it is only in rare and exceptional cases that it should be exercised in favour of a trial taking place or continuing, particularly if the defendant is unrepresented.
5. In exercising that discretion, fairness to the defence is of prime importance but fairness to the prosecution must also be taken into account. The judge must have regard to all the circumstances of the case including, in particular:

i. the nature and circumstances of the defendant's behaviour in absenting himself from the trial or disrupting it, as the case may be and, in particular, whether his behaviour was deliberate, voluntary and such as plainly waived his right to appear;

ii. whether an adjournment might result in the accused being caught or attending voluntarily and/ or not disrupting the proceedings;

ii. the likely length of such an adjournment;

iv. whether the defendant, though absent, is, or wishes to be, legally represented at the trial or has, by his conduct, waived his right to representation;

v. whether an absent defendant's legal representatives are able to receive instructions from him during the trial and the extent to which they are able to present his defence;

vi. the extent of the disadvantage to the defendant in not being able to give his account of events, having regard to the nature of the evidence against him;

vii. the risk of the jury reaching an improper conclusion about the absence of the defendant;

viii. the seriousness of the offence, which affects defendant, victim and public;

ix. the general public interest and the particular interest of victims and witnesses that a trial

should take place within a reasonable time of the events to which it relates;

x. the effect of delay on the memories of witnesses;

xi. where there is more than one defendant and not all have absconded, the undesirability of separate trials, and the prospects of a fair trial for the accused who are present.

6. If the judge decides that a trial should take place or continue in the absence of an unrepresented accused, he must ensure that the trial is as fair as the circumstances permit. He must, in particular, take reasonable steps, both during the giving of evidence and in the summing-up, to expose weaknesses in the prosecution case and to make such points on behalf of the defendant as the evidence permits. In summing-up he must warn the jury that absence is not an admission of guilt and adds nothing to the prosecution case.

These observations received the approval of the House of Lords in ***Jones* [2002] UKHL 5, [2003] 1 AC 1,** save that Lord Bingham qualified the Vice-President's references to the seriousness of the case and to the desirability of representation even where the defendant is voluntarily absent:

> 14. First, I do not think that 'the seriousness of the offence, which affects defendant, victim and public', listed in paragraph 22(5)(viii) as a matter relevant to the exercise of discretion, is a matter which should be considered.

> The judge's overriding concern will be to ensure that the trial, if conducted in the absence of the defendant, will be as fair as circumstances permit and lead to a just outcome. These objects are equally important, whether the offence charged be serious or relatively minor.
>
> 15. Secondly, it is generally desirable that a defendant be represented even if he has voluntarily absconded. The task of representing at trial a defendant who is not present, and who may well be out of touch, is of course rendered much more difficult and unsatisfactory, and there is no possible ground for criticising the legal representatives who withdrew from representing the appellant at trial in this case. But the presence throughout the trial of legal representatives, in receipt of instructions from the client at some earlier stage, and with no object other than to protect the interests of that client, does provide a valuable safeguard against the possibility of error and oversight. For this reason trial judges routinely ask counsel to continue to represent a defendant who has absconded during the trial, and counsel in practice accede to such an invitation and defend their absent client as best they properly can in the circumstances.

If the trial is to proceed in the defendant's absence, that fact should be explained to the jury, as soon as possible, in appropriate terms. When the judge has ruled that the defendant has voluntarily absented themselves, the judge will not inform the jury of that fact and will need to warn the jury against speculating upon the reason for the defendant's

absence and treating the defendant's absence as any support for the Prosecution's case.

These directions should be repeated during the summing-up. Depending upon the stage of the trial at which the defendant has absented themselves, the jury may also be told that as a matter of fact the defendant has given no evidence which is capable of contradicting the evidence given by witnesses for the Prosecution.

If the defendant gave an account in interview which was partly self-serving, it is admissible as to the truth of the matters stated.

The jurisprudence emanating from Trinidad and Tobago provides instructive guidance in this area. The Trinidad and Tobago **Criminal Bench Book 2015**, at 16, summarises these as follows:

> 1. **Brown (1963) 6 WIR 284** (CA) followed **Lawrence [1933] AC 699** (PC Nigeria): It is an essential principle of our criminal law that the trial (including sentence) for an indictable offence has to be conducted in the presence of the defendant. There may be special circumstances which permit a trial in the absence of the defendant, but on trials for felony the rule is inviolable, unless possibly the violent conduct of the defendant was intended to make trial impossible and thus renders it lawful to continue in their absence. In **Brown** the appellant fell ill and was taken outside while evidence was being given on the question of admissibility of a statement given by the appellant. The inadvertent absence of the appellant resulted in a mistrial and his appeal was allowed.

2. **Patrick and Small (1974) 26 WIR 518** (CA): On his arraignment S refused to plead and immediately sought to escape from the dock and generally behaved in such a violent and disorderly manner as to render it necessary for the trial judge to have him removed from the court. The trial proceeded and terminated with his being sentenced in his absence. Dismissing his appeal, it was held inter alia that the conduct of S during the trial was designed for the deliberate purpose of making it impossible to proceed with his trial, and in such circumstances the learned judge followed the correct course in proceeding with the trial (including the sentence) in his absence.

3. **David Donald v The State CA Crim No 5 of 2007**: The appellant threw peanuts at members of the jury and prosecuting counsel during the course of the trial. The trial judge discussed the issue with counsel and then excluded the appellant from the proceedings. The Court of Appeal upheld the trial judge's decision to exclude the appellant. Considering that the appellant must take responsibility for their own actions, there was no onus on the judge to make any inquiry; however, in so doing, the judge acted favourably towards the appellant. Further, given the strong directions to the jury not to hold the incident against the appellant, the court took the view that the appellant suffered no prejudice by the approach taken by the judge.

4. Trial of One Defendant in the Absence of Another

Guidelines

A defendant named in the indictment may not be before the court because they have pleaded guilty or will be separately tried.

Sometimes, particularly by agreement between the parties, the fact of an absent defendant's plea of guilty, or conviction, will be admitted to 'de-mystify' the current proceedings, but it will be of no evidential significance.

Directions

i. Where a co-defendant is named on the indictment but is not taking part in the trial, if it is possible to do so without prejudice to the defendant being tried, it will be helpful to make the situation the subject of an agreed fact and put before the jury in this way.

ii. Where it is not appropriate for the jury to be given any information about the co-defendant, they must be directed that they are not trying that defendant, they must not speculate about that defendant's position and that it has no bearing on the position of the defendant whom they are trying.

iii. Where a co-defendant's plea of guilty has been referred to, the jury must be directed that whilst this information explains the co-defendant's absence, it is not evidence in the case of the defendant they are trying and that they must try the defendant before them solely on the basis of the evidence which they have heard.

iv. Where evidence of a co-defendant's plea of guilty has been admitted, the jury must be directed about the potential relevance of that

conviction to the defendant's case. They must also be warned that it must not be used for any other purpose (of which example/s may be given as appropriate to the case).

v. Sometimes there is evidence that persons who are not before the court, other than a co-defendant, have been arrested/charged. This should be the subject of discussion with the advocates before speeches and appropriate directions given to the jury.

Points to Consider

i. Where the fact of a plea of guilty by another person named in the indictment is not admitted in evidence, or they are to be separately tried, the jury should be told that they are not required to reach a verdict in that case and should not speculate. They should concentrate on the evidence in the case of the defendant they are considering.

ii. Where the guilt of another becomes known to the jury but it is inadmissible as evidence against the defendant, the jury should be explicitly directed to that effect.

iii. The issue of separate trials is a matter for the judge's discretion at the trial, and an appellate court will be slow to interfere with the judge's exercise of discretion, unless it is clearly shown that such exercise resulted in a miscarriage of justice: **Archbold (38th edn)** at 127.

iv. The Trinidad and Tobago **Criminal Bench Book 2015** provides, at page 18, a summary of instructive cases in this area:

a. ***Patrick*** **(1974) 26 WIR 518** (TT CA);

b. ***Hoggins*** **[1967] 3 All ER 334** (CA);

c. ***Lake* (1976) 64 Cr App R 172** (CA);

d. ***Carter v The State* Crim No 32 of 2005** (TT CA).

5. Application by One Defendant for a Separate Trial

In ***Small v The DPP; Gopaul v The DPP* [2022] CCJ 14 (AJ) GY,** at [30], the CCJ, noting ***Middis* (New South Wales SC, 27 Mar 1991)**, provided:

> The law recognises, however, that there will be exceptional cases where it is just to order separate trials to avoid a miscarriage of justice that would result from accused persons being tried together. Mr Hughes, counsel for Small, assisted the Court by citing the Australian decision of *R v Middis* which was summarised in the headnote as follows:
>
> > The principles upon which an application for separate trials will be considered are: (1) where the evidence against an applicant for a separate trial is significantly weaker than and different to that admissible against another or the other accused to be jointly tried with him, and (2) where the evidence against those other accused contains material highly prejudicial to the applicant although not admissible against him, and (3) where there is a real risk that the weaker Crown case against the applicant will be made immeasurably stronger by reason of the prejudicial material, a separate trial will usually be ordered in relation to the charges against the applicant.

In the case of ***Small v The DPP; Gopaul v The DPP*** separate notices of appeal were filed against both conviction and sentence. They were however heard together. The leading grounds of appeal for Small, in relation to conviction, were that the Court of Appeal erred in law in upholding the trial judge's decision to conduct a joint trial and in rejecting the submission of no case to answer. Therefore, one of the issues the court had to consider, was whether separate trials ought to have been granted.

That case involved a gruesome and very sad murder of a 16-year-old girl, who was found in a suitcase which was submerged in a creek near the Linden-Soesdyke Highway in Guyana. Her mother, Bibi Gopaul and the mother's lover, Jarvis Small, were charged with murder. Small's attorney made an application for a separate trial, but this was refused by the trial judge. At the close of the Prosecution's case, Small's attorney submitted there was no case for him to answer, but this was also refused by the trial judge. The jury returned guilty verdicts for Gopaul and Small and the trial judge imposed sentences of 106 years and 96 years imprisonment, respectively. At the Court of Appeal, their appeals against conviction were refused but their sentences were reduced to 45 years.

The CCJ was satisfied that there was insufficient evidence against Small and that the trial judge ought to have granted his attorney's application that there was no case for him to answer. Furthermore, the CCJ took the view that this was an exceptional case where the trial judge should have ordered separate trials, as Small was prejudiced by the strength of evidence that was led against Gopaul, which was entirely inadmissible against Small. The CCJ noted:

> [27] The principles upon which courts act in deciding upon joint and separate trials start from the premise that it is only in exceptional cases separate trials are ordered

for two or more defendants who are jointly charged with participation in one offence. There are powerful public interest reasons why joint offences should be tried jointly. The importance is not merely the saving of time and money; it also concerns the desirability that the same verdict and the same treatment are returned against all persons concerned in the same offence, as the State submitted. If joint offenders were widely to be tried separately, all sorts of inconsistencies might arise.

[28] Even though jointly trying persons who are accused of a joint offence will involve evidence being given before the jury that is inadmissible as against a co-accused, and the possible prejudice which may result from that, it is accepted that persons accused of a joint offence can properly be tried jointly. This course is considered fair because the law attempts to mitigate possible prejudice by a number of practices, such as requiring the trial judge to warn the jury that such evidence is not admissible as against a particular defendant or defendants. Another practice is for the judge, at the point when the prejudicial evidence is about to be given, to draw to the jury's attention that what will be said must not be heard or received by them as evidence against a co-accused. A further practice is for the judge in directing the jury to direct them separately in relation to the evidence admissible against individual defendants.

[29] These practices, designed to reduce the prejudice that may arise on a joint trial and that make it fair to hold a joint trial, were summed up in R v Towle...

In relation to Jarvis Small, the CCJ therefore allowed his appeal.

6. Delay

Guidelines

A defendant has the right to a fair trial within a reasonable time.

Delay might be excused in certain circumstances where there are cogent and convincing explanations for it: ***Lovell*** **[2016] CCJ 6 (AJ)** (BB).

Where the defendant alleges delay, they bear the burden of proof to show that they have been prejudiced in the presentation of their case as a result of the delay: ***Attorney General's Reference (No 1 of 1990)*** **(1992) 95 Cr App R 296**.

A prolonged delay between the commission of the alleged offence and the complaint leading to trial, is capable of leading to forensic disadvantages. The judge should refer to the fact that the passage of time is bound to affect memory. A witness' inability to recall detail applies equally to Prosecution and Defence witnesses, but it is the Prosecution which bear the burden of proof. The jury may be troubled by the absence of circumstantial detail which, but for the delay, they would expect to be available. Conversely, the jury may be troubled by the witness' claim to recall a degree of detail which is unlikely after such a prolonged passage of time. Whether reference should be made to such possibilities is a matter for the trial judge to assess, having regard to the evidence and the issues which have arisen in the case.

If, as a result of delay, specific lines of inquiry have been closed to the defendant, the disadvantage this presents should be identified and explained by reference to the burden of proof.

In ***Peters v The State*** **(Trinidad and Tobago, HCA No 24 of 1994); (Trinidad and Tobago, Crim App No 34 of 2008**, there was a delay of twenty-four years, twelve years attributable to the State and the other 12 attributable to the appellant, who voluntarily removed herself from the jurisdiction. The appeal was dismissed and the conviction and sentence for attempted murder affirmed. The Court of Appeal set out the law in this jurisdiction on the stay of criminal proceedings for abuse of process as a result of delay. Weekes JA (as she then was) stated:

> **The Law on Delay**
>
> **Common Law**
>
> 15. At common law, a defendant who wishes to stay a prosecution on the basis that his continued prosecution would amount to an abuse of process, -must show that he would suffer serious prejudice to the extent that no fair trial would be possible owing to the delay, so that the continuation of the prosecution amounted to an abuse of process (*Attorney General's Reference (No. 1 of 1990) [1992] 3 W.L.R.9.*). The right to a fair trial is an absolute right which does not permit the application of any balancing exercise, and the public interest can never be invoked to deny that right to any person under any circumstances (*Dyer v. Watson* (supra). This case although based on the constitutional right to trial with in a reasonable time expressed the position that the rights created by the relevant enactment were separate and distinct and that in respect of the fair trial requirement no balancing of the public interest was permitted.).
>
> 16 Where there is an express constitutional right to trial without undue delay or within a reasonable time

then complaint, in advance of the trial, by way of constitutional motion is the more appropriate remedy. Where there is no express right to a speedy trial or trial within a reasonable time, (as in the Trinidad and Tobago's Constitution), then common law principles are to be applied in order to determine whether the trial would be a fair one, this being a matter primarily for the trial judge who must decide whether the criminal proceedings should be stayed as a result of unfairness (*DPP v. Tokai (1996) 48 W.I.R. 376 PC; [1996] U.K.P.C. 19*).

17 A preponderance of authority suggests that the discretion to stay proceedings should be exercised only in exceptional cases, and even in those exceptional circumstances the judge is bound to consider the extent to which a suitable direction to the jury is capable of obviating any prejudice to the accused resulting from the delay. At common law, even where the delay was unjustifiable, a stay in criminal proceedings should only be granted in exceptional circumstances (*Hardeo Sinanan v. Senior Magistrate Ayers-Caesar citing AG's Reference (No. 1 of 1990)* (supra)). The applicant bears an onerous burden of proof to show that he would suffer prejudice so that no fair trial could be held, and, on such an application, the court should take into account any measures available to the trial judge to mitigate unfairness (*Sookermany v. the DPP (1996) 48 W.I.R. 346*)

...

Presumptive and Actual Prejudice

25 In view of the foregoing, the central issue in this appeal is whether the appellant would have suffered serious prejudice to the extent that no fair trial "as expressly guaranteed by the Constitution of Trinidad and Tobago" was possible owing to the delay and therefore continuation of the prosecution would have amounted and did amount to an abuse of process.

26 Prejudice simpliciter is not sufficient, what is required is prejudice which leads to unfairness that cannot be cured by the trial judge's actions/directions. It is axiomatic that a person charged with having committed a criminal offence should receive a fair trial and if he cannot be tried fairly then he should not be tried at all (*R v. Horseferry Road Magistrates' Court, Ex p Bennet [1994] 1 A.C. 42*). If the apprehended unfairness could be cured by the exercise of the trial judge's discretion within the trial process, then the trial should not be stayed, proceedings must only be stayed in the exceptional circumstance that the prejudice cannot be obviated and a fair trial cannot be had (*Attorney General's Reference (No. 1 of 1990) [1992] Q.B. 630*)...

In ***Tan v Cameron*** **(1993) 2 All ER 493** (PC), the Privy Council fully endorsed the judgement given in ***Attorney General's Reference No 1 of 1990***, and highlighted that even where it is established that the Prosecution is at fault, thereby causing prejudice to the defendant, a court is still required to consider whether the situation that was created by the delay was such as to make it unfair for the defendant to be held accountable.

Directions must make clear that the jury should give careful consideration to the exigencies of delay.

In ***H* [1998] 2 Cr App R 161** (CA) at 164 – 168**,** the Court of Appeal carried out a review of the authorities, as they concerned the judge's obligation to refer to delay in their directions, of which the following is part:

> Such directions would surely be called for in a case where not only had there been substantial delay but where it could be seen that witnesses who might have been able to give relevant evidence, and a large number of them, had disappeared during the interval and accordingly there was the clear possibility that the defence was not only prejudiced but seriously prejudiced as a result of not being able to produce that evidence…There is…a difference between the point being made by counsel and the submission which has been made by counsel being endorsed by the judge. It seems to us that this was a case in which it really was incumbent upon the learned judge, having taken the decision which he did at the outset of proceedings,…to, at the end of the case, point out to the jury that what was said by the defence about the possible prejudice to the defence as a result of the delay was a matter to which they could, and should properly have regard.
>
> …
>
> We consider it is plain upon the state of the authorities to which we have referred that it is desirable in cases

> of substantial delay that some direction should be given to the jury on possible difficulties with which the defence may have been faced as a result of such delay. Nonetheless, such a direction is not to be regarded as invariably required except in cases where some significant difficulty or aspect of prejudice is aired or otherwise becomes apparent to the judge in the course of the trial. Equally, such a direction should be given in any case where it is necessary for the purposes of being even-handed as between complainant and defendant.

Points to Consider

i. In ***Gibson v Attorney General of Barbados*** **[2010] CCJ 3 (AJ) (BB), (2010) 76 WIR 137**, the Caribbean Court of Justice stated that determination of unreasonable delay must be made on a case-by-case basis. A finding of unreasonable delay cannot be reached by applying a mathematical formula. However, the mere lapse of time would give rise to the presumption, rebuttable by the state, that there had been undue delay. In ***Gibson***, the Caribbean Court of Justice had to weigh the competing interests of the public and the defendant and apply the principles of proportionality, thereby taking into consideration all the circumstances of the case. The Caribbean Court of Justice stated that the following remedies may be available:

   a. **Stay of proceedings -** The permanent stay or dismissal of a charge could not be regarded as the normal remedy in cases where an unreasonable delay existed, but it was still possible to have a fair trial;

   b. **Reduction in sentence** - Where there is delay in hearing of an appeal for which no blame can be accorded to the appellant, and

the delay is such that it amounts to a violation of their right to have their criminal charge determined within a reasonable time, generally the most suitable redress is a reduction of sentence **(Archbold (2023) at 201, 7-143)**. This was applied in *Gibson* by the Caribbean Court of Justice, which held that following a conviction, the formulating of a remedy for extreme delay would necessitate consideration of a reduction of sentence;

c. **Award of damages** - The award of damages is not automatic. Depending on the circumstances of the case, it may be a suitable remedy for breach of the right to be tried within a reasonable time. Damages may be considered suitable where the defendant was tried and acquitted, or their conviction was quashed. However, where there is a possibility that the defendant may still be tried and convicted for the offence for which they are charged, it may offend against the public conscience that such award be afforded to the defendant.

ii. In ***PR*** **[2019] EWCA Crim 1225, [2019] 2 Cr App R 22**, it was stated at [72]:

> The judge's directions to the jury should include the need for them to be aware that the lost material, as identified, may have put the defendant at a serious disadvantage, in that documents and other materials he would have wished to deploy had been destroyed. Critically, the jury should be directed to take this prejudice to the defendant into account when considering whether the Prosecution had been able to prove, so that they are sure, that he or she is guilty. The judge gave an impeccable direction to

> this effect, of which there is no criticism by [counsel for the appellant].

iii. In ***Hewitt*** **[2020] EWCA Crim 1247**, **[2021] Crim LR 227**, the Court of Appeal considered in detail the way the judge at first instance had dealt with delay. One ground of appeal was that the judge had failed to provide sufficient guidance by way of examples as to missing documents and the potential disadvantage that could represent for the defendant. The Court quoted with approval this passage from the summing up:

> A lengthy delay between the time when an incident is said to have occurred and the time when the complaint is made and the matter comes to trial, is something that you should bear in mind when considering whether the Crown has proved its case or not. Necessarily, the longer the delay the harder it may be for someone to defend themselves because, as I have already said, memories will have faded and material that might have been of assistance may have been lost or destroyed. If you find that the delay in the case [has placed] Mr Hewitt at a material disadvantage in meeting the case against him, that is something that you should bear in mind in his favour.

Barbados

Burden and Standard of Proof

The Burden is on the State

Section 18(2) of the **Constitution of Barbados 1966**, although not specifically stating that the burden is on the Prosecution, makes provisions to secure protection of the law. Section 18 (2)(a) provides that every person who is charged with a criminal offence 'shall be presumed to be innocent ***until he is proved*** or has pleaded guilty' [emphasis added]. This clearly establishes that there is a burden of proof.

Additionally, s 134(1) of the **Evidence Act, Cap 121** (BB) deals with the general burden of proof in criminal cases: 'In criminal proceedings, the court shall not find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.' The jury must therefore be made sure of the guilt of the defendant. This burden can shift to the defendant in certain instances, for example, see ss 42(1) and (2) of the **Drug Abuse (Prevention and Control) Act, Cap 131** (BB).

Reverse Burden of Proof

This occurs when the burden is placed on the defendant: ***Hooper* (Barbados CA, Crim App No 18 of 2008)**. Section 134(2) of the **Evidence Act, Cap 121** (BB) provides: 'In a criminal proceeding where the burden of proof is on the accused, the court shall find the case of the accused proved if it is satisfied that the case has been proved on the balance of probabilities.'

In ***Hooper***, the burden, though on the defendant, was of a lower standard, that is, on the balance of probabilities akin to that in a civil case: ss 133(1) and (2) of the **Evidence Act, Cap 121** (BB).

In ***Hooper***, the conviction was quashed on appeal as this lower standard, the balance of probabilities, was not told to the jury: ***Francis*** **[2009] CCJ 9 (AJ)** (BB), **[2009] 74 WIR 108; *DPP's Reference (No 1 of 2001)* (Barbados CA, 26 February 2002)**; ***Grazette*** **[2009] CCJ 2 (AJ) (BB), [2009] 74 WIR 92**.

Voir Dire – s 135 of the **Evidence Act, Cap 121** (BB) deals with the admissibility of evidence, the standard being that of 'on the balance of probabilities'.

It is noteworthy that the challenge which arises in this instance, is that since the burden of proof in relation to the voir dire is on the Prosecution, it may be confusing that it is a lesser standard than proof beyond reasonable doubt which is used in relation to the admissibility of Confessions and Admissions.

In ***Francis*** the CCJ noted:

> [39] In *Grazette v. The Queen* this court held that section 135 applies in criminal cases to the proof of facts which provide a foundation for the admission of evidence, and that section 134 was limited to findings of fact based on the whole of the evidence admitted at the trial and made as part of the exercise of determining the guilt of the accused. We adhere to that view. Guilt must be proved beyond reasonable doubt but admissibility may be established on a balance of probabilities. We would point out with regard to the construction of the two sections that the words 'subject to this Act' at the beginning of section 135 (1) have nothing to do with section 134 but are necessary

> because several other sections of the Act formulate differently the pre-condition for the making of a finding that determines the admissibility of evidence. Some of these other sections specify that it must be 'reasonably open' to find the relevant facts, others require that there be 'reasonable grounds' for making the relevant finding.

Points to Consider

In considering how this area of law can be further developed, instructive points to note are outlined below:

i. Carefully explain the burden and standard of proof to a jury in the summation, showing them the difference between the standard of proof when the burden is on the Prosecution and when the burden is on the defendant.

ii. This burden on the defendant, it can be argued as in ***Hooper***, is less onerous than the burden placed upon the Prosecution. Section 18(2)(a) of the **Constitution** expressly states there is a **presumption of innocence.** See also: ***Gibson v Attorney General*** **[2010] CCJ 3 (AJ)** (BB), **(2010) 76 WIR 137** at [37]:

> The starting point in the assessment is the presumption of innocence. See: s.18(2)(a). *Gibson* has maintained his innocence and it must be presumed that he is innocent. It is not for him to establish innocence at trial. The State has the onus of proving his guilt. His trial is before a jury...

iii. **Defences** (examples: alibi, self-defence, provocation): the State has to disprove or negative such defences or issues as set out above. The burden still remains on the State to negative such defences.

Specimen Counts

The **Indictment Act, Cap 136** (BB) does not provide for specimen counts.

However, while there are no specimen counts, a careful direction is required for the jury to keep each count charged separate. Where the evidence is very similar in respect of each count, this may involve some degree of mental gymnastics on the part of the jury to avoid the evidence on certain counts not tainting the others.

The jury must be directed that a verdict of not guilty or guilty on one count, does not automatically mean the adoption of that verdict without more, on the other counts.

Points to Consider

i. Multiple counts in an indictment can cause confusion and lead to inefficiency as far as trials are concerned.

ii. It is sometimes difficult to deal with multiple count trials, where the defendant pleads not guilty to all the counts.

iii. Challenges in sentencing may occur as evidenced in the following cases:

   a. ***Evans*** **[1999] EWCA Crim 1537** (CA);

   b. ***Canavan*** **[1998] 1 Cr App R (S) 243** (CA);

   c. ***Clark*** **[1996] 2 Cr App R (S) 351** (CA);

   d. ***Bradshaw*** **(1997) 2 Cr App Rep (S) 128** (CA).

Trial in the Absence of the Defendant

Section 18(2) of the **Constitution of Barbados 1966 as amended by Act No 14 of 2002** provides that a defendant:

> ...(d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice ...
>
> ...
>
> ...and, except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence.

In ***Neil*** **(Barbados CA, Crim App No 18 of 2011)** at [64], the appellant absconded from his trial and the trial judge continued the trial in his absence. See also: ***Jones*** **[2002] UKHL 5**, **[2003] 1 AC 1; *Hayward*** **[2001] EWCA Crim 168, [2001] QB 862**.

Points to Consider

i. Try to give a reasonable time for the defendant to reappear. If they do not, care must be taken to:

   a. warn the jury that absence does not mean guilt and they are not to draw such an inference from the absence of a defendant.

   b. properly place their defence before the jury and explain the issues fairly and accurately, dealing with any weaknesses in

the Prosecution's case, strengths in the Defence's case and highlighting any defences open to the defendant, whether they are represented or not.

c. ensure that they are not prejudiced by the conduct or defence of a co-defendant.

ii. The decision in ***Nwodo v The State*** **(2021) LPELR-54491** (NG CA) may be helpful.

iii. If the defendant is unrepresented, there will be a lack of cross examination of Prosecution witnesses and a lack of witnesses for the Defence. If represented, should counsel remain to be of assistance, or should they withdraw as they may lack proper instructions?

Trial of One Defendant in the Absence of Another

Points to Consider

i. If the co-defendant is not a party in the trial of the remaining defendant/s, care has to be taken so that there is no prejudice, or likelihood of prejudice to the remaining defendant/s.

ii. The jury should be directed that the absence of the co-defendant is not evidence in respect of the defendant/s being tried, and the jury should only determine the case on the evidence led before them.

iii. Any matters relating to the guilty plea of a co-defendant who is not absent, should be discussed with Counsel or the defendant/s if they are unrepresented. Such guilty plea must not be used by the jury to implicate the remaining defendant/s.

iv. In ***Neil v Queen*** **BB 2018 CA 9**, the appellant absconded from his trial and the trial judge continued the trial in his absence. The Court of Appeal noted at [48]:

> However, as we have seen, the right to be present at trial is not an absolute right. Section 18 (2) provides two circumstances in which a trial may take place in the absence of a defendant. The first circumstance is where a defendant gives his consent to the trial proceeding in his absence. The second circumstance is where the defendant "so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence".

Delay

A. Delay between arrest and trial

Section 18(1) of the **Constitution of Barbados 1966 as amended by Act No 14 2002** provides: 'If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

In ***Gibson v Attorney General of Barbados*** **[2010] CCJ 3 (AJ) (BB), (2010) 76 WIR 137**, the Caribbean Court of Justice at [58] noted:

> A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying

> a mathematical formula although the mere lapse of an inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making such a finding the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State…

See also: ***Bell v DPP*** **[1985] 1 AC 937** (JM PC), where the Privy Council discussed the issue of delay between arrest and trial; and ***Darmalingum v The State*** **[2000] 1 WLR 2303** (MU PC).

B. Delay between Trial and Appeal

In ***Prescod*** **(Barbados CA, Crim App No 32 of 2001)**, the Court of Appeal reduced the 12-year sentence by 2 years to 10 years, to take into account what the Court referred to as the 'unexplained systemic failure' regarding the delay in the time it took for the case to reach the Court of Appeal.

C. Delay between Arrest and Trial, Delay between Conviction and Appeal

See ***Barton*** **(Barbados CA, Crim App No 7 of 2009)** at [42] – [51], per Williams JA.

D. Delay during the Covid-19 Pandemic

During this period, delays were experienced in Barbados with respect to:

i. starting a criminal trial; and

ii. continuing a part-heard trial.

E. Delay as an Evidential Issue within a Trial under the Sexual Offences Act – Recent Complaint

Sections 29(a) and (b) of the **Sexual Offences Act, Cap 154** (BB) provides for the duty of the judge to give the jury a warning to the effect that the absence of complaint or a delay in complaining does not necessarily indicate that the allegation that the offence was committed is false (s 29(a)), and to inform the jury that there may be good reasons why a victim of a sexual assault may hesitate in making or may refrain from making a complaint about the assault (s 29(b)).

Points to Consider

i. The experience in Barbados to date has been that increases in delay have resulted in further backlog. Both complainants and defendants have been left in suspended animation.

ii. There is forensic disadvantage to a defendant as a result of delay in the making of a complaint.

iii. There has thus been much discussion around the possibility of Judge Alone Trials, and developing the concept of virtual hearings, in an attempt to address the issue of delay.

iv. The case of ***United States v Jeffrey Olsen*** **995 F.3d 683 (9th Cir 2021)** highlighted the approval of the 9th Circuit Court of Appeal holding

that the dismissal by the district court of the criminal case against Olsen was erroneous, basically indicating that the State's decision to suspend criminal trials did not breach the defendant Olsen's right of a speedy trial.

Belize

Burden and Standard of Proof

In ***Rivas*** **(Belize CA, Crim App No 2 of 1983)**, the Court of Appeal considered the issue of whether the learned trial judge misdirected the jury on the burden and standard of proof that they had to apply in reaching their conclusion. The court opined as follows:

> The jury should be told (or reminded) of the burden of proof and standard of proof that rests on the prosecution to establish its case before the question of extreme provocation arises. The prosecution must establish beyond all reasonable doubt that the accused intentionally caused the death of the deceased by unlawful harm. Unless they are sure that those ingredients have been established the defence of extreme provocation does not fall to be considered. If they have any reasonable doubt in relation to any of those ingredients the defence of extreme provocation does not fall to be considered.
>
> If, however, they are sure that the accused intentionally caused the death of the deceased by unlawful harm then (it should be explained) he will be deemed to be

> guilty only of manslaughter, and not of murder, if the extenuating circumstances of extreme provocation are proved on his behalf, namely, that he was deprived of the power of self control by such extreme provocation given by the deceased as explained.
>
> It should be pointed out that this involves a shift in the burden of proof to the accused. It should be explained what the accused has to prove to establish the defence of extreme provocation. Above all it should be explained that the standard of proof required to establish this defence is far lighter than that of the prosecution to establish its case; that it turns on the balance of probabilities which can be explained as being more probable than not that he had been deprived of the power of self control by the extreme provocation given by the deceased.

Sections 90 and 91(1) of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) specifically provide for admissions and confessions and state:

> 90. (1) An admission at any time by a person charged with the commission of any crime or offence which states, or suggests the inference, that he committed the crime or offence may be admitted in evidence against him as to the facts stated or suggested, if such admission was freely and 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.
>
> 91. (1) Subject to the provisions of this section, where the voluntary nature of an accused person's confession or admission of guilt has been established beyond reasonable doubt, such confession or admission shall be sufficient to warrant a conviction without any confirmatory or corroborative evidence.

In ***FW* (Belize CA, Crim App No 18 of 2011)** at [5], the Court of Appeal of Belize reiterated that the Crown's burden at trial was to prove to the required standard, i.e. beyond reasonable doubt.

Criminal Offences

Section 6(3)(a) of the **Belize Constitution Act 1981** states: 'Every person who is charged with a criminal offence, shall be presumed to be innocent until he is proved or has pleaded guilty…'

Section 6 (10) (a) further provides:

> (10) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of,
>
> (a) subsection (3) (a) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts…

Specimen Counts

Specimen counts are not provided for in Belize; however alternative counts are included in an indictment by which the Crown intends to proceed (see ss 70 – 73 of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ)).

Rules 4 and 5(1) of the Indictment Rules in the First Schedule to the **Indictable Procedure Act** complement s 73, and state the following:

> 4. Charges for any crimes, whether felonies or misdemeanours, may be joined in the same indictment if those charges are found on the same facts, or form or are a part of a series of crimes of the same or a similar character.
>
> 5. (1) A description of the crime charged in an indictment or, where more than one crime is charged in an indictment, of each crime so charged, shall be set out in the indictment in a separate paragraph called a count.

See also ***NLN*** **(Belize CA, Crim App No 3 of 2012)** at [33] – [63].

Trial in the Absence of the Defendant

Sections 87 and 88 of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ) provide as follows:

> 87. (1) An accused person shall be entitled to be present in court during the whole of his trial, unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable.

> (2) The court may, if it thinks proper, permit the accused person to be out of court during the whole or any part of the trial on any terms it deems right.
>
> 88. Where any person against whom an indictment has been duly presented and who is then at large does not appear to plead thereto, whether he is under recognisance to appear or not, the court may issue a warrant for his apprehension.

Note also s 6(3) of the **Belize Constitution Act 1981**.

As a best practice, where a defendant has been arraigned but is absent for their trial, a warrant for their arrest is issued, the surety to the defendant's bail appears in court and cannot give an account of the defendant's whereabout, a trial may then proceed in the defendant's absence.

Trial of One Defendant in the Absence of Another

Sections 20(5) and (6) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provide as follows:

> (5) An abettor may be tried before, with or after a person abetted, and although the person abetted be dead, or be otherwise not amenable to justice.
>
> (6) An abettor may be tried before, with or after any other abettor, whether he and such other abettor abetted each other in respect of the crime or not, and whether they abetted the same or different parts of the crime.

Note: The guidance provided in Trial in the Absence of the Defendant above is relevant in this area.

Delay

Section 6(2) of the **Belize Constitution Act 1981** provides as follows: 'If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

In ***Daley*** **(Belize CA, Crim App No 8 of 2012)** at [18]– [32], the Court of Appeal in Belize discussed the issue of delay and the right to a fair trial within a reasonable time. The Court of Appeal noted the comments of the CCJ in ***Henry*** **[2018] CCJ 21 (AJ)** (BZ), **(2018) 93 WIR 205**, where there was a four-year delay between the charge and trial and a delay of five years in the hearing of the appeal. At [27] and [28], the Court of Appeal noted:

> [27] The Court at paragraph 37 of that judgment said the following about the delay pending appeal:
>
> > [37] ..... The delay of five years in the hearing of the appeal was entirely unsatisfactory. It must be unsatisfactory for a convict to serve his entire sentence before his appeal is heard and decided. Such delay renders the right of appeal more an illusion than a right. As the appellate process is undoubtedly part of the trial, such a delay constitutes an infringement of the constitutional right to a fair trial within a reasonable time.

> [28] However, Gilbert Henry was not granted any relief by the CCJ, although there was an infringement of his constitutional right to a fair trial. The Court at paragraph 41 of the judgment said that since Henry had not made a claim for constitutional relief at the trial, the claim should not have been entertained at the Court of Appeal for the first time. Further, "Strictly speaking, therefore, the issue of remedy for any breach of the reasonable time guarantee does not arise.

In ***Marin* [2021] CCJ 6 (AJ) BZ**, the CCJ also considered the issue of whether Marin was entitled to raise the constitutional issue of a breach of his fundamental right to a fair hearing within a reasonable time before the Court of Appeal, as well as before the CCJ and if so, whether he was entitled to any relief. The CCJ explicitly noted at [22]:

> One thing is certain, a post-conviction delay of nine years from the filing of an appeal to disposition by a court of appeal is on the face of it, and without any or any reasonable justification, an egregious breach of s 6(2), and consequently also of s 3(a) (protection of the law) of the Belizean Constitution. This much is agreed by all.

At [71], the CCJ opined:

> Finally, section 6 (2) of the Constitution guarantees a right to a fair hearing. A guarantee that is part of the more general and pervasive right to the protection of the law (section 3 (a) of the Constitution). In this context, again applying a generous and purposive interpretation

> to section 6 (2), 'hearing' includes all aspect of court proceedings. And 'fairness' imports the protection of the law in relation to the entire process. Thus, the right to 'a fair hearing within a reasonable time', textually covers and is intended to cover post-conviction delay as in this case. Post-conviction delay can be a denial of the protection of the law to guarantee a fair and timely hearing.

Guyana

Burden and Standard of Proof

Proof beyond reasonable doubt is the standard of proof required in all criminal trials; whatever evidence is presented by the Prosecution must be capable, if accepted, of proving a defendant's guilt beyond reasonable doubt. That burden is no different for the evidence that is to be considered for the purposes of a no case submission: ***The State v Khan*** **(2012) 80 WIR 407** (GY CA).

In ***Ward v The State*** **(Guyana CA, Crim App No 32 of 2013)**, the Court of Appeal in Guyana noted:

> [7] A convenient starting point is the familiar and longstanding principle that that *(sic)* in a criminal trial, the legal (or persuasive) burden is on the prosecution throughout to prove guilt. This includes an obligation to rebut (most, not all) defences raised by a defendant. In *Woolmington v DPP* [1935] AC 462, where the judge directed the jury that once the Crown proved the killing by the prisoner it was for him to prove circumstances

which would reduce the crime to manslaughter, his conviction was quashed by the House of Lords. In the course of the judgment Lord Sankey LC uttered the immortal words that "Throughout the web of the English criminal law one golden thread is always to be seen that it is the duty of the prosecution to prove the prisoner's guilt …" That burden included disproving the defences raised by the defendant, with the exception of insanity, so that the judge's direction was a misdirection.

[8] However, the familiarity of this principle has possibly obscured some of its nuances, one of which is that there are different burdens which may not always rest with the same party. Here is where it is crucial to appreciate the distinction between the persuasive burden and the evidential burden. The former captures the obligation described by Lord Sankey LC in *Woolmington*, which is one of proving (or disproving) a fact in issue. This is distinct from the evidential burden, which 'determines whether an issue should be left to the trier of fact'. Cross and Tapper define the evidential burden as '"the obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or nonexistence of a fact in issue."

[9] *Woolmington* established that the persuasive burden in a criminal trial rests on the prosecution, subject to certain exceptions, but whether a persuasive burden exists in the first place would depend on if that issue has arisen in the trial. Unless the issue has been raised, there is no burden to rebut it or for a judge to leave it to

> the jury. Put another way, there must be some evidence of the defence (or other issue) before the obligation to disprove it arises…

Where on a charge of murder, provocation was relied on by the Defence, the jury should be directed that the onus of proving the absence of provocation remained throughout on the Prosecution, and if the jury were left in doubt whether the facts showed sufficient provocation to reduce the killing to manslaughter, that issue is to be determined in favour of the prisoner: ***Rahim v The* State (2013) 81 WIR 388** (GY CA)

The following additional cases provide further instructive and useful discussion on the burden and standard of proof:

i. ***The State v Alfred* (2015) 86 WIR 360** (GY CA);

ii. ***Benedict v The State* (Guyana CA, Crim App Nos 11 and 12 of 2012)**;

iii. ***Samuels v The State* (Guyana CA, Crim App No 15 of 2009)**.

Specimen Counts

See the **Criminal Law (Procedure) Act, Cap 10:01** (GY), Fifth Schedule (Indictment Rules).

Application by One Defendant for a Separate Trial

Note the recent decision of ***Small v The DPP; Gopaul v The DPP* [2022] CCJ 14 (AJ)** (GY) at [26] to [32], where the court dealt with the issue of separate trials being conducted to avoid a miscarriage of justice that would result from defendants being tried together.

Delay

Article 144(1) of the **Constitution of the Co-operative Republic of Guyana, 1980** provides, 'If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'

In ***Singh v Harrychan*** **[2016] CCJ 4 (AJ)** (GY), **(2016) 88 WIR 362**, the CCJ considered that nine years had elapsed since the incident (September 2007) which led to the charge, the conviction (November 2010), and the appeal by the appellant. The court noted as follows:

> [4] Throughout the course of the special leave application and during the course of the hearing of the appeal, it became painfully obvious that the differing views in the court below as to the interpretation of s 8(2) were in essence attempts to grapple with the impact and implications of the serious and apparently endemic delays being experienced in the criminal justice system in Guyana.
>
> [5] The present case is illustrative of the problem. This matter dates back to an incident which occurred in September 2007 in respect of which an employee of the Guyana Power & Light Company, Sichan Harrychan, the respondent before us (but the appellant in the Court of Appeal), along with another individual, was convicted by a magistrate on 4 November 2010, of the offence of demanding with menace in contravention of section 225 of the Criminal Law (Offences) Act, and sentenced to three years' imprisonment. On 18

> November 2010 (14 days after conviction and sentence) the Respondent's notice of appeal was lodged with the clerk of the court and he was placed on bail pending the appeal. However, it was not until some 3 years after conviction and sentence (on 30 October 2013), that the magistrate submitted the memorandum of reasons to the clerk. Some 17 months after the memorandum was submitted the clerk (on 26 March 2015) issued the notice of readiness of proceedings by registered post to the Respondent's attorney which was, at least according to the clerk, received by the attorney on 11 April 2015.
>
> [6] Evidently then, over three years had elapsed between the incident and the conviction and sentence, and another four years and five months between the Respondent's notification of his intention to appeal and the receipt by his attorney of notification that the judicial system was ready to proceed with the appeal...

The Caribbean Court of Justice remitted the matter to the Court of Appeal for hearing and ordered that in light of the time that had passed, the respondent be afforded the opportunity to have his appeal fully heard in the Court of Appeal on its merits despite the technical errors. It further identified issues of merit that warranted appellate review, including the conviction itself, the sentence imposed by the learned magistrate (whether it was excessive) and the impact of the delay on the respondent's constitutional right to a fair hearing within a reasonable time. The Court of Appeal was also directed to consider the extensive delay in the processing of the case and the resulting impact on the appellant's conviction and sentence.

In ***Ogle*** **(1968) 11 WIR 439** (GY HC), the High Court of Guyana grappled with the issue of delay in a criminal trial. There was a delay of three years between the magistrate's committal of the defendant and the trial. The Prosecution was faced with the further difficulty of having to utilise the depositions as evidence due to the absence of witnesses, which itself was a result of the delay in bringing on the trial. It was held that the delay was excessive. Furthermore, the judge did not allow the depositions to be read as an alternative to oral evidence, and the Prosecution did not offer any other evidence. Consequently, the court acquitted the defendant.

In ***Sandiford v DPP*** **(1979) 28 WIR 152** (GY HC), the High Court of Guyana emphasised the importance of trial within a reasonable time. The case dealt with a delay of 14 months between arrest and commencement of preliminary inquiry.

In ***Bridgelall v Hariprashad*** **[2017] CCJ 8 (AJ)** (GY), **(2017) 90 WIR 300**, the CCJ, in considering whether there had been a breach of the reasonable time guarantee, noted:

> 38. We agree with the view that in considering whether there has been a breach of the reasonable time guarantee it is appropriate first to consider the overall period of time that has elapsed. If, on its face, the period appears to be overly lengthy, then it would be appropriate for the court to interrogate all the relevant facts and circumstances with a view to determining whether the State has provided a satisfactory explanation or justification for any lapse of time which appears to be excessive.
>
> 39. The time which has elapsed between Bridgelall's conviction by the Magistrate and the date of the hearing

> of the DPP's appeal by the Court of Appeal (see: [35] above) raises a real concern. There is no doubt that the delay here is inordinate, excessive and unreasonable. The several justifications offered for the delay mirror the arguments which we rejected in Singh. We disagree with the notion that, as Bridgelall was at large in the intervening period between the giving of the decisions of the Full Court and the Court of Appeal, he suffered no prejudice. It is entirely unacceptable that a person who is convicted and sentenced, but later declared a free man by a higher court, should have dangling over his head for over six years the possibility that he may have to return to prison to serve out his sentence....

The defendant's right to a fair hearing within a reasonable time had been violated. The appropriate remedy was to stay any further action against the defendant with respect to the enforcement of the imposed prison sentence. The appeal was allowed in part.

See also ***Fraser v The State*** **(Guyana CA, Crim App Nos 21A and 22A of 2007)** which provides further instructive and useful discussion on the issue of delay and the right to a fair trial within a reasonable time.

In this Chapter:

Chapter 4
Causation

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

'Causation' refers to the relationship between an act of a defendant and the consequences it produces. It is one of the elements that must be proved before a defendant can be convicted of a crime in which the effect of the act is part of the definition of the crime (e.g. murder). Whatever other causes may have impacted the bringing about of the crime, it needs to be shown that the defendant's behaviour was, in a substantial way, the cause of the crime. Causation is a question of both fact and law and in both cases, it is a question for the jury to decide.

Guidelines

In its simplest form, the test for causation is whether "but for" the defendant's act the result would have happened, but such a test might not permit concurrent causes and might, inappropriately, impose liability for an unforeseeable change to consequences.

"Result" offences sometimes create problems of causation to be resolved by the jury. The question of whether the defendant's act caused the prohibited result is one for the jury; but in answering this question, they must apply legal principles which should be explained to them by the judge: ***Pagett*** **[1983] EWCA Crim 1, (1983) 76 Cr App R 279**.

The judge may need to give careful consideration to:

i. what the Prosecution needs to prove;

ii. whether it is necessary to provide the jury with an explanation of causation and, if so,

iii. how to explain the concept of causation in the context of the facts of the case.

'There are a number of cases in the law of contract and tort on these matters of causation, and it is always difficult to find a form of words when directing a jury or, as here, a court which will convey in simple language the principle of causation': per Lord Parker, ***Smith*** **[1959] 2 QB 35 (CA) 43**.

General Rule

There may be more than one cause. The Prosecution must usually establish that the defendant's act was a substantial cause of the "result", by which is meant a more than minimal cause: ***Hennigan*** **[1971] 3 All ER 133** (CA).

The fact that the result was unusual or unexpected in consequence of some unanticipated decision of the victim will not necessarily assist the defendant. In ***Blaue*** **[1975] 1 WLR 1411** (CA) for example, the victim of a wounding refused a blood transfusion which would have saved her life. Lawton LJ said:

> It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about

> did not break the causal connection between the act and death.

The defendant may be held to have caused a result even if the defendant's conduct was not the only cause and even if the defendant's conduct could not by itself have brought about the result: ***Warburton*** **[2006] EWCA Crim 627, [2006] AllER (D) 305 (Mar)**.

Where there are multiple causes (including where the victim has contributed to the result), the defendant will remain liable if the defendant's act is a continuing and operative cause: see the review of the law of causation in ***Wood Treatment Ltd*** **[2021] EWCA Crim 618, [2021] All ER (D) 47 (May)**.

Contributory causes from third parties, or victims, will not necessarily absolve the defendant of causal liability unless the contribution from the other party is such as to break the chain of causation. In ***Warburton***, Hooper LJ, delivering the judgment of the court, emphasised that, 'the test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death?'

1. Unlawful Act Manslaughter and Foreseeable Harm

In cases of unlawful act manslaughter, the co-existence of the unlawful act and the death of the victim will not be enough, unless some harm was a foreseeable risk on the facts as they were known to the defendant. In ***Church*** **[1966] 1 QB 59** (CA), the defendant inflicted grievous injuries. His evidence was that in panic and believing his victim to be still alive, he threw her body into a river. As Edmund Davis J explained:

> ...an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict

> inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

The defendant was convicted of manslaughter. The court held that although the jury had been misdirected that the defendant's belief that his victim was alive was irrelevant, a conviction for at least manslaughter had been inevitable because either (1) the victim was dead when she was thrown into the river and the injuries the defendant had already inflicted made a significant contribution to death or (2) his victim was alive and his act of throwing her into the river was an unlawful and dangerous act which any reasonable person would have realised would risk some harm.

The Court of Appeal made plain in ***Dawson*** **(1985) 81 Cr App R 150** (CA) and ***Carey*** **[2006] EWCA Crim 604, [2006] AllER (D) 107 (Mar)** that it is not the foreseeability of the risk of any harm which will be sufficient to satisfy the test in a case of manslaughter. In ***Dawson***, a petrol station attendant aged 60 was the victim of an attempted robbery. He undoubtedly suffered an emotional reaction but was subjected to no violence. He died from a heart attack caused by the effect of stress upon an already severely diseased heart to which he was in constant danger of succumbing. The bystander would have had no reason to suspect that a heart attack might be the result of the stress the victim suffered. In ***Carey***, the deceased was subjected to direct physical assault during an affray but, having run away from the scene, suffered a dysrhythmia of the heart to which she was, unknown to anyone, susceptible, and from which she collapsed and died. In both cases the court held that the death was not "caused" by the unlawful act. Whether the act was objectively dangerous was to be judged according to the circumstances as they were known to the defendant. Accordingly,

unless there were circumstances which would have given the bystander foresight that the defendant's unlawful act might cause relevant harm, death would not have been "caused" by the unlawful and dangerous act. In ***Watson*** **[1989] 1 WLR 684** (CA) on the other hand, the victim of a burglary could be seen to be a frail 87-year-old man. Lord Lane CJ said at 686-687:

> The judge clearly took the view that the jury were entitled to ascribe to the bystander the knowledge which the appellant gained during the whole of his stay in the house and so directed them. Was this a misdirection? In our judgment it was not. The unlawful act in the present circumstances comprised the whole of the burglarious intrusion and did not come to an end upon the appellant's foot crossing the threshold or windowsill. That being so, the appellant (and therefore the bystander) during the course of the unlawful act must have become aware of Mr. Moyler's frailty and approximate age, and the judge's directions were accordingly correct. We are supported in this view by the fact that no one at the trial seems to have thought otherwise.

2. Novus Actus Interveniens and Remoteness

Most problems of causation concern the application of the principle novus actus interveniens, or new and intervening act. The UK Court of Appeal has, on more than one occasion, advised against entering into an exposition of the law concerning an intervening act when it is plain that there was more than one cause, and the issue is whether the defendant made a more than minimal contribution to the result. In ***Pagett*** **[1983] 76 Cr App R 279** (CA) at 288, Robert Goff LJ said:

In cases of homicide (…) Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that result. It is right to observe (…) that even this simple direction is a direction of law relating to causation, on the basis of which the jury are bound to act in concluding whether the prosecution have established, as a matter of fact, that the accused's act did in this sense cause the victim's death. Occasionally, however, a specific issue of causation may arise. One such case is where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such intervention (…) has often been described by lawyers as a novus actus interveniens. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused.

Subject to the existence of an ***Empress Car Co*** duty (see below), the defendant will be relieved of liability for the result, if the intervening act or event becomes the dominating operative cause, such as:

i. an extraordinary natural event or one which is not reasonably foreseeable (e.g. earthquake);

ii. a third party's free, deliberate, and informed act (see ***Gamble*** **[1989] NI 268** (CC) and ***Latif*** **[1996] 1 WLR 104** (HL) below);

iii. a third party's act which is not reasonably foreseeable (see **Girdler [2009] EWCA Crim 2666, [2010] RTR 307** and the medical intervention cases below);

iv. the victim's free, deliberate, and informed act (see ***Kennedy (No 2)*** **[2008] 1 AC 269** (HL) below, but compare ***Blaue*** above where the wound remained the operative cause);

v. the victim responded to the defendant's act in a way which was not reasonably foreseeable (see ***Lewis*** **[2010] EWCA Crim 151** below).

In ***Latif***, the defendants were alleged drug importers. Customs officers seized in Pakistan heroin intended for the defendants in the UK. The officers conveyed the drug to the UK where the defendants took delivery. The defendants were not guilty of the importation. Lord Steyn said:

> The problem, as Sir John Smith pointed out in the note in the Criminal Law Review, is one of causation. The general principle is that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is held to relieve the first actor of criminal responsibility: see *Hart and Honore*, *Causation*

> *in the Law,* 2nd ed. (1985), pp. 326 et seq.; *Blackstone's Criminal Practice* (1995), pp. 13 – 15. For example, if a thief had stolen the heroin after Shahzad delivered it to Honi, and imported it into the United Kingdom, the chain of causation would plainly have been broken. The general principle must also be applicable to the role of the customs officers in this case. They acted in full knowledge of the content of the packages. They did not act in concert with Shahzad. They acted deliberately for their own purposes whatever those might have been. In my view consistency and legal principle do not permit us to create an exception to the general principle of causation to take care of the particular problem thrown up by this case. In my view the prosecution's argument elides the real problem of causation and provides no way of solving it.

The defendants did not, however, escape conviction because they were charged under s 170(2) of the **Customs and Excise Management Act 1979** (UK), by which the defendant is guilty when they evade or attempt to evade the duty. There was no doubt that they had attempted to evade the duty.

3. Acts of Self Preservation Causing Injury or Death

In ***Pagett*** **[1983] EWCA Crim 1, (1983) 76 Cr App R 279** (CA), the defendant advanced towards armed police officers in the darkness of a stairwell using his girlfriend, whom he had taken hostage, as a shield. He fired a shot from a shotgun, which produced the instinctive and self-defensive

response of shots from the police officers. The girlfriend was killed by shots fired by the officers. Robert Goff LJ, recognising the analogy with the "escape" cases, said:

> There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act, does not operate as a novus actus interveniens. If authority is needed for this almost self-evident proposition, it is to be found in such cases as **R. v. Pitts (1842) C. & M. 284, and R. v. Curley (1909) 2 Cr. App. R. 96.** In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgment, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party. Of course, it does not necessarily follow that the accused will be

> guilty of the murder, or even of the manslaughter, of the third party; though in the majority of cases he is likely to be guilty at least of manslaughter. Whether he is guilty of murder or manslaughter will depend upon the question whether all the ingredients of the relevant offence have been proved; in particular, on a charge of murder, it will be necessary that the accused had the necessary intent…

Thus, the defendant's unlawful and dangerous acts of (1) the assault upon his girlfriend by forcing her to act as a shield and (2) firing a shot at the police officers, created a foreseeable risk of relevant harm and were a significant cause of the girlfriend's death.

The trial judge had directed the jury that if they found these facts proved, the defendant would in law have caused the death. The judge should have left the issue to the jury. Robert Goff LJ continued:

> The principles which we have stated are principles of law. This is plain from, for example, the case of *Pitts*, to which we have already referred. It follows that where, in any particular case, there is an issue concerned with what we have for convenience called novus actus interveniens, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury. Thus in, for example, **R. v. Towers (1874) 12 Cox C. C. 530**, the accused struck a woman; she screamed

> loudly, and a child whom she was then nursing turned black in the face, and from that day until it died suffered from convulsions. The question whether the death of the child was caused by the act of the accused was left by the judge to the jury to decide as a question of fact.

Nevertheless, the verdict was undisturbed because the judge's directions had been somewhat more generous than they need have been.

If the defendant's unlawful act generates in the victim a reaction which results in the victim's injury or death, the question for the jury will be whether the victim's reaction was a foreseeable consequence of the defendant's unlawful act. In ***Williams*** **[1992] 1 WLR 380** (CA), Stuart-Smith LJ explained:

> It is plain that in fatal cases there are two requirements. The first, as in non-fatal cases, relates to the deceased's conduct which would be something that a reasonable and responsible man in the assailant's shoes would have foreseen. The second, which applies only in fatal cases, relates to the quality of the unlawful act which must be such that all sober and reasonable people would inevitably recognise must subject the other person to some harm resulting therefrom, albeit not serious harm. It should be noted that the headnote is inaccurate and tends to confuse these two limbs.
>
> The harm must be physical harm. Where the unlawful act is a battery, there is no difficulty with the second ingredient. Where, however, the unlawful act is merely a threat unaccompanied and not preceded by any actual

> violence, the position may be more difficult. In the case of a life-threatening assault, such as pointing a gun or knife at the victim, all sober and reasonable people may well anticipate some physical injury through shock to the victim, as for example in *Reg v Dawson* (1985) 81 Cr App R 150 where the victim died of a heart attack following a robbery in which two of the appellants had been masked, armed with a replica gun and pickaxe handles. But the nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat; that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a novus actus interveniens and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing.

In ***Lewis*** **[2010] EWCA Crim 151**, the deceased was chased by the appellant into the path of an oncoming car and suffered fatal injuries. The appellant was convicted of manslaughter. Upon the issue of causation, the judge posed to the jury the question whether the Prosecution had proved, so that they were sure, that (1) by chasing the deceased the appellant had committed an unlawful act, (2) the deceased's flight was the result of the unlawful act, and (3) the deceased's flight into the road was at least one of the responses which might have been expected of the deceased in the circumstances. The directions were upheld. They correctly identified in non-legal terms the need for the Prosecution to prove both that the

appellant's unlawful act was the operative cause of the fatal collision and that the unlawful act created a foreseeable risk of relevant harm in the circumstances known to the appellant at the time, and was therefore dangerous.

4. Death by Dangerous Driving

In the trial of offences of causing death by dangerous driving, the bad driving of the defendant and of others may be concurrent causes of death. In ***Hennigan*** **[1971] 3 All ER 133** (CA), the defendant overtook vehicles at speed. He regained his correct side of the road, but in front of him to his nearside the deceased emerged from a side turning to turn left. The defendant was unable to avoid a collision which killed the deceased and his passenger. Lord Parker CJ made clear that the jury was not concerned with apportionment. It was enough if the dangerous driving of the defendant was a real cause of the death, that is, more than minimal.

In ***Skelton*** **[1995] Crim LR 635** (CA), the driver of a lorry knew of the unsafe condition of its braking system. The brakes seized and the lorry came to rest in the nearside lane. Several following vehicles managed to avoid the obstruction, but after about 12 minutes, a lorry collided with the obstruction and the driver was killed. The question for the jury was whether the deceased's own negligence was a new and intervening cause. Sedley J, as he then was, delivering the judgment of the court, said: '…the dangerous driving [of the stationary vehicle] must have played a part, not simply in creating the occasion of the fatal accident but in bringing it about'.

In ***Barnes*** **[2008] EWCA Crim 2726, [2009] RTR 262**, the defendant carried an unsafe load on his truck. A sofa worked loose, became detached and fell into the carriageway. The truck stopped a short distance further along

the carriageway. A following motorcyclist managed to avoid the sofa but collided with the rear of the truck. Hallett LJ said:

> 13. The jury was entitled to find that the appellant put other road users at risk by driving dangerously. He drove with a load which was insecure. Had he not done so the sofa would not have fallen off, and Mr Wildman would not have been forced to drive round it. He would not have been distracted by it or turned to warn others coming behind him. The appellant's car would not have been stopped in the carriageway and Mr Wildman would not have driven into the back of it. Whatever criticisms, Mr Bridge could properly make of Mr Wildman's driving, in our judgment all those circumstances are such that it was open to the jury to find that his dangerous driving played more than a minimal role in bringing about the accident and the death.
>
> 14. We turn therefore to the further criticisms made of the judge by Mr Bridge. The second ground of appeal is that the judge, it is said, failed adequately to sum up the law in respect of causation. The judge summed up the law in this way:
>
> > "Now the words 'thereby caused the death'. You have to be sure the dangerous driving was a cause of death, not the only cause of death or the main cause of death, but a cause of death which was more than just trivial. This means you must be sure that not only the defendant's dangerous driving created the circumstances of the fatal collision but it was an actual cause in bringing about the death

> of Mr Wildman. And the defence say here, you might be satisfied the defendant had created the circumstances of the collision but - and they say, and they recognise it is an unattractive argument - and they say it is nonetheless right - the only cause of death was Mr Wildman failing to keep a proper look-out. And if that is so, or may be so, I direct you to acquit."

The court held that while in some circumstances judges might have to give the jury further assistance upon the difference between bringing about the conditions in which death occurred and "causing" the death, the direction given by the judge was sufficient on the facts in ***Barnes***.

The Court of Appeal gave consideration in ***Girdler*** **[2009] EWCA Crim 2666, [2010] RTR 307** to the question how the jury could be assisted with the concept of foreseeability, where it was the Defence's case that a new act intervened. The defendant had collided with another vehicle which, when it came to rest, created an obstruction. Some vehicles avoided the obstruction; one did not, and a fatal accident occurred. The court considered how the trial judge might best explain to the jury that the defendant caused the second and fatal collision, if it was a foreseeable consequence of his driving. Hooper LJ concluded:

> 43. We are of the view that the words 'reasonably foreseeable' whilst apt to describe for a lawyer the appropriate test, may need to be reworded to ease the task of a jury. We suggest that a jury could be told, in circumstances like the present where the immediate cause of death is a second collision, that if they were sure that the defendant drove dangerously and were

sure that his dangerous driving was more than a slight or trifling link to the death(s), then:

> ...the defendant will have caused the death(s) only if you are sure that it could sensibly have been anticipated that a fatal collision might occur in the circumstances in which the second collision did occur.

The judge should identify the relevant circumstances and remind the jury of the prosecution and defence cases. If it is thought necessary it could be made clear to the jury that they are not concerned with what the defendant foresaw.

In ***L* [2010] EWCA Crim 1249, [2011] RTR 237** (concerning death by careless driving), Toulson LJ, as he then was, held at [9] that ***Hennigan***, ***Skelton***, and ***Barnes*** established the following principles:

> ...First, the defendant's driving must have played a part not simply in creating the occasion for the fatal accident, i.e. causation in the "but for" sense, but in bringing it about; secondly, no particular degree of contribution is required beyond a negligible one; thirdly, there may be cases in which the judge should rule that the driving is too remote from the later event to have been the cause of it, and should accordingly withdraw the case from the jury.

He concluded at [16]:

> ...it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should

> fairly be regarded as having brought about the death of the victim by his careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury.

5. Medical Intervention

Medical intervention is a foreseeable consequence of injury caused by the defendant's violent unlawful act; so also is the possibility of ineffective or negligent medical treatment. The defendant will not be liable if a medical professional intervenes to treat injuries inflicted by the defendant and the treatment is so independent of the defendant's conduct (although usually an act, it can be an omission to act: ***McKechnie* (1992) Cr App R 51** (CA)) and so potent, as to render the defendant's contribution part of the history and not a substantial and operating cause of death. The jury must remain focused on whether the defendant remains liable, not whether the medical professional's conduct ought to render the medical professional criminally liable for their part. Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which the defendant is charged.

In ***Smith* [1959] 2 QB 35** (CA), the deceased was injured by a bayonet during a fight. While being taken to the medical reception station, the deceased was dropped twice. On arrival, his condition was misdiagnosed, and he was not given a blood transfusion. Nevertheless, the Courts Martial Appeal Court (Lord Parker CJ) held that the deceased's death was caused by his stab wounds. The facts of ***Jordan* (1956) 40 Cr App**

R 152 (CA) were in this regard, exceptional. The victim of a stabbing was taken to hospital where he died. The defendant was convicted of murder. However, the Court of Criminal Appeal admitted fresh medical evidence which came to light after the trial. Hallett J, giving the judgment of the court said:

> There were two things other than the wound which were stated by these two medical witnesses to have brought about death. The stab wound had penetrated the intestine in two places, but it was mainly healed at the time of death. With a view to preventing infection it was thought right to administer an antibiotic, terramycin.
>
> It was agreed by the two additional witnesses that that was the proper course to take, and a proper dose was administered. Some people, however, are intolerant to terramycin, and Beaumont was one of those people. After the initial doses he developed diarrhoea, which was only properly attributable, in the opinion of those doctors, to the fact that the patient was intolerant to terramycin. Thereupon the administration of terramycin was stopped, but unfortunately the very next day the resumption of such administration was ordered by another doctor and it was recommenced the following day. The two doctors both take the same view about it.
>
> Dr Simpson said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Mr Blackburn agreed.
>
> Other steps were taken which were also regarded by the doctors as wrong—namely, the intravenous introduction of wholly abnormal quantities of liquid far exceeding

> the output. As a result the lungs became waterlogged and pulmonary oedema was discovered. Mr Blackburn said that he was not surprised to see that condition after the introduction of so much liquid, and that pulmonary oedema leads to bronchopneumonia as an inevitable sequel, and it was from bronchopneumonia that Beaumont died.
>
> We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.

In ***Cheshire*** **[1991] 1 WLR 844** (CA), the deceased had, after emergency treatment, made a substantial recovery from the effect of bullet wounds, when he developed difficulty with his breathing. Doctors failed to appreciate that he had developed a complication of a tracheotomy carried

out as a necessary emergency procedure, which restricted his breathing and he died. Beldam LJ said:

> In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the defendant was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the defendant caused the death of the deceased adding that the defendant's acts need not be the sole cause or even the main cause of death it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the defendant unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.
>
> It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the defendant's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible.

In ***Malcherek*** **[1981] 1 WLR 690** (CA), the Court of Appeal had to consider an application to adduce fresh medical evidence to the effect that death had been caused not by the defendant's act, but the treating physicians'

inappropriate decision to withdraw life support. Lord Lane CJ explained the court's decision to refuse the application as follows:

> The reason is this. Nothing which any of the two or three medical men whose statements are before us could say would alter the fact that in each case the assailant's actions continued to be an operating cause of the death. Nothing the doctors could say would provide any ground for a jury coming to the conclusion that the assailant in either case might not have caused the death. The furthest to which their proposed evidence goes, as already stated, is to suggest, first, that the criteria or the confirmatory tests are not sufficiently stringent and, secondly, that in the present case they were in certain respects inadequately fulfilled or carried out. It is no part of this court's function in the present circumstances to pronounce upon this matter, nor was it a function of either of the juries at these trials. Where a medical practitioner adopting methods which are generally accepted comes bona fide and conscientiously to the conclusion that the patient is for practical purposes dead, and that such vital functions as exist— for example, circulation— are being maintained solely by mechanical means, and therefore discontinues treatment, that does not prevent the person who inflicted the initial injury from being responsible for the victim's death. Putting it in another way, the discontinuance of treatment in those circumstances does not break the chain of causation between the initial injury and the death.
>
> Although it is unnecessary to go further than that for

> the purpose of deciding the present point, we wish to add this thought. Whatever the strict logic of the matter may be, it is perhaps somewhat bizarre to suggest, as counsel have impliedly done, that where a doctor tries his conscientious best to save the life of a patient brought to hospital in extremis, skilfully using sophisticated methods, drugs and machinery to do so, but fails in his attempt and therefore discontinues treatment, he can be said to have caused the death of the patient.

6. Defendant Assisting a Lawful Act Causing Death

The House of Lords, in ***Kennedy (No 2)*** **[2008] 1 AC 269** (HL), finally resolved the question whether a defendant who assisted the victim to inject a controlled drug committed the offence of manslaughter when the victim died from an overdose. When the victim by their "free, deliberate and informed act" chose to ingest a controlled drug, they were committing no offence. It followed that a defendant who assisted them could not be guilty as a secondary party. Lord Bingham said:

> 14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to

be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "*Finis for Novus Actus?*" [1989] 48 (3) CLJ 391, 392, Professor Glanville Williams wrote:

> 'I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before'.

In Chapter XII of **Causation in the Law**, 2nd ed (1985), at 326, Hart & Honoré wrote:

> The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.
>
> This statement was cited by the House with approval in **R v Latif** [1996] 1 WLR 104 115. The principle is fundamental and not controversial.

Lord Bingham, in ***Kennedy***, continued:

> 17. In his article already cited Professor Glanville Williams pointed out, (at p 398), that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a novus actus interveniens breaking the chain of causation:
>
> > 'Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the novus actus principle as one of the bases of our criminal law. The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, 'derivative' from that of the perpetrator'.
>
> 18. This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant's first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in ***R v Dias*** **[2002] 2 Cr App R 96**, paras 21–24, and in ***R v Rogers*** **[2003] 1 WLR 1374** and is now accepted. If the conduct of the deceased was not criminal he was not a principal

> offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

7. Statutory Context

Usually, there will be a direct cause and effect. However, a leading modern authority on causation is ***Environment Agency v Empress Car Co (Abertillery) Ltd*** **[1999] 2 AC 22** (HL), in which the House of Lords was considering the meaning of the word "causes" in s 85(1) of the **Water Resources Act 1991** (UK). The section reads: 'A person contravenes this section if he causes...any poisonous, noxious or polluting matter or any solid waste matter to enter any controlled waters.'

Empress Car Co stored diesel fuel in a tank at their yard adjoining the River Ebbw in Abertillery. Overnight, someone mischievously opened the tap which caused the fuel to overflow and pollute the river. The question was whether the company had "caused" the fuel to enter the controlled waters. Notwithstanding the immediate and direct cause of the pollution was the deliberate act of a third party, the House held that the company had caused the pollution.

Although the decision in ***Empress Car Co*** has since been confined to its particular statutory context (environmental pollution), Lord Hoffman's rationale for the meaning of the word "causation" received the subsequent

endorsement of the House in ***Kennedy (No 2)*** **[2008] 1 AC 269** (HL). Lord Hoffman explained that before a decision could be reached as to what was required, the court had to examine the scope intended by the "rule":

> Before answering questions about causation, it is therefore first necessary to identify the scope of the relevant rule. This is not a question of common sense fact; it is a question of law. In *Stansbie v Troman* ([1948] 1 All ER 599) the law imposed a duty which included having to take precautions against burglars...
>
> What, therefore, is the nature of the duty imposed by section 85(1)? Does it include responsibility for acts of third parties or natural events and, if so, for any such acts or only some of them? This is a question of statutory construction, having regard to the policy of the Act. It is immediately clear that the liability imposed by the subsection is strict: it does not require mens rea in the sense of intention or negligence. Strict liability is imposed in the interests of protecting controlled waters from pollution. The offence is, as Lord Pearson said in *Alphacell Ltd v Woodward* [1972] AC 824, 842, 'in the nature of a public nuisance'. *National Rivers Authority v Yorkshire Water Services Ltd* [1995] 1 AC 444 is a striking example of a case in which, in the context of a rule which did not apply strict liability, it would have been said that the defendant's operation of the sewage plant did not cause the pollution but merely provided the occasion for pollution to be caused by the third party who discharged the iso-octanol. And in *Alphacell Ltd v Woodward* [1972] AC 824, 835, Lord Wilberforce said with reference to

Impress (Worcester) Ltd v Rees [1971] 2 All ER 357, which I shall discuss later, that:

> 'it should not be regarded as a decision that in every case the act of a third party necessarily interrupts the chain of causation initiated by the person who owns or operates the installation or plant from which the flow took place'.

Clearly, therefore, the fact that a deliberate act of a third party caused the pollution does not in itself mean that the defendant's creation of a situation in which the third party could so act did not also cause the pollution for the purposes of section 85(1).

Lord Hoffman concluded that the mischievous act of opening the tap did not break the chain of causation if, on the evidence, it was one which could be expected or anticipated in the ordinary course of things. He said:

> (4) ...If the defendant did something which produced a situation in which the polluting matter could escape but a necessary condition of the actual escape which happened was also the act of a third party or a natural event, the justices should consider whether that act or event should be regarded as a normal fact of life or something extraordinary. If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant's acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. If it can be regarded as something extraordinary, it will be

open to the justices to hold that the defendant did not cause the pollution.

(5) The distinction between ordinary and extraordinary is one of fact and degree to which the justices must apply their common sense and knowledge of what happens in the area.

Points to Consider

i. The judge will need to identify the legal requirements of causation. The jury must decide whether the defendant caused the result.

ii. It may, and usually will be, enough for the Prosecution to establish that the defendant's act was one of the operative causes of the result, in which case the jury should be directed that it must be a significant or substantial cause in the sense that it must be more than trivial, trifling, or minimal.

iii. When the evidence is that the defendant set in train a sequence of events which led to the result, but the jury needs to consider whether a new event has intervened so as to break the chain of causation, the jury will need help on the issue of foreseeability. The jury should be directed to consider whether the new event is one which could sensibly have been anticipated by a reasonable person, in the circumstances known to the defendant at the time, as a possible consequence of the defendant's act. If it could not, then the jury should conclude that the chain of causation was broken, and the defendant's act should not be treated as an operative cause. If the result could sensibly have been anticipated the jury must be sure that the defendant's act was a substantial and not a trivial cause of the result.

iv. Where the jury needs to consider the response of the victim to the unlawful and threatening act of the defendant, the jury should be directed that they must be sure that (1) the response was a reaction to the defendant's unlawful act and not the victim's free choice and (2) was a response which could sensibly have been anticipated by a reasonable person in the circumstances known to the defendant at the time. Where the charge is manslaughter arising from the victim's flight response the jury must also be sure that a reasonable person would have realised that the defendant's unlawful act exposed the victim to a risk of some, although not serious, relevant harm (i.e. in consequence of the response).

Barbados

Sources

Halsbury's Laws (5th edn, 2010) vol 25, para 7

Peter Murphy, *Blackstone's Criminal Practice 2004*, (14th edn, OUP 2004) at. A.128

Relevant Statutory Provisions

i. Killings in Special Cases – ss 8(1)(a) – (e) and 8(2) of the **Offences Against the Person Act, Cap 141** (BB).

ii. Causing Death by Reckless or Dangerous Driving – s 81 of the **Road Traffic Act, Cap 295** (BB).

Guidelines

In ***Pagett*** **[1983] EWCA Crim 1, (1983) 76 Cr App R 279**, it was stated with respect to the **'but for' test**, that factual causation requires proof that the defendant's conduct was a necessary condition of the consequence, establishing that the consequence would not have occurred 'but for' the defendant's conduct.

In ***Hughes*** **[2013] UKSC 56, [2013] 4 All ER 613** at [33], the court noted that '...the driving of the defendant, beyond the mere presence of the vehicle on the road...contributed in some more than minimal way to the death.'

In ***Hennigan*** **[1971] 3 All ER 133** (CA), it was stated that '...it is only necessary for the prosecution to show that the accused's dangerous driving was a cause of the accident and was something more than de minimis; it is not necessary to show that it was a 'substantial' cause...' It is wrong to direct a jury that the defendant is not liable if they are, for example, only one-fifth to blame.

Gittens **(Barbados CA, Crim App No 10 of 2007)** discussed the law on causation for murder, which requires that there must be a factual link between the act complained of and the death, as well as a legal link in that the act must be a significant, sometimes described as an operating and substantial, cause of the death.

In ***Warburton*** **[2006] EWCA Crim 627**, the court noted, 'The test for the jury is a simple one: did the acts for which the defendant is responsible significantly contribute to the victim's death.'

The onus is on the Prosecution to prove every ingredient of an offence. However, it is not every possibility of a cause of death that the Prosecution is required to exclude. It is for the jury to determine whether on the facts of

the particular case, they are left with a reasonable doubt as to causation: ***Juman*** **(Barbados CA, Crim App No 8 of 1986)**.

Novus Actus Interveniens

Was there a New and Intervening Act?

Where a wound necessitates medical intervention and such treatment is negligent so that death is the result, the wound will be regarded as causing the death unless it is no longer the operating cause of death, and the negligent treatment is so independent of the defendant's conduct that it breaks the chain of causation: ***Jordan*** **(1956) 40 Cr App Rep 152** (CA).

In ***Cheshire*** **[1991] 1 WLR 844** (CA), it was noted that the jury did not have to weigh up different causes of death and needed only to be satisfied that the defendant's actions made a significant contribution to the victim's death.

Remoteness and Foreseeability

An 'Act of God' or natural event may break the chain of causation leading from the defendant's initial act, if it is not reasonably foreseeable and if it is also the sole immediate cause of the consequence in question.

The subsequent intervention of a third party may break the chain of causation if it is 'free, deliberate and informed', whether reasonably foreseeable or not. However, human intervention in the form of a foreseeable act instinctively done for the purposes of self-preservation or in the execution of a duty to prevent a crime or arrest an offender, will not break the chain of causation: ***Pagett*** **[1983] EWCA CRIM 1, (1983) 76 Cr App R 279**.

In ***Blaue*** **[1975] 1 WLR 1411** (CA), it was noted that the defendant would still be liable if a wound is inflicted and death results, where the victim refuses medical intervention.

It is also noteworthy that the defendant would be liable if the victim injures themselves in an attempt to escape from an attack by the defendant: ***Roberts*** **(1971) 56 Cr App R 95** (CA).

The test is whether the victim's response was 'within a range of responses which might be anticipated from a victim in their situation', or whether it was 'so daft as to make it his own voluntary act which amounted to a *novus actus interveniens*' ***Williams*** **[1992] 2 All ER 183** (CA).

Dangerous Driving

Howard **(Barbados CA, Crim App No 6 of 2003)** was an appeal against sentence. In this case, there was clear evidence of speeding and racing, and these facts aggravated the offence. Moreover, the appellant was driving a public service vehicle with passengers. It invited discussion of the appropriate sentence for a conviction of causing death by dangerous driving. In that case, the court took the opportunity to review the English authorities and provide sentencing guidelines for the offence of causing death by dangerous driving.

At [8], Simmons CJ stated:

> The guidelines which we issue today are designed to set the range of custodial sentence for the offence of causing death by reckless or dangerous driving. We have drawn heavily upon the judgment of Lord Woolf in Cooksley. These guidelines seek to reflect an evident public concern with indisciplined driving on our roads

> and they take into account the vast increase in vehicular traffic on our roads in recent times...

Points to Consider

The following have been identified as areas which present specific challenges when they arise and may require further discussions on how such challenges can be ameliorated when encountered:

i. Where there may be contributory causes from third parties.

ii. Where there are contributory causes from victims.

iii. Whether the chain of causation has been broken by:

   a. a naturally occurring event;

   b. an act of someone else;

   c. a new and intervening act or event.

iv. Does the defendant's conduct remain the substantial and operative cause of the result?

v. Where the defendant's conduct was not the only cause.

vi. Where there is medical negligence.

vii. Where the victim refuses medical treatment.

viii. Acts of the victim which may call into question whether the defendant's act was the continuing and operative cause.

ix. Issues of remoteness and foreseeability.

x. In a charge for causing death by dangerous driving pursuant to s 81 of the **Road Traffic Offences, Cap 295** (BB), defendants tend to plead guilty to the lesser offence of dangerous driving found at s 82. The element of causation in relation to causing death by dangerous

driving has therefore not been pronounced upon in the Barbadian courts.

Belize

Relevant Statutory Provisions

Section 11 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides great detail for causation surrounding an event:

> 11 (1) If a person intentionally or negligently causes any involuntary agent to cause an event, that person shall be deemed to have caused the event.
>
> (2) "Involuntary agent" means any animal or other thing, and also any person who is exempted from liability to punishment for causing the event by reason of infancy, or insanity or otherwise, under the provisions of Title V.
>
> (3) If an event is caused by the acts of several persons acting either jointly or independently, each of those persons who has intentionally or negligently contributed to cause the event shall, subject to sub-section (4), and to the provisions of Title IV with respect to abetment, be deemed to have caused the event, but any matter of exemption, justification, extenuation or aggravation which exists in the case of any one of those persons shall have effect in his case whether it exists or not in the case of any of the other persons.
>
> (4) A person shall not be convicted of having intentionally or negligently caused an event, if, notwithstanding his

act and the acts of any person acting jointly with him, the event would not have happened but for the existence of some state of facts or the intervention of some other event or of some other person, the probability of the existence or intervention of which other event or person the accused person did not take into consideration, and had no reason to take into consideration.

(5) Sub-section (4) shall not apply where a person is charged with having caused an event by an omission to perform a duty for averting the event.

(6) If a person beyond the jurisdiction of the courts causes any involuntary agent to cause an event within the jurisdiction, he shall be deemed to have caused the event within the jurisdiction.

(7) Subject to the provisions of this section, and to the special provisions of any particular Title of this Code, it is a question of fact whether an event is fairly and reasonably to be ascribed to a person's act as having been caused thereby.

(8) A person shall not, by reason of anything in this section, be relieved from any liability in respect of–

(a) an attempt to cause an event;

(b) negligent conduct, if such negligent conduct is punishable under this Code irrespectively of whether it actually causes any event.

(9) If a person intending to cause an event with respect to one or some of several persons or things, or to such indeterminate person or things as may happen to be

> affected by his act, cause such event with respect to any such person or thing, he shall be liable in the same manner as if he had intended to cause the event with respect to that person or thing.
>
> (10) If a person does an act with intent to assault, harm, kill or cause any other event to a particular person and his act happens to take effect, whether completely or incompletely, against a different person, he shall be liable to be tried and punished as if his intent had been directed against that different person, but any ground of defence or extenuation shall be admissible on behalf of the accused person which would have been admissible if his act had taken effect against the person or in respect of the thing against whom or in respect of which he intended it to take effect.

Section 124 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) outlines special provisions as to causing death and provides as follows:

> 124. The general provisions of Title II with respect to causing an event are in their application with respect to the causing of death by harm subject to the following explanations and modifications, namely–
>
> (a) the death of a person shall be held to have been caused by harm if by reason of the harm death has happened otherwise or sooner, by however short a time, than it would probably have happened but for the harm.

(b) it is immaterial that the harm would not have caused the person's death but for his infancy, old age, disease, intoxication or other state of body or mind, at the time when the harm was caused.

(c) it is immaterial that the harm would not have caused the person's death but for his refusal or neglect to submit to or seek proper medical or surgical treatment, or but for his negligent or improper conduct or manner of living or of treating the harm, unless it be made to appear that the person acted as he did with the purpose of causing his own death.

(d) death shall be held to have been caused by harm if the death be caused by the medical or surgical treatment of the harm, unless such treatment itself amount to murder or manslaughter.

In ***Martinez*** **(Belize CA, Crim App No 4 of 2014)**, [15], [16] and [18] are instructive and provide useful discussion on this area. In that case, the Prosecution led evidence regarding the cause of death. Dr. Estrada Bran provided two explanations about the cause of death. One explanation linked the fall of the deceased together with the health precondition that he had to the cause of his death. The other explanation pointed out that hematoma in the occipital area of the head alone would not have caused the death of the deceased. The Court noted that it was for the jury to decide the cause of death upon proper direction by the judge and whether it would accept the evidence as sufficient proof of the cause of death.

Guyana

General Guidelines

In ***George v The State*** **(Guyana CA, Crim App No 8 of 2013)**, the main ground of appeal centred on what was described as the lack of nexus between the injuries sustained by the deceased and the cause of death, as well as insufficient evidence with regard to causation (namely, that the deceased died as a result of injuries inflicted on her by the appellant). For these reasons, the appellant submitted, the trial judge should have withdrawn the case from the jury, or alternatively, having failed to do so, their directions on causation and nexus were inadequate. Complications regarding the issue of causation arose because of the interval that occurred between injury and death, which was a few days more than six months. The Court of Appeal at paras. 7 – 10 restated some of the general principles governing the issue of causation.

Gafoor v Thomas **(Sergeant No 11082), No 36 of 2017** discusses the elements of the offence of causing death by dangerous driving. The Court noted:

> [10] ...In result crimes, such as the present offence with which the appellant is charged, the general principle is that the defendant's conduct must have caused the outcome. There are two aspects of this requirement: factual and legal. Factual causation simply means that there must be a causal connection between the defendant's conduct and the actus reus of the offence charged while legal causation means that the act or conduct of the defendant must constitute a substantial

> or significant and operating cause of the result: see Blackstone's Criminal Practice (OUP 2006), para. A1.21.
>
> [11] Turning first to factual causation, one must be able to say that the actus reus would not have occurred but for the actions of the defendant, or that the defendant's actions were a sine qua non of the commission of the actus reus; Card, Cross & Jones Criminal Law 19th ed (OUP 2010), para 2.29. In relation to the present offence of causing death by dangerous driving, this would require the prosecution to establish a link between the defendant's driving which led to the collision and the injuries sustained by the victim that led to her death. Simply put, it must have been the defendant's act or omission which led to the death of the deceased. Visually, this chain could be represented as follows:
>
> Defendant's driving → victim's injuries → death of victim

The following additional cases provide further instructive and useful guidance on the issue of causation:

i. **Sahadeo v The State (Guyana CA, Crim App No 5 of 2013);**
ii. **Ramdyal v The State (Guyana CA, Crim App No. 2 of 2011);**
iii. **Grant v The State (Guyana CA, Crim App No 12 of 2011).**

In this Chapter:

Chapter 5
Intention

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

1. Intention

Guidelines

Numerous offences are defined as requiring proof of 'intention' to cause specified results. The fact that a result was a natural and probable consequence of the defendant's action does not prove that the defendant intended or foresaw that result. The defendant's actual foresight of the result may or may not enable the jury to infer intention.

i. 'Intention' is a word incapable of further satisfactory analysis. 'Want' or 'desire' are not synonyms for 'intend' since it is open to the jury to infer intention from the defendant's awareness of the virtual certainty of consequences of their conduct, even though they accept that the defendant hoped that the result would not occur. The word 'intend' is readily understood if used in the context in which the jury need to consider it.

ii. Intention is a state of mind which the jury can resolve only by inference or by the admission of the defendant.

iii. Elaboration will almost never be required. The "golden rule" when directing a jury upon intent, per Lord Bridge in ***Moloney*** **[1984] UKHL 4, [1985] AC 905,** is that it is best to avoid any elaboration or paraphrasing of what is meant by intent. It is an ordinary English word that is quite distinct from "motive". If it is that the defendant may not have wanted or desired the kind of harm their act caused, but the Prosecution contends that they were aware of the likely consequence, then the jury should be directed that foresight of consequences is not proof of intent but only one factor to be considered.

iv. A specific direction will usually be required only when a specific intent is in issue.

v. The jury should be told from what sources of evidence they can consider drawing the inference.

Illustration

Intent to cause really serious harm – the intention must accompany the act – drawing the inference from the circumstances

If you are sure that the defendant unlawfully caused really serious bodily harm to the victim (V), they are guilty of Count 1 if the Prosecution also proves that the defendant intended to cause V really serious bodily harm.

The Prosecution does not have to prove that the defendant set out with the intention to cause harm. The fact that afterwards the defendant may have regretted what they had done does not amount to a defence. You need to reach a conclusion on what was their intention during the moments they were using unlawful violence towards V.

Naturally, you can reach a conclusion on what was the defendant's intention only by examining the circumstances of the attack on V. This includes what was done and said at the time, the nature and duration of the attack, the use of any weapon, the nature of the injury inflicted on V and the defendant's behaviour immediately afterwards. You should also consider what the defendant had to say about their state of mind in an interview and in evidence.

The Prosecution relies, in particular, on (...).

The defendant told you (...).

If, having examined the evidence, and despite the defendant's denial, you are sure they intended to cause V really serious bodily harm, then your verdict upon Count 1 will be guilty. If you are not sure, then your verdict will be not guilty.

2. Intention Formed Under the Influence of Drink or Drugs

In ***Garlick*** **(1980) 72 Cr App R 291** (CA), the Court of Appeal held that in a case where the defendant raised the defence of drunkenness to a charge of murder, it was held that the question for the jury was simply whether they formed an intent to kill or do really serious bodily harm. The question was not whether the defendant was capable or incapable of forming such an intent.

Offences that Require a Specific Intention

The illustration below, found at page 42 of the Trinidad and Tobago **Criminal Bench Book 2015**, is helpful in this area:

> **Illustration**
>
> The accused is charged with an offence that requires the prosecution to prove a specific intention, for example, murder, theft, robbery, burglary, wounding with intent to do grievous bodily harm and assault with intent to rob.
>
> Before you can find the accused guilty of the offence of (...), the prosecution must satisfy you to the extent that

you feel sure that the accused had the intention to (...) at the time of the commission of the offence.

In deciding whether the prosecution has discharged the burden of proving this intention, you must consider all the circumstances of the case including the evidence that the accused had indulged in alcoholic drinks or drugs before the commission of the offence.

Having considered the evidence carefully, if you find that the accused did not have or may not have had the intention to (...) at the time of the offence, then you must find him not guilty.

If, however, having considered the evidence carefully, you are sure that the accused did have the intention to (...) at the time of the offence, then you must find that the prosecution has proved this element of the offence.

In deciding whether the accused did in fact intend to (...), you must bear in mind that a drunken or drugged intention is still an intention. It is not relevant that the accused may not have acted in the way that he did, had he not been intoxicated or under the influence of drugs.

Offences that Do Not Require a Specific Intention

Illustration

Dangerous act an indirect cause of really serious harm – foresight of consequences of dangerous act relevant to inference of intention – young defendant with learning difficulties

The defendant accepts that he carried a concrete block from the roadside onto the footbridge over the motorway. He wanted, he said, to have a bit of fun by giving a driver a shock but no more than that. He pushed the block off the bridge parapet at the moment he judged it would hit the bumper of the car driven by V. As we know, the block struck the bonnet of V's car but it bounced and smashed the windscreen. V lost control of the car and the car mounted the bank to the nearside and turned over. The evidence is that V suffered a fractured skull on the right side when his head came into violent contact with the driver's door pillar as the car turned over. The defendant told you that he was very upset by what he had done. He thought the car would swerve a bit, then stop, and the driver would get out not knowing what had hit him.

The defendant is charged with causing grievous bodily harm with intent to cause grievous bodily harm.

The Prosecution must first prove that by his unlawful act the defendant caused V really serious bodily injury.

The defendant does not dispute that this is what he did.

The real issue between the Prosecution and the Defence is whether the defendant intended to cause really serious bodily injury. It is not necessary for the Prosecution to prove that the defendant knew V or intended to cause really serious injury to V specifically. It is enough if the Prosecution prove that the defendant intended to cause an occupant of the car really serious injury.

Naturally, you can reach a conclusion on what was the defendant's intention only by examining the circumstances in which the harm was caused and the defendant's own explanation of his state of mind. What are the circumstances which you need to consider?

First, the defendant was, at the time, 16 years of age. You have heard evidence about his personality and his learning difficulties.

Second, consider exactly what he did.

Third, consider what were the likely consequences of what he was about to do. Would those consequences have been obvious to this 16-year-old defendant?

Fourth, consider the defendant's own evidence about his awareness of the likely consequences of what he did. It is important that you reach a decision whether the defendant was lying to you or doing his best to tell you the truth.

Do not judge the defendant's awareness with the benefit of hindsight but consider his state of mind as it would have been while the block was resting on the parapet. You may regard the defendant's act as extremely dangerous. Indeed you may conclude that there was a high probability of death or serious injury arising from the defendant's intentional act. I must emphasise, however, that what you are considering is what the defendant himself intended. If you accept that the defendant may have wanted just to give V an unpleasant surprise, that is evidence from which you could conclude that he did not intend to cause really serious harm. On the other hand, if you are sure that the defendant realised it was a virtual certainty that by pushing the block off the parapet really serious harm to someone in the car would follow, it is open to you to conclude that, despite his denial, even though his main purpose may have been merely to derive pleasure from his mischief.

However, you need to bear in mind throughout that this defendant was not an adult. He was aged 16 and, in many respects, he is still an immature 16 year old. You have heard that his ability to process information and to anticipate events is impaired by his learning difficulty. You must judge

not whether the ordinary man would have been aware, but whether this 16-year-old defendant himself was aware, of the likely consequences of what he was about to do. If the defendant may not have realised that consequences such as these were almost bound to follow, you could not conclude from the circumstances alone that he intended really serious harm. Even if you were to conclude that the defendant was aware that serious injury was a virtually certain consequence of what he was about to do, that does not mean that you are bound to conclude that he intended it. It would be only one of the factors, an important factor perhaps, from which you could infer his intention.

Having considered all the available evidence in this way, ask yourselves the question, are we sure that the defendant intended to cause someone in the car really serious bodily injury. If you are sure he did, the defendant is guilty of count 1. If you are not sure…

3. Recklessness

Guidelines

Recklessness features as a mens rea element in a wide range of offences. In some, it relates to the circumstances (e.g. whether the property belongs to another); in others, to the consequences (whether damage or injury will result).

Lord Diplock in ***Lawrence*** **[1982] AC 510** (HL) set out the parameters in respect of an act done recklessly. He said at 526:

> Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary

> prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting "recklessly" if before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it.

There is a difference in the standard used for some statutory offences as opposed to that used for common law offences such as motor manslaughter, where the activity itself carries some amount of danger. Lord Diplock in ***Lawrence*** further noted at 525-6:

> In ordinary usage 'recklessly' as descriptive of a physical act such as driving a motor vehicle which can be performed in a variety of different ways, some of them entailing danger and some of them not, refers not only to the state of mind of the doer of the act when he decides to do it but also qualifies the manner in which the act itself is performed. One does not speak of a person acting 'recklessly', even though he has given no thought at all to the consequences of his act, unless the act is one that presents a real risk of harmful consequences which anyone acting with reasonable prudence would recognise and give heed to. So the actus reus of [driving recklessly] is not simply

> driving a motor vehicle on a road, but driving it in a manner which in fact creates a real risk of harmful consequences resulting from it.

In ***G*** **[2003] UKHL 50, [2004] 1 AC 1034**, the House of Lords overruled ***Metropolitan Police Commissioner v Caldwell*** **[1982] AC 341** (HL) (which had held that a defendant was reckless when their act, causing damage, presented an obvious risk of damage and either they took that risk or gave no thought to it) and returned to subjective recklessness as defined in ***Cunningham*** **[1957] 2 QB 396** (CA).

Since ***G***, a person acts recklessly with respect to:

i. a circumstance, when they are aware of a risk that it exists or will exist;

ii. a result, when they are aware of a risk that it will occur;

and it is, in the circumstances known to them, unreasonable to take the risk.

It is likely that this subjective definition of recklessness will apply to all statutory offences of recklessness unless Parliament explicitly provides otherwise.

The mens rea of offences requiring malice remains intention or subjective recklessness and is therefore in line with ***G*** (i.e. the defendant was aware of a risk of some harm which they then, unreasonably, went on to take). It is a subjective form of mens rea, focused on the defendant's own perceptions of the existence of the risk. Whether it is reasonable for the defendant to run the risk is a question for the jury dependent on all the facts. In directing a jury, there is no need to qualify the word "risk". If the defendant may have been unaware of the risk of circumstance or result

under consideration because they were under the influence of drink or drugs, the jury must assess their state of awareness as it would have been if they had been sober: ***Majewski*** **[1977] AC 443** (HL).

When deciding whether the defendant was reckless, the first stage is a judgment on whether the defendant was aware of the risk (subjective).

The second stage is a judgment on whether the risk taken was reasonable in the circumstances of which the defendant was aware (objective).

If the defendant's ability to appreciate the risk was or may have been impaired through drink or drugs the jury should be asked to consider the defendant's awareness as it would have been had they been sober. If the jury are sure the defendant would have been aware of the risk if they had been sober, the first stage is satisfied.

Barbados

Offences that Require a Specific Intention

Offences that require a specific intention include:

i. Murder: intending to cause death or serious bodily harm;

ii. Robbery: for example, assault with intent to rob: s 8(2) of the **Theft Act, Cap 155** (BB); Theft: ss 3(1) and 7(1) of the **Theft Act, Cap 155**;

iii. Wounding with intent: s 16 of the **Offences Against Person Act, Cap 141** (BB);

iv. Assault: s 27(a) of the **Offences Against Person Act, Cap 141** (BB);

v. Possession of dangerous substance or 'thing': s 43 of the **Offences Against Person Act, Cap 141** (BB);

vi. Burglary: s 24(1)(a) of the **Theft Act, Cap 155** (BB);

vii. Sacrilege: s 26 of the **Theft Act, Cap 155**;

viii. Any attempt to commit an offence. For example, Attempt to murder: s 9 of the **Offences Against Person Act, Cap 141** (BB);

ix. Handling Stolen Goods;

x. Criminal Damage: ss 3, 4, 6(1) and 7 of the **Criminal Damage Act, Cap 113B** (BB)

The following cases are instructive, specifically on intention in relation to murder:

i. ***Cadogan* (Barbados CA, Crim App No 16 of 2005)**: review of the law on intention in relation to murder.

ii. ***Nedrick* [1986] 3 All ER 1** (CA) noted: 'It may be advisable first of all to explain to the jury that a man may intend a certain result whilst at the same time **NOT** desiring it to come about' [emphasis added]. Lord Lane CJ further stated: 'When determining whether the defendant had the necessary intent, it may therefore be helpful for a jury to ask themselves two questions. (1) How probable was the consequence which resulted from the defendant's voluntary act? (2) Did he foresee that consequence?'

iii. ***Moloney* [1984] UKHL 4, [1985] AC 905** at 926 per Lord Bridge.

iv. ***Hancock* [1986] AC 455** (HL) at 473 per Lord Scarman: 'They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that the consequence was also intended.'

v. ***Woollin*** **[1998] 3 WLR 382** (HL) where Lord Steyn, approving Lord Lane CJ in ***Nedrick***, clearly suggests helpful approaches for a jury and the questions they should ask themselves in determining whether the defendant 'had the necessary intent.' See also Lord Hope of Craighead in ***Woollin***.

vi. See ***Stringer*** **[2008] EWCA Crim 1222** for a discussion on the 'virtual certainty' of the consequence/s of what the defendant did.

The 'guidelines' on the questions which should be asked by jurors, as set out in the abovementioned cases, provide a clearly recommended practice. Further, adopting an approach similar to that of s 8 of the **Criminal Justice Act 1967** (UK) can be useful. Section 8 provides that:

> A court or jury, in determining whether a person has committed an offence -
>
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of it being a natural and probable consequence of those actions; but
>
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

There is a need for jurors to have written directions on intent, or at least the discussion of the directions on intent between the trial judge and counsel, so that there may be some clarity and agreement, prior to the summation.

Points to Consider

i. Intention is regarded as being a concept which may be difficult to prove.

ii. See ***Attorney General's Reference (No 3 of 1994)*** **[1997] 3 All ER 936** (HL) per Lord Mustill for a brief discussion on transfer of malice.

iii. Consideration ought to be given as to whether there should be a statute drafted so that the mental element, for example in murder, is specifically stated as being either intending to cause death or engaging in conduct which the defendant is aware is virtually certain to cause death.

iv. Various Law Commissions such as the **Law Commission, Murder, Manslaughter and Infanticide (Law Com No 304, 2006)** noted that there is challenge in this area of the law and recommended codification.

v. Written directions on intention, or some measure of agreed directions before the summation commences.

vi. A person should be taken to intend a result if they act in order to bring it about.

vii. In cases where the judge believes that justice may not be done unless an expanded understanding is given, the jury should be directed as follows: 'An intention to bring about a result may be found if it is shown that the Defendant thought that the result was a virtually certain consequence of their action.' However, there may be concerns even with that proposed direction, but can it be refined?

Offences that Do Not Require a Specific Intention

Offences that do not require a specific intention include:

i. Firearm Offences: ss 3(1), 25, and 29 of the **Firearms Act, Cap 179** (BB);

ii. Drug Offences:

a. **Drug Abuse (Prevention and Control) Act, Cap 131 (BB):**

- Section 4(3) - Importation/Exportation of controlled drug;
- Sections 5(2) and 5(3) - Production/Supply of controlled drug;
- Section 6(2) - Possession of controlled drug;
- Section 8(2) - Misuse of controlled drug;
- Section 10(2) - Acts preparatory to the importation, supply, etc of controlled drugs;
- Section 11(2) - Cultivation of cannabis and coca plant;
- Section 15(5);
- Section 17(6);
- Section 18(4) - Drug trafficking;
- Section 20(3) - Supplying or offering to supply a purported controlled drug;
- Section 21(2) - Possession of a controlled drug;
- Section 23 - Supply of controlled drug to child or young person.

b. **Medical Cannabis Act 2019 (BB):**

- Section 25(3) - Unauthorised consumption of medical cannabis;
- Section 35(2) - Prohibition against supply;
- Section 40(1) - General offences.

iii. Driving Offences: **Road Traffic Act, Cap 295** (BB):

- Section 5B(1) (as amended by the **Act 31 of 2018**
- Section 9(5);
- Section 12A(9);
- Section 13(1);
- Section 16(4) (as amended by **Act 31 of 2018**);
- Section 16A(4);
- Section 18 (5)(a) (as amended by **Act 31 of 2018**);
- Section 20(3);
- Section 23(2) (as amended by **Act 31 of 2018**);
- Section 24(7) (as amended by **Act 31 of 2018**);
- Section 28(2);
- Section 31(2);
- Section 36C(4);
- Section 36D(5);
- Section 36G;
- Section 37(2);

- Section 37A(2);
- Section 50(2);
- Section 51(1) and (2);
- Section 63(8);
- Section 63A;
- Section 64;
- Section 70;
- Section 74(3) (as amended by **Act 5 of 2022**);
- Section 79 (14);
- Section 79A (5);
- Section 83;
- Section 84(1);
- Section 85 - Driving while under the Influence of Drink or Drug (as amended by **Act 26 of 2017**);
- Section 89(8);
- Section 90(3);
- Section 95(2);
- Section 98(2);
- Section 99(1);
- Section 106.

- Section 58;
- Section 61(3) (as amended by **Act 31 of 2018**).

See also **Road Traffic Regulations, Cap 295** (BB) regs 21 and 22 (8).

iv. Sexual Offences: ss 4 and 5 of the **Sexual Offences Act, Cap 154** (BB).

v. Offences Relating to Minors: Sexual Offences; Sale of Alcohol: s 27 of the **Liquor Licences Act 2021** (BB) - sale of alcohol to minors prohibited.

The following cases are also instructive:

i. Firearm Offences:
   a. ***Medford*** **(Barbados CA, Crim App No 1 of 2012)**
   b. ***Alexander*** **(Barbados CA, Crim App No 14 of 2007)**

ii. Drug Offences:
   a. ***Toussaint and Browne*** **(Barbados CA, Crim App Nos 5 and 9 of 2018)**
   b. ***Barton*** **(Barbados CA, Crim App No 7 of 2009)**
   c. ***Prescod*** **(Barbados CA, Crim App No 32 of 2001)**
   d. ***Lake v Commissioner of Police*** **(Barbados CA, Crim App No 7 of 2004)**
   e. ***Mason*** **(Barbados CA, Crim App Nos 10 and 31 of 1998)**: 'The Drug Abuse (Prevention and Control) Act must be construed as applying to the whole of Barbados, that is, to the territorial waters as well as to the land area of Barbados.'

iii. Sexual Offences:
    a. ***Sealy* (Barbados CA, Crim App 16 of 2012)**
    b. ***Doyle* (Barbados CA, Crim App 22 of 2008)**

iv. Road Traffic Offences:
    a. ***Downes v Commissioner of Police* (Barbados CA, Mag App No 1 of 2006)**

Points to Consider

i. There are many exceptions and defences stated within the legislations mentioned above which should be referenced when considering the guilt of a defendant.

ii. There is a plethora of other offences listed in the **Road Traffic Regulations, Cap 295** (BB).

iii. The **Drug Abuse (Prevention and Control) (Amendment) Act 2020** has been passed to provide for the payment of a fixed penalty by persons found in possession of small quantities of cannabis.

iv. There has been an increase in legislation to meet current global trends, such as the provision of an Act for the cultivation, sale and consumption of medical marijuana by persons with licences.

Recklessness

Relevant statutory provisions are outlined below:

i. Section 19 of the **Offences Against the Person Act, Cap 141** (BB): endangering life or safety;

ii. Section 3(1) of the **Sexual Offences, Cap 154** (BB);

iii. **Firearms Act, Cap 179** (BB): ss 18, 19, 20, 21A(1) and (2) and 26(5);

iv. Sections 81 and 82 of the **Road Traffic Act, Cap 295** (BB).

The following cases are also instructive:

i. ***Woollin*** **[1998] 3 WLR 382** (HL);

ii. ***Lawrence*** **[1982] AC 510** (HL);

iii. ***G*** **[2003] UKHL 50, [2004] 1 AC 1034** - in relation to property.

Consideration of the recklessness of the defendant pursuant to the **Penal System Reform Act, Cap 139** (BB):

i. ***Alleyne*** **[2019] CCJ 6 (AJ) (BB), [2019] 95 WIR 126** – the appellant's 'callous and/or reckless disregard for human life' was considered in his sentencing.

ii. ***Persaud*** **[2018] CCJ 10 (AJ)** (BB)**, (2018) 93 WIR 132**.

Belize

Offences that Require a Specific Intention

Sections 79 – 83 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provide for causing criminal harm to a person, in particular: wounding, grievous harm, maim and dangerous harm, and the use of deadly means of harm.

Murder and an attempt to murder require specific intention. Section 106(1) read along with s 117 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ), provides the penalties for murder, and s 107 read along with s 18 of

the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides the penalties for attempt to murder.

Section 108(1) read along with s 116 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ), deals with manslaughter.

The case of ***Montez*** **(Belize CA, Crim App No 12 of 2015)** is instructive on the intention to kill (in particular, [69]-[79]). At [79], the court noted:

> [79] In this case the prosecution has adduced ample evidence from which it could be inferred that the appellant had an intention to kill.
>
> There were two witnesses to the infliction of the injuries. Medical evidence was received, to give details of the injury, the force of its application, and its trajectory. The knife was an exhibit. The learned trial judge did not misdirect himself. His examination of the evidence from which intention could be inferred, demonstrated an awareness of the guidelines in **Winston Williams**. There is no danger disclosed on the record of the learned trial judge, qua arbiter of facts, making a determination that the death under consideration was a natural and probable cause of the accused act, and reach a conclusion as to whether the accused, intended to kill, without considering all of the evidence and the proper inferences to be drawn from them. The learned trial judge's examination of the evidence of the accused exiting the car, the positioning of the men when the car was being banged supports the view that *all other relevant evidence* would be considered.

Section 139, read along with s 146 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ), provides for the specific intention for theft.

Offences that Do Not Require a Specific Intention

Sexual Offences

Sections 46, 47, and 47(A), read along with s 71 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) relate to sexual offences such as rape, unlawful sexual intercourse and rape of a child, the definition of 'rape' being provided for under s 71, all of which do not require a specific intention.

Possession of Control Drugs

Section 7(4) of the **Misuse of Drugs Act, Rev Ed 2020, CAP 103** (BZ) provides for the restriction on possession of controlled drugs and the requisite quantities are outlined therein.

Recklessness

Crimes against rights to property and/or criminal damage to property, inclusive of recklessness in causing such damage, are outlined in s 132 (to be read along with s 8) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ). Section 8 outlines the standard test of recklessness as follows:

> 8. - (1) The standard test of recklessness as to result is –
>
> Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it?

(2) The standard test of recklessness as to circumstances is –

Did the person whose conduct is in issue realise that the circumstances might exist and, if so, was it unreasonable for him to take the risk of their existence?

(3) The appropriate key words are "reckless", "recklessness" and "recklessly".

(4) The question whether it was unreasonable for the person to take the risk is to be answered by an objective assessment of his conduct in the light of all relevant factors, but on the assumption that any judgment he may have formed of the degree of risk was correct.

Guyana

Offences that Require a Specific Intention

Relevant Statutory Provisions

Criminal Law (Offences) Act, Cap 8:01 (GY):

i. Section 100A provides for the sentence for murder;

ii. Section 103 provides for the attempt to commit murder in certain specified ways;

iii. Section 57 provides for the offence of feloniously wounding;

iv. Section 46 provides for assault with intent to commit a felony;

Sexual Offences Act, Cap 8:03 (GY):

i. Section 34 provides for trespass with intent to commit a sexual offence;

ii. Section 32 provides for administering a substance with intent.

Section 4 of the **Kidnapping Act, Cap 10:05** (GY) provides for punishment for abduction with intent secretly or wrongfully to confine a person.

Points to Consider

i. 'There could be no serious disputation about the assertion that intention is a subjective issue…The accepted common law position is that the test for intention is a subjective one and I have the authority of the other members of the bench to say that a subjective test for intention in the determination of criminal liability for murder is the test that should be applied in the Courts of Guyana.': ***Mc Leod v The State*** **(2010) 76 WIR 366** (GY CA).

ii. See also ***Braithwaite v The State*** **(Guyana CA, Crim App No 26 of 2015)**.

Offences that Do Not Require a Specific Intention

Relevant Statutory Provisions

Section 94 of the **Criminal Law (Offences) Act, Cap 8:01** (GY) deals with manslaughter.

Section 3 of the **Sexual Offences Act, Cap 8:03** (GY) provides for rape.

Narcotics Offences are provided for in Part II of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 10:10** (GY).

Recklessness

Section 35 of the **Motor Vehicle and Road Traffic Act, Cap 51:02** (GY) is instructive on the issue of causing death by reckless driving.

In ***Tazim Gafoor v George Thomas*** **(Sergeant No 11082) No 36 of 2017**, the appellant was charged with the offence of causing death by dangerous driving, contrary to s 35(1) of the **Motor Vehicle and Road Traffic Act, Cap 51:02** (GY). The Court discussed the elements of the offence of causing death by dangerous driving.

On reckless manslaughter, the case of ***Fraser v The State*** **(Guyana CA, Criminal Appeal Nos 21A and 22A of 2007)** is instructive.

In this Chapter:

Guidelines

Chapter 6
Criminal Attempts

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and*

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Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

An attempt to commit a crime is itself considered to be a crime even if the attempt itself fails. Its core elements are a criminal act done with criminal intent, and the offence occurs when a defendant with the requisite intent takes action to complete the crime.

Guidelines

An attempt to commit an offence is any act done with intent to commit that offence, that forms part of a series of acts which would constitute its actual commission if the series of acts was not interrupted: ***Linneker*** **[1906] 2 KB 99**; **Halsbury's Laws** (5th edn, 2010) vol 26 at 116. The mere intention to commit an offence (apart from treason) is not criminal.

The test at common law for determining the precise point when an attempt is committed, is known as the 'proximity' test: ***Eagleton*** **[1855] 6 Cox CC 559** at 571.

It is no defence that it was physically impossible to complete the offence: ***Shivpuri*** **[1987] AC 1** (HL).

To constitute an attempt, the act must be accompanied by an intention to commit the full offence even if the full offence is one which requires a lesser degree of mens rea (e.g. attempted wounding requires an intent to wound, attempted murder requires an intent to kill), or is an offence of strict liability. Blackburn J noted at [145] of ***Cheeseman*** **(1862) Le & Ca 140, (1862) 169 ER 1337**: 'There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.'

It is for the judge to decide whether there is sufficient evidence of an attempt for the issue to be left to the jury; if so, it is for the jury to decide whether the acts proved do amount to an attempt.

Points to Consider

i. It is common practice and, save in the obvious case, useful to explain and/ or illustrate the difference between an attempt to commit an offence and acts preparatory to committing an offence. The jury should be told that the issue whether the act was more than merely preparatory is for them to decide.

ii. The actus reus necessary to constitute an attempt is complete if the defendant does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime: **Archbold (36th edn)** at [4104].

Barbados

Sources

James Stephen, *A Digest of the Criminal Law (crimes and punishments)* (5th edn, Macmillan and Co 1894) at 50

Halsbury's Laws (5th edn, 2010) vol 26

Halsbury's Laws (5th edn, 2020) vol 25

Janet Dine, James J Gobert and William Wilson, *Cases and Materials on Criminal Law* (6th edn, OUP, 2011)

Relevant Statutory Provisions

Section 9 of the **Offences Against the Person, Cap 141** (BB) provides as follows:

> Any person who
>
> (a) attempts unlawfully to kill another; or
>
> (b) with intent unlawfully to kill another does any act, or omits to do any act which it is his duty to do, the act or omission being of such a nature as to be likely to endanger human life, is guilty of an offence and is liable on conviction on indictment to imprisonment for life.

Section 2(1) of the **Proceeds and Instrumentalities of Crime Act 2019** (BB), describes a drug trafficking offence as:

> (a) an offence under section 18 or 19 of the Drug Abuse (Prevention and Control) Act, Cap. 131;
>
> (b) an attempt, conspiracy or incitement to commit an offence specified in paragraph (a); or
>
> (c) aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a)...

Criminal Attempt

Halsbury's Laws (5th edn, 2020) vol 25, at 116 states:

> A person is guilty of attempting to commit an offence if, with intent to commit any offence which, if it were completed, would be triable in England and Wales as an indictable offence, they do an act which is more than merely preparatory to the commission of the offence.

In ***Cheeseman*** **(1862) LE & CA 140, (1862) 169 ER 1337** (CC) at [145], Blackburn J noted:

> There is, no doubt, a difference between the preparation antecedent to an offence, and the actual attempt. But, if the actual transaction has commenced which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime.

Actus Reus In Criminal Attempt

Halsbury's Laws (5th edn, 2020) vol 25 at 119 states:

> A person is guilty of an attempt if he does an act which is more than merely preparatory to the commission of the offence which he intended to commit, even if the facts were such that commission of the actual offence was impossible. Whether the act relied on is capable of being more than merely preparatory so as to be capable of amounting to an attempt is a question of law; and whether the act was actually more than merely preparatory is a matter of fact for the jury.

In ***Eagleton*** **[1855] 6 Cox CC 559** at 571, Parke B noted:

> The mere intention to commit a misdemeanour is not criminal. Some act is required, and we do not think that all acts towards committing a misdemeanour are indictable. Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it, but acts immediately connected with it are…

See also ***Davey v Lee*** **[1968] 1QB 366** at 370 and ***Linneker*** **[1906] 2 KB 99**.

Mens Rea In Criminal Attempt

Halsbury's Laws (5th edn, 2020) vol 25, at 121 states:

> In order to support a charge of attempting to commit a crime, it must be shown that the defendant intended to commit the completed crime to which the charge relates. This means that it must be proved that the defendant intended to commit an act or to continue with a series of acts which, when completed, will amount to the offence allegedly attempted (assuming the other elements of the offence are satisfied) and that the defendant intended any requisite consequence of that offence to result from his intended act or acts.

In ***Cunliffe v Goodman*** **[1950] 2 KB 237** at 253**,** Asquith LJ noted:

> …An "intention" to my mind connotes a state of affairs which the party "intending" – I will call him X - does more

> than merely contemplate: it connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition.

It must be proven that the defendant intended to commit the offence, whether or not their intention was the mens rea for the completed offence.

In ***Whybrow*** **(1951) 35 Cr App Rep 141** (CA), Lord Goddard noted as follows:

> ...if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm.

Intent is therefore an element inherent in the definition of attempt, and is the same at least as, if not greater than, the intent to constitute the full offence: ***O'Toole* (1987) Crim LR 759** (CA).

As in the best practices, care must be taken not to confuse these concepts of what the defendant intended in respect of the attempted offence and the legal concept of 'intention' in the **completed offence**.

So, an intent to cause grievous bodily harm may be insufficient in attempted murder, but sufficient for the full offence of murder. As such, it must be proved that the defendant intended to bring about the proscribed result.

In ***Walker* (1990) 90 Cr App R 226** (CA), Lloyd LJ stated as follows:

> Since the charge was attempted murder, the prosecution had to prove an intention to kill. Intention to cause really serious harm would not have been enough... Moreover, the position is not quite the same in a case of attempted murder as it is in murder. In the great majority of murder cases, as the court pointed out in *Nedrick*, the defendant's desire goes hand in hand with his intention. If he desires serious harm, and death results from his action, he is guilty of murder. A simple direction suffices in such cases. The rare and exceptional case is where the defendant does not desire serious harm, or indeed any harm at all. But where a defendant is charged with attempted murder, he may well have desired serious harm, without desiring death. So the desire of serious harm does not provide the answer. It does not go hand in hand with the relevant intention, as it does in the great majority of murder cases, since in attempted murder the relevant intention MUST (emphasis added) be an

> intention to kill... The mere fact that a jury calls for a further direction on intention does not of itself make it a rare and exceptional case requiring a foresight direction. In most cases they will only need to be reminded of the simple direction which they will already have been given, namely that the relevant intention is an intention to kill and nothing less can suffice.

It is therefore arguable that one has to be careful, as it may seem that a lesser mens rea may be required for the completed offence of murder, than that of attempted murder which requires an intention to kill, and nothing less will suffice.In terms of addressing this dilemma, a Criminal Attempts Act can be considered in an effort to codify such offences in one statute, as done in the **Criminal Attempts Act 1981** (UK).

Forming Part of A Series of Acts

An attempt to commit a crime is an act done with intent to commit that crime and forms part of a series of acts which would constitute its actual commission if it were not interrupted.

The following cases are instructive:

a. ***Davey v Lee*** **[1968] 1 QB 366** at 370 per Lord Parker CJ;
b. ***Gullefer*** **[1987] Crim LR 195** (CA);
c. ***Jones*** **[1990] 1 WLR 1057** (CA);
d. ***Geddes*** **[1996] Crim LR 894** (CA).

Defence

It is important to note that it is no defence that it was physically impossible to complete the offence.

In ***Shivpuri*** **[1987] 1 AC** (HL), the Court noted that it does not matter that the offence which the defendant is intending to commit, is impossible by reason of facts unknown to them. Where impossibility has featured in the evidence, the jury should be told that they must be sure of an attempt to commit the offence intended.

Attempted Rape

In this area, there are some cases which may be cause for concern in relation to directions provided.

In ***Khan*** **(1990) 2 All ER 783** (CA), Russell LJ noted at 787:

> In our judgment an acceptable analysis of the offence of rape is as follows: (1) the intention of the offender is to have sexual intercourse with a woman; (2) the offence is committed if, but only if, the circumstances are that (a) the woman does not consent and (b) the defendant knows that she is not consenting or is reckless as to whether she consents.
>
> ...
>
> The only difference between the two offences is that in rape sexual intercourse takes place whereas in attempted rape it does not, although there has to be

> some act which is more than preparatory to sexual intercourse. Considered in that way, the intent of the defendant is precisely the same in rape and in attempted rape and the mens rea is identical, namely an intention to have intercourse plus a knowledge of or recklessness as to the woman's absence of consent. No question of attempting to achieve a reckless state of mind arises; the attempt relates to the physical activity; the mental state of the defendant is the same. A man does not recklessly have sexual intercourse, nor does he recklessly attempt it. Recklessness in rape and attempted rape arises not in relation to the physical act of the accused but only in his state of mind when engaged in the activity of having or attempting to have sexual intercourse.

Importantly, Russell LJ went on to state, 'We recognise, of course, that our reasoning cannot apply to all offences and all attempts.'

Where no state of mind other than recklessness is involved in the offence, for example, causing death by reckless driving, or reckless arson, there can be no attempt to commit it.

Note: The CCJ established in its decision in ***Commissioner of Police v Alleyne*** **[2022] CCJ 2 (AJ)**, the applicable law for Barbados, which recognises that a male may be the victim of rape. At [22], Jamadar JCCJ notes:

> ...Such a reading and interpretation of s 3(1), giving the words used their natural and ordinary meanings and regarding that as used they reflect the intention of the legislature, is dispositive of this appeal. The language used consistently throughout s 3(1) is gender-neutral

> ('any person' and 'another person') and pursuant to s 36(1) of the Interpretation Act is intended and presumed to include all genders. A victim/survivor of rape as defined in that section (s 3(6)) therefore includes a male person and the law thus recognises that rape (as defined) may be committed against a male. No intra or inter textual ambiguities, contradictions, or conflicts arise from such a reading. Indeed, it is overtly intra-textually consistent. Therefore, pursuant to s 3(1) the law permits a man to be charged for rape of another man. On this basis alone the appeal should be allowed.

Points to Consider

Some challenges to these guidelines on attempted rape are:

i. Whether the offence of attempted rape is committed when the defendant is reckless as to a person's consent to sexual intercourse.

ii. A judge has to be very careful in tailoring each direction to the jury based on the particular offences, and the specific facts of each case. The mens rea in rape and attempted rape is the same. However, that is not the case with murder and attempted murder.

Belize

Relevant Statutory Provisions

Section 18 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides for attempts to commit crimes as follows:

(1) A person who attempts to commit a crime by any means shall not be acquitted on the ground that by reason of the imperfection or other condition of the means, or by reason of any circumstances under which they are used, or by reason of any circumstances effecting the person against whom or the thing in respect of which the crime is intended to be committed, or by reason of the absence of such person or thing, the crime could not be committed according to his intent.

(2) Every person who attempts to commit a crime shall, if the attempt be frustrated by reason only of accident or of circumstances or events independent of his will, be deemed guilty of an attempt in the first degree, and shall (except as in this Code otherwise expressly provided) be punishable in the same manner as if the crime had been completed.

(3) Every person who is guilty of an attempt other than an attempt in the first degree shall (except as in this Code otherwise expressly provided) be liable to any kind of punishment to which he would have been liable if the crime had been completed, but the court shall mitigate the punishment according to the circumstances of the case.

(4) Where any act amounts to a complete crime, as defined by any provision of this Code, and is also an attempt to commit some other crime, a person who is guilty of it shall be liable to be convicted and punished either under such provision or under this section.

> (5) Any provision of this Code with respect to intent, exemption, justification or extenuation, or any other matter in the case of any act, shall apply, with the necessary modifications, to the case of an attempt to do that act.
>
> (6) Every person who attempts to commit a crime shall be punishable on indictment or summary conviction, according as he would be punishable for committing that crime.

See also ss 139 and 146 regarding Theft and s 147 regarding Attempted Robbery.

Attempted Murder

Section 107 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides that a person who attempts to commit murder shall be liable to imprisonment for life.

Section 117 of the **Criminal Code**, **Rev Ed 2020, CAP 101** (BZ) defines murder as follows:

> Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned.

In ***Hemmans*** **(Belize CA, Crim App No 12 of 2016)**, the Court of Appeal noted, at [48], that when considering a charge for attempted murder, all the elements of murder had to be proven with the exception of death. The court further noted as follows:

> [50] …The question to be asked is whether that was sufficient to prove beyond a reasonable doubt that there was a specific intent to kill. That is, the appellant had the intention to commit the full offence, being murder.
>
> [51] Section 6 of the Criminal Code provides for the standard test of intention, that is, whether the person, (the appellant in this case) intended to produce the result, that is, to kill Mr. Zaiden when he chopped him with the machete.
>
> [52] Section 9 of the Criminal Code sets out the approach to be adopted in relation to proof of intention to kill. Section 9 of the Criminal Code provides that:
>
> > 9. A court or jury, in determining whether a person has committed an offence-
> >
> > (a) shall not be bound in law to infer that any question specified in the first column of the Table below is to be answered in the affirmative by reason only of the existence of the factor specified in the second column as appropriate to that question, but
> >
> > (b) shall treat that factor as relevant to that question, and decide the question by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.

> [53] The relevant question and factor in this case as shown in the table being whether the person charged with the offence intended to produce a particular result by his conduct (question) by the "*fact that the result was a natural and probable result of such conduct*." (appropriate factor).

The case of ***Staine*** **(Belize CA, Crim App No 4 of 2018)** at [49] – [58], is also instructive.

Guyana

Attempt and Incitement

Sections 35 – 37 of the **Criminal Law (Offences) Act, Cap 8:01** (GY) provide as follows:

> 35. Everyone who, in any case where no express provision is made by this Act, or by any other written law for the time being in force, for the punishment thereof, attempts to commit, or incites or attempts to incite any other person to commit, any felony not punishable with imprisonment for seven years or more, or any misdemeanour, under this Act shall be guilty of a misdemeanour and liable to imprisonment for one year.
>
> 36. Everyone who, wherever no express provision is made by this Act, or by any other written law for the time being in force, for the punishment thereof, attempts to

> commit, or incites or attempts to incite any other person to commit, any felony punishable with imprisonment for seven years or more under this Act shall be guilty of a misdemeanour and liable to imprisonment for two years.
>
> 37. Everyone who, in any case where no express provision is made by any written law for the time being in force for the punishment thereof, attempts to commit, or incites or attempts to incite any other person to commit, any indictable offence at common law or under any written law, other than this Act, for the time being in force, shall be guilty of a misdemeanour and liable to imprisonment for two years.

Section 95(a) of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 10:10** (GY), provides that every person who attempts to commit any offence against this Act, may be charged with, tried, convicted, and punished in all respects as if they were a principal offender.

Similarly, s 36(a) of the **Sexual Offences Act, Cap 8:03** (GY), provides that every person who attempts to commit any offence, whether summary or indictable, against this Act, may be charged with, tried, convicted and punished in all respects as if they were a principal offender.

In this Chapter:

Chapter 7

Parties to a Crime: Joint Enterprise

Sources

Judicial College, *The Crown Court Compendium, Part I: Jury and Trial Management and Summing Up (*June 2018)

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Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

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'Joint enterprise' is a common law doctrine where two or more parties embark on a joint enterprise, as either principal offender/s or secondary party/parties, and where each will be liable for acts committed in pursuance of that joint enterprise with the necessary intent, unless the principal offender/s go beyond the scope of what was agreed. However, note that a contending development in the law is that a member of a group cannot be found guilty of an offence unless there is proof that they positively intended that it should be committed; mere foresight of what someone else might do is not enough.

1. Principal and Secondary Parties

An offence may be committed by a principal offender or a secondary party. For present purposes, a principal offender (P) can be taken to mean one who personally or by means of an innocent agent, committed the conduct element of the offence or the actus reus. There may be more than one principal offender when the conduct amounting to the actus reus was committed by more than one person (e.g. if P1 and P2 attack the victim, V, with their fists, with intent to cause some harm, and together do really serious harm to V, they are both principals in the offence of causing grievous bodily harm). A secondary party (D) is one who aids, abets, counsels or procures the offence. For the purpose of trial, a secondary party is to be treated in the same way as a principal offender.

However, 'secondary liability' for the commission of the offence is usually derived from the conduct of the principal offender. For this reason, it is important when framing directions, to identify, if possible, the conduct of the principal offender/s which comprises the actus reus. From this starting point, the conduct and mens rea required to prove the guilt of a

secondary party can be more readily identified and explained. When the Prosecution's case is that the defendant was a secondary party to the offence, it may be appropriate for the indictment to say so, and for the Route to Verdict to identify the elements which constitute the defendant's secondary liability.

2. Where the Principal Offender Cannot be Identified

It may not be possible for the Prosecution to identify the principal offender, for example, when one of a group carrying out an attack on V produces a knife and stabs V. That will not save a defendant from conviction founded on the act of stabbing, provided that the jury can be sure that the defendant was either the principal offender who stabbed V, or a secondary party to that offence. Whether they were a principal or secondary offender, they can be convicted as a principal offender.

3. Routes to Principal or Secondary Liability

Legal liability for a criminal offence may arise because the defendant:

i. either alone or through the innocent agency of another or in combination with another committed the offence (principal or joint principal); or took part in the offence as a secondary party (aiding and abetting).

ii. by their own conduct and with intent, assisted another to commit the offence (aiding and abetting).

iii. by words, conduct and/or presence, intentionally encouraged another to commit the offence (aiding and abetting).

iv. directed or, with the requisite intention, enabled the offence committed (counselling or procuring).

v. joined and participated in an enterprise to commit one offence in the course of which, as the defendant either intended or realised, the other offence would or might be committed (joint enterprise).

See **Archbold (2023)** at 18; **Blackstone's (2022)** at A4.

'Secondary liability is a common law doctrine the rules of which are generally the same irrespective of the context in which the secondary accused provides encouragement or assistance and regardless of the seriousness of the principal offence': **Law Commission Report (Law Com 305) Participating in Crime, May 2007** at [2.4].

4. Requirements for Secondary Liability

With some exceptions (for example, in some cases of "counselling or procuring"), the secondary liability of the defendant (D) is dependent upon or derives from the commission of a principal offence by the principal offender (P). To prove the secondary liability of D, the Prosecution must establish:

i. Conduct by D amounting to assistance to, or encouragement of P;

ii. An intention to assist or encourage P to commit the principal offence; and

iii. D's knowledge of the essential matters which constitute the principal offence.

It is the third requirement which has generated most debate. The "principal offence" comprises the conduct, qualifying circumstances, consequences, and fault required for its commission.

However, the term "knowledge" requires qualification. It is not necessary for D to "know" all the details of P's plans or of the principal offence committed, provided they know the matters essential to the principal offence. For example, if D supplies P with a crowbar to enable P to commit a burglary, it is not necessary to prove that D knew the date, time, and place the burglary was actually committed. Furthermore, the Court of Appeal has found, as a sufficient substitute for knowledge, the foresight by D of a real possibility that P will act as they did: ***Reardon* [1999] Crim LR 392** (CA). This is an application of the ***Powell and English* [1999] 1 AC 1** (HL) test in joint enterprise cases where no common purpose between P and D is alleged.

The requirement for knowledge of "consequences" has been modified in cases of constructive liability, for the consequences such as murder, manslaughter, inflicting grievous bodily harm and wounding, where D knows that the consequence is a risk that P's act will cause some harm. So, it is enough if D knows/foresees that P will act in a way which creates an obvious risk of some harm to V, which in fact causes death/grievous bodily harm/wound.

As to "fault", the defendant must be aware that P will act with the intention required to commit the offence. In a case of murder, D must be aware of the real possibility that P will act with the intent required for murder: ***Powell and English***.

Where the foundation for the secondary liability of D for offence Y, is their participation in a "joint enterprise" or "common purpose" to commit offence X, "knowledge" of the intention of P for the commission of offence Y is to be interpreted as foresight of a real possibility that P will act with

the intent required for the offence. Thus, if P and D embark on a robbery in the course of which P kills with intent to do really serious bodily harm, D is guilty of murder if they participated in the robbery knowing there was a real possibility that P might, if confronted, attack V with intent to do really serious bodily harm.

An offence may be "counselled" if D advises or solicits it. The Prosecution does not have to prove that the counselling caused the offence; only that D counselled the offence which was committed by P acting within the scope of their authority: ***Calhaem*** **[1985] QB 808** (CA).

"Procuring", however, denotes 'setting out to see that [a thing] happens and taking the appropriate steps to produce that happening'; ***Attorney General's Reference (No 1 of 1975)*** **[1975] QB 773**. There must be a causal link between the procuring and the event procured.

5. Joint Enterprise and the Foresight Principle

It is to be noted that, notwithstanding the shift in the law as outlined in the decision in ***Jogee*** **[2016] UKSC 8, [2017] AC 387; *Ruddock*** **[2016] UKPC 7, [2017] AC 387**, the law as articulated in the case of ***Chan Wing-Siu v The Queen*** **[1985] AC 168,** remains the applicable law in the jurisdictions that have accepted the Caribbean Court of Justice (CCJ) as their final appellate court: ***Hyles*** **[2018] CCJ 12 (AJ) (GY), (2018) 93 WIR 353**.

In the joint judgment of the Rt Honourable Mr. Justice De La Bastide (as he then was) and the Honourable Mr. Justice Saunders, in ***Attorney General v Joseph*** **[2006] CCJ 1 (AJ)**, it was noted at [18]:

> The main purpose in establishing this court is to promote the development of a Caribbean jurisprudence, a goal which Caribbean courts are best equipped to pursue. In

> the promotion of such a jurisprudence, we shall naturally consider very carefully and respectfully the opinions of the final courts of other Commonwealth countries and particularly, the judgments of the JCPC which determine the law for those Caribbean states that accept the Judicial Committee as their final appellate court. In this connection we accept that decisions made by the JCPC while it was still the final Court of Appeal for Barbados, in appeals from other Caribbean countries, were binding in Barbados in the absence of any material difference between the written law of the respective countries from which the appeals came and the written law of Barbados. Furthermore, they continue to be binding in Barbados, notwithstanding the replacement of the JCPC, until and unless they are overruled by this court.

In light of the above, the CCJ in ***Hyles*****,** in considering the issue of whether the jury was substantially misdirected on joint enterprise, took the opportunity to discuss the applicable law in Guyana with respect to this area. At [122], the CCJ noted as follows:

> Before concluding on this point, it may be helpful to address the Court of Appeal's reliance on *R v Jogee; Ruddock v The Queen* in its decision on joint enterprise. In that case, the Privy Council and the Supreme Court of the United Kingdom reviewed the law on the criminal liability of accessories, particularly the case of *Chan Wing-Sui v R* and decided that the law had taken a wrong turn by adopting the doctrine of extended joint enterprise involving "parasitic accessory liability." As a consequence,

> the Privy Council and the Supreme Court jointly declared *Chan Wing-Sui* to be bad law. In its judgment in this case, the Court of Appeal considered *Jogee* at length before relying on it for the Court of Appeal's finding that the directions of the judge were inadequate. This engages us for three reasons. Firstly, *Jogee* and *Chan Wing Sui* deal with criminal liability beyond direct criminal involvement of participants in the crime and with the question how wide that liability net should be spread; it was therefore irrelevant in the case before us. Secondly, *Jogee* was decided three years after the trial judge gave his directions, so to criticise the judge's directions based on law that did not exist at the time of the trial and still does not exist in Guyana, was rather unfair to the trial judge. Thirdly, *Jogee,* a controversial decision, recently decided by the Privy Council and representing the departure from established law, cannot be regarded as binding in Guyana, until that departure is confirmed or propounded by this Court. The practical point is that unless this court states otherwise *Chan Wing-Sui* remains applicable in Guyana.

The decision in ***Powell and English*** sets out the test for the secondary liability of D, when P went further than D intended, which is whether D, foreseeing that P may act as they did in furtherance of the common design, nevertheless participated in the joint enterprise. Lord Hutton noted:

> The principle stated in **R v Smith [1963] 1 WLR 1200** was applied by the Privy Council in **Chan Wing-Siu v The Queen [1985] A.C. 168** in the judgment delivered by Sir Robin Cooke, who stated, at p 175:

> 'The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. That there is such a principle is not in doubt. It turns on contemplation or, putting the same idea in other words, authorisation, which may be express or is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.'

The principle stated by Sir Robin Cooke in Chan Wing-Siu's case was followed and applied in the judgment of the Court of Appeal in **R v Hyde [1991] 1 Q.B**. 134, where Lord Lane CJ took account of Professor Smith's comment on **R v Wakely** that there is a distinction between tacit agreement and foresight and made it clear that the latter is the proper test.

Where, however, the act committed by P is fundamentally different from that contemplated by D, D will not be liable. Lord Hutton noted at page 21:

> Mr. Sallon, for the appellant, advanced to your Lordships' House the submission (which does not appear to have been advanced in the Court of Appeal) that in a case such as the present one where the primary party kills with a deadly weapon, which the secondary party did not know that he had and therefore did not foresee his use of it, the secondary party should not be guilty of murder. He submitted that to be guilty under the

principle stated in **Chan Wing-Siu** the secondary party must foresee an act of the type which the principal party committed, and that in the present case the use of a knife was fundamentally different to the use of a wooden post.

My Lords, I consider that this submission is correct. It finds strong support in the passage of the judgment of Lord Parker C.J. in **R v Anderson; R v Morris [1966] 2 Q.B. 110**, 120 which I have set out earlier, but which it is convenient to set out again in this portion of the judgment:

> 'It seems to this court that to say that adventurers are guilty of manslaughter when one of them has departed completely from the concerted action of the common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today.'

The judgment in ***Chan Wing-Siu*** also supports the argument advanced on behalf of the appellant because Sir Robin Cooke stated at page 175: 'The case must depend rather on the wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend.'

It should be noted that the fact that P's act was fundamentally different from those contemplated by the common design is not identified by Lord Hutton as a separate test by which D's liability should be excluded; rather, it is an application of the evidence to the foresight test. If the act

was fundamentally different from the agreed course of action, it is, on the evidence, improbable or impossible that D was aware P might act as they did in furtherance of the common design.

The issue for the jury will be whether, when participating in offence X, D foresaw that in the course of committing it:

i. there was a real risk that P would commit the conduct element of the offence Y;

ii. with knowledge of the prescribed circumstances which make it an offence, and

iii. that P might commit the conduct element of offence Y with the mens rea required for offence Y.

6. Extension of the Foresight Principle

The case of ***Reardon*** **[1999] Crim LR 392** (CA) is important as it applied ***Powell and English*** principles to a defendant (D) who was not involved in a joint enterprise with P. In ***Reardon***, P shot two men in a bar and was assisted by others to remove their bodies to the garden. P returned to the bar and said, '[He's] still alive', not distinguishing between the two victims, and asked D to lend him his knife which D promptly handed over. P used the knife to finish off both victims. The Court of Appeal held that D was either guilty of both murders or of neither. D was guilty of both murders because he foresaw that P would use the knife to finish off one of the victims; thus, he must have foreseen as a real possibility that P would use the knife to finish off the other if necessary. D's liability was formulated upon D's foresight of the real possibilities arising from D's act of assistance even though there was a lack of common purpose, as in ***Chan Wing-Siu*** and ***Powell and English***.

In **B*ryce* [2004] EWCA Crim 1231**, D drove P carrying a shotgun to a caravan where P could watch the movements of V. Thirteen hours later P shot V to death. D's defence was that he did not know P was carrying a shotgun. He was just giving him a lift. D argued that even if he was aware that P was thinking of shooting V, he was not liable as an accessory because he could not and did not know that P intended to shoot V when P did not form that intention for several hours. Potter LJ observed that the Court of Appeal had already extended the ***Powell and English*** principle to assistance given before the commission of the offence. In ***Rook*** **[1993] 2 All ER 955** (CA) Lloyd LJ said:

> It is now well established that in a case of joint enterprise, where the parties are both present at the scene of the crime, it is not necessary for the prosecution to show that the secondary party intended the victim to be killed, or to suffer serious injury. It is enough that he should have foreseen the event, as a real or substantial risk: see *Chan Wing-Siu v R [1984] 3 All ER 877*, [1985] AC 168, *R v Hyde [1990] 3 All ER 892*, [1991] 1 QB 134 and *Hui Chi-Ming v R [1991] 3 All ER 897*, [1992] 1 AC 34. Thus, a secondary party may be liable for the unintended consequences of the principal's acts, provided the principal does not go outside the scope of the joint enterprise.
>
> We see no reason why the same reasoning should not apply in the case of a secondary party who lends assistance or encouragement before the commission of the crime.

Potter LJ in ***Bryce*** continued at [71]:

> We are of the view that, outside the Powell and English situation (violence beyond the level anticipated in the course of a joint criminal enterprise), where a defendant, D, is charged as the secondary party to an offence committed by P in reliance on acts which have assisted steps taken by P in the preliminary stages of a crime later committed by P in the absence of D, it is necessary for the Crown to prove intentional assistance by D in the sense of an intention to assist (and not to hinder or obstruct) P in acts which D knows are steps taken by P towards the commission of the offence. Without such intention the mens rea will be absent whether as a matter of direct intent on the part of D or by way of an intent sufficient for D to be liable on the basis of 'common purpose' or 'joint enterprise'. Thus, the prosecution must prove:
>
> (a) an act done by D which in fact assisted the later commission of the offence;
>
> (b) that D did the act deliberately realising that it was capable of assisting the offence;
>
> (c) that D at the time of doing the act contemplated the commission of the offence by A i.e. he foresaw it as a 'real or substantial risk' or 'real possibility' and,
>
> (d) that D when doing the act intended to assist A in what he was doing.

In ***Webster*** **[2006] EWCA Crim 415**, D handed the controls of a car to P whom he knew to be drunk. It was argued on D's behalf that he could

not be criminally liable for P's dangerous driving. The Court of Appeal disagreed. Moses LJ said at [23]:

> The very foundation of the decision in *R v Powell & English* [1999] AC 1 is acceptance of the principle that a secondary party is criminally liable for the acts of the principal if he foresees those acts even though he does not necessarily intend them to occur (see e.g. Lord Hutton at p 27 to p 28). Evidence that the Appellant knew that Westbrook had not only been drinking but appeared to be intoxicated was powerful evidence that he foresaw Westbrook was likely to drive in a dangerous manner at the time he permitted him to drive. But evidence of Westbrook's apparent intoxication did not determine the issue. It was merely evidence which tended to prove the conclusion which the jury had to reach before it convicted him. In short, the more drunk Westbrook appeared to be, the easier it was for the prosecution to prove that the Appellant foresaw that he was likely to drive dangerously if he permitted him to drive.

He continued at [25] and [26]:

> Further, we must emphasise what the prosecution had to prove in relation to the Appellant's state of mind. It accepted that it was not sufficient to prove that the Appellant ought to have foreseen that Westbrook would drive dangerously. The prosecution had to prove that the Appellant did foresee that Westbrook was likely to drive dangerously when he permitted him to get into

the driver's seat (see *Blakely, Sutton v DPP* [1991] RTR 405, [1991] Crim LR 763). We stress the need to focus upon the Appellant's state of mind because of certain criticisms made in relation to the wording of the judge's directions to the jury on this issue. Generally, the prosecution will be able to prove the actual state of mind of the Defendant, absent any confession, by reference to what must have been obvious to him from all the surrounding circumstances. But it is important to distinguish between that which must have been obvious to a Defendant and what the Defendant foresaw. In most cases there will be no space between the two concepts; if the prosecution can prove what must have been obvious, it will generally be able to prove what the Defendant did foresee. But the danger of eliding the two concepts, namely what the Defendant did foresee and what he must have foreseen, is that it might suggest that it is sufficient to prove what the Defendant ought to have foreseen. That is not enough. It is the Defendant's foresight that the principal was likely to commit the offence which must be proved and not merely that he ought to have foreseen that the principal was likely to commit the offence.

We conclude that in order to prove that the Appellant was guilty of aiding and abetting Westbrook to drive dangerously, the prosecution had to prove that at the time he permitted him to drive he foresaw that Westbrook was likely to drive in a dangerous manner.

It is suggested that the foresight principle is equally applicable to offences of counselling and procuring and, for the same policy reasons, if D foresaw as a real possibility that P would exceed the acts they were counselling or procuring, D should be liable as a secondary party.

7. The Trial Judge's Task

It will usually be unnecessary for the judge to embark on a full explanation of terms which define criminal liability. It is enough, and more helpful, to inform the jury what it is the Prosecution must prove before the defendant can be convicted. There is no need, for example, to embark on a lengthy exposition of the law of joint enterprise, when it is common ground that the offence was committed by at least one individual and the sole issue is whether the defendant participated. It will be necessary only to identify the act of participation and the state of mind which the Prosecution must prove, to establish the defendant's guilt. In every case, it will be necessary for the judge to identify what must be proved against a defendant within the factual context of the case before them.

In the more complex cases in which the jury will need to consider the different positions of multiple defendants, or where the policy of the law towards liability of secondary parties is not straightforward, it may well be necessary to give a fuller explanation and to provide the jury either with written directions or a note explaining their route to verdicts, or both.

8. Participation (Simple Joint Enterprise)

Guidelines

The jury should be directed that the offence charged can be committed by one person or more than one person. If two or more people act together with a common criminal purpose to commit an offence, they are each responsible, although the parts they play when carrying out that purpose may be different. For example, two burglars may enter a house together and together remove a television set – they are both guilty of burglary; or, one burglar may enter the house while the other keeps watch for the other outside – again, they are both guilty of burglary.

The Prosecution must prove participation by the defendant with a common purpose. While participation with a common purpose implies an agreement to act together (a joint enterprise), no formality is required. The agreement can be made tacitly and spontaneously and may be inferred from the actions of the defendant.

When two or more people act together to bring about the result, their participation need not be precisely contemporaneous; one may begin, and others join in. For example, if D1 attacks V and D2 joins in, and V suffers really serious harm, each is liable for causing grievous bodily harm. The jury need not be concerned to isolate the acts of the participants in order to decide which of them caused the really serious injury; they are both liable if they participated together in acts which they knew risked causing bodily injury and which actually caused really serious bodily injury.

The first Illustration is designed to reflect a direction in a straightforward case. The second Illustration is designed to deal with the cut-throat defence. The third illustration deals with the route to verdict.

Illustration 1

Two co-defendants – burglary – common purpose – inferring the common purpose – parts played in fulfilling the common purpose – verdicts need not be the same

An offence may be committed by one person acting alone, or by more than one person acting together with the same criminal purpose.

The agreement of the defendant to act together need not have been expressed in words. It may be the result of planning, or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.

Those who commit a crime together may play different parts to achieve their purpose. The Prosecution must prove that each defendant took some part.

Here the Prosecution's case is that D1 and D2 acted together to commit burglary. D1's part was to enter the house and remove property. D2's part was to keep watch outside. Their actions, the Prosecution asserts, clearly had a common purpose.

D1's defence is that they were not present; D2's defence is that although they were outside the property, they were not there to take part in any offence.

If you are sure D1 and D2 did act together to commit the offence, your verdict is guilty in the case of each defendant.

You must consider the case of each defendant separately. It is open to you to conclude that your verdicts should be the same in each case, but it does not follow that they have to be. Provided you are sure that a burglary was committed by one or more than one person, if you are sure that one

defendant took some part in that offence, but you are not sure about the other, your verdict can be guilty in respect of one defendant and not guilty in respect of the other.

Illustration 2

Two co-defendants – grievous bodily harm – joint assault on V – dispute which defendant caused grievous bodily harm – joint enterprise to cause some harm – defendant may be either principal or secondary offender

D1 and D2 are jointly charged with causing grievous bodily harm with intent, and, in the alternative, with the lesser offence of inflicting grievous bodily harm.

They both admit that they took part together in an unlawful assault upon V by kicking them while V was on the ground. V suffered serious injuries from kicks delivered to their head. It is clear, and the defendants do not contest, that whoever delivered those kicks caused really serious injury and intended to do so. However, each of them denies aiming kicks to the head; each blames the other; each says they intended to cause V only some physical harm by kicking them to their legs and body. They both say that the act of kicking to the head was quite different from the assault they intended or anticipated.

The defendants jointly embarked on the unlawful assault of V and each of them accepts that they intended to cause some harm. They are each liable for the acts of the other and each of them is at least guilty of inflicting grievous bodily harm, count 2. However, the Prosecution's case is that they are both guilty of count 1, causing grievous bodily harm with intent.

Count 1 requires the proof of a specific intent, namely the intent to do really serious harm. There are two ways in which the Prosecution can

establish that intent against each defendant. The first is to prove that the defendant, at the time of the joint assault, kicked V in the head personally intending that V should suffer really serious harm. Alternatively, the Prosecution may prove that the defendant participated or continued to participate in the assault realising that there was a real risk the other may, in the course of the joint assault, kick V in the head with intent to do V really serious harm.

I have prepared a note which will enable you to approach these issues sequentially in order to arrive at your verdicts. Let us read it together.

Illustration 3

Route to Verdict

Please apply the following questions to the case of each defendant in turn. Answer the first question and proceed as directed.

Question 1

Did the defendant take part with their co-defendant in an unlawful assault on V intending to cause some bodily injury or realising that some bodily injury may be caused? Admitted. Go to question 2.

Question 2

Did V, in consequence of the joint assault, suffer really serious injury? Admitted. Go to question 3.

Question 3

Did the defendant either

i. kick V in the head intending that V should suffer really serious injury; or

ii. take part in the attack realising that there was a real risk that their co-defendant might kick V in the head with intent to cause V really serious injury; or

iii. continue to take part in the attack realising that their co-defendant was kicking V in the head and might be doing so with intent to cause V really serious harm?

If you are sure of either i. or ii. or iii., verdict guilty count 1, causing grievous bodily harm with intent.

If you are not sure of either i. or ii. or iii., verdict guilty count 2.

Note: If one of the defendants may have injured V in a manner fundamentally different from that contemplated by the joint enterprise, e.g., by taking a house brick and striking V over the head with it, a further step would be required.

9. Jurisprudential Developments In This Area of Law

This law on joint enterprise relating to accessories and/or secondary liability remains an emerging and complex area of the law. As such, what follows is no more than a summary of some of the jurisprudential developments in this area of law.

In ***Jogee*** **[2016] UKSC 8, [2017] AC 387;** ***Ruddock*** **[2016] UKPC 7, [2017] AC 387**, the UK Supreme Court and Privy Council unanimously re-stated the principles concerning the liability of accessories/secondary parties in a single judgment. The court held that the so-called "parasitic accessory" approach to liability is no longer to be applied in English law. Essentially, the Courts noted that the approach laid down by the Privy Council in ***Chan Wing-Siu*** **[1985] AC 168** (HK PC), as subsequently adopted in English law could not be supported.

The Court of Appeal of Trinidad and Tobago in ***Agard v The State*** **(Trinidad and Tobago CA, Crim App No P023 of 2013)** succinctly summarised ***Jogee and Ruddock*** at [27], [28], and [29] as follows:

> [27] The landmark judgment of ***R v Jogee***; ***R v Ruddock***, delivered in 2016, is of application to this case. In those cases, the two appellants had been convicted of murders on the basis of joint enterprise in which their confederates used knives to kill the two deceased persons. In directing the jury on accessorial liability, in each case, the trial judges directed them in line with the principles derived from ***Chan Wing-Siu***. That case established that where a secondary party realised that there was a possibility that the principal might commit an offence, in addition to the planned offence, and the secondary party continued in the enterprise, that party was guilty as an accessory to the additional offence, whether or not he intended it.
>
> [28] In the case of ***Jogee***, the trial judge directed the jury that the defendant was guilty of murder if they accepted that he participated in the attack on the deceased while realising that his confederate might stab him with the

> intent to cause really serious harm. In the case of ***Ruddock***, the trial judge directed the jury that it was necessary for the Prosecution to establish that the defendant and his confederate possessed a shared common intention and that such a common intention would arise "where the defendant knew that there was a real possibility that the other defendant might have a particular intention and with that knowledge, nevertheless, went on to take part in it".
>
> [29] On appeal, the Supreme Court and the Privy Council reviewed the doctrine of accessorial liability as established in ***Chan Wing-Siu***. The courts came to the conclusion that the relevant law as expounded in ***Chan Wing-Siu*** had taken a wrong turn…

The UK Supreme Court and Privy Council in ***Jogee*** stated that the defendant's liability for criminal offences committed by the principal party is to be based on ordinary principles of secondary liability. Lord Hughes and Lord Toulson JJSC, in their joint judgment, noted at [76] – [79] as follows:

> 76. We respectfully differ from the view of the Australian High Court, supported though it is by some distinguished academic opinion, that there is any occasion for a separate form of secondary liability such as was formulated in the ***Chan Wing-Siu*** case. As there formulated, and as argued by the Crown in these cases, the suggested foundation is the contribution made by D2 to crime B by continued participation in crime A with foresight of the possibility of crime B. We prefer the view expressed by the Court

of Appeal in ***Mendez***, at para 17, and by textbook writers including ***Smith and Hogan's Criminal Law***, 14th ed (2015), p 260 that there is no reason why ordinary principles of secondary liability should not be of general application.

77. The rule in ***Chan Wing-Siu*** is often described as "joint enterprise liability". However, the expression "joint enterprise" is not a legal term of art. As the Court of Appeal observed in ***R v A*** **[2011] QB 841**, para 9, it is used in practice in a variety of situations to include both principals and accessories. As applied to the rule in ***Chan Wing-Siu***, it unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law.

78. As we have explained, secondary liability does not require the existence of an agreement between D1 and D2. Where, however, it exists, such agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. The long-established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent is an example of the intention to assist which is inherent in the making of the agreement. Similarly, where people come together without agreement, often spontaneously, to commit an offence together, the giving of intentional support

> by words or deeds, including by supportive presence, is sufficient to attract secondary liability on ordinary principles. We repeat that secondary liability includes cases of agreement between principal and secondary party, but it is not limited to them.
>
> 79. It will be apparent from what we have said that we do not consider that the ***Chan Wing-Siu*** principle can be supported, except on the basis that it has been decided and followed at the highest level. In plain terms, our analysis leads us to the conclusion that the introduction of the principle was based on an incomplete, and in some respects erroneous, reading of the previous case law, coupled with generalised and questionable policy arguments...

The defendant is therefore liable as an Accessory (and not as a Principal) if they assist or encourage or cause another person, the Principal, to commit the offence and the defendant does not, by their own conduct, perform the actus reus: ***Kennedy (No 2)*** **[2008] 1 AC 269** (HL).

The offence occurs where and when the principal offence occurs: ***J F Alford Transport Ltd*** **[1997] EWCA Crim 654, [1997] 2 Cr App R 326**.

It is not necessary that the defendant's act of assistance or encouragement was contemporaneous with the commission of the offence by the Principal: ***Stringer*** **[2011] EWCA Crim 1396, [2012] QB 160**.

The defendant's acts, however, must have been performed before the Principal's crime is completed. There is no requirement that the defendant and the Principal shared a common purpose or intent: ***Attorney General's Reference (No 1 of 1975)*** **[1975] QB 773**.

It is immaterial that the defendant joined in the offence without any prior agreement: ***Mohan* [1967] 2 AC 187** (PC).

The defendant, however, will not be liable for the Principal's offence if the defendant and the Principal have agreed on a particular victim and the Principal deliberately commits the offence against a different victim.

The defendant's liability for assisting with an offence will depend on proof that the offence was committed, even if the Principal cannot be identified, and that:

i. the defendant's conduct assisted the Principal in the commission of the offence: see ***Jogee*** at [12] for guidance.
ii. the defendant intended that their conduct would assist the Principal: ***Bryce* [2004] EWCA Crim 1231, [2004] 2 Cr App Rep 35**; ***National Coal Board v Gamble* [1959] 1 QB 11** (DC). There need not be a meeting of minds between the defendant and the Principal.
iii. the defendant intended that their act would assist the Principal in the commission of either: (a) a type of crime, without knowing its precise details or (b) one of a limited range of crimes that were within the defendant's contemplation.
iv. the defendant had not withdrawn at the time of the Principal's offence.

The defendant's liability for encouraging an offence will depend on proof that the offence was committed, even if the Principal cannot be identified, and that:

i. the defendant's conduct amounting to encouragement came to the attention of the Principal (it does not matter that the Principal would have committed the offence anyway: see ***Jogee*** at [12]), but

there is no requirement that the defendant's conduct has caused the Principal's conduct. Non-accidental presence may suffice if the defendant's presence did encourage the conduct, and the defendant intended it to.

ii. the defendant intended, by their conduct, to encourage the Principal. The Prosecution does not need to establish that the defendant desired that the offence be committed (see ***Jogee*** at [90]). The Principal must have been aware that they had the defendant's encouragement or approval.

iii. with regard to the mental element, the intention to assist or encourage will often be specific to a particular offence. But in some offences, e.g. terrorism, it may not be. The defendant may intentionally assist or encourage the Principal to commit one of a range of offences. If so, the defendant does not have to "know" (or intend) in advance the specific form which the crime will take. It is enough that the offence committed by the Principal is within the range of possible offences which the defendant intentionally assisted or encouraged them to commit (see ***Jogee*** at [14]).

iv. where it is alleged that the defendant counselled the Principal to commit the offence, that offence must have been within the scope of the Principal's authority i.e. was one which the Principal knew they had been encouraged to commit: ***Calhaem*** **[1985] QB 808** (CA).

v. the defendant had not withdrawn at the time of the offence.

The defendant's liability for commanding or commissioning will depend on proof that the defendant's conduct caused the Principal to commit the offence and that the defendant acted with intent 'to produce by endeavour' the commission of the offence.

It is not necessary to prove that there existed any agreement between the defendant and the Principal to commit an offence (see ***Jogee*** at [17]).

The defendant's mens rea is satisfied by proof that:

i. the defendant intended to assist or encourage the Principal.

ii. the defendant had done so with knowledge of "any existing facts necessary" for the Principal's conduct/ intended conduct to be criminal; i.e. the defendant must intend/know that the Principal will act with the mens rea for the offence.

iii. intention is what is required. As elsewhere in the criminal law, intention is not limited to cases where the defendant "desires" or has as their "purpose", that the Principal commits the offence (see ***Jogee*** at [91]), but most importantly, intention is not to be equated with foresight: 'Foresight may be good evidence of intention, but it is not synonymous with it' (see ***Jogee*** at [73]).

iv. 'Knowledge or ignorance that weapons generally, or a particular weapon, is carried by the Principal will be evidence going to what the intention of the defendant was, and may be irresistible evidence one way or the other, but it is evidence and no more' (see ***Jogee*** at [26] and [98]; ***Brown*** **[2017] EWCA Crim 1870**).

v. where the Principal's offence requires proof that they acted with intent (e.g. murder) the defendant must intend to assist/encourage the Principal to act with that intent (see ***Jogee*** at [10]). It is sufficient that the defendant intended to assist or encourage the Principal to commit grievous bodily harm (see ***Jogee*** at [95] and [98]). It is not necessary for the defendant to intend to encourage or assist the Principal in killing.

Where there is a prior joint criminal venture, it might be easier for the jury to infer the intent. It 'will often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional' (see Jogee at [92]). The UK Supreme Court and Privy Council in Jogee noted at [94]:

> If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.

An intention may also be inferred where there was no prior criminal venture. At [95] of ***Jogee***, it was noted that where:

> …D2 joins with a group which he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.

The defendant may claim that the Principal's act is an overwhelming supervening event (OSE) and that any assistance or encouragement that

the defendant may have given has been superseded. The Supreme Court recognised this in ***Jogee*** at [97] and [98]:

> 97. The qualification to this (recognised in ***Wesley Smith***, ***Anderson and Morris*** *and* ***Reid***) is that it is possible for death to be caused by some overwhelming supervening act by the perpetrator which nobody in the defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history; in that case the defendant will bear no criminal responsibility for the death.
>
> 98. This type of case apart, there will normally be no occasion to consider the concept of "fundamental departure" as derived from English. What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined only by whether he knows what kind of weapon D1 has in his possession. The tendency which has developed in the application of the rule in ***Chan Wing-Siu*** *to* focus on what D2 knew of what weapon D1 was carrying can and should give way to an examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least. Very often he

> may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more.

This approach replaces the pre-***Jogee*** position in which the defendant could plead a "fundamental difference". The law concerning OSE has recently been subject to review in ***Grant*** **[2021] EWCA Crim 1243, [2022] 2 WLR 321** and what follows should be read in the light of that judgment.

The court in ***Grant***, echoing ***Tas*** **[2018] EWCA Crim 2603, [2019] 4 WLR 14**, emphasised the limited circumstances in which it envisaged a successful claim of OSE arising in practice. There are four things to bear in mind:

i. The court will need to carefully consider whether a claim of overwhelming supervening event is something that should be left to the jury. It is perfectly proper for a judge to withdraw the issue if there is not sufficient evidence on which a jury could reach the conclusion that there was an overwhelming supervening event. In ***Tas*** **[2018] EWCA Crim 2603** the President of the Queen's Bench Division noted that:

> 40 …It is important not to abbreviate the test articulated above which postulates an act that "nobody in the

> defendant's shoes could have contemplated might happen and is of such a character as to relegate his acts to history". In the context of this case, the question can be asked whether the judge was entitled to conclude that there was insufficient evidence to leave to the jury that if they concluded (as they must have) that, in the course of a confrontation sought by Tas and his friends leading to an ongoing and moving street fight (which had Tas driving his car following the chase to ensure that his friends could be taken from the scene), the production of a knife is a wholly supervening event rather than a simple escalation.
>
> 41 We repeat that in the light of the relegation of knowledge of the weapon as going to proof of intent, it cannot be that the law brings back that knowledge as a pre-requisite for manslaughter. In our judgment, whether there is an evidential basis for overwhelming supervening event which is of such a character as could relegate into history matters which would otherwise be looked on as causative (or, indeed, withdrawal from a joint enterprise) rather than mere escalation which remained part of the joint enterprise is very much for the judge who has heard the evidence and is in a far better position than this court to reach a conclusion as to evidential sufficiency.

ii. If the matter is left to the jury, the test is a narrow one and not to be diluted: 'nobody in the defendant's shoes could have contemplated what might happen and is of such a character as to regulate his acts to history.'

iii. In a case of murder by the Principal, if the Principal's act is a supervening overwhelming event, consideration needs to be given to whether the defendant is liable for a lesser offence and if so what (see ***Tas* [2018] EWCA Crim 2603, [2019] 4 WLR 14**).

vi. Finally, in deciding whether to leave the issue to the jury, and if doing so, deciding on how to direct them, care must also be taken to avoid the issue of knowledge of a weapon, which following ***Jogee*** is no longer necessarily a central issue, being reintroduced as a matter of overwhelming supervening event. As the President of the Queen's Bench Division stated in ***Tas***:

> …one of the effects of R v Jogee is to reduce the significance of knowledge of the weapon so that it impacts as evidence (albeit very important if not potentially irresistible) going to proof of intention, rather than being a pre-requisite of liability for murder. We do not accept that if there is no necessary requirement that the secondary party knows of the weapon in order to bring home a charge of murder (as is the effect of R v Jogee), the requirement of knowledge of the weapon is reintroduced through the concept of supervening overwhelming event for manslaughter.
>
> The argument can be tested in this way. The joint enterprise is to participate in the attack on another and events proceed as happened in this case with Tas punching one of the victims (otherwise than in self-defence), then providing backup (and an escape vehicle) to the others as they chased after them. One of the principals kicks the deceased to death (or, as articulated in para 96 of R v Jogee, the violence has escalated). Alternatively, a bottle is used or a weapon found on the ground. Both based

> on principle and the correct application of R v Church (participation by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some, not necessarily serious, harm to another, with death resulting), a conviction for manslaughter would result: the unlawful act is the intentional use of force otherwise than in self defence.

That point was reiterated in ***Harper*** **[2019] EWCA Crim 343, [2019] 4 WLR 39**, where the Court rejected the argument that a failure to leave OSE to the jury undermined the safety of the conviction, when that argument was based on the lack of evidence that the defendant knew that the Principal had a knife when they both attacked the victim. As the President of the Queen's Bench Division stated at [28]:

> This submission ignores the thrust of *R v Jogee*. First, intention to assist in a crime of violence is not determined only by whether D2 knows what kind of weapon D1 has in his possession: see *R v Jogee* at para 98 which goes on: "Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more."

For Illustrations and further points of law in this area, see 7-14 of **The Crown Court Compendium Part I: Jury and Trial Management and Summing Up** (June 2022).

The Abolition of Parasitic Accessory/Joint Enterprise

Note: Following the UK Supreme Court decision in ***Jogee***, the principles governing every form of secondary liability, as described above, is the applicable approach to be adopted in jurisdictions that have retained the JCPC as their final appellate court. Thus, in those jurisdictions, there is no longer any separate category of parasitic accessory/joint enterprise liability.

Withdrawal from Joint Criminal Liability

A secondary party may exceptionally rely on the fact that they have withdrawn from the criminal venture prior to the Principal's acts: ***Mitchell*** **[1999] Crim LR 496**.

What constitutes effective withdrawal depends on the circumstances of the case, particularly the extent of the defendant's involvement and proximity to the commission of the offence by the Principal.

It is certainly not sufficient that the defendant merely changed their mind about the venture; the defendant's conduct must demonstrate unequivocally (***O'Flaherty*** **[2004] EWCA Crim 526, [2004] 2 Cr App R 20** at [58]) their voluntary disengagement from the criminal enterprise: ***Bryce*** **[2004] EWCA Crim 1231, [2004] 2 Cr App Rep 35**. In addition, the defendant must communicate to the Principal (or by communication with the law enforcement agency) their withdrawal and do so in unequivocal terms unless physically impossible in the circumstances: ***Robinson*** **[2000] EWCA Crim 8**. This requirement for timely, effective, unequivocal communication applies equally to cases of spontaneous violence, unless it is not practicable or reasonable to communicate the withdrawal: ***Robinson*** **[2000] EWCA Crim 8**, explaining ***Mitchell*** **[1999] Crim LR 496**. In a case in which the participants have engaged

in spontaneous violence, in practice the issue is not whether there had been communication of withdrawal, but whether a particular defendant clearly disengaged before the relevant injury or injuries forming the allegation were caused. In some instances, the defendant throwing down their weapon and walking away may be enough. Whether the defendant is still a party to the crime is a question of fact and degree for the jury to determine. Where the defendant is one of the instigators of the attack, more may be needed to demonstrate withdrawal: ***Gallant* [2008] EWCA Crim 1111, [2008] Crim L R 287**.

A judge need not direct on withdrawal in every case (e.g. it is unnecessary where the defendant denies that they played any part in the criminal venture): ***Gallant***.

It is not necessary for the defendant to have taken all reasonable steps to prevent the crime although clearly it should be a sufficient basis for the Defence.

Directions

i. Any direction on withdrawal from assisting or encouraging is likely to be highly fact specific. The need for and the form of any such direction should therefore be discussed with the advocates in the absence of the jury before closing speeches.

ii. Subject to this, it will usually be appropriate to direct the jury as follows:

   a. The law provides that a person can withdraw from involvement in a crime only if strict conditions are met.

   b. A defendant must before the crime has been committed:

- conduct themselves in such a way as to make it completely clear that they have withdrawn; and
- if there is a reasonable opportunity to do so, inform one or more of the others involved in the enterprise or a law enforcement agency (as appropriate) in clear terms that they have withdrawn.

c. Against that background, it is for the jury to decide whether, in the circumstances of the case, the defendant did (and said) enough and in sufficient time to make an effective withdrawal from the enterprise. If the defendant did or may have done so, the verdict would be "Not Guilty". If the defendant did not, the verdict would be "Guilty" if all the elements of the offence were proved against them.

d. The circumstances to be taken into account would include (as appropriate):

- the nature of the proposed joint crime;
- the defendant's anticipated role in the proposed crime;
- what, if anything, the defendant had already done to further the proposed crime;
- the time at which the defendant sought to withdraw;
- what the defendant did to indicate their withdrawal;
- whether the defendant had any reasonable opportunity to inform anyone else that they were withdrawing/backing out; and, if so
- how and when the defendant took that opportunity.

e. Briefly summarise the parties' cases on these issues

For Illustrations and further points of law in this area, see 7-22 of **The**

Crown Court Compendium Part I: Jury and Trial Management and Summing Up (June 2022).

Points to Consider

i. A direction (as outlined at (ii)(a) below) will need to be given in every case in which the defendant is said to be liable as an Accessory/ secondary party. Directions based on the subsequent paragraphs should be added only if and as appropriate to the facts and issues in the particular case. The need for (and form of) any such directions should be discussed with the advocates in the absence of the jury before closing speeches. What follows below is based on the law as stated in ***Jogee; Ruddock***.

ii. The jury must be directed as follows:

   a. The defendant is guilty of a crime committed by another person, that is, the Principal (P) if the defendant intentionally assists/ encourages/causes P to commit the crime (paras. 8, 9, and 99).

   b. If P's crime requires a particular intention on P's part, e.g. murder, this means that the defendant must intentionally assist/ encourage/cause P to commit the actus reus with the required intent. In ***Jogee*** at [90] and [98], it is said that in a case of concerted physical attack resulting in grievous bodily harm to the victim (V), it may be simpler and will generally be perfectly safe to direct the jury that the defendant must intentionally assist/encourage/ cause P to cause such harm to V, the defendant intending that such harm be caused.

   c. Though the Prosecution must prove that the defendant intended to assist/encourage/cause P to commit the crime concerned, they do not need to prove that the defendant had any particular

wish/desire/motive for the offence to be committed (see [91]). Such a direction is most likely to be appropriate in conjunction with those referred to in Directions (e) and (m) below.

d. The Prosecution must prove that the defendant knew about the facts that made P's conduct criminal (see [9]).

e. Where the defendant does not know which particular crime P will commit, e.g. where the defendant supplies P with a weapon to be used for a criminal purpose, the defendant need not know the particular crime which P is going to commit. The defendant will be guilty if they intentionally assist/encourage/cause P to commit one of a range of offences which the defendant has in mind as possibilities, and P commits an offence within that range (see [10], [14] and [90]). See also Direction (c) above.

f. It does not matter whether P commits the crime alone or with others.

g. The defendant need not assist/encourage/cause P to commit the crime in any particular way e.g. by using a weapon of a particular kind (see para. 98).

h. The assistance or encouragement by the defendant must have occurred before the actual commission of the crime.

i. The defendant's conduct in assisting, encouraging, causing P to commit the crime may take different forms. It will usually be in the form of words and/or conduct. Merely associating with P being present at the scene of P's crime, will not be enough; but if the defendant intended by associating with P being present at the scene, to assist/encourage/cause P to commit the crime e.g. by contributing to the force of numbers in a hostile confrontation, or letting P know that the defendant was there to provide back-

up if needed, then the defendant would be guilty (see [11], [78], and [89]).

j. The Prosecution does not have to prove that what the defendant did actually influenced P's conduct or the outcome (see para. 12).

k. The Prosecution does not have to prove that there was any agreement between the defendant and P that P should commit the offence concerned (see [17], [78], and [95]).

l. Where the Prosecution does allege an agreement between the defendant and P, the agreement that P should commit the crime need not be formal or made in advance. It may be spoken or made by a look or a gesture. The way in which people behave, e.g. by acting as part of a team, may indicate that they had made an agreement to commit a crime. Any such agreement would be a form of encouragement to P to commit the crime (see [78]).

m. Where the Prosecution alleges that there was an agreement between the defendant and P to commit crime A, in the course of doing which P went on to commit crime B, with which the defendant is also charged, a direction based on the following will be appropriate: If the defendant agrees with P to commit crime A, in the course of doing which P also commits crime B, the defendant will also be guilty of crime B if the defendant shared with P an intention that crime B, or a crime of that type, should be committed if this became necessary. It is for the jury to decide whether the defendant shared that intention with P. If the jury were satisfied that the defendant must have foreseen that, when committing crime A, P might well have committed crime B, or a crime of that type, it would be open to the jury to conclude that the defendant did intend that crime B would be committed if the occasion arose. Whether or not the jury think it right to draw that

conclusion is a matter entirely for them (see paras. 91–94). See also Direction (c) above.

Barbados

Joint Participation in an Offence

Where two or more persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise.

The law recognises joint enterprise and parasitic accessory liability: ***Gnango* (2011) UKSC 59, [2012] 1 AC 827**.

The Court of Appeal in ***Taitt* BB 2011 CA 23**, referenced at [102]:

> The principle of joint or common enterprise has been set out in numerous reported cases and texts including Archbold. That principle states that the secondary party is in law party to any act of the principal which he foresaw the principal might do. He is therefore equally liable in law for all such acts, together with the consequences thereof, whether foreseen or unforeseen. However, if the principal acts outside the ambit of what was expressly or tacitly agreed or foreseen, then the secondary party is not responsible for the acts or consequences of the principal party. It is for the jury, properly directed, to decide whether what was done was part of the joint enterprise or went beyond it. Mere foresight therefore is not enough; the secondary party, in order to be guilty, must have foreseen the relevant act of the principal as

> a possible incident of the common unlawful enterprise, and must, with such foresight, have participated in the enterprise: Archbold 1997, 10–30 referring to the case of *Hui Chi-Ming v R* [1992] 1 A.C. 34, PC.

The best practice would include a clear explanation to the jury of the concept of joint enterprise, with particular attention being paid to an examination of the facts and their relationship to the principle.

Outlined below are some challenges for consideration:

i. Was the act done in pursuance of joint enterprise? This is the challenge, mainly in matters where more than one defendant is charged with murder, but the act was committed by only one defendant.

ii. Each case must be dealt with on its specific facts: ***Barrett*** **[2022] JMCA Crim 24** at [82] – [87]. ***Barrett*** addressed the way the Jamaican Court of Appeal dealt with a review of ***Jogee*** (2016).

iii. In the Jamaican case of ***Smith*** **[2021] JMCA Crim 1,** what is made clear is that each case will depend on its specific facts, including whether there is any justification for leaving the alternative offence of manslaughter to the jury. See particularly [82] of the judgment in ***Barrett***.

iv. Note ***Campbell*** **[2020] JMCA Crim 10**, where the JMCA referenced ***Ruddock***. The court said at [421] of its judgment, that ***Ruddock*** did not apply where there was no evidence to suggest an intention other than to kill or cause serious bodily harm. The court noted:

> There was therefore nothing in the evidence to ground a

> suggestion that any of them may have had an intention other than the intention to kill or cause serious bodily harm. In these circumstances, in our view, the question of manslaughter did not arise and the judge was entirely correct to remove it from the jury's consideration.

See also **Archbold (2017)** at 18-15.

Joint Principals

A Principal is the actor or actual perpetrator of the fact: William Hale, **A Series of Precedents and Proceedings in Criminal Causes, Extending From the Year 1475 to 1640,** 615. There is a possibility that two or more persons can be principals to the same crime, or "parties to a joint enterprise": ***Williams*** **(1991) 95 Cr App R 1** (CA). See also ***Mohan*** **(1967) 2 AC 187** (PC).

A joint enterprise must be shown to have existed by the Prosecution.

It is not necessary for a Principal to be present when the offence is committed: ***Harley*** **(1830) 4 C&P 369**, **172 ER 744**.

The act need not be perpetrated with the Principal's own hands. If the offence is done through the medium of an innocent agent, the Principal is still answerable: ***Manley*** **(1844) 1 Cox CC 104**.

In ***Macklin*** **(1838) 2 Lew CC 225, 168 ER 1136**, it was held that the principal offender in a joint participation is the party whose conduct fulfils the actus reus, and who has the relevant mens rea.

Have they acted pursuant to a common purpose? This was the question in

***Petters* [1995] Crim LR 501**. In this case, the Court of Appeal (CA) quashed the conviction because the trial judge had not adequately directed the jury as to whether the defendants had acted pursuant to a 'common purpose'.

See also **Archbold (2017)** at 18-6, 18-7.

Accessory/Secondary Liability

Common Law – Mens Rea

An Accessory is one who either assisted or at least encouraged the Principal to commit the offence.

The mental element is rebutted by proving that the person charged as an Accessory did not intend to assist or encourage the Principal: ***Jogee* [2016] UKSC 8, [2017] AC 387**; ***Ruddock* [2016] UKPC 7, [2017] AC 387** (JM PC).

In ***Jogee***, at [12], the Court noted:

> Once encouragement or assistance is proved to have been given, the prosecution does not have to go so far as to prove that it had a positive effect on D1s conduct or on the outcome: *R v Calhaem* [1985] QB 808. In many cases that would be impossible to prove. There might, for example, have been many supporters encouraging D1 so that the encouragement of a single one of them could not be shown to have made a difference. The encouragement might have been given but ignored, yet the counselled offence committed. Conversely, there may be cases where anything said or done by

> D2 has faded to the point of mere background, or has been spent of all possible force by some overwhelming intervening occurrence by the time the offence was committed. Ultimately it is a question of fact and degree whether D2s conduct was so distanced in time, place or circumstances from the conduct of D1 that it would not be realistic to regard D1s offence as encouraged or assisted by it.

See also David Ormerod and Karl Laird, **Smith, Hogan and Ormerod's Text, Cases and Materials on Criminal Law** (13 edn OUP 2020).

Withdrawal from Joint Criminal Liability

Defence

A secondary party can rely on the defence that they withdrew from the criminal venture prior to the act: **A Series of Precedents** at 618. This withdrawal must be a "timely communication" of the intent to abandon the common purpose.

"Timely communication" is determined by the facts of each case (to be decided by the jury), which should be unequivocal regarding the secondary party's disengagement.

The withdrawal must be communicated to the Principal(s) to give the opportunity to desist rather than complete the crime: ***Robinson*** **[2000] EWCA Crim 8**. It should be left for the jury to decide whether the facts put forward as a withdrawal amounted to an effective withdrawal: ***Whitehouse*** **[1941] 1 WWR 112**.

Some useful cases:

i. In ***Grundy*** **(1974) 1 All ER 292**, it was noted that effective withdrawal was demonstrated when the secondary party gave a week's notice of his disengagement to a burglary.

ii. In ***Becerra*** **(1976) 62 Cr App R 212**, it was noted that effective withdrawal was demonstrated by the secondary party actively intervening to stop the other party from committing the crime.

iii. ***Bryce*** **[2004] 2 Cr App R 35** indicated that where an act of assistance or encouragement, accompanied by the necessary mens rea, was proved, the defendant would only avoid liability if he did a further act that amounted to a countermanding of the earlier assistance and a withdrawal from common purpose; repentance alone would not suffice. The fact that his mind was innocent when the crime was committed was no defence.

iv. ***Gallant*** **[2008] EWCA Crim 1111, [2008] Crim LR 287**.

v. ***Mitchell*** **(1999) 163 JP 75** (CA): where the defendant had thrown down his weapon and moved away before the final and fatal blows were struck.

vi. In the case of ***Taitt*** **BB 2011 CA 23**, the issue arose whether *Taitt* effectively withdrew by retreating to the graveyard after seeing a motor vehicle. The Court of Appeal concurred with the trial judge that the evidence raised issues of fact for the jury to decide.

See also **Archbold (2017)** at 18-26.

Belize

Joint Participation in an Offence and Joint Principals

When persons are jointly charged with a crime, the section of the Act which is contravened is quoted in the Statement of Crime on the indictment. Section 11(3) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) captures the joint enterprise principle. It provides as follows:

> ...(3) If an event is caused by the acts of several persons acting either jointly or independently, each of those persons who has intentionally or negligently contributed to cause the event shall, subject to sub-section (4), and to the provisions of Title IV with respect to abetment, be deemed to have caused the event, but any matter of exemption, justification, extenuation or aggravation which exists in the case of any one of those persons shall have effect in his case whether it exists or not in the case of any of the other persons.

In ***Godoy*** **(Belize Crim Case App No 27 of 2011)** it was stated, at [3]:

> The appellant, Leonard Godoy, and two others, Norman Peters and Brandon Lozano, were indicted jointly. The indictment was comprised of three counts. In the first count, all three accused were charged with the offence of robbery, contrary to s. 147 of the Criminal Code Cap. 101, Laws of Belize. It was alleged that on 5 day of March, 2007 at Placencia, they robbed HN of $350.00 and three cell phones. In the second count, only Norman Peters

> was charged with rape of HN, contrary to s.46 of the Criminal Code. The rape was committed in the course of the robbery. In the third count, Norman Peters, and may be the appellant Leonard Godoy, were charged with the offence of attempted murder of HN, contrary to s.117 of the Criminal Code. We say, "may be", because a question arose, whether the third count was ever amended and Godoy was added to Peters, the original sole accused in the count, and charged jointly with Peters. No answer was provided. The attempted murder was alleged to have occurred at the time of the robbery. All the offences took place at the family home of HN at Placencia on the Main Street, about 8.00 pm on 5 March, 2007 when HN was home alone doing school homework.

In considering joint enterprise and the scope of it, and allowing the appeal against conviction for attempted murder, the Court of Appeal in ***Godoy*** noted the following:

> [26] The other reasons for allowing the appeal against the conviction for attempted murder were based on the principle of joint enterprise (common purpose) and the principle regarding a principal offender and a secondary offender. The first of those reasons is that, the direction by the judge to the jury about the principle of joint enterprise was inadequate in the circumstances of this case. The judge did not state unequivocally that if the jury found that the three accused set out on a joint enterprise, that is, with a common purpose, the jury had to identify what that joint enterprise was, and the

scope of it. Secondly, the judge did not direct the jury that, if they concluded that, the joint enterprise was to rob, they had to decide further whether the stabbing of HN or anyone resisting, with intention to kill, was part of the robbery that all the accused intended. Furthermore, the judge did not direct the jury that, if they decided that, the stabbing was not part of the intention in the robbery, then only the perpetrator of the stabbing would be liable for the stabbing which was the subject matter of the offence of attempted murder, if the stabbing was carried out with intent to kill.

[27] One of the requirements of the offence of attempted murder is that the harm (the stabbing) done to the victim must be shown to have been carried out with the specific intent to kill. The judge correctly stated this to the jury. However, he erred when he directed that, if Peters was the perpetrator who intended to kill HN, then the appellant (the secondary offender) would be taken to have had the intention that HN be killed, if the appellant foresaw that Peters would kill in the course of the robbery when Peters produced a knife and threatened to kill HN with it, and the appellant continued participating in the joint enterprise.

[28] We do not blame the judge at all for that direction which instructed the jury to act on what would be a presumption of law that foresight that death could be caused was sufficient intent that death be caused. That was in line with the restatement of the law made by the Privy Council in *Chan Wing Siu* [1985] AC 168. The

> Privy Council has recently overruled that restatement of the law in a joint judgement in R v Jogee (England and Wales); and *Ruddock v The Queen* (from Jamaica) [2016] UKSC 8, [2016] UKPC 7. The restatement in *Chan Wing Siu* had been adopted in several judgments of this Court. In *Jogee* and *Ruddock*, the Privy Council held that, contemplation (foresight) that the principal offender may use lethal force was no more than evidence, and sometimes very important evidence, in proving that the secondary offender assisted or encouraged the crime of violence with the intent that death be caused.
>
> [29] Furthermore still, we noted that, the judge did not mention to the jury that the evidence to consider included that, Peters stabbed HN after the appellant and Lozano had left the scene and the house. Although the judge had no obligation to mention all the evidence, and had earlier in a general way told the jury to take into consideration evidence that he might omit to mention, we consider that, this item of evidence was very important in the decision by the jury as to whether either of the other two accused intended killing in the course of the common purpose to rob. This made the conviction of the appellant for attempted murder unsafe.

Accessory/Secondary Liability

Section 20 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides for Abetment of crimes. Sub-section (1) states:

> Every person who –

(a) directly or indirectly instigates, commands, counsels, procures, solicits or in any manner purposely aids, facilitates, encourages or promotes the commission of any crime, whether by his act, presence or otherwise; or

(b) does any act for the purpose of aiding, facilitating, encouraging or promoting the commission of a crime by any other person, whether known or unknown, certain or uncertain,

shall be guilty of abetting that crime and of abetting the other person in respect of that crime.

The case of ***Godoy*** is also applicable, in particular at [27] – [28] above.

It is important to note that defendants are rarely indicted with the crime of Abetment. The practice has been to charge them jointly with the principal offender without making reference to abetment. In fact, it would be wrong for a trial judge to direct the jury on the law of aiding and abetting: ***Lopez* (Belize CA Crim App Nos 15, 16 and 17 of 1983)**.

Withdrawal from Joint Criminal Liability

See, s 11(7) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ).

Guyana

Joint Participation in an Offence

Title 3 of the **Criminal Law (Offences) Act, Cap 8:01** (GY) provides for Abetment and Conspiracy. In particular, ss 24 and 25 provide as follows:

> 24. Everyone who becomes an accessory before the fact to any felony, whether it is a felony at common law or by virtue of any written law for the time being in force, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.
>
> 25. Everyone who counsels, procures, or commands any other person to commit any felony, whether it is a felony at common law or by virtue of any written law for the time being in force, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been previously convicted, or is or is not amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted as an accessory, may be punished.

Section 31 of the **Criminal Law (Offences) Act, Cap 8:01** (GY) provides for an Abettor in Misdemeanour and states: 'Everyone who aids, abets, counsels, or procures the commission of any misdemeanour, whether it

is a misdemeanour at common law or by virtue of any written law for the time being in force, may be indicted, tried, convicted, and punished in all respects as a principal offender.'

Section 61 of the **Evidence Act, Cap 5:03** (GY) makes provision for cases in which corroborative evidence is required. Section 61(5) provides:

> Where the only proof against a person charged with an indictable offence is the evidence of an accomplice, uncorroborated in any material particular, it is the duty of the judge to warn the jury that it is unsafe to convict any person upon that evidence, though they have a legal right to do so.

Section 36 of the **Sexual Offences Act, Cap 8:03** (GY) provides as follows:

> Notwithstanding anything contained in any other written law, every person who-
>
> (a) attempts to commit;
>
> (b) conspires with any other person to commit;
>
> (c) solicits, incites, aids, abets or counsels or attempts to solicit, incite, aid, abet or counsel any other person to commit; or
>
> (d) causes or procures, or attempts to cause or procure the commission of, any offence, whether summary or indictable, against this Act may be charged with, tried, convicted and punished in all respects as if that person were a principal offender.

In ***Rowe*** **(Guyana CA, Criminal Appeal No 23 of 2013)**, the Court of Appeal made instructive comments regarding the law of joint enterprise. The Court noted at [45]:

> …As the law in this area has developed, the participants to a joint enterprise are liable only for offences commensurate to their actual intention but this is provided that the actus reus of the offence was committed in the course of the joint enterprise: *R v Anderson and Morris* [1966] 2 All ER 644 and *R v Jogee; R v Ruddock* [2016] 2 All ER 1. The longstanding principle based on *Chan Wing-Siu v the Queen* [1984] 3 All ER 877, whereby an accessory is liable for the acts of the principal of a type which he foresees but does not necessarily intend, was recently disapproved in *Jogee* and *Ruddock*, which thereby brought the law more into conformity with the common theme of the subjectivity of intention. Their Lordships' rationale in *Jogee and Ruddock* for overturning the position that had been laid down in *Chan* was their view that mere contemplation of a possible crime was not the same as and could not be equated with authorisation. Foreseeability of an outcome is still evidence from which intent may be inferred, but the two are not to be treated as one and the same. Thus, where a principal goes outside the common design and an unusual consequence occurs, the accessory may not be liable for any offence at all.

In ***Hyles*** **[2018] CCJ 12 (AJ)** (GY), **(2018) 93 WIR 353**, the Caribbean Court of Justice considered the issue of whether the jury was substantially

misdirected on joint enterprise. The Court took the opportunity to discuss the applicable law in Guyana with respect to this area and at [122], noted as follows:

> [122] Before concluding on this point, it may be helpful to address the Court of Appeal's reliance on *R v Jogee; Ruddock v The Queen* in its decision on joint enterprise. In that case, the Privy Council and the Supreme Court of the United Kingdom reviewed the law on the criminal liability of accessories, particularly the case of *Chan Wing-Sui v R* and decided that the law had taken a wrong turn by adopting the doctrine of extended joint enterprise involving "parasitic accessory liability." As a consequence, the Privy Council and the Supreme Court jointly declared *Chan Wing-Sui* to be bad law. In its judgment in this case, the Court of Appeal considered *Jogee* at length before relying on it for the Court of Appeal's finding that the directions of the judge were inadequate. This engages us for three reasons. Firstly, *Jogee* and *Chan Wing Sui* deal with criminal liability beyond direct criminal involvement of participants in the crime and with the question how wide that liability net should be spread; it was therefore irrelevant in the case before us. Secondly, *Jogee* was decided three years after the trial judge gave his directions, so to criticise the judge's directions based on law that did not exist at the time of the trial and still does not exist in Guyana, was rather unfair to the trial judge. Thirdly, *Jogee,* a controversial decision, recently decided by the Privy Council and representing the departure from established law, cannot be regarded

> as binding in Guyana, until that departure is confirmed or propounded by this Court. The practical point is that unless this court states otherwise *Chan Wing-Sui* remains applicable in Guyana.

Points to Consider

i. Participation of each defendant should be clearly highlighted for the jury.

ii. The concepts associated with joint participation should be clearly explained.

In this Chapter:
General Guidelines

Chapter 8
Conspiracy

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Under the common law, conspiracy is usually described as an agreement between two or more persons to commit an unlawful act, or to accomplish a lawful end by unlawful means, with an intent to achieve the agreement's goal. Conspiracy is an inchoate crime because it does not require that the illegal act must have been completed. A person can be charged with both conspiracy to commit a crime and the crime itself if the crime is completed.

General Guidelines

At common law, the offence of conspiracy is committed where two or more persons have agreed 'to do an unlawful act, or to do a lawful act by unlawful means': ***Mulcahy* [1868] LR 3 HL 306; Archbold (2014)** .

The essence of a criminal conspiracy is the agreement to commit the substantive offence or to defraud. It is an agreement between two or more conspirators. Negotiation or mere intention is not enough. The mens rea for conspiracy is the intention to be a party to an agreement to do an unlawful act. It is an essential element: ***Anderson* [1986] 1 AC 27** (HL) and ***Chiu-Cheung* (1994) 99 Cr App R 406** (PC).

It may be necessary to analyse the evidence in order to identify whether what is revealed is one, or more than one conspiracy. The issues raised may, and usually will, make it necessary to explain the structure and evolution of the conspiracy as contended by the Prosecution. The fact that the defendants are all charged with conspiracy does not necessarily imply that each is as deeply involved as the other.

While conspiracy is complete as soon as two parties agree to effect an unlawful purpose, the conspiracy will continue to subsist as long as they

agree and will only terminate on its completion either by performance, abandonment, or frustration: ***DPP v Doot*** **[1973] AC 807** (HL).

Conspiracy is a continuing offence and other persons may join in an existing conspiracy and become parties to it. It is not necessary for all the parties to a conspiracy to be in contact with each other. Conspirators can join and leave a conspiracy while the conspiracy lives on. They need not all be known to one another. They need not know all the details. As such, directions to the jury regarding proof of the conspiracy and the defendant's participation in it should be tailored to the particular facts of the case. The directions will usually depend upon the issues raised by the Defence. The Prosecution will generally rely on inferences from conduct and circumstantial evidence.

A conspiracy may take the form of a 'chain' (A agrees with B who agrees with C), or a 'wheel' (X agrees with A, X agrees with B, X agrees with C), or a combination of the two. It is not necessary for each conspirator to have met or communicated with the others or even to know their identities, but it is necessary that each of the conspirators is party to the common design and is aware that the design involves a larger scheme involving others. In the 'wheel' conspiracy, with X at its hub, if A, B, and C are unaware of their involvement in the larger scheme but are only aware of their agreement with X, then there are three separate conspiracies, not one. Even if A, B, and C are aware that X is making separate agreements with them, they are not conspirators with each other unless they are all parties to the wider common design.

The conspiracy may be proved by inference from conduct, including words spoken in furtherance of the common design, or by direct evidence of the agreement.

When two alleged conspirators are defendants in the same trial, there may be evidence admissible against one which is not admissible against the other. Thus, it will be open to the jury to convict one defendant and acquit the other. These are matters which must be considered before speeches and, if they arise, the observations of the advocates must be sought. The trial judge should evaluate the evidence against each defendant. In ***Testouri* [2003] EWCA Crim 3735**, Kennedy LJ had the following advice in a case of an alleged conspiracy to defraud:

> [9] There is some support, on the face of it, to be found for the approach adopted by the learned judge in a decision of this Court in the case of *R v Ashton* [1992] Crim LR 667, of which we had an opportunity to read the transcript. In that case this Court came to the conclusion that the learned judge was wrong in directing the jury that it was a situation in which they must return the same verdict in relation to each of the co-accused. But in commenting upon that decision, in the Crim LR, Professor Sir John Smith said:
>
> > 'If the evidence admissible against A proves that A and B conspired together, A may be convicted of conspiracy with B, even though B, his co-defendant, is acquitted because there is no sufficient evidence admissible against him. The usual case is that where A has made a confession which is evidence against him but not against B. The present case, however, was not like that. The tape-recordings were not of admissions or confessions but of steps taken by the parties in pursuance of the alleged conspiracy and were equally admissible against both: Blake and Tye

(1844) 6 QB 126. W was entitled to rely on A's evidence at the trial that he (A) never intended the murder to take place. The jury could not be satisfied that this evidence was untrue so far as W was concerned while finding that it was, or might be, true so far as A was concerned. It was the same evidence. The jury either believed it or they did not. If they believed it, neither defendant was guilty, if they disbelieved it, both were guilty. It is submitted that the trial judge's direction to the jury was correct.'

[10] **...where what is alleged is a conspiracy to defraud, in which only two defendants are alleged to have participated, the judge should ask himself two questions. First: whether there is evidence of conspiracy to defraud? That means there must be evidence of an agreement to achieve a criminal purpose. If there is no evidence of that because, for example, on one view of the evidence only one defendant can be shown to have been dishonest then, if that view of the evidence is taken, both defendants must be acquitted and the jury must be so directed. The authority for that proposition is to be found in Yip Chieu-Chung v The Queen [1995] 1 AC 111, [1994] 2 All ER 924. Secondly: whether there is any evidence admissible against only one defendant? If that evidence is or could be critical, in that without it that defendant cannot be shown to have been a party to the conspiracy alleged, then it will be necessary to explain to the jury how they may reach the conclusion that although the case**

> **is proved against that defendant, it is not proved against the defendant in relation to whom the evidence may not be admissible. Where there is no such evidence the jury must be told that it is not open to them to return different verdicts in relation to two defendants. That, as it seems to us, is in practical terms what is meant by the authorities to which we have referred when they speak of evidence being of unequal weight**. (emphasis added)

A further discussion on authorities in this area can be found at page 51 of the Trinidad and Tobago **Criminal Bench Book 2015** as follows:

> 1. **Joseph Melville and Hilton Winchester v The State CA Crim Nos 24 and 25 of 2004**: Before the Prosecution can rely upon the utterances of a conspirator against a co-conspirator there must be some independent evidence beyond the utterance itself that the co-conspirator was a party to the conspiracy. See also **Ahern (1988) 62 ALJR 440** (HC Australia) and **R v Jones and Barham [1997] 2 Cr App R 119** (CA) as to the prima facie standard of independent evidence required before a charge of conspiracy may be laid.
>
> 2. **Archbold (2008) 34–60**: The acts and declarations of any conspirator made in the furtherance of the common design may be admitted as part of the evidence against any other conspirator. The act or declaration must be made by a conspirator, although it matters not whether the maker is present or absent at the trial.

3. ***Reeves*** **(unreported) 4 December 1998** (CA): The phrase 'in furtherance of the common design' means no more than the act must be demonstrated to be one forming an integral part of the machinery designed to give effect to the joint enterprise.

4. **R v Jones and Barham [1997] 2 Cr App R 119** (CA): The test of admissibility of statements made by a conspirator in the furtherance of the common design, is whether the conversation was about the operation of the conspiracy, or was simply a narrative of past events or evidence of a future conspiracy. Mere narrative is generally inadmissible against a co-conspirator. See also **Platten [2006] EWCA Crim 140,** and Arnold **Huggins and Others v The State CA Crim Nos 26 – 28 of 2003** judgment of Hamel-Smith at page 19.

5. **Tripodi (1961) 104 CLR 1** (HC Australia): The overt acts and/or declarations of a conspirator performed between him and a non-conspirator, are admissible if they occurred during the currency of the conspiracy and if they are part of the natural process of making the arrangements to carry out the conspiracy. Applied in **Joseph Melville and Hilton Winchester v The State CA Crim Nos 24 and 25 of 2004.**

Barbados

Relevant Statutory Provisions

Section 11 of the **Offences Against the Person Act, Cap 141** (BB) provides as follows: 'Any person who conspires with any other person to kill any person, whether such person is in Barbados or elsewhere, commits an offence and is liable on conviction on indictment to imprisonment for a term of 14 years.'

Section 2(1) of the **Proceed and Instrumentalities of Crime Act, 2019** (BB) provides:

> "drug trafficking offence" means
>
> (a) an offence under section 18 or 19 of the Drug Abuse (Prevention and Control) Act, Cap. 131;
>
> (b) an attempt, conspiracy or incitement to commit an offence specified in paragraph (a); or
>
> (c) aiding, abetting, counselling or procuring the commission of an offence specified in paragraph (a);

Section 38(1) of the **Drug Abuse (Prevention and Control) Act, Cap 131** (BB) provides: 'Notwithstanding anything in any other law contained, a person who attempts to commit an offence under this Act or solicits, incites, procures or conspires with another to commit an offence under this Act is guilty of an offence.'

Mens Rea In Conspiracy

A conspiracy is an agreement between two or more people to carry their criminal scheme into effect. The very agreement is the criminal act itself; it is an essential element of the offence: ***Tibbits*** **[1902] 1 KB 77** at [89].

The agreement must be spoken, written or shown to exist by other acts. As such, proof of the existence of a conspiracy is generally a 'matter of inference, deduced from certain criminal acts of the parties accused, done in pursuance of an apparent criminal purpose in common between them': ***Brisac*** **(1803) 4 East 164 at 171, 102 ER 792**.

The jury is responsible for presuming the agreement: ***Parsons*** **(1763) E.R. 222**; ***Murphy*** **(1837), 8 C. & P. 297** at 310; **173 E.R. 504**.

However, a conspiracy does not end with the making of the agreement. It will continue so long as there are two or more parties to it intending to carry out the design. Thus, it terminates on completion of the act by performance, by abandonment, or by frustration.

It was noted in ***Anderson*** **[1986] 1 AC 27** (HL), that it is essential that there must be an intention to be a party to an agreement to do an unlawful act.

It is important to note that motive is irrelevant to proof of the offence. In addition, repentance, lack of opportunity, and failure are also immaterial. In ***Bolton*** **94 Cr App R 74** (CA), the Court noted that if the defendant repents and withdraws immediately after the agreement has been concluded, they are still guilty of the offence. Such withdrawal from the offence simply goes to mitigation.

The Court of Appeal in the case of ***Burnham*** **(Barbados CA, Crim App No 21 of 2005)**, affirmed the sentences on the basis that the case held similar factors to those which were identified by Lord Bingham, CJ in ***Martin*** **[1999] 1 Cr App R (S) 477**. The said factors identified were:

i. the target of any conspiracy;
ii. the role of the individual defendant;
iii. the nature, size, and likely effect of explosive device;
iv. the motivation of the defendant; and
v. where death, injury or damage has been caused, the nature and extent of the death, injury and damage.

In ***Jack* (Barbados CA, Criminal Appeal No 9 of 2008)**, the Courts held that the appellant was a key participant in a conspiracy to import drugs into that country due to his actions of providing assistance to load the drugs onto the boat in St. Vincent and swim the drugs ashore.

See also ***Chiu-Cheung* (1994) 99 Cr App R 406** (PC); ***Aspinall* (1876) 2 QBD 48** (CA); ***Director of Public Prosecution v Doot* [1973] AC 807** (HL).

See also **Archbold (2017)** at 33-5, 33-14, 33-15.

Belize

Relevant Statutory Provisions

Sections 23 and 24 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provide for the offence of conspiracy and the punishment for committing the offence.

Section 23 provides as follows:

> 23. (1) If two or more persons agree to commit or abet a crime, or act together with a common purpose in committing or abetting a crime, whether with or without

any previous concert or deliberation, each of them is guilty of conspiracy to commit or abet that crime, as the case may be.

(2) If a person abets the commission of a crime by another person, and such other person in any manner assents to the abetment, each of them is guilty of conspiracy to commit such crime, although it be not a part of the design of either of them that the person abetting the other should take any part in or towards the preparing for or committing such crime.

(3) A person within the jurisdiction of the courts can be guilty of conspiracy by agreeing with another person who is beyond the jurisdiction for the commission or abetment of any crime to be committed by them or either of them, or any other person, either within or beyond the jurisdiction, and for the purposes of this subsection as to a crime to be committed beyond the jurisdiction, "crime" means any act which if done within the jurisdiction would be a crime under this Code or under any other law.

(4) A person shall not be guilty of conspiracy to commit or abet any crime if he is an intended victim of that crime.

(5) A person shall not be guilty of conspiracy to commit or abet any crime or crimes if the only other person or persons with whom he agrees are (both initially and at all times during the currency of the agreement) persons of any one or more of the following descriptions, that is to say–

(a) his spouse;

(b) a person exempted from criminal liability under section 25 (1);

(c) an intended victim of that crime or each of those crimes.

Section 24 states:

> (1) If two or more persons are guilty of conspiracy for the commission or abetment of any crime, each of them shall in case the crime be committed, be punished as for that crime according to the provisions of this Code, or shall in case the crime be not committed, be punished as if he had abetted that crime.
>
> (2) Any court having jurisdiction to try a person for a crime shall have jurisdiction to try a person or persons charged with conspiracy to commit or abet that crime.

Guyana

Relevant Statutory Provisions

Sections 32 to 34 of the **Criminal Law (Offences) Act, Cap 8:01** (GY) provide for the offence of conspiracy as follows:

> 32. Everyone who conspires with any other person to prevent, by force and intimidation, the collection of any rates or taxes, the levying and collection of which is authorised by any written law for the time being in

> force, shall be guilty of a misdemeanour and shall be liable to imprisonment for two years.
>
> 33. Everyone who, wherever no express provision is made by this Act, or by any other written law for the time being in force, for the punishment thereof, conspires with any other person to commit any felony not punishable with imprisonment for seven years or more, or any misdemeanour, or to do anything in any part of the world which, if done in Guyana, would be a felony not punishable with imprisonment as aforesaid, or a misdemeanour, shall be guilty of a misdemeanour and shall be liable to imprisonment for three years.
>
> 34. Everyone who, in any case where no express provision is made by this Act, or by any other written law for the time being in force, for the punishment thereof, conspires with any other person to commit any felony punishable with imprisonment for seven years or more, or to do anything in any part of the world which, if done in Guyana, would be a felony punishable with imprisonment as aforesaid, shall be guilty of felony and liable to imprisonment for seven years.

Section 36(b) of the **Sexual Offences Act, Cap 8:03** (GY) provides for the offence of conspiracy as follows:

> 36. Notwithstanding anything contained in any other written law, every person who-
>
> ...

(b) conspires with any other person to commit;

...

any offence, whether summary or indictable, against this Act may be charged with, tried, convicted and punished in all respects as if that person were a principal offender.

Section 95(b) of the **Narcotic Drugs and Psychotropic Substances (Control) Act, Cap 10:10** (GY) provides as follows:

95. Notwithstanding anything contained in any other written law, every person who-

...

(b) conspires with any other person to commit;

...

any offence against this Act may be charged with, tired, convicted and punished in all respects as if he were a principal offender.

In this Chapter:

Chapter 9
Identification Evidence

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Identification evidence is central to a criminal trial. It is used to identify the person who is alleged to have committed a crime and can be integral to the Prosecution's case. It includes evidence given by a victim or a witness and covers other ways of identifying suspects. There are several different types of identification evidence, and the following are discussed in this chapter: visual identification, identification parades, identification from CCTV and other visual images, identification by finger and other prints, identification by voice, and identification by DNA. The reliability of identification evidence is critical and certain types of evidence may generally be considered more reliable than others, e.g. fingerprint and DNA evidence, which nevertheless must also meet certain legal standards.

1. Visual Identification

Guidelines

The basic principle is the special need for caution when the issue turns on evidence of visual identification. The summing-up in such cases must not only contain a warning, but expose to the jury the weaknesses and dangers of identification evidence both in general and in the circumstances of the particular case.

Trial judges are not bound to any form of words, but they have a duty to recount the evidence with accuracy, to present the defence fully and fairly, and to have regard to the decisions of the Court of Appeal that in directing the jury on the issue of visual identification, the significance of the strength and weakness of that evidence must be pointed out: ***Thompson*** **(1986) 23 JLR 223** (JM CA) at 226.

See also the guidelines as outlined in ***Turnbull*** **[1977] QB 224** (UK CA).

Note the following in relation to principal safeguards:

i. Making a record of a description first given by the witness, before any identification procedure takes place.

ii. In **Phipson On Evidence 19th edition**, (Sweet & Maxwell 2017), it is stated that the nature of visual identification is that it identifies a person by means of comparison with physical attributes, including physiognomy. Identity, it is said, may be proved by similarity of personal characteristics, e.g. age, height, size, hair, complexion, voice, handwriting, manner, dress, and distinctive marks among many other attributes. See also ***Hall*** **[2020] CCJ 1 (AJ)** at [124].

iii. Where identification evidence passes the threshold that warrants it being left to the jury, there is, nevertheless, the need to give the jury certain directions. ***Stephen Edward Dossett*** **[2013] EWCA Crim 710** is one of many cases where it was held on appeal that the quality of the original observation was good enough to justify leaving the case to the jury, provided that the judge warned the jury of the dangers inherent in visual identification and drew their attention to the specific weaknesses in the evidence. The warnings and directions to be given follow the ***Turnbull*** guidelines closely. See ***Hall*** at [33].

Further, in ***Hall***, the Caribbean Court of Justice noted at [149]:

> There is a general danger in relying on disputed visual identification as the sole basis for a conviction that is well recognised both by the common law and statute. This danger is especially acute when the charge is for murder and the penalty on conviction is death, as was the case when the charge in this matter was laid

> and when it was first heard and determined by the trial judge. In such cases, in particular, the constitutional value of fundamental fairness, and the fundamental rights to due process and the protection of the law, as they exist in Barbados, demand careful and heightened scrutiny of visual identification evidence that is offered in singular support of guilt. The primary responsibility for this examination and eventual filtering exercise falls upon the judge in a trial by jury and is not to be lightly passed over. Indeed, this special need for caution is corroborated by current cognitive scientific research on the subject, which compellingly demonstrates the potentially perilous unreliability of such singular reliance on visual identification as the basis for conviction.

Turnbull is intended, primarily, to deal with the 'ghastly risk' in cases of fleeting encounters: Lord Widgery CJ in ***Oakwell*** **(1978) 66 Cr App R 174** (UK CA) and also ***Pattinson*** **(1996) 1 Cr App R 51** (UK CA). The rule is equally applicable to police witnesses: ***Reid*** **(1990) 90 Cr App R 121** (JM PC).

The requirements of a ***Turnbull*** direction are as follows:

i. There is a special need for caution when the case against the defendant depends wholly upon the correctness of a visual identification;

ii. The reason for caution is experience that a witness who is genuinely convinced of the correctness of their identification, may be impressive but mistaken. This may be so even when a number of witnesses make the same identification;

iii. The jury should examine the circumstances in which the identification came to be made. There are two elements to these circumstances, both of which go to the reliability of the identification:

a. The opportunity to register and record the features of the suspect:
   - How long was the suspect under observation?
   - At what distance?
   - In what light?
   - Was the observation impeded in any and, if so, what way?
   - Had the witness seen the suspect before (i.e. was this recognition?) and, if so, how often and in what circumstances?

b. The reliable recall of those features when making the identification:
   - What period elapsed between the observation and the identification?
   - Was there any material difference between the description given by the witness at the time of identification and the suspect's actual appearance?
   - Are there any other circumstances emerging from the evidence which might have affected the reliability of the identification (e.g. press photographs, conversations with others)?

Weaknesses

i. Any specific weaknesses in the identification should be identified (e.g. fleeting opportunity, bad light, speed of incident, photographs inadvertently viewed);

ii. Evidence capable (and, when necessary, not capable) of supporting the identification should be identified;

iii. If the defence is alibi, the jury should be directed that if the alibi is

rejected it does not (or may not) follow that the defendant committed the offence, because a false alibi may be constructed for reasons other than guilt (e.g. because an alibi is easier to present than the true defence);

iv. If the judge admits the evidence notwithstanding a breach of Code D, they should explain how the breach may affect the jury's consideration of the evidence. In ***Forbes*** **[2001] 1 AC 473, [2000] UKHL 66**, V recognised his assailant in the street. No identification parade was held. The Appellate Committee said:

> In any case where a breach of Code D has been established but the trial judge has rejected an application to exclude evidence to which the defence objected because of that breach, the trial judge should in the course of summing up to the jury (a) explain that there has been a breach of the Code and how it has arisen, and (b) invite the jury to consider the possible effect of that breach. The Court of Appeal has so ruled on many occasions, and we approve those rulings: see, for example R v Quinn [1995] 1 Cr App R 480 at 490F. The terms of the appropriate direction will vary from case to case and breach to breach. But if the breach is a failure to hold an identification parade when required....., the jury should ordinarily be told that an identification parade enables a suspect to put the reliability of an eye-witness's identification to the test, that the suspect has lost the benefit of that safeguard and that the jury should take account of that fact in its assessment of the whole case, giving it such weight as it thinks fair. In cases where there has been an identification parade with the consent of the suspect, and the eye-

> witness has identified the suspect, in circumstances involving no breach of the code, the trial judge will ordinarily tell the jury that they can view the identification at the parade as strengthening the prosecution case but may also wish to alert the jury to the possible risk that the eye-witness may have identified not the culprit who committed the crime but the suspect identified by the same witness on the earlier occasion.
>
> Therefore, if the judge admits the evidence notwithstanding a breach of Code D (or similar provisions), they should explain how the breach may affect the jury's consideration of the evidence.

Identification of Strangers and Recognition

Where the substantial issue in a case is the credibility of an identifying witness, a general warning must be given by the trial judge to the jury concerning the danger of relying on identification evidence; such warning is as important where the case is one concerning recognition as it is in cases concerning the identification of a stranger. The failure to give any such warning will nearly always by itself be fatal to a conviction based on identification evidence: ***Beckford*** **(1993) 42 WIR 291** (JM PC); ***Pop*** **[2003] UKPC 40**, **(2003) 62 WIR 18** (BZ PC).

The need to give the general warning, even in recognition cases where the main challenge is to the truthfulness of the witness, should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is 'Yes', the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely are they right or could they be mistaken? Of course,

no rule is absolutely universal: ***Beckford***.

2. Identification Parade

Introduction

The normal function of an identification parade is to test the ability of the witness to identify the person seen on a previous occasion and to provide safeguards against mistaken identification.

Unlike a confrontation or a dock identification, a parade can confirm the witness's ability to pick out the person identified (***Watt*** **(1993) 42 WIR 273** (JM PC)). Failure to hold a parade does not necessarily result in a serious miscarriage of justice, provided that the trial judge adequately directs the jury (***Goldson*** **(2000) 56 WIR 444** (JM PC)). However, there ought to be an identification parade where it would serve a useful purpose: ***Popat*** **[1998] 2 Cr App R 208** (UK CA). In ***Fergus*** **[1992] Crim LR 363** (UK CA), the witness claimed only to have seen the defendant once and to have heard his name from someone else. An identification parade should have been held.

However, where it is not practicable to hold one, or where it would serve no useful purpose in proving or disproving whether the suspect was involved in committing the offence, an identification procedure need not be held: **Archbold (2011)** at 14-29, 14-33.

The Trinidad and Tobago **Criminal Bench Book 2015**, at 92, provides a useful summary of authorities as follows:

> In **Marlon G John v The State CA Crim No 39 of 2007** Weekes JA stated:
>
> **Guidance to Trial Judges on Appropriate Directions**

with respect to Identification Parades:

42. **After giving the appropriate directions from R v Turnbull with assistance on the relevant evidence, the judge was required to deal with the issue of the challenged identification parade, first explaining the reason for an identification parade and pointing out to the jury that it was for them to decide whether it had been fair. The jury would have to be alerted to the consequences of each finding. If they found that it was fair, they could find that it supported and strengthened the identification of the appellant by the witnesses. However, if they were unsure whether it was fair or found that it was unfair, the appellant would have lost the benefit of the safeguard provided by a fair parade and they must take that into account in assessing the whole case and give it such weight as they think fit. Additionally, they had to be told that in the circumstances, the identification of the accused in the dock was of no value whatsoever for the purposes of supporting the identification of the accused. They must be told in the clearest of terms that their assessment of the correctness of the identification rests solely on the observations made by the witnesses on the scene since the ability of the eye witnesses to recognise their assailant had not been tested.**

43. **The judge then had to go on to put the issue**

into the context of the whole history of the matter and would have been obliged to then point out the evidence, other than that of identification, which was capable of proving/supporting the State's case against the appellant.

44. While the jury was not adequately assisted on the issues pertinent to the identification parade, when we consider the totality of the State's case against the appellant, we are satisfied that even if an adequate direction had been given, the jury would have indubitably come to the same conclusion. The evidence against the appellant was, to put it mildly, overwhelming. The circumstances of observation on the scene gave the witnesses, in particularly, M, an excellent opportunity to see the accused, in particular his face, in favourable lighting conditions for an extended period of time and in close proximity. In fact, it could be said in respect of M, that there had been "a full and complete identification at the scene". There was also the circumstantial evidence of the items recovered by the police during the execution of the search warrant which linked the accused to the events of the offences and further, there was the evidence of the oral and written admissions. When looked at in the context of all of the evidence against the appellant, the judge's error is not fatal to the convictions.

In **Dwayne Vialva v The State CA Crim No 33 of 2008**

the Court of Appeal summarised the guidelines for the holding of an identification parade as stated in the Judges' Rules: 'In a case which involves disputed identification evidence, a parade shall be held if the suspect asks for one and it is practicable to hold one. A parade may also be held if the officer in charge of the investigation considers it would be useful.'

In **John v The State [2009] UKPC 12** the Privy Council enumerated three situations in which an identification parade would be useful, namely:

i. where the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw them commit the crime (or saw them in circumstances relevant to the likelihood of their having done so);

ii. where the suspect and the witness are not well known to each other and neither of them disputes this;

iii. when the witness claims to know the suspect but the suspect denies this.

Where the identification of the perpetrators is plainly going to be a critical issue at any trial, the balance of advantage will almost always lie with holding an identification parade: See **Pipersburgh [2008] UKPC 11** (Belize).

The Trinidad and Tobago **Criminal Bench Book 2015** also provides useful guidelines on the application of Judges' Rules at 94 – 95 and the Illustration at 96 – 100.

3. Identification From CCTV and Other Visual Images

Adapted from the Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Introduction

The proliferation of CCTV cameras has increased the number of cases in which relevant events are recorded. Thus, attempts are made by the Prosecution to prove identification of suspects from such images.

In ***Attorney General's Reference (No 2 of 2002)*** **[2002] EWCA Crim 2373**, **[2003] 1 Cr App R 21,** Rose LJ held that there were at least four circumstances in which, subject to a sufficient warning, the jury could be invited to conclude that the defendant committed the offence based on a photographic image from the scene of the crime which is admitted in evidence. Judges may be guided by the following:

i. When the photographic image is sufficiently clear the jury can compare it with the defendant sitting in the dock, as in ***Dodson*** **[1984] 1 WLR 971** (UK CA).

ii. When a witness knows the defendant sufficiently well to recognise them as the offender depicted in the photographic image, the witness can give identification evidence. This may be so notwithstanding the loss of the image: ***Taylor v Chief Constable of Cheshire [*****1986] 1 WLR 1479** (UK QBD).

iii. A witness, such as a police officer, who does not know the defendant, but who has spent many hours viewing and analysing photographic images, may have acquired specialist knowledge of the material.

They can give evidence of their comparison between the images of the scene of the crime and a reasonably contemporary photograph of the defendant, provided that those images are available to the jury for the purpose of testing the witness's evidence: ***Clare*** **[1995] 2 Cr App R 333** (UK CA).

iv. A witness who is an expert in facial mapping techniques, can express an opinion based on a comparison between the scene of crime images and a reasonably contemporary photograph of the defendant, provided both images are made available to the jury for the purpose of testing the expert's evidence: ***Stockwell*** **[1993] 97 Cr App R 260** (UK CA); ***Clarke*** **[1995] 2 Cr App R 425** (UK CA); ***Hookway*** **[1999] Crim LR 750** (UK CA).

A. Comparison Made by the Jury

In ***Dodson*** **[1984] 1 WLR 971** (UK CA), Watkins LJ expressed the view of the Court of Appeal as follows:

> What are the perils which the jury should be told to beware of? ...We do not think the provision by us of a formula or series of guidelines upon which a direction by a judge upon this matter should always be based would be helpful. Evidence of this kind is relatively novel. What is of the utmost importance with regard to it, it seems to us, is that the quality of the photographs, the extent of the exposure of the facial features of the person photographed, evidence, or the absence of it, of a change in a defendant's appearance and the opportunity a jury has to look at a defendant in the dock and over what period of time are factors, among other matters of

> relevance in this context in a particular case, which the jury must receive guidance upon from the judge when he directs them as to how they should approach the task of resolving this crucial issue. In the present case we do not doubt that the jury was made well aware of the need to exercise particular caution in this respect.

What is required is an adapted ***Turnbull*** direction, which includes its warning of the risk of mistaken identification by several witnesses. The jury is, for this purpose, the witness of the event. The suspect will be unknown to them.

The quality of the opportunity for observation will depend upon the clarity and completeness of the image which the jury is examining.

The jury will not suffer the disadvantage of a fleeting glimpse since they can study the scene of the crime image at leisure, but the quality of the image will not be perfect; it will be two-dimensional, and it may provide only a limited view of the suspect.

The defendant's appearance may have changed since the suspect's image was captured on CCTV, in which case, the jury must be made aware of speculation. A photograph of the defendant, contemporaneous with the CCTV image, may significantly remove this disadvantage.

While the exercise of comparison will, in large measure, involve the study of similarities, the need to consider the existence of irreconcilable differences will be just as important. The existence of one difference may exclude the defendant altogether. The jury should be reminded of any specific arguments addressed to them on behalf of the defendant.

Directions

i. The jury must be given a warning, adapted from ***Turnbull***, as to the risk of mistaken identification and the special need for caution before relying on such evidence, in order to avoid injustice. In particular, they should be directed that:

   a. it is possible for anyone, and any one of them, to make a genuine and honest mistake in identification; it is also possible for all of them to make such a mistake. The fact that several people make the same identification does not of itself prove that the identification is correct;

   b. none of them knew the defendant before they saw them in the dock, so this is the only knowledge on which any of them can base their recognition of the defendant;

   c. even if the person shown on an image appears to be similar to the defendant, it may not be them.

ii. The jury must also be warned that although they have had the advantage of being able to observe the defendant during the course of the trial, over a significant period, in clear light, from a reasonably short distance and without obstruction or distraction:

   a. the defendant's appearance may have changed since the time that the suspect's image was captured, and they must be careful not to make assumptions about what the defendant might have looked like at that time (this situation will not arise if an image proved/agreed to be that of the defendant taken at the time that the suspect's image was captured has been put in evidence);

   b. the image/s with which they are comparing the defendant's features is/are only two dimensional; this is not the same as

observing an actual person at the scene.

iii. The jury must also be alerted to other factors which may make identification more difficult/less reliable, such as poor lighting, a poor quality or black and white image, obstruction, movement, a partial view of the suspect's face.

iv. Any obvious difference between the appearance of the defendant and the suspect shown on the image must be drawn to the attention of the jury.

v. Evidence, which is capable of supporting, not capable of supporting, or capable of undermining the case that the person shown on the image is the defendant must be drawn to the attention of the jury.

Illustration

Comparison by the jury of photographic images of a suspect at the scene of the crime with the defendant – modified Turnbull direction – quality of images – significance of similarities and any dissimilarity – supporting evidence

You have seen the CCTV films and in your bundle are several photographic stills recorded by CCTV cameras located close to the scene of the crime. There are three individuals depicted in those photographs. It is agreed between the Prosecution and the Defence that the person we have labelled '3' on each of those stills is the complainant. The two others we have labelled '1' and '2' are, it is also agreed, the complainant's attackers. The person labelled '2' is unknown to the Prosecution. The Prosecution's case is that the person labelled '1' is the defendant.

There is no identifying witness. The defendant was arrested 3 days after

the incident. Their photograph was taken at the police station. You have also been able to observe the defendant in court for the last 2 days. You are invited to make a comparison between all these images and the defendant in person, and to conclude that they are all of one and the same man.

This is an exercise in identification in which there is a special need for caution. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked to make a comparison between images and the physical features of someone who was until this trial a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspect '1' appears. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, you have the advantage of stills from two different cameras and views of the suspect's face both frontal and in profile. The first question you need to consider, is whether these images are of sufficient quality to make any comparison with the defendant. If you are not sure they are, then you should abandon the exercise altogether. If they are of sufficient quality, then you have the further advantage of being able to make your comparison in your own time and in as much

detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

Next, you have a contemporaneous photograph of the defendant, one frontal and one in profile on each side. The main advantage of a contemporaneous photograph of the defendant is that it records their body shape and the length of their hair, and demonstrates the shape of their moustache at or about the time the incident took place.

Finally, you have the defendant in person, now clean shaven and wearing their hair much shorter than it was at the time, but giving you a 3-D view of the contours of their head and face.

When asked questions by their own advocate, the defendant accepted that the person in the CCTV film bears a striking resemblance to them. The defendant denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially, common to the suspect and the defendant, which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line-up of men of similar appearance. What you do have is the ability to search for any features of suspect '1' which you do not find in the defendant and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

In reaching your decision, you do not have to look at the images in isolation from the other evidence. Found in the defendant's bedroom was a pair of trainers. They are of a relatively common design, but the expert evidence is that they are identical in all discernible respects to the footwear worn by suspect '1' in the still photographs taken at the scene. When they were arrested, the defendant was wearing a T-shirt with a distinctive logo written on the front. The same logo appears on

the T-shirt worn by suspect '1'. If, having considered all the evidence, you are sure that the person numbered '1' in your still photographs is the defendant, you can move on to consider whether they committed the offence charged. If you are not sure they are one and the same person, you must find the defendant not guilty.

Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.

i. Recognition by a Witness

The requirements of a modified ***Turnbull*** direction will be similar to those required when the jury have to make the judgment for themselves (see also **Chapter 9: 3A— Comparison Made by the Jury**).

When the Prosecution relies both upon the evidence of a witness who recognises the defendant and the jury's own ability to compare the photographic evidence with the defendant in person, the jury may be directed that the evidence and their own examination can be mutually supportive. If so, they should be reminded of the danger that several witnesses can make the same mistake.

Points to Consider

i. ***Caldwell*** **[1994] 99 Cr App R 73** (UK CA). See also ***Ali*** **[2008] EWCA Crim 1522, [2009] Crim LR 40**, in which the court (1) doubted that the image from which a police officer purported to recognise the suspect was of sufficient quality to permit recognition (the face was partially obscured), (2) doubted that the police officer's recognition would, for this reason, constitute supporting evidence of identification in the absence of evidence given by an expert, and (3) repeated the need for an explicit direction warning of the dangers arising from the purported recognition at [34] – [35].

ii. ***Smith*** **[2008] EWCA Crim 1342, [2009] 1 Cr App R 36**, and ***Chaney*** **[2009] EWCA Crim 21, [2009] 1 Cr App R 35**: The Judges' Rules procedural safeguards, appropriately adapted, should be followed when a witness is asked to attempt a recognition from a scene of crime image. Thus, there should be a contemporaneous record of the witness's reaction and its terms, which would enable the jury to make a meaningful assessment of its reliability. Furthermore, an explicit warning of the dangers of recognition evidence should be given to the jury.

iii. In ***Savalia*** **[2011] EWCA Crim 1334**, the "special knowledge" category of cases was held to extend to the identification of a defendant from CCTV, based not only on the defendant's facial features but on a combination of factors, including physical build and gait.

Illustration

<u>Recognition by witness of suspect in scene of crime images – suspect known to police witness – modified Turnbull warning – advantages and disadvantages – jury using their own judgment – supporting evidence</u>

The police recovered CCTV film from the local authority recorded by two

separate cameras. As you have seen, those films depict an attack by two people on the complainant. You have in your bundle several photographic stills copied from the film. There are three individuals depicted in those photographs. It is agreed between the Prosecution and the Defence that the person we have labelled '3' on each of those stills is the complainant. The two others we have labelled '1' and '2' are, it is also agreed, the complainant's attackers. The person labelled '2' is unknown to the Prosecution. The Prosecution's case is that the person labelled '1' is the defendant.

The complainant was unable to provide a description of either of their attackers and there was no witness at the scene to assist you. However, following the recovery of the films, the investigating officers invited the local community policeman, PC A, to view them in controlled conditions. PC A was asked whether they could identify anyone on the films. PC A told you, the jury, that they immediately recognised the victim and the person we have labelled suspect '1'. PC A was unable to identify the person labelled suspect '2'. PC A's evidence is that suspect '1' is the defendant.

PC A knew where the defendant lived and, as a result, the defendant was arrested. The defendant accepts that they and PC A live on the same estate and that, from time to time, they have spoken together in a local public house. The defendant maintains that although they are well known to one another, PC A was, and is, mistaken in their identification of the defendant as suspect '1'.

The Prosecution's case depends in large measure upon the correctness of PC A's identification of the defendant. There is a special need for caution before convicting upon such evidence. The reason is that experience shows that genuine and convincing witnesses can make mistakes in identification, even several witnesses making the same identification. While this is not identification by PC A of someone unknown to them, but is the recognition

of someone PC A knows, caution is still required because of the known danger that witnesses can make honest mistakes in recognition even of friends or family members.

There is one advantage which PC A has which they would not have enjoyed had they just been present at the scene of the assault. They have been able, at leisure, to test their first impression by viewing the CCTV films over and over again. Their disadvantage has been that they have been limited to a two-dimensional image recording of the scene at night.

You need to consider, first, the nature of the images seen by PC A in order to judge their quality since, only if the images are of acceptable quality, could you conclude that it is safe to rely upon PC A's recognition. They are all captured at night. The street lighting is quite good and the images are reasonably sharply focused. They are in colour. They are not, however, as clear as would have been daylight views of the suspect in person, and they are, of necessity, two-dimensional. On the other hand, PC A had views from two different cameras and views of the suspect's face both frontal and in profile. The first question you need to consider is whether these images are of sufficient quality for PC A to make any reliable comparison with the defendant. If you are not sure they are, then you should place no reliance upon PC A's evidence. If they are of sufficient quality, then you will need to consider whether PC A's knowledge of the defendant's physical appearance was recent enough to make a reliable identification.

In judging the reliability of PC A's evidence, you will be able to make your own comparison in your own time and in as much detail as you need. When asked questions by their own advocate, the defendant accepted that the person in the CCTV film bears a striking resemblance to them. The defendant denied, however, that they are one and the same person. You will need to consider whether there are features, both of build and facially,

common to the suspect and the defendant, which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that neither you nor PC A has the advantage of a line-up of men of similar appearance. What you do have are contemporaneous photographs of the defendant, taken on their arrest, and the ability to search for any features of suspect '1' which you do not find in the defendant and vice versa. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

You are entitled to treat PC A's evidence and your own observation, if you agree with PC A, as support for each other but, before doing that, please bear in mind the danger, to which I have already referred, that several people can make the same mistaken identification. Only if you are sure that PC A has correctly identified the defendant as suspect '1' could you then proceed to consider whether the defendant committed the offence charged. If you are not sure, you must find the defendant not guilty.

Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you do see.

ii. Comparison by a Witness with Special Knowledge of Scene of Crime Images

In ***Clare*** **[1995] 2 Cr App R 333** (UK CA), police officers had recorded good quality (colour) film of football supporters making their way to a match. After the match there was a violent confrontation between two groups of

supporters outside licensed premises, recorded (in black and white) by CCTV cameras. PC Fitzpatrick studied the pre-match recordings and the lesser quality CCTV film and formed an opinion as to which defendant had been engaged in which acts of violence. He was permitted by the trial judge to give evidence explaining to the jury how he had reached his conclusions.

The Court of Appeal approved the trial judge's decision. The evidence was admissible for two purposes, first, to enable the jury to make their own comparison between the colour and black and white photographs and, second, as direct evidence of identification. The trial judge gave and the Court of Appeal approved, unfortunately without quoting it, their modified ***Turnbull*** direction.

For an appropriately modified ***Turnbull*** direction see **Chapter 9: 3A—Comparison Made by the Jury.**

Illustration

Comparison by witness with special knowledge – result of witness's research now available to the jury – modified Turnbull direction – advantages and disadvantages

Following this violent incident the police recovered from the local authority two CCTV films. It was discovered that most of the incident, but not quite all of it, was captured on these films. The technology unit prepared a composite film which you have seen. The quality is admittedly not the best and it is recorded in black and white. Secondly, officers recovered from licensed premises in the town centre further CCTV films. They were of good quality, recorded in colour. You have in your bundles still photographs taken from each film. Several individuals were shown in

those licensed premises shortly before the violence erupted outside. DC A set about studying both sets of films. DC A's purpose was twofold. First, they endeavoured to separate out the individual confrontations which are recorded on the two black and white films. Second, they sought to ascertain whether any of those individuals shown in the colour film took part in the violence which could be seen in the black and white film and, if so, to identify them. DC A told you that they had spent upwards of two hundred hours viewing these films and taking still copies.

DC A has explained how they identified D1 and D2 drinking in the X wine bar before moving quickly towards the exit moments before the violence began. DC A asked you to note both D1 and D2's features and their clothing. DC A then drew to your attention individuals depicted in the black and white films which DC A says are, respectively, D1 and D2. DC A has identified them taking part in two separate attacks on youths outside, then joining together to carry out a joint attack on a third.

D1 and D2 have made formal admissions that they are indeed to be seen in the colour film. We have marked them as '1' and '2' on our copies of the stills taken from the colour film. However, they deny that they are also to be seen taking part in the violence outside. Their case is that DC A is mistaken in attributing to them the actions of the suspects we have marked as '1' and '2' in the black and white stills. They say they are not to be seen in the black and white film because they are on the periphery watching, but taking no part in, the violence.

The Prosecution's case depends almost entirely upon the correctness of DC A's identification of D1 and D2 in the black and white film. DC A was not an identifying witness in the sense that they were present at the incident and tried, later, to make an identification of the suspects from memory. DC A's ability to make an identification depends entirely upon

their study of the two films. They have, in the process, saved you the trouble of carrying out an examination lasting over two hundred hours. However, the end result is that you are just as able to reach a conclusion about the critical few moments recorded in the black and white film as was DC A. DC A did not know either D1 or D2 before they were arrested and had no special expertise in the analysis of film. In effect DC A has passed on their experience of extensive viewing to you, and you are now in a position to assess whether DC A has made a correct identification of suspects '1' and '2'.

There is a special need for caution before convicting on this evidence of identification, either DC A's analysis or your own. The reason is that experience tells us it is easy to be convinced but mistaken about the identification of others. This applies to you and me as it does to any witness making an identification. Several people can make the same mistaken identification, even of someone known to them. The identification of a person in the course of our daily lives can be difficult. You may be convinced that you have seen someone you know well in the street, or passing in a car, but it turns out you were misled by the similarity in appearance between two completely different people. Here, you are not being asked if you recognise someone you know. You are being asked, with DC A's assistance, to make a comparison between images and the person of someone who was until this trial a stranger to you.

The reliability of the comparison will depend, first, upon the quality of the images on which suspects '1' and '2' appear. They are all captured at night. The street lighting is quite good and the images are reasonably focused. They are, however, in black and white while the film with which you are invited to compare them is in colour and is of much better quality. Both films are of course only two-dimensional. The first question you need to consider is whether these black and white images are of sufficient quality

to make any comparison with a defendant as depicted in the colour film. If you are not sure they are, then you should abandon the exercise altogether. If they are of sufficient quality then you have the further advantage of being able to make your comparison in your own time and in as much detail as you need. This puts you, in this respect, in a better position than a witness watching a fast moving and brief encounter.

I will now remind you of the evidence of DC A as it concerned D1. What you are being asked to note from the colour film and stills are the following features of D1's appearance, including their clothing… Please turn, next, to the black and white stills numbered 1-4. You are invited to pay close attention to the following features of suspect '1' and their clothing…

Second, let us carry out the same exercise in relation to D2 and the black and white stills numbered 5-8…

In each case you will need to consider whether there are features, both of build and facially, common to the suspect and the defendant which are sufficiently unusual in combination to remove the possibility of coincidence. Remember that you do not have the advantage of a line-up of persons of similar appearance. What you do have is the ability to search for any features of the suspect which you do not find in the defendant. It is just as important to look for any evidence of dissimilarity as it is to identify features common to both.

It is submitted on behalf of the defendant that the exercise you are being asked to perform is capable of creating an injustice. It is pointed out that the composite black and white film is an edited version of the whole incident. You cannot, it is said, receive the full picture. There may be other people who took part in this violence who were of similar appearance to the defendant and wore similar clothing. This is a submission to which you should give close attention when you are reviewing the film. DC A

told you they had viewed all the film available from both CCTV cameras and saw no other individuals with these combinations of features.

Full copies of those films had been made available to the Defence. DC A was not asked on behalf of either defendant to view an image of any other person who might have been mistaken for either of them.

If, having exercised the caution I have advised, you are sure that a defendant has been correctly identified by DC A, you should proceed to consider whether that defendant is guilty of the offence charged. If you are not sure that a defendant has been accurately identified, then you must find them not guilty. Please remember, if and when considering whether the film depicts the defendant committing the offence charged, that we were watching frames recorded at intervals of a few seconds. We did not see the same fluid movement as we would when watching a cinema film or television programme. It is possible that a movement or gesture or expression was not recorded during these intervals and is therefore lost to you when evaluating what you see.

4. Identification by Finger and Other Prints

A match by an expert of fingerprint impressions left at the scene of the crime with the defendant's fingerprint impressions has been admissible in evidence for at least one hundred years. In ***Buckley*** **(1999) 163 JP 561** (UK CA), the Vice-President, Rose LJ, described the history of fingerprint standards and gave guidance on current minimum requirements:

> It has long been known that fingerprint patterns vary from person to person and that such patterns are unique and unchanging throughout life. As early as 1910 in *R v Castleton* 3 Cr App R 74, a conviction was upheld which

depended solely on identification by fingerprints. At that time there were no set criteria or standards. But, gradually, a numerical standard evolved and it became accepted that once 12 similar ridge characteristics could be identified, a match was proved beyond all doubt.

In 1924, the standard was altered by New Scotland Yard, but not by all other police forces, so as to require 16 similar ridge characteristics. That alteration was made because, in 1912, a paper had been published in France by a man called Alphonse Bertillon. It was on the basis of his paper that the 16 similar ridge characteristics standard was adopted. However, in recent times, the originals of the prints used by Bertillon have been examined and revealed conclusively to be forgeries. It is therefore apparent that the 16 point standard was adopted on a false basis.

Meanwhile, in 1953, there was a meeting between the then Deputy Director of Public Prosecutions, officials from the Home Office and officers from several police forces, with a view to agreeing on a common approach. As a result, the National Fingerprint Standard was created, which required 16 separate similar ridge characteristics.

It is apparent that the committee were not seeking to identify the minimum number of ridge characteristics which would lead to a conclusive match, but what they were seeking to do was to set a standard which was so high that no one would seek to challenge the evidence and thereby, to raise fingerprint evidence to a point of unique reliability.

At the same time, a National Conference of Fingerprint

Experts was established to monitor the application of the standard. Shortly afterwards, there was an amendment to the standard, to provide that, where at any scene there was one set of marks from which 16 ridge characteristics could be identified, any other mark at the same scene could be matched if ten ridge characteristics were identified. Logical or otherwise, that system operated for many years.

During the passage of time, there have, of course, in this area, as in the realms of much other expert evidence, been developments in knowledge and expertise. Of course, in practice, many marks left at the scene of a crime are not by any means perfect; they may be only partial prints; they may be smudged or smeared or contaminated. However, a consensus developed between experts that considerably fewer than 16 ridge characteristics would establish a match beyond any doubt. Some experts suggested that eight would provide a complete safeguard. Others maintained that there should be no numerical standard at all. We are told, and accept, that other countries admit identifications of 12, 10, or eight similar ridge characteristics and, in some other countries, the numerical system has been abandoned altogether.

In 1983, there was a conference which recognised that all fingerprint experts accepted that a fingerprint identification is certain with less than the current standard of 16 points of agreement. It was also recognised that all experts agreed that there should be a nationally accepted standard, which should be adhered to in all but the most

exceptional cases. The Conference recognised that there would be rare occasions where an identification fell below the standard, but the print was of such crucial importance in the case that the evidence about it should be placed before the Court. Therefore the conference advised that, in such extremely rare cases, the evidence of comparison should be given only by an expert of long experience and high standing.

It was this approach which led to the trial judge in R v Charles (unreported, Court of Appeal (Criminal Division) transcript of 17th December 1998) admitting evidence of 12 similar ridge characteristics. That was a decision, in the exercise of his discretion, which was upheld in the face of challenge in this Court. In the course of giving the judgment of the Court on that occasion, the Lord Chief Justice, Lord Bingham of Cornhill, said this at 9E of the transcript, by reference to the evidence of factual match with the defendant's print:

> 'It was not suggested that there were differences between the two prints being compared; nor was it suggested that the similarities on which he relied did not exist. It was not, in other words, any part of the appellant's case that the prints did not match. Nor was any contradictory evidence of any kind adduced at the trial. The appellant did not call a fingerprint expert who disagreed with anything that Mr Powell said'.

The learned Lord Chief Justice went on to refer to the

expert's opinion evidence that the relevant print was made by the defendant. The expert:

> '...relied on the comparison between them, on the similarities and absence of dissimilarities, on his professional experience during a long career, and on his expert knowledge of the experience of other experts as reported in the literature. He concluded that the possibility of the disputed print and the control prints being made by different people could in his judgment be effectively ruled out. In cross-examination... he agreed that he was expressing a professional opinion and not a scientific conclusion'.

It is further to be noted that in *R v Giles*, (unreported, Court of Appeal (Criminal Division) transcript, dated 13th February 1988) a differently constituted division of this Court over which Otton LJ presided, refused a renewed application for leave to appeal against conviction. The trial judge's exercise of discretion, in admitting evidence of one print of which there were 14 similar characteristics and of one with only eight similar characteristics, was not regarded as being the subject of effective challenge.

It is pertinent against that background to refer to current developments so far as fingerprint experts are concerned. It was recognised that, in view of the 1983 concessions to which we have referred, the 1953 standard was logically indefensible. In 1988, the Home Office and ACPO (The Association of Chief Police Officers) commissioned a study by Drs Evett and Williams into

fingerprint standards. They recommended that there was no scientific, logical or statistical basis for the retention of any numerical standard, let alone one that required as many as 16 points of similarity.

In consequence, ACPO set up a series of committees to consider regularising the position and to ensure that, if fingerprint identifications based on less than 16 points were to be relied upon, there would be clear procedures and protocols in place to establish a nationwide system for the training of experts to an appropriate level of competence, establishment of management procedures for the supervision, recording and monitoring of their work and the introduction of an independent and external audit to ensure the quality of the work done. In 1994 an ACPO report produced under the chairmanship of the Deputy Chief Constable of Thames Valley Police recommended changing to a non numerical system and the Chief Constable's Council endorsed that recommendation in 1996. Further discussions followed between the heads of all the Fingerprint Bureau in this country and ACPO. In consequence, a Fingerprint Evidence Project Board was established with a view to studying exhaustively the systems needed before moving nationally to a non numerical system. The first report of that body was presented on 25th March 1998 and recommended that the national standard be changed entirely to a non numerical system: a target date of April 2000 was hoped for, by which the necessary protocols and procedures would be in place. If and when that occurs, it may be that fingerprint experts

will be able to give their opinions unfettered by any arbitrary numerical thresholds. The courts will then be able to draw such conclusions as they think fit from the evidence of fingerprint experts.

It is to be noted that none of this excellent work by the police and by fingerprint experts can be regarded as either usurping the function of a trial judge in determining admissibility or changing the law as to the admissibility of evidence.

That said, we turn to the legal position as it seems to us. Fingerprint evidence, like any other evidence, is admissible as a matter of law if it tends to prove the guilt of the accused. It may so tend, even if there are only a few similar ridge characteristics but it may, in such a case, have little weight. It may be excluded in the exercise of judicial discretion, if its prejudicial effect outweighs its probative value. When the prosecution seek to rely on fingerprint evidence, it will usually be necessary to consider two questions: the first, a question of fact, is whether the control print from the accused has ridge characteristics, and if so how many, similar to those of the print on the item relied on. The second, a question of expert opinion, is whether the print on the item relied on was made by the accused. This opinion will usually be based on the number of similar ridge characteristics in the context of other findings made on comparison of the two prints.

That is as matters presently stand. It may be that in

the future, when sufficient new protocols have been established to maintain the integrity of fingerprint evidence, it will be properly receivable as a matter of discretion, without reference to any particular number of similar ridge characteristics. But, in the present state of knowledge of and expertise in relation to fingerprints, we venture to proffer the following guidance, which we hope will be of assistance to judges and to those involved in criminal Prosecutions.

If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular:

(i) the experience and expertise of the witness;

(ii) the number of similar ridge characteristics;

(iii) whether there are dissimilar characteristics;

(iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fragment of print than in an entire print; and

(v) the quality and clarity of the print on the item

> **relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination.**
>
> **In every case where fingerprint evidence is admitted, it will generally be necessary, as in relation to all expert evidence, for the judge to warn the jury that it is evidence of opinion only, that the expert's opinion is not conclusive and that it is for the jury to determine whether guilt is proved in the light of all the evidence.** [emphasis added]

Since this advice was given, the police fingerprint bureaux in England and Wales have adopted a non-numerical standard. It is suggested that the guidance provided in ***Buckley*** remains valid but admissibility will depend primarily on the quality of the opinion and the matching characteristics which support it. Notably:

i. Once the evidence is admitted, the jury's conclusion upon the cogency of the evidence of match will also depend on the factors listed by the Vice-President.

ii. Occasionally, fingerprint experts disagree on the identification of a dissimilar characteristic between the two samples. If there is such a disagreement, careful directions will be required because, if there is a realistic possibility that a dissimilar characteristic exists, it will exonerate the defendant.

iii. The second question is the significance of the match. Since there is no nationally accepted standard of the number of identical characteristics required for the match to be conclusive of identity,

the terms in which the expert expresses their conclusion and the experience on which it is based will be critical.

Points to Consider

i. On 11 May, 2001, the Chief Constables' Council (UK) endorsed the recommendation to implement the change to evidential standard for fingerprints. A Rationale was issued together with a statement of process, and briefing and guidance notes for fingerprint experts were prepared by the Project Board to which Rose LJ referred in his judgment.

ii. A fingerprint expert should therefore be (as per ***Buckley*** above):

   a. an expert of long-standing, thoroughly versed in all aspects of fingerprint work and crime scene examinations;

   b. capable of giving a comprehensive and independent assessment of all relevant aspects of Prosecution evidence;

   c. competent to initiate and complete fingerprint investigations in matters where the Prosecution is not involved;

   d. capable of producing technical papers based on their own experience and not that of others;

   e. able to produce comprehensive reports and advice for counsel;

   f. able to give verbal evidence at all court levels and stand up to rigorous cross-examination;

   g. able to advise counsel during cross-examination of the other side's expert.

5. Identification by Voice

Introduction

Evidence of identification by voice can take a number of forms, such as evidence from a lay witness who may or may not have known the defendant before hearing the questioned speech; evidence of voice identification procedures, at which a lay witness has identified the defendant's voice from a number of others; and, as a supplement or alternative to the above, the evidence of experts who may report conclusions based on analysis of questioned and reference speech, especially where the speech is accessible in electronic form. In certain circumstances, the jury may be asked to make their own comparison between questioned and reference speech recordings.

Gage LJ noted in ***Flynn*** **[2008] EWCA Crim 970, [2008] 2 Cr App R 20**, that '…in all cases in which the prosecution rely on voice recognition evidence, whether by listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases.'

In ***Osbourne*** **(1992) 29 JLR 452** (JM CA), the evidence of voice identification was challenged. The learned trial judge had reminded the jury of the basis on which the recognition was made. He pointed to the period both men were acquainted, the nature of their relationship, the particular speech pattern of the appellant, and the opportunities for such knowledge. Carey P (Ag), said:

> …Common-sense suggests that the possibility of mistakes and errors exists in the adduction of any direct evidence, in the sense of evidence of what a witness can perceive with one of his five senses. But that can hardly be a warrant for laying down that a Turnbull type warning is mandatory in every sort of situation where identification of some object capable of linking

> an accused to the crime or perhaps some attributable or feature of his speech capable of identifying him as a participant, forms part of the Prosecution case.

A year later, in ***Taylor*** **(1993) 30 JLR 100** (JM CA), Gordon JA said, 'We would add that the directions given must depend on the particular circumstances of the case…'

After reviewing the relevant authorities, the learned judge continued:

> In order for the evidence of a witness that he recognised an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act.

In ***O'Doherty*** **[2002] NI 263, [2003] 1 Cr App R 5** (CA), the Northern Ireland Court of Appeal considered an appeal against conviction for aggravated

burglary. A significant part of the evidence for the Prosecution comprised a tape recorded telephone call between the suspect and the emergency services. The trial judge directed the jury that they could consider the following evidence as to the identity of the caller:

i. Recognition of the voice by a police officer who knew the defendant;

ii. Opinion evidence of a voice expert;

iii. The jury's own comparison of the suspect's speech with the defendant's speech.

Voices and speech can be compared by the expert listener (auditory phonetic analysis) and by acoustic recording and measurement (quantitative acoustic analysis). The Court considered evidence that it was generally accepted among experts that the inexpert listener could not alone make a reliable comparison of voice and should only attempt it with the assistance of an expert. An expert's evidence would enable the jury to identify relevant similarities in accent or dialect but that is not generally enough to make an identification. All that auditory phonetic analysis can achieve is a judgment that the defendant is among those who could have used the disputed speech. The reason for this is, as stated at 269g:

> Phonetic analysis does not purport to be a tool for describing the difference between one speaker and another, the differences which arise from the vocal mechanisms. The way in which we hear will fail to distinguish quite a number of the features which are important in deciding whether samples came from two speakers or one.

Accordingly, it was generally accepted that quantitative acoustic analysis was an essential requirement of professional analysis of voices.

The court reached conclusions, at 276 a-c, as to the use of voice identification evidence in general, as follows:

> … in the present state of scientific knowledge, no prosecution should be brought in Northern Ireland in which one of the planks is voice identification given by an expert which is solely confined to auditory analysis. There should also be expert evidence of acoustic analysis such as is used by Dr Nolan, Dr French and all but a small percentage of experts in the United Kingdom and by all experts in the rest of Europe, which includes formant analysis.
>
> We make three exceptions to this general statement. Where the voices of a known group are being listened to and the issue is, 'which voice has spoken which words' or where there are rare characteristics which render a speaker identifiable- but this may beg the question- or the issue relates to the accent or dialect of the speaker (see *R. v Mullan* [1983] N.I.J.B. 12) acoustic analysis is not necessary…

Evidence of voice recognition was admissible and, if admitted (as stated at 276g):

> It seems to us that… the jury should be allowed to listen to a tape-recording on which the recognition is based, assuming that the jury have heard the accused giving evidence. It also seems to us that the jury may listen to a tape-recording of the voice of the suspect in order to assist them in evaluating expert evidence and in making

> up their own minds as to whether the voice on the tapes is the voice of the defendant.

Of the practice of inviting juries to make their own voice comparison for the purpose of assessing an identification by recognition or by an expert, the court said, at 282c:

> We are satisfied that if the jury is entitled to engage in this exercise in identification on which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying on their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the voice of one person, the defendant, with the voice on the tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating on what he was saying, not comparing it with the voice on the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasise the need to give a specific warning to the jurors themselves.

In ***Flynn***, the Court of Appeal of England and Wales considered evidence

of voice recognition by police officers. It was the Prosecution's case that the defendants were to be heard in a covertly recorded conversation. The officers were permitted to give evidence identifying what each defendant said to the other during the conversation, which implicated them in a conspiracy to rob. The defendants denied that their voices were to be heard. The Court heard expert evidence and described its effect as follows:

> 16. In general terms the expert evidence before us demonstrates the following:
>
> (1) Identification of a suspect by voice recognition is more difficult than visual identification.
>
> (2) Identification by voice recognition is likely to be more reliable when carried out by experts using acoustic and spectrographic techniques as well as sophisticated auditory techniques, than lay listener identification.
>
> (3) The ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:
>
> (i) the quality of the recording of the disputed voice or voices;
>
> (ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
>
> (iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from

person to person.

(iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.

(v) the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.

However, research shows that a confident recognition by a lay listener of a familiar voice may nevertheless be wrong. One study used telephone speech and involved fourteen people representing three generations of the same family being presented with speech recorded over both mobile and land line telephones. The results showed that some listeners produced mis-identifications, failing to identify family members or asserting some recordings did not represent any member of the family. The study used clear recordings of people speaking directly into the telephone.

(4) Dr Holmes states that the crucial difference between a lay listener and expert speech analysis is that the expert is able to draw up an overall profile of the individual's speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. In contrast, the lay listener's response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the

> speaker's speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener's voice recognitions will make it more difficult to challenge the accuracy of their evidence.

The court held that the evidence should not have been admitted on the principal ground that the covert recording was not of sufficient quality for voice recognition to be made by the witnesses. Furthermore, the evidence should have been excluded because inadequate steps had been taken to ensure the integrity of the recognition process:

> 53…First, in our opinion, when the process of obtaining such evidence is embarked on by police officers it is vital that the process is properly recorded by those officers. The amount of time spent in contact with the defendant will be very relevant to the issue of familiarity. Secondly, the date and time spent by the police officer compiling a transcript of a covert recording must be recorded. If the police officer annotates the transcript with his views as to which person is speaking, that must be noted. Thirdly, before attempting the voice recognition exercise the police officer should not be supplied with a copy of a transcript bearing another officer's annotations of whom he believes is speaking. Any annotated transcript clearly compromises the ability of a subsequent listener to reach an independent opinion. Fourthly, for obvious

> reasons, it is highly desirable that such a voice recognition exercise should be carried out by someone other than an officer investigating the offence. It is all too easy for an investigating officer wittingly or unwittingly to be affected by knowledge already obtained in the course of the investigation.

Gage LJ added general observations. The court would not follow the Court of Appeal in Northern Ireland in its view that voice recognition should never be admitted without expert acoustic analysis. Such a finding appeared to be out of step with the judgment of the court in ***Attorney General's Reference (No 2 of 2002)*** **[2002] EWCA Crim 2373, [2003] 1 Cr App R 21**, (see Identification by CCTV and Other Visual Images above) concerning visual recognition from films or photographs but the Court had a warning to give about the use of such evidence and the need for an explicit modified ***Turnbull*** direction to the jury:

> 62. As appears from the above we have been dealing in these appeals with issues arising out of voice recognition evidence. Nothing in this judgment should be taken as casting doubt on the admissibility of evidence given by properly qualified experts in this field. On the material before us we think it neither possible nor desirable to go as far as the Northern Ireland Court of Criminal Appeal in O'Doherty which ruled that auditory analysis evidence given by experts in this field was inadmissible unless supported by expert evidence of acoustic analysis. So far as lay listener evidence is concerned, in our opinion, the key to admissibility is the degree of familiarity of the witness with the suspect's voice. Even then the dangers

of a mis-identification remain; the more so where the recording of the voice to be identified is poor.

63. The increasing use sought to be made of lay listener evidence from police officers must, in our opinion, be treated with great caution and great care. In our view where the prosecution seek to rely on such evidence it is desirable that an expert should be instructed to give an independent opinion on the validity of such evidence. In addition, as outlined above, great care should be taken by police officers to record the procedures taken by them which form the basis for their evidence. Whether the evidence is sufficiently probative to be admitted will depend very much on the facts of each case.

64. It goes without saying that in all cases in which the prosecution rely on voice recognition evidence, whether lay listener, or expert, or both, the judge must give a very careful direction to the jury warning it of the danger of mistakes in such cases. [emphasis added]

There are two separate of areas of concern.

i. The first is voice recognition by someone familiar with the voice of the defendant. In ***Hersey*** **[1998] Crim LR 281** (UK CA), the defendant was charged with robbery. The victim (V) thought he recognised the voice of one of the robbers as one of his customers, H. The police carried out a voice comparison exercise in which H and eleven volunteers read the same text. V identified the defendant. The court

approved the procedure and encouraged the use of safeguards and warnings to the jury as near to those employed following ***Turnbull*** as the adaptation would permit. The possible dangers and precautions which may minimise them were described by Gage LJ in ***Flynn*** (see [16], [63], and [64]). He did not refer to the desirability of a voice comparison exercise such as that performed in ***Hersey***. However, the absence of such a procedure would be a matter for comment by the trial judge.

ii. The second area of concern is the use of expert evidence based solely upon auditory analysis without recourse to acoustic analysis. While, unlike the practice in Northern Ireland, the courts of England and Wales are prepared to receive such evidence, its limitations were described in ***O'Doherty*** (see above) as being unable to distinguish between the vocal mechanisms of voices. It is likely to be the subject of criticism by an expert called on behalf of the Defence and directions will need to be tailored to the evidence in the case.

See also **Blackstone's (2023)** at F19.

6. Identification by DNA

Glossary*

Term	Definition
Allele	One member of a pair or series of genes which control the same trait. Represented by forensic scientists at each locus as a number.

Term	Definition
Allele "drop in"	An apparently spurious allele seen in electrophoresis which potentially indicates a false positive for the allele. A potentially spurious contribution to the mathematical analysis is known as a "stochastic effect" of LCN when the material analysed is less than 100-200 picograms (one 10 millionth of a grain of salt).
Allele "drop out"	An allele which should be present but is not detected by electrophoresis, giving a false negative. Known as a "stochastic effect" of LCN as above.
DNA	Deoxyribonucleic acid in the mitochondria and nucleus of a cell contains the genetic instructions used in the development and functioning of all known living organisms.
DNA profile	Made up of target regions of DNA codified by the number of STR (see below) repeats at each locus
Electrophoresis	The method by which the DNA fragments produced in STR are separated and detected.
Electrophoretogram	The result of electrophoresis produced in graph form.
Locus/loci	Specific region(s) on a chromosome where a gene or short tandem repeat (STR) resides. The forensic scientist examines the alleles at 10 loci known to differ significantly between individuals.

Term	Definition
Low template DNA/ Low copy numbering	By increasing the number of PCR cycles from the standard 28-30 to 34, additional amplification can produce a DNA profile from tiny amounts of sample
Masking	When two contributors to a mixed profile have common alleles at the same locus they may not be separately revealed; hence pair "masks" the other.
Mixed profile	Profile from more than one person, detected when there are more than two alleles at one locus. There will frequently be a major and a minor contributor in which the minor profile is partial.
NDNAD	National DNA Database.
PCR	Polymerase chain reaction, a process by which a single copy or more copies of DNA from specific regions of the DNA chain can be amplified.

***Adopted from the Judicial College, The Crown Court Compendium Part I: Jury and Trial Management and Summing Up (August 2021), 15-36 – 15-37**

Profiling DNA Material

Different regions or 'loci' in the DNA chain contain repeated blocks of 'alleles'. Modern analysis concentrates on 10 loci in the chain, which are known to contain alleles that vary widely between individuals, one contributed by each parent. There is also a gender marker. The sample is amplified using PCR. The blocks are identified using electrophoresis.

Analysis of the result is achieved by means of laser technology which detects coloured markers for the alleles, converted by a computer software programme to graph form. The alleles are represented by numbers at each of the 10 known loci.

Low template DNA is the technique by which a minute quantity of DNA can be copied to produce an amplified sample for analysis. Both the lack of validation for the technique and the danger of contamination were criticised by Weir J in the Omagh bombing case of ***Hoey*** **[2007] NICC 49**, leading to the exclusion of the evidence. As a result, the Forensic Science Regulator commissioned a review by a team of experts which, in April 2008, while making recommendations, reached favourable conclusions both as to method and as to precautions taken in UK laboratories against contamination. The state of the science was thoroughly reviewed by the Court of Appeal in England and Wales in ***Reed*** **[2009] EWCA Crim 2698, [2010] 1 Cr App R 310**. Thomas LJ expressed the conclusion of the court as follows:

> 74. On the evidence before us, we consider we can express our opinion that it is clear that, on the present state of scientific development:
>
> (i) Low Template DNA can be used to obtain profiles capable of reliable interpretation if the quantity of DNA that can be analysed is above the stochastic threshold – that is to say where the profile is unlikely to suffer from stochastic effects (such as allelic drop out mentioned at paragraph 48) which prevent proper interpretation of the alleles.
>
> (ii) There is no agreement among scientists as to the precise line where the stochastic threshold should be drawn, but it is between 100 and 200 picograms.

(iii) Above that range, the LCN process used by the FSS can produce electrophoretograms which are capable of reliable interpretation. There may, of course, be differences between the experts on the interpretation, for example as to whether the greater number of amplifications used in this process has in the particular circumstances produced artefacts and the effect of such artefacts on the interpretation. Care may also be needed in interpretation where the LCN process is used on larger quantities than that for which it is normally used. However a challenge to the validity of the method of analysing Low Template DNA by the LCN process should no longer be permitted at trials where the quantity of DNA analysed is above the stochastic threshold of 100-200 picograms in the absence of new scientific evidence. A challenge should only be permitted where new scientific evidence is properly put before the trial court at a Plea and Case Management Hearing (PCMH) or other pre-trial hearing for detailed consideration by the judge in the way described at paragraphs 129 and following below.

(iv) As we have mentioned, it is now the practice of the FSS to quantify the amount of DNA before testing. There should be no difficulty therefore in ascertaining the quantity and thus whether it is above the range where it is accepted that stochastic effects should not prevent proper interpretation of a profile.

(v) There may be cases where reliance is placed on a profile obtained where the quantity of DNA analysed is within the range of 100-200 picograms where there is disagreement on the stochastic threshold on the present state of the science. We would anticipate that such cases would be rare and that, in any event, the scientific disagreement will be resolved as the science of DNA profiling develops. If such a case arises, expert evidence must be given as to whether in the particular case, a reliable interpretation can be made. We would anticipate that such evidence would be given by persons who are expert in the science of DNA and supported by the latest research on the subject. We would not anticipate there being any attack on the good faith of those who sought to adduce such evidence.

The judgment in ***Reed*** is a valuable source of information in the following areas:

i. The technique of conventional DNA analysis ([30] – [43]);

ii. The technique of analysis of Low Template DNA by the Low Copy Numbering (LCN) process and the phenomenon of stochastic effects ([44] – [49]);

iii. Match probability (paragraphs [52] – [55]);

iv. Expert evidence of the manner and time of transfer of cellular material ([59] – [61]; [81] –[103]; [111] – [127]);

v. The procedural requirements of CPR 33 for the admission of expert evidence ([128] – [134]);

vi. Analysis of mixed and partial profiles and the effect of that analysis upon the need for careful directions in summing up ([178] – [215]).

Interpretation of Results

Interpretation is a matter which requires expertise. The analyst is comparing the blocks of alleles at each locus as identified from the crime specimen, with their equivalent from the suspect's specimen. The statistical likelihood of a match at each locus can be calculated from the forensic science database of 400 profiles. If a match is obtained at each of the 10 loci, a match probability in the order of 1 in 1 billion is achieved. The fewer the number of loci in the crime specimen producing results for comparison, the less discriminating will be the match probability.

Match Probability

The "random occurrence ratio" (or "match probability") is the statistical frequency with which the match in profile between the crime scene sample and someone unrelated to the defendant will be found in the general population. A probability of 1 in 1 billion is so low that, barring the involvement of a close relative, the possibility that someone other than the defendant was the donor of the crime scene sample is effectively eliminated. This significantly reduces the risk that the "prosecutor's fallacy" will creep into the evidence or have any effect upon the outcome of the trial: ***Gray*** **[2005] EWCA Crim 3564** [21] – [22].

The Prosecutor's Fallacy

The "prosecutor's fallacy" confused the random occurrence ratio with the probability that the defendant committed the offence. In ***Doheny*** **[1997] 1 Cr App R 369** (UK CA), Phillips LJ demonstrated it by reference to a random occurrence ratio of 1 in 1 million. This did not mean that there was a 1 in a million chance that someone other than the defendant left the stain. In a male population of 26 million, there were 26 who could have left the stain. The odds of someone other than the defendant having left the stain depend upon whether any of the other 26 is implicated.

Mixed and Partial Profiles

It will be recalled that each parent contributes one allele at each locus. The analyst may find in the profile produced from the crime scene specimen, more than two alleles at a single locus. If so, the specimen contains a mix of DNA from more than one person. The major contribution will be indicated by the higher peaks on the graph. Separating out the different profiles is a matter for expert examination and analysis. The presence of mixed profiles allows for the possibility that, while both contain the same allele at the same locus, one allele masks the other. Further, the presence of stutter, represented by stunted peaks in the graphic profile, may mask an allele from a minor contributor.

There may be recovered from the crime scene specimen a profile which is partial because, for one reason or another (e.g. degradation), no alleles are found at one or more loci. These are called 'voids'. The significance of voids lies in the possibility that the void failed to yield alleles which could have excluded the defendant from the group which could have left the specimen at the scene. In statistical terms, a matching but partial profile will increase the number of people who could have left their DNA at the

scene. It was the proper statistical evaluation of a partial profile which was the subject of appeal in ***Bates*** **[2006] EWCA Crim 1395**. The Court of Appeal held that a statistical evaluation based upon the alleles which were present and did match (in that case 1 in 610,000) was both sound and admissible in evidence, provided that the jury were made aware of the assumption underlying the figures and of the possibilities raised by the 'voids'.

Procedural Requirements

The court in ***Doheny*** heard evidence from experts on both sides as to the appropriate method of statistical calculation used to produce the random occurrence ratio. Its focus was upon the question whether the match probability for each of several matching bands in two separate tests (single and multi-locus probes), could be multiplied to arrive at the random occurrence ratio. The answer was negative because the scientists could not eliminate the possibility that the results obtained from each test replicated or overlapped one another. The result was detailed guidance from the court as to the way in which such evidence should be presented and handled at trial. In ***Reed*** at [128] – [134], the court emphasised the importance of pre-trial preparation and management. At [131] – [132] Thomas LJ said:

> 131 In cases involving DNA evidence:
>
> (i) It is particularly important to ensure that the obligation under r 33.3(1)(f) and (g) is followed and also that, where propositions are to be advanced as part of an evaluative opinion (of the type given by Valerie Tomlinson in the present case), that each

proposition is spelt out with precision in the expert report.

(ii) Expert reports must, after each has been served, be carefully analysed by the parties. Where a disagreement is identified, this must be brought to the attention of the court.

(iii) If the reports are available before the PCMH, this should be done at the PCMH; but if the reports have not been served by all parties at the time of the PCMH (as may often be the case), it is the duty of the Crown and the defence to ensure that the necessary steps are taken to bring the matter back before the judge where a disagreement is identified.

(iv) It will then in the ordinary case be necessary for the judge to exercise their powers under Rule 33.6 and make an order for the provision of a statement.

(v) We would anticipate, even in such a case, that, as was eventually the position in the present appeal, much of the science relating to DNA will be common ground. The experts should be able to set out in the statement under Rule 33.6 in clear terms for use at the trial the basic science that is agreed, in so far as it is not contained in one of the reports. The experts must then identify with precision what is in dispute – for example, the match probability, the interpretation of the electrophoretograms or the evaluative opinion that is to be given.

(vi) If the order as to the provision of the statement under Rule 33.6 is not observed and in the absence of a good reason, then the trial judge should consider carefully whether to exercise the power to refuse permission to the party whose expert is in default to call that expert to give evidence. In many cases, the judge may well exercise that power. A failure to find time for a meeting because of commitments to other matters, a common problem with many experts as was evident in this appeal, is not to be treated as a good reason.

132 This procedure will also identify whether the issue in dispute raises a question of admissibility to be determined by the judge or whether the issue is one where the dispute is simply one for determination by the jury.

The use of hearsay statements from laboratory staff and others engaged in the process of analysis is now expressly permitted by s 127 of the **Criminal Justice Act 2003** (UK).

Additional Guidelines

In ***Doheny***, Phillips LJ said:

> 11. In the summing-up careful directions are required in respect of any issues of expert evidence and guidance should be given to avoid confusion caused by areas of expert evidence where no real issue exists.

12. The judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and to that which conflicts with the conclusion that the defendant was responsible for the crime stain.

13. In relation to the random occurrence ratio, a direction along the following lines may be appropriate, tailored to the facts of the particular case:

> 'Members of the jury, if you accept the scientific evidence called by the Crown this indicates that there are probably only four or five white males in the United Kingdom from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics.'

Advances in the sensitivity of DNA analysis have been such that now, when a full profile has been obtained, the match probability will be so low that the defendant will concede that they were the donor of the sample taken from the scene. The summing-up will concentrate on an explanation given by the defendant for their presence at the scene.

Controversy is more likely to arise in expert assessment of the significance of mixed and incomplete profiles. The trial judge will need to be aware of and explain to the jury the difference between results which are capable

of bearing a match probability (and, if so, how it should be expressed in the light of the analysis) and those matches which, while not statistically significant, do not exclude the defendant as the source. These were issues which arose in the appeal of ***Reed***.

Scientific terms, match probability, and prosecutor's fallacy are also issues for consideration and guidance on these areas can be gleaned from the decision in ***Emerson Richardson v The State and The Public Defender's Department*** **Crim App No P011 of 2019** (TT CA).

The illustration below represents an example of placing inconclusive DNA evidence into the context of a circumstantial case so that the jury understands its limitations.

Illustration

Murder of deceased in her bedroom - full, partial and mixed profiles – explanation of significance – statistical probabilities – interpretation of DNA results – defendant admits presence but denies murder

The DNA evidence is not in dispute. However, the conclusions you reach from it are very much in issue.

Cause of death

Ms A was found dead in her bed by a neighbour at about 9am on Sunday 17 May. The cause of death was blows to the head with a blunt instrument. A bloodstained baseball bat was found on the bed. The forensic pathologist has given evidence that the baseball bat could have caused all the injuries suffered by Ms A from which she died sometime during Saturday night or early Sunday morning.

Admitted contact between the deceased and the defendant

The defendant admits that during the early evening of Saturday, he and Ms A had sexual intercourse in the main bedroom of her two bedroom flat. Semen obtained from swabs taken from Ms A's vagina after her death was analysed by the forensic scientist, B, and found to contain what B described as a full match between the specimen and the defendant's DNA. The defendant gave evidence that he and Ms A afterwards smoked cigarettes in the bedroom. As you have seen from the photographs, cigarette butts were recovered from ashtrays on each side of the bed. The tips were swabbed for saliva and the swabs were analysed for DNA. From the swabs recovered from one side of the bed, B obtained a full DNA profile which matched the profile of Ms A; from the swabs obtained from the other side of the bed he obtained a full DNA profile which matched the profile of the defendant. B noted that some of the cigarette butts and the ashtrays on each side of the bed had been spattered with tiny flecks of blood. He concluded that the evidence supported the defendant's account in interview that he had smoked in the bedroom with Ms A before she was killed.

Case for Prosecution and Defence

The Prosecution's case is that the defendant was her killer. The Prosecution relies upon the further DNA evidence of B concerning what he found on two further items, Ms A's purse and the baseball bat. The defendant's evidence was that when he left Ms A at 9pm she was alive and sleeping in her bed. When he was in Ms A's bedroom he was unaware of the presence of either a baseball bat or a purse and he certainly did not handle them.

DNA analysis, comparison and statistical evaluation

It is important that we understand what B meant by a full DNA profile and a full DNA match. DNA profiling has been part of the forensic scientist's tools for over 20 years now. I have no doubt you will have heard and read about its capabilities in the media. There are various ways in which it can be explained. We as individuals are made up of cells. DNA is the chemical in our cells which determines who we are. We inherit one half of our DNA from each parent. The more closely related you are the more similar your DNA will be. But apart from identical twins we are all different. So far, science has not succeeded in compiling a complete DNA profile for you or me so it is important to understand what forensic scientists mean by a full DNA profile.

As B explained, he concentrates on 10 specific areas (the scientists call them 'loci') of the DNA chain which are known to vary widely between people. The 11th area is the sex indicator, the XX or XY chromosome. For each of those 10 loci except for one there is a component provided by dad and another provided by mum. In one of them the component provided by dad and mum is identical. That is why B explained that forensic scientists were looking at 19 components in each profile. Each component at each locus is represented by a number and the number is called by the scientists an "allele".

Full and partial profiles

So, if B and their colleagues find what they call a full profile they have found a match in those 19 alleles in different loci which are known to vary widely between individuals, and they have determined that both profiles come from either a male or female. Because the Forensic Science Service uses a database of 400 known profiles taken from a wide range of individuals,

they are able to calculate the probability that a profile being examined will be found elsewhere in the population. Each time one of those alleles is matched, the chances of finding another person with the same allele in the same locus decreases at a compound rate. So, when, using B's technique, a match of all 19 alleles and the sex indicator is found between the profile found on a cigarette butt at the scene and the defendant's known profile, B is able to say that the chance of finding another match with a person in the UK population unrelated to the defendant is 1 in 1 billion. The population of the UK is about 60 million. It is for you to decide whether in the circumstances of this case that effectively excludes anyone else, but the defendant accepts that he was the donor of the saliva on the cigarette butts on his side of the bed.

The quality of the specimen may be such that only a few alleles are found in the scientific test. All 19 must have been there originally but they have not been revealed by the analysis. Obviously, the fewer the number of matches, the less discriminating is the statistical result. You will have noticed that when B found only 2 alleles from a swab taken from one location on the baseball bat which matched the profile of the defendant, he did not put a statistical evaluation on it, because in his view his finding was statistically insignificant.

What he meant was that you cannot rely on the match of only two alleles to make any identification of the donor because there are so many people in the UK population who would match it.

Origin, deposit and transfer of DNA material

The next thing we need to remember is that the DNA result does not necessarily, of itself, tell us from what cellular material the result was produced. It could have been blood, or in the case of a man, semen, or

it could have been saliva, as in the case of the cigarette butts, or it could have been a flake of skin or sweat. When B was describing saliva on the cigarette butts and semen on the vaginal swab he was only using common sense. That is what the material probably was given the place from which the specimen was taken. Secondly, as we have heard, there has to be enough good quality material to produce a full profile. Just because you have handled an object does not mean you left your DNA. You may do or you may not. If you do, you may not leave enough material to provide a full profile. You can pick up someone else's DNA and place it on another object which you handle. You can wipe blood with a cloth and the DNA may be transferred to the cloth. You may wipe the cloth on another surface and transfer DNA from the cloth in the process. If your hand has someone's blood on it you can transfer it to another object. B told us how he took swabs from the baseball bat and the purse. Sometimes it was obvious to B from his experience of examining such material that it was blood. On other occasions it seems to have been a mixture of blood and something else. Interpretation is a matter of deduction and judgement by an expert, whose evidence you have to consider, so we have to take care to understand exactly what B was saying.

Mixed and partial profile from purse

Recovered from inside the bedside cabinet on Ms A's side of the bed was her purse. It was empty. B found tiny smears of blood staining on the outer and inner surfaces of the wallet. He prepared the photographs at pages 5 and 6. He has marked the areas where he saw what appeared to be smears of blood and numbered them. On page 5 he has marked on the inside surface of the purse, area 1. From area 1 he obtained a swab which provided him with a DNA profile which appeared to be a mixture

of two people. He could tell that two or more people had contributed because he found more than two alleles in the same locus in the profile. The major component of the mixed profile came from a woman. The minor component was provided by a man or more than one man. He obtained a full profile for the woman. It matched Ms A's profile. B told you that the minor profile was incomplete. It comprised four distinct alleles, one in each of four separate loci. B told you that, assuming these four alleles came from one person, the match probability that the DNA belonged to someone unrelated to the defendant was 1 in 120. In other words, for every 120 men in the male population, unrelated to the defendant, one could have been the source of the DNA. There are, therefore, on B's assumption about 250,000 men in the UK who could have left their cellular material inside Ms A's purse.

B was cross examined. He agreed that he had been provided with the DNA profiles of the men known to have had a relationship with Ms A within the preceding 3 years. One of those men, Mr C, had had a relationship with Ms A which lasted for some 3 weeks about 2 years before Ms A died. Of the four components in the mixed profile inside the purse which did not come from Ms A, two of them matched Mr C and the other two did not. If, contrary to B's assumption, we assume that the minor component was contributed by two men, one of whom was Mr C, the match probability that the other two came from someone unrelated to the defendant was 1 in 9. That would mean that about 10 per cent of the male population of the UK or about 3 million men could have left the profile.

Mr C gave evidence. He told you that as far as he can recall he had never handled Ms A's purse and had certainly never opened it. Depending upon your view, the evidence of Ms A's sister, Ms E, may be more significant. She told you that she purchased the purse for Ms A for her last birthday

on 28 March last year, at least a year after her relationship with Mr C was over. She was not challenged about the accuracy of her recollection.

It follows that your judgment of the significance of the DNA evidence concerning the purse may be different depending upon your decision whether you can exclude the possibility so you are sure that Mr C at some stage handled Ms A's purse.

Partial profile from baseball bat

I shall turn next to the handle of the baseball bat. B swabbed the handle in an area where he would have expected the bat to be gripped but which appeared to be uncontaminated with blood. He obtained from the resulting swab an incomplete profile. He found six alleles which matched the corresponding alleles in the defendant's profile. Assuming that they came from one person the match probability of that person being unrelated to the defendant was 1 in 2,500. There are, on B's assumption, about 12,000 men in the UK who could have left this material on the baseball bat.

Again B was cross examined. He had compared the profile he obtained from the handle of the baseball bat with the profile of a man, Mr D, who had lived as a lodger in her flat for 6 months until New Year's Day, some four and half months before Ms A's death. Three of the alleles found by B in the specimen from the handle matched Mr D's profile. If we assume that it was Mr D whose cellular material produced those three alleles, then the match probability of the other three being left by someone unrelated to the defendant rises to 1 in 77. That would mean that some 400,000 men could have deposited the other three alleles.

Mr D also gave evidence. During the time that he lived at Ms A's flat he had purchased the baseball bat. There had been a spate of burglaries locally and he purchased the bat for Ms A's protection. It was kept by Ms A in the corner of her bedroom and, to his knowledge, he had not touched it since it was put there in about October. When he left the flat in January the bat remained where it was. It is an agreed fact that at the time of Ms A's death Mr D was on honeymoon with his wife in France. You may conclude that although no other alleles were revealed in the analysis which would be consistent with Mr D being the donor, there is every reason to think he might have done. You should therefore assume that the other three alleles could have been deposited by 400,000 men in the UK of whom the defendant was only one.

Evaluation of DNA evidence

B was asked to evaluate the significance of his findings. He told you that the results were what he would expect to find if:

i. The defendant was present in Ms A's bedroom before her death smoking cigarettes.
ii. The defendant had opened Ms A's purse.
iii. The defendant had handled the baseball bat.

All of the DNA found on the purse could be accounted for by Ms A and the defendant. All of the DNA found on the baseball bat could be accounted for by the defendant. It was possible, however, that someone other than the defendant or someone related to him had handled both the purse and the baseball bat. The DNA evidence is incapable of establishing, by itself, that the defendant did handle Ms A's purse or that he handled the baseball

bat. The defendant is just one of many thousands of men who could have left the cellular material which produced the profiles B obtained.

Directions

The DNA evidence is not alone capable of proving the identity of the killer. All it can do, depending upon your judgment of the evidence of Mr C, Ms E and Mr D, is to narrow down somewhat the group of men who could have left cellular material on the purse and the baseball bat. Even if you were to be sure that Mr C and Mr D did not leave their DNA on those items, there remain many thousands of men in the UK, unrelated to the defendant, who could have done.

However, the DNA evidence does not stand alone. You have heard from Ms A's sister, Ms E, that she visited her sister at lunchtime on Saturday. They had a cup of coffee together. Ms A told her that she was due to pay a substantial bill for repairs to her car at her local garage. She had saved up $500 in cash. She took the money from a pot in the kitchen and placed it in her purse which she put on the kitchen table. It was still there when the defendant called at the flat at about 4pm and Ms E left. That money was never paid to the garage and it was not in the purse when the purse was recovered from the bedside cabinet. At about 11pm on Saturday night the defendant went to a casino in Manchester city centre and remained there until 2 am. He exchanged $500 cash for chips which, during the course of the night, he lost. He left the casino when he was refused credit and the casino refused to cash his cheque. The defendant said in evidence that the $500 was accumulated winnings from previous visits to the casino.

I will remind you of this and the other evidence of the surrounding circumstances, together with the defendant's evidence, in more detail

later. The Prosecution invites you to infer that Ms A took her purse into the bedroom with her. While she was asleep the defendant took the opportunity to steal her money. When Ms A awoke to discover what was happening the defendant beat her with the baseball bat until she was dead. The Defence's case is that no such inference is available or, if it is, you could not be sure of it.

Barbados

Visual Identification

Section 100(6) of the **Evidence Act, Cap 121 as amended by Act No 10 of 2015** states:

> In this section,
>
> ...
>
> "visual identification evidence" means identification evidence relating to an identification based wholly or partly on what a person saw, but does not include picture identification evidence...

In ***Forbes*** **[2001] 1 AC 473, [2000] UKHL 66**, the House of Lords indicated that it is the evidence of an eyewitness who saw (or claims to have seen) the criminal incident, or the events leading up to or following it, which should

be relied on to connect the suspect or defendant with the commission of the offence.

Section 100 of the **Evidence Act, Cap 121 as amended by Act No 10 of 2015**, also details the instances in which visual identification is admissible:

> **...Visual identification excluded unless certain conditions are met**
>
> 100. (1) Visual identification evidence adduced by the prosecutor is not admissible unless
>
> (a) either
>
> (i) an identification parade was held; or
>
> (ii) a video identification was conducted which included the accused before the identification was made; or
>
> (b) it would not have been reasonable to have
>
> (i) held a identification parade; or
>
> (ii) conducted a video identification; or
>
> (c) the accused refused to take part in an identification parade or a video identification and the identification was made without the person who made it having been intentionally influenced to identify the accused.

Further, s 102(1) of the **Evidence Act, Cap121** (BB), refers to the fact that 'where identification evidence has been admitted, the Judge shall inform the jury that there is a special need for caution before accepting identification evidence and of the reasons for the need for caution, both generally and in the circumstances of the case.'

In particular, pursuant to s 102(2) of the Act:

> …the Judge shall warn the jury that it should not find, on the basis of the identification evidence, that the accused was a person by whom the relevant offence was committed unless
>
> (a) there are, in relation to the identification, special circumstances that tend to support the identification; or
>
> (b) there is substantial evidence, not being identification evidence that tends to prove the guilt of the accused and the jury accepts that evidence…

As well, see ***Hall*** **[2020] CCJ 1 (AJ)** (BB).

Section 102(3) outlines special circumstances which include:

> (a) the accused being known to the person who made the identification; and
>
> (b) the identification having been made on the basis of a characteristic that is unusual.

Section 102(4) further provides that the judge shall direct that the defendant be acquitted where:

> (a) it is not reasonably open to find the accused guilty except on the basis of identification evidence;
>
> (b) there are no special circumstances of the kind mentioned in paragraph 2(a); and

(c) there is no evidence of the kind mentioned in paragraph 2(b)...

Points to Consider

i. What happens in a case where the witness indicates that they know the perpetrator (the defendant) and as a result of this, relying on section 100(2)(d), no identification parade is held? Under section100(1)(a)(ii) the police determine that, because the witness speaks of a relationship between themselves and the defendant, 'it would not have been reasonable to have held such a parade' and in compliance with section 100(1)(b) 'the identification was made without the person who made it having been intentionally influenced to make it.'

ii. What if there was no dock identification as in ***Pop*** **[2003] UKPC 40, (2003) 62 WIR 18** (BZ PC), but both the police witness and the civilian witness stated that the defendant was pointed out as being the perpetrator in circumstances where there was no ID parade? Would the classification of "special circumstances" still hold as the State would be relying on section 101(2)(a)? If this is the case and the witness contends that the defendant is a person known to them and the defendant disputes this at trial, should the trial judge give the warning as stated in ***Pop***: 'the Judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade.'

iii. Would this type of scenario be covered under section 102(2)(a), as one of the "special circumstances" set out at section 102(3)(a): 'the accused being known to the person who made the identification'?

See ***Pipersburgh*** **[2008] UKPC 11, (2008) 72 WIR 108** (BZ PC), a case of disputed identification from Belize, in which no identification parade had been held. The trial judge, despite having pointed out the desirability of an identification parade, had failed to give any directions to the jury along the lines recommended by the Privy Council in ***Pop***. However, the Court of Appeal considered that because the judge had given generally satisfactory ***Turnbull*** directions, there had been no miscarriage of justice. The Privy Council disagreed, pointing out (at [15]) that it was necessary to distinguish between general directions along ***Turnbull*** lines, and directions on the dangers of dock identification evidence. But this scenario here is not a dock identification. Rather it is a disputed identification along the lines that a defendant at trial is saying the witness does not know them. In this scenario, it must be argued that the police should have carried out an ID parade. But what if none was done and the police only relied on the witness saying that they knew the defendant? And because of this prior knowledge and relationship, no parade was held as it was thought to be in conformity with the **Evidence Act, Cap 121** (BB) and fell within the special circumstances, or it was deemed as not reasonable to hold an ID parade because the police fully accepted that the witness knew the defendant. The defendant is not obligated to answer questions by the police if they elect to remain silent and only wish to raise the disputed relationship between themselves and the witness at trial. If this occurs, it may present a challenge.

iv. ***Goldson (*****2000) 56 WIR 444** (TT PC), where Lord Hoffman at 448, stated:

> The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as

> experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification.

However, an identification parade in ***Goldson*** would have been for an altogether different purpose. Lord Hoffman went on to point out that the source of the obligation of the police to hold identification parades in England is to be found in the Code of Practice issued by the Home Secretary pursuant to s 66 of the **Police and Criminal Evidence Act 1984** (UK).

v. Lord Hobhouse in ***Popat*** **[1998] 2 Cr App R 208** (UK CA) at 215, 'There ought to be an identification parade where it would serve a useful purpose.'

vi. See also the guidance for judges in relation to commenting in cases of recognition where there was determined to be no need for an ID Parade: ***Ebanks*** **[2006] UK PC 6**, **(2006) 68 WIR 390** (JM PC), and also ***Harris*** **[2003] EWCA Crim 174** per Potter LJ at [33], who pointed out that although the holding of an identification parade in a recognition case put the issue of recognition 'no further from the prosecution point of view', it could be material where the recognition was disputed, since there might be 'the possibility of a change of mind and/or a failure to identify the appellant at the identification parade, of which possibility the appellant was, in the end, deprived.' In ***Ebanks***, the Board therefore considered that the trial judge had been wrong to suggest to the jury that a parade would have served no useful purpose. However, it concluded that since a parade was in fact held and the judge had given ample directions on the need to ensure that it had been fairly conducted, there was no basis to disturb the conviction on this score. See also ***John v The State*** **[2009] UKPC 12, (2009) 75 WIR 429** (TT PC) per Lord Brown at [14]: 'As

a basic rule, an identification parade should be held whenever it would serve a useful purpose.'

vii. What do "special circumstances" within the ambit of s 102(2)(a) of the **Evidence Act, Cap 121** (BB) mean? See ***Hall*** **[2020] CCJ 1 (AJ)** (BB); ***Severin*** **[2018] CCJ 20 (AJ)** (BB). In the case of ***Hall***, the nature and circumstances of the previous sightings of the witness Benn, were such as to be regarded as "special circumstances" for the purposes of s 102(2)(a) of the **Evidence Act, Cap 121** (BB). Also note, although the identification evidence had passed the threshold that warranted it being left to the jury, there was still a need to give the jury certain directions and warnings. Accordingly, the directions and warnings given by the trial judge were examined. These directions and warnings were found to be adequate and, indeed, exemplary.

viii. Note also ***Tido*** **[2011] UKPC 16, (2011) 79 WIR 1** (BS PC) at [21], that a dock identification of a defendant is not inadmissible evidence per se.

Identification Parade

Section 100(6) of the **Evidence Act, Cap 121 as amended by Act No 10 of 2015** states:

> In this section,
>
> ...
>
> "Identification parade" means an identification procedure conducted by a police officer in which a suspect and other persons who physically resemble that suspect are

> shown to a person to determine whether that suspect can be identified by the person as having committed an offence…

Also it is worth noting the **Evidence (Identification of Persons) Regulations 2014**. These Regulations were made pursuant to section 169 of the **Evidence Act, Cap 121** (BB): ***Forbes* [2001] 1 AC 473, [2000] UKHL 66**.

It is not always practical to find persons who may look similar to the suspect, whether it be by way of age or some peculiar characteristic. Also, if one has to test the veracity of police witnesses, it may highlight the deficiencies in the keeping of records of those persons who are actually placed on parade. All of these are circumstances to which the trial judge must be alert, especially when dealing with an unrepresented defendant. Whether all of those on parade are similar in height, age, complexion, and build, are matters about which the trial judge may have to remind the jury and specifically ensure that the jury is directed upon the issue of the fairness of the identification parade.

In Barbados, it is highly unlikely, as a result of the **Evidence Act, Cap 121** (BB), that there will be dock identifications. But there may be circumstances in which a judge has to determine whether or not to admit evidence where there was no ID parade.

Thus, what happens in a case where there is no ID parade and the Prosecution relies on the witness who points out a suspect in the street and the evidence is technically admissible under the **Evidence Act, Cap 121** (BB)? Guidance may be found at [21] and [22] of the judgment in ***Tido* [2011] UKPC 16, (2011) 79 WIR 1** (BS PC), even though that case dealt with the issue of a dock identification. In particular, [21] provides:

The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well- intentioned eye-witness to be the person who had committed the crime with which he or she was charged.

At [22], it is further noted:

> The Board does not consider that this was a case where the judge was bound to have concluded that the admission of the dock identification of the appellant by Ms Edgecombe would result in an unfair trial to the accused. But the discretion to admit the evidence must be exercised in light of the particular circumstances of the individual case. Relevant circumstances will always include consideration of why an identification parade was not held. If there was no good reason not to hold the parade this will militate against the admission of the evidence. Conversely, if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence…In this case, however, counsel for the appellant had pointed out that the prosecution had not offered any explanation for the failure to hold such a parade but the judge in giving her ruling that the evidence was admissible made no reference to this. There was therefore no consideration of why an identification parade had not been held.

Further, [23] – [26] of the judgment, although dealing with dock identification, speaks to exercising discretion and whether or not to admit evidence. Where there is no ID parade, extreme care should be taken both in the exercise of the discretion and also in the directions given to the jury in relation to how they should deal with such evidence and the dangers of which they must be aware in the acceptance of such evidence.

Guidelines were laid down for trial judges regarding disputed identification evidence: ***Turnbull*** **[1977] QB 224** (UK CA).

Points to Consider

i. The type of issues that have arisen in the UK clearly also show that legislation along the lines of the **Police And Criminal Evidence Act 1984** (UK) may be of particular significance, especially when a judge, at trial, has to make rulings on the admissibility of evidence such as "street" identifications, as in the case of ***Forbes***. Generally speaking, there should be emphasis placed on whether the **Evidence (Identification of Persons) Regulations 2014** (BB) have been complied with, or if there has been non-compliance or otherwise a breach of these regulations. The trial judge must be alert to this and deal with it. This is extremely crucial when dealing with unrepresented persons. Care must also be exercised when dealing with identification evidence which pre-dates these regulations: see for example, the **Police And Criminal Evidence Act 1984** (UK).

ii. Outlined below are some considerations for the conduct of an ID Parade:

   a. What if the suspect does not say whether or not they are known to a witness who purports to know the suspect?

   b. If such a suspect is quiet about this, should it not be mandatory to have the ID parade?

   c. Should the investigating officers not always try to have a parade in fairness to both the Prosecution and also the defendant unless it is beyond dispute that the witness clearly knows the defendant?

Even with the **Police And Criminal Evidence Act 1984** in the UK, there have been instances when the courts have been called upon to determine whether or not there was a need for a parade in the particular circumstances. All of these are matters upon which a trial judge will have to make rulings and may have to issue directions in the summation, especially where the case depends wholly or substantially upon the evidence of one or more identification witnesses.

Identification From CCTV and Other Visual Images

Section 100(6) of the **Evidence Act, Cap 121 as amended by Act No 10 of 2015** states:

> In this section,
>
> ...
>
> "picture identification evidence" means identification evidence relating to an identification made wholly or partly by the person who made the identification examining pictures or photographs kept for the use by a police officer...
>
> ...
>
> "video identification" means an identification procedure conducted by a police officer in which moving images

> or still images of a suspect and other persons who physically resemble that suspect are shown to a person to determine whether that suspect can be identified by the person as having committed an offence…

In ***Dwyer*[1925] 2 KB 799** (UK CA), Lord Hewart CJ stated at 802, that 'the fair thing is to show a series of photographs and to see whether the person who is expected to give information can pick out the appropriate person.'

How should a judge approach the issue of the exercise of their discretion where the expert evidence, though admissible, is more prejudicial to the defendant than probative of guilt? In ***Dupas* (2012) VSCA 32*8*** (AU-VIC), at [78], it was noted:

> When the unfair prejudice was said to be a risk that the jury would attach undue weight to the impugned evidence, the trial judge was required to evaluate what weight could reasonably be assigned to that evidence, in order to assess whether there was such risk. That called for some assessment of the reliability and quality of the evidence, matters ordinarily viewed as being separate and distinct from the credibility of the witness from whom the evidence was to be elicited…

When assessing the probative value of the expert evidence (and whether the prejudicial effect outweighs the probative value), the court should not consider its credibility, reliability or weight: ***Shamouil* (2006) NSWCCA 112** (AU-NSW).

In ***Attorney General's Reference (No 2 of 2002*) [2002] EWCA Crim 2373, [2003] 1 Cr App R 21,** Rose LJ, at [19], outlined four circumstances in relation to the use of photographic and video image as follows:

i. Where the photographic image is sufficiently clear, the jury can compare it with the defendant sitting in the dock: ***Dodson*** **(1984) 1 WLR 971** (UK CA).

ii. Where a witness knows the defendant sufficiently well to recognise them as the offender depicted in the photographic image, the witness can give evidence of this, and this may be so even if the photographic image is no longer available to the jury: ***Taylor v Chief Constable of Cheshire*** **[1986] 1 WLR 1479** (UK QBD).

iii. Where a witness who does not know the defendant spends substantial time viewing and analysing photographic images from the scene thereby acquiring special knowledge which the jury does not have, the witness can give evidence of identification based on a comparison between those images and a reasonably contemporary photograph of the defendant, provided that the images and the photograph are available to the jury: ***Clare*** **[1995] 2 Cr App R 333** (UK CA).

iv. A suitably qualified expert with facial mapping skills can give opinion evidence of identification based on a comparison between images from the scene (whether expertly enhanced or not) and a reasonably contemporary photograph of the defendant, provided the images and the photograph are available for the jury: ***Stockwell*** **[1993] 97 Cr App R 260** (UK CA).

Points to Consider

i. In Barbados, challenges to admissibility of evidence referred to in s 137 of the **Evidence Act, Cap 121** (BB) can be made under s 115 of the Act.

ii. The **Evidence (Identification of Persons) Regulations 2014** (BB) should be observed in considering what codes of practice the police are expected to follow when video identification of suspects is done. However, it is noteworthy that these regulations may not be applicable to matters which pre-dated the regulations.

iii. What about the issue of expert evidence being used in this type of identification procedure? See Horry, Ruth and others, **Video Identification of Suspects: A Discussion of Current Practice and Policy in the United Kingdom** (2013) 7 (3) Policing: A Journal of Policy and Practice 307.

iv. Careful directions on any strengths and weaknesses in relation to the video ID, CCTV, and photographs should be given.

Identification by Finger and Other Prints

Evidence is to be presented by a qualified expert, with appropriate experience in examining and comparing prints: ***Barnes*** **[2005] EWCA Crim 1158, [2005] All ER (D) 117 (May)**.

Points to Consider

i. Judges however, have the discretion to consider the experience of the expert witness: ***Buckley*** **(1999) 163 JP 561** (UK CA).

ii. Fingerprint evidence may be excluded if its prejudicial effect outweighs its probative value: ***Buckley*** per Rose LJ.

iii. The latest guidelines emphasise the primacy of subjective evaluation when comparing prints and do not rely on any particular number of matching characteristics.

iv. **Footprints:** Even though footprints appear to match exactly, this can, at most, place the defendant person within a given group of individuals who could have left the crime scene prints.

v. **Footwear:** The Court of Appeal in ***T*** **[2010] EWCA Crim 2439, [2011] 1 Cr App R 85** (UK CA) warned that there was no sufficiently reliable data on which an expert witness could purport to offer any kind of scientific or statistical assessment as to whether footwear impressions had been left by the defendant.

vi. **Ear-prints:** The Court of Appeal in ***Kempster*** **[2008] EWCA Crim 975, [2008] 2 Cr App R 256** concluded at [27]:

> ...ear-print comparison is capable of providing information which could identify the person who has left an ear-print on a surface. That is certainly the case where minutiae can be identified and matched. Where the only information comes from the gross features, we do not understand him to say that no match can ever be made, but there is likely to be less confidence in such a match because of the flexibility of the ear and the uncertainty of the pressure which will have been applied at the relevant time.

vii. It is to be noted that disclosure can be an issue, as well as the question of evidence from independent experts. However, the cost of the provision of expert evidence to defendant persons who are

indigent will always be a valid concern for consideration, as to who pays for this. There may be cause for considering constitutional provisions, as well as the duty of the State to provide facilities for a defendant to conduct their defence: ***Gibson v Attorney General of Barbados*** **[2010] CCJ 3 (AJ) (BB)**, **(2010) 76 WIR 137**.

viii. The article, Gary Edmond and Mehera San Roque, **Quasi-justice: Ad hoc expertise and identification evidence** (2009) 33 Crim LJ 8, is helpful when looking at the "specialised knowledge" of familiars and the issues relating to reconsidering fact/recognition/ opinion dichotomies. The article makes a distinction between 'the identification evidence of familiars and those – like investigators – who generally have limited familiarity with the accused.' Even though the article deals with Australian cases, the Act mentioned is quite similar in part to the **Evidence Act, Cap 121** (BB). Page 29 of the article notes:

> …Familiarity, and the identification evidence of familiars has created problems for judges. A potential solution is offered, grounded in the text of the Evidence Act.
>
> Because the distinction between "fact" and "opinion" is philosophically complex and not particularly productive when pushed, practically, it makes sense to treat virtually all identification evidence as opinion evidence. Subtle questions about whether some identifications, or some types of "recognition", are factual or non-interpretative, are of little consequence. This means that the vast majority of evidence based on sound recordings and visual images should be treated as opinion evidence and subject to Pt 3.3 of the UEL. Characterising identification evidence as opinion focuses attention on issues which

relate to the reliability of the opinion – is it "specialised knowledge" based on "experience"? – rather than encouraging a controvertible attempt to reconstruct the circumstances in which the original identification was made. Such an approach eliminates the need to determine whether the identification was unconscious and instantaneous (fact or recognition) or interpretive and deductive (opinion).

In order to give opinion evidence about identity, a person who is not a witness to relevant events needs to demonstrate that his/her opinion satisfies s 79 – that is, "wholly or substantially" based on "specialised knowledge" based on their "training, study or experience". There are good grounds for believing that a familiar has "specialised knowledge" based on their long and intimate "experience". That is, months and preferably years of close contact with a spouse, relative, friend or colleague provides familiarity with his/her appearance, mannerisms and voice. Subject to the duration and quality of the sounds and/or images and the exclusionary discretions, "specialised knowledge" based on long personal "experience" provides a credible basis for the admissibility of opinion about the identity of familiars.

It is important to emphasise that this approach not only makes intuitive sense – that is, those who are most familiar with a person are in the best position to identify them – but it also accords with empirical research on the ability of individuals to make accurate identifications

> from sound recordings and images. Studies have shown that test subjects are far more successful at identifying people with whom they are very familiar than persons unknown to them. These results are fairly stable across high and low quality images and do not seem to be dramatically affected by whether the observer is an expert (in a field such as psychology or anatomy). The preference for allowing lay people to give opinions based on "specialised knowledge" about a person derived from their "experience" is, in this way, generally reliable. This empirically predicated approach to the opinions of familiars is quite different to the position of ad hoc experts.

The article, at page 31, further outlines that some of these concerns were expressed by Kirby J at [56] of ***Smith*** **(2001) 206 CLR 650** (AU HC), where he notes:

> The experience of the law, expressed with increasing conviction during the last two decades, is that very great risks of wrongful conviction and miscarriages of justice can attend identification (and recognition) evidence generally, and particularly where such evidence is based on photographs. In this sense, I see no difference in the dangers caused by evidence of identification from photographs of the offender in action, such as produced by bank surveillance, and identification from photographs of the accused and other suspects held by police. The risks, already large, may be enhanced by the natural desire of a person performing the act of identification to produce an affirmative outcome

> rather than to admit to incapacity and failure. The risks are still further increased where the person concerned has a relevant professional motivation (even if only subconsciously) to identify a person.

Identification by Voice

Where voice recognition evidence is admitted, juries are entitled to listen to recordings to try to identify who said what, provided they are directed that when they listen to the tapes, they should bear in mind the evidence of the voice recognition witness: ***Flynn*** **[2008] EWCA Crim 970, [2008] Cr App R 20**; ***Leung*** **(1999) 47 NSWLR 405** (NSW CCA) at [44]; ***Irani*** **(2008) 188 A Crim R 125** (NSW CCA); ***Dhanhoa*** **(2003) 217 CLR** (AU HC) at [22] and [53].

Where voice identification is an issue, the jury should be given the full ***Turnbull*** warning: ***Hersey*** **[1998] Crim LR 281** (UK CA). The warning should be more stringent than that given in relation to visual identification: ***Roberts*** **[2000] Crim LR 183** (UK CA).

Points to Consider

i. A jury should be permitted to hear prepared tapes on which expert opinion is based: ***Bentum*** **(1989) 153 JP 538** (UK CA); ***O'Doherty*** **[2002] 1 NI 263, [2003] 1 Cr App R 5**.

ii. It is also worth considering whether this voice identification evidence is based on "specialised knowledge" in the terms set out at s 66 of the **Evidence Act, Cap 121** (BB), or is it accepted in contravention of this section? Also, does the jurisdiction of Barbados suffer the same criticisms expressed in **Quasi-justice: Ad hoc expertise and identification evidence**? And will the trial judge be called upon to

determine whether this is ad hoc expertise, or whether it is from specialised knowledge based on training, study and experience?

Identification by DNA

Section 3 of the **Forensic Procedures and DNA Identification Act, Cap 121B** (BB) provides as follows:

> **Forensic procedures by consent**
>
> 3. (1) Subject to this Part, a suspect referred to under section 5 other than an incapable person may give his informed consent to the conduct of a forensic procedure in accordance with that section.
>
> (2) An authorised person may carry out a forensic procedure on a suspect under this Part where the informed consent of the suspect has been obtained.
>
> (3) An authorised person referred to under subsection (2) shall carry out the forensic procedure in accordance with Part V.

DNA profiling plays a significant part in the successful prosecution of the perpetrators of crime: ***Grazette*** **[2009] CCJ 2 (AJ) (BB), [2009] 74 WIR 92**.

In ***R (S) v Chief Constable of the South Yorkshire Police*** **[2004] UKHL 39, [2004] 1 WLR 2196**, Lord Steyn stated:

> ...

1. It is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from enquiries. Thus in the 1990s closed circuit television (CCTV) became a crime prevention strategy extensively adopted in British cities and towns. The images recorded facilitate the detection of crime and prosecution of offenders. Making due allowance for the possibility of threats to civil liberties, this phenomenon has had beneficial effects.

2. The use of fingerprint evidence in this country dates from as long ago as 1902. In due course other advances of forensic science followed. But the dramatic breakthrough was the use of DNA techniques since the 1980s. The benefits to the criminal justice system are enormous. For example, recent Home Office statistics show that while the annual detection rate of domestic burglary is only 14%, when DNA is successfully recovered from a crime scene this rises to 48%. It is, of course, true that such evidence is capable of being misused and that courts must be ever watchful to eliminate risks of human error creeping in. But as a matter of policy it is a high priority that police forces should expand the use of such evidence where possible and practicable.

However, DNA evidence does not stand alone, and its significance is to be determined by the jury. The challenge is in having the relevant samples or evidence from crime scenes properly collected and tested and the evidence provided in order that it can be placed before a court of law.

In ***Pringle*** **[2003] UKPC 9; (2003) 64 WIR 159** (JM PC), Lord Hope noted at [19]:

> …the probative effect of the DNA evidence must depend on the question whether there is some other evidence which can demonstrate its significance. And it is for the jury, not the person who gives the DNA evidence, to assess its significance in the light of that other evidence.

DNA evidence, even if obtained unlawfully, could still be used as evidence. In ***Attorney-General's Reference*** **(No 3 of 1999) [2001] 2 AC 91**, Lord Steyn, at page 188E, noted: '…the purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interest of everyone that serious crimes should be effectively investigated and prosecuted.'

Belize

Visual Identification

In ***August*** **[2018] CCJ 7 (AJ)** (BZ), the Prosecution's case was purely based on circumstantial evidence. One of the witnesses, Garbutt, gave evidence, noted at [14], that:

> …at about 9:15 pm on 23 May 2009 he came from inside his house on to his verandah as he had heard his dogs barking. When he came out, he saw August, whom he had known for some 8 years, and another man on bicycles entering the Garbutt property from the general direction of the highway. He observed them riding past his house through to the back of the land until they "vanished" into the night. He stayed for about 5 minutes on his verandah and then went back inside. Shortly after 10:00 pm Garbutt was alerted once more by his dogs' barking. Again, he came out to the verandah where he observed the same two persons riding in the opposite direction; that is, coming from the back of the yard going towards the highway. August, who was riding in the back, was now carrying a white cloth in his right hand. Garbutt went inside as they went across the highway.

At [23], the court noted the following:

> The trial judge warned the jury that the prosecution's case depended largely on the accuracy of the identification of August by the witness, Garbutt. He told the jury that the effect of August's alibi defence was that he was saying that Garbutt was mistaken. The jury was also directed that mistakes could be made in the recognition of someone known to a witness, even a close relative. Accordingly, the judge told the jury that they needed to make a cautious examination of the circumstances in which the identification was made. To assist the jury, the judge highlighted the length of time and conditions

> under which Garbutt had sight of August. The judge pointed out the weaknesses in that evidence noting, specifically, the duration of the sighting, the distance from which Garbutt would have seen August, the fact that Garbutt only had a side view of him, the absence of a direct indication of how fast August and the other person were riding, and the lighting conditions…

In ***Stain*** **(Belize CA, Crim App No 4 of 2018)**, the witness was permitted by the Judge to point out the appellant in the dock as the gunman she had seen, and referred to as Bigga, on the night of the shooting incident. This permission was granted notwithstanding the objection of the Defence, who contended that, in the absence of evidence that the witness had previously pointed out the appellant at an identification parade, she ought not to be allowed to point out the appellant at trial, as that would amount to a dock identification. The court at [47], adopted the language of Lord Kerr in ***France*** **[2012] UKPC 28, (2012) 82 WIR 382** (JM PC), and noted as follows:

> The warning in the present case needed to be directed …not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made.

Also helpful is ***Espinosa*** **(Belize CA, Crim App No 8 of 2015)** at [9] – [14].

Identification Parade

Section 2 of the **Police (Identification Parades) Regulations 2006, SI No 118/2006** (BZ) outlines its purpose as, 'to ensure that the evidence of identification is obtained in a fair and transparent manner so as to eliminate any risk of misidentification and the consequent miscarriage of justice.' The Regulations make provision for the general and special rules governing Identification Parades with which all police officers are required to comply.

In ***Espinosa***, the court noted at [24] to [27]:

> [24] The need for fairness in carrying out identification parade has been the common law, and now is statutory law in Belize. **The Police (Identification Parades) Regulations, 2006**, **Statutory Instrument No. 118 of 2006**, is part of the statutory law. It provides at regulation 2 as follows:
>
> > **2. The purpose of these regulations is to ensure that the evidence of identification is obtained in a fair and transparent manner so as to eliminate any risk of misidentification and consequent miscarriage of justice.**
>
> [25] The rest of the regulations are directions imposing steps and other actions on police officers when carrying out identification parade. So, what is fair and transparent is determined largely from the facts of the particular case, and taking into account the requirements in the Police (Identification Parades) Regulations, 2006.
>
> [26] While bearing in mind fairness and transparency, it is important to note that, holding an identification

parade is a very important step in the investigation of a crime. It is held when a police officer considers it to be useful in the investigation, and the suspect consents to participating in the parade; moreover, it must be held when a suspect has demanded that it be held.

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

***Ical* (Belize CA, Crim App No 3 of 2016)** is also instructive. In that case, one of the issues raised was that the learned trial judge failed 'to warn the jury of the unfairness and unreliability of the results of the identification parade having regard to the prior photograph identification.' Counsel for the Appellant contended at [9], *inter alia*, that 'there is no evidence as to how and what were the circumstances which led the complainant to pick out the Appellant in a photograph or photographs at the police station; whether it was after several attempts or any details of this nature.'

Further, at [12], the court noted:

> The Respondent's argument, relying on R v Lamb, was that the decision about whether to lead the evidence of the prior photograph identification was for the defence, particularly since the probable effect of that line of questioning was explained to the Appellant by the learned trial judge in the absence of the jury. The Respondent also appeared to argue that once the learned trial judge told the jury to disregard the reference to the photograph identification, there was no further obligation to warn the jury to be cautious, since this would effectively remind them about it. We agree with the broad principle that the decision to refer to the photograph identification should be made by the defence.

The court also highlighted at [18], that the issue in the case was identification, which was also the entire basis of the Prosecution's case and as such, the prior photograph identification, particularly in light of the type of photograph, 'was a weakening factor to be taken into account when assessing the results of the identification parade.'

Identification from CCTV and Other Visual Images

In ***The Queen v Lavern Longsworth*** (Ruling, dated 22 October, 2012, delivered by the Honourable Adolph D Lucas, Justice of the Supreme Court), the defendant was on trial for the murder of her common-law husband (the deceased). The Prosecution had four (4) video recordings in

which the defendant allegedly admitted causing injuries to the deceased. They wanted to tender the video recordings into evidence. However, for numerous reasons, the Defence objected to the admission of the video recordings into evidence. The learned judge noted that there is no distinct express statutory provisions for the admission of video or tape recordings in the Courts in Belize. Notwithstanding this, it was noted that, upon interpretation of s 4 of the **Evidence Act, Chapter 95** (BZ), it was open to the court to draw upon the large extent of English jurisprudence for guidance on the issue. The court therefore ruled that the video recordings were relevant to the issue as to whether the defendant caused the death of the deceased. In terms of the cogency and authenticity of the evidence on the video recordings, the court noted that they fell within the domain of the jury and were therefore admissible and would be shown to and heard by the jury after cross-examination of each of the pertinent witnesses. The court further ruled that it would be for the jury to be sure of the authenticity and cogency of the video recordings and so too, the credibility of the witnesses with respect to the video recordings.

Identification by Finger and Other Prints

Section 19 of the **Police Act, Rev Ed 2020, CAP 138** (BZ) provides as follows:

> 19. - (1) It shall be lawful for the competent police authority to take or cause to be taken and to record for the purposes of identification the measurements, weight, photographs, and prints of all persons who may from time to time be in lawful custody.
>
> (2) If such measurements, weight, photographs and prints are taken of a person who has not previously

> been convicted of any criminal offence and such person is discharged or acquitted by a court, all records relating to such measurements, weight, photographs (both negatives and copies) and prints shall be immediately destroyed or handed over to such person.
>
> (3) Every competent police authority may take such action as the proper and efficient execution of the provisions of this section may reasonably require.
>
> (4) For the purposes of this section the competent police authority shall be any non-commissioned officer of the Department authorised by the Commissioner or any commissioned officer of such Department.

In ***August***, the Caribbean Court of Justice was, *inter alia*, called upon to consider the issue of a shoe print which was found beside a pool of water close to the deceased's home, of which a plaster mould was made. The court noted at [36]:

> ...Although at the time of examination the mould was found to have been broken, it is important to note that the forensic evidence revealed that the sole pattern of the shoe that made the shoe print and the pattern of the corresponding portions of the sole of the left tennis shoe (worn by August the day after the killing) were one and the same. In addition, the forensic evidence was that every feature of the sole pattern on the heel and toe portions of the cast impression was of the same dimensions as the corresponding feature of the sole pattern of August's left tennis shoe. The forensic expert,

> Mrs Bol-Noble, made it clear that the shoe print found close to the deceased's home the morning after the killing, "may" have been made by August's tennis shoe. There was therefore sufficient forensic evidence linking the shoe print at least to shoes of the type that August wore that evening, and on which the jury could have inferred that the shoe print found near to the deceased's home was that of August's left tennis shoe. This further bolstered any initial inference to be drawn that August was in the vicinity of the crime. The trial judge ought to have so directed the jury. Instead, he misdirected them that they could not rely on the forensic evidence of the shoe print, because the expert was not certain, and they had to be "sure" about these "pieces of evidence". We do not say that the jury should have been told that each strand required proof beyond a reasonable doubt or that they should have been told that there was such proof where the evidence was not of such a quality. However, the course that the trial judge ought to have taken was to point out to the jury that despite it not being established beyond a reasonable doubt that this was August's shoe print, it was one strand in the chain of circumstantial evidence which, when put with the others, could lead to proof beyond a reasonable doubt.

At the Supreme Court trial in 2017, fingerprints found on the scene were admitted into evidence. Note that this case is pending appeal: ***The Queen v Brian Clark & Donovan Casildo*** **(Belize CA, Crim App Nos 9 & 10 of 2017**.)

Identification by Voice

In ***Taylor*** **(Belize CA, Crim App No 6 of 2017)**, the appellant's case had to do only with evidence of visual identification as distinct from evidence of voice identification. The court noted at [12] and [13] that:

> [12]…On the subject of voice identification, relevant guidance is to be found in the decision of the Judicial Committee in *Phipps v Director of Public Prosecutions* [2012] UKPC 24 (judgment delivered on 27 June 2012). That was a case in which, according to the judgment of the Board, at para 21, part of the trial judge's pertinent direction to the jury had been as follows:
>
> > 'Now, in order for the evidence of a witness to be accepted who said that he recognized an accused person by voice, to be cogent there must be evidence of the degree of familiarity the witness have (sic) had with the accused and his voice including the time the witnesses may have had to listen [to] the voice of the accused and the occasion when the recognition of the voice occurred must be such that such words used to make a recognition of that voice is (sic) safe to act on.'
>
> [13] It was further noted in the Board's judgment that the trial judge there had reminded the jury that only one of the three witnesses giving evidence of voice identification had claimed to be familiar with the so-called 'telephone voice' of Mr Phipps. The topic had been returned to later in the summation when the directions given earlier had been made the subject of a reminder

and the jury had been warned of the need to exercise 'very special caution' before accepting that the voice said to have been heard was indeed the voice of Mr Phipps. The Board also pointed out in its judgment that the trial judge had, at the request of the Crown, directed the jury that the witnesses who had given evidence of voice identification might, even if they were honest, be mistaken. Indeed, the Board saw fit to reproduce, at para 22 of its judgment, the relevant further direction of the trial judge, which was as follows:

> '…I omitted to indicate to you that sometimes people can be very convincing although they are mistaken when they say that they identify somebody by their voice on the telephone. And you are going to be very careful in your assessment of the evidence because an honest witness can also be a mistaken witness. The witness may honestly feel that the person they heard on the phone was John Brown, but in fact it turns out to be otherwise. So you look on the evidence, the circumstances under which the identification of the voice was made. You look at the previous history of the person who heard the particular voice. The person who seeks to identify the person by voice, what opportunity that other person would have had to have heard the voice.
>
> I told you that of the three person (sic) who said they heard the accused, only one had given evidence that he had spoken to and heard the accused on a telephone. So please remember that.'

The court then went on to conclude at [20]:

> …Manifestly, neither the evidence of identification adduced by the Crown against the appellant nor the directions of the judge on identification were capable of passing muster. The case that the appellant was on that street and on those premises at the material times cannot, in short, be taken to have been established to the requisite standard by the Crown.

Identification by DNA

At the Supreme Court trial, DNA evidence was adduced by the Crown and was admitted into evidence: ***The Queen v Brian Clark & Donovan Casildo***.

Guyana

Visual Identification

In ***Rowe v The State*** **(Guyana CA, Crim App No 23 of 2013)**, the court, *inter alia*, had to consider the issue of whether the trial judge failed to direct the jury on the weaknesses of the identification evidence of two witnesses, as well as give proper directions on the discrepancies between the evidence of these two witnesses. In considering this issue, the court noted at [11] to [13]:

> 11. A useful starting point is the guidelines laid down in ***R v Turnbull*** [1976] 3 All ER 549, which stipulate that the trial judge must:

(i) where the case against an accused depends wholly or substantially upon the correctness of identification, warn the jury as to the special need for caution before convicting in reliance on the correctness of such evidence, give the reason for the warning, and point out that a mistaken witness can be a convincing witness and that a number of witnesses can be mistaken;

(ii) direct the jury to examine closely the circumstances in which the identification was made, highlighting such matters as the length of the observation, the distance from which it was made, whether there was any impediment to the observation, whether there was prior knowledge, the length of time between the original observation and subsequent identification to the police, and material discrepancies between the initial description and the accused's actual appearance;

(iii) discuss any specific weaknesses in the identification evidence;

(iv) remind the jury that mistakes in recognition can occur even of close relatives and friends; and

(v) highlight the evidence capable of supporting the identification, as well as any evidence which might appear to, but does not in fact, support the identification.

12. Since *Turnbull*, a plethora of cases have affirmed and expanded these guidelines. One of the earliest to do so in this jurisdiction was the ***State v Green and Alleyne***

(1979) 26 WIR 395, where the Court of Appeal of Guyana held that the *Turnbull* guidelines were to be applied 'wherever the conditions of identification are difficult or poor or otherwise such that the possibility of mistake is real, whether the person identified was known to the identifier or not.' (per Haynes C). One aspect of the directions that has been stressed is the need to explain to the jury why there is the need for caution, which is the law's experience of wrongful convictions arising from erroneous identification. In ***Junior Reid el al v R*** (1989) 37 WIR 346, Lord Ackner emphasised (at 349) that it was important to tell the jury why there is the need for caution, for if not they might not heed the warning 'full-heartedly'.

13. Importantly, it has also been held that a failure to give a *Turnbull* direction in a case depending on identification evidence will generally result in a substantial miscarriage of justice, necessitating the quashing of the conviction: ***Kirpaul Sookdeo v the State*** (1972) 19 WIR 407; ***Calvin Douglas v R*** (1995) 47 WIR 340. This will only be avoided if the evidence is so compelling that it is plain that a conviction was inevitable, even had the direction been given. However, once the need for caution is impressed upon the jury, 'there is…no special incantation of words which the trial judge is required to use…for each summation must, of necessity, be tailored to the particular circumstances of the case': per Massiah JA in *Greene and Alleyne* at 409.

Identification from CCTV and Other Visual Images

Section 89 of the **Evidence Act, Cap 5:03** (GY) defines "document" to include:

> i. books, maps, plans, graphs, drawings and photographs;
>
> ii. any disc, tape, soundtrack or other device in which sound or other data (not being visual images) are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom;
>
> iii. any film, negative, tape or other device in which one or more visual images are embodied so as to be capable (with or without the aid of some other equipment) of being reproduced therefrom.

Section 92 of the **Evidence Act, Cap 5:03** (GY) provides for the admissibility of certain documents in criminal proceedings and states as follows:

> (2) In any criminal proceedings where direct oral evidence of a fact would be admissible, any statement contained in a document and tending to establish that fact shall, on production of the document, be admissible as *prima facie* evidence of that fact if –
>
> (a) the document is, or forms part of, a record relating to any trade or business and compiled in the course of that trade or business from information supplied (whether directly or indirectly) by persons who have, or may reasonably be supposed to have,

personal knowledge of the matters dealt with in the information they supply; and

(b) the person who supplied the information recorded in the statement is called as a witness in the proceedings:

Provided that the condition that the person who supplied the information recorded in the statement shall be called as a witness need not be satisfied if he is dead, or outside Guyana, or unfit by reason of his bodily or mental condition to attend as a witness, or cannot with reasonable diligence be identified or found, or cannot reasonably be expected (having regard to the time which has elapsed since he supplied the information and to all the circumstances) to have any recollection of the matters dealt with in the information he supplied. ...

Identification by Finger and Other Prints

In ***Swamy v The State*** **(1991) 46 WIR 194** (GY CA), the deceased was killed in October 1985 in the home of another person of which she had been left in charge in the absence of the owner. The appellant was an occasional visitor to that home and following the death of the deceased, a partial palm-print was found at the scene of the crime; the partial palm-print was stated by a finger-print expert to be that of the appellant, although the palm-print might have been made some two weeks before the murder. The appellant was charged with murder. The fingerprint expert gave evidence and the evidence relating to the palm-print was the only real evidence linking the appellant with the crime. The appellant herself

vehemently denied having been present at the scene of the crime on the day in question. The trial judge directed the jury that they should not lightly disregard the evidence of an expert unless they had good reason to do so. The jury found the appellant 'Guilty' of murder and she appealed against her conviction.

On appeal, the court held that it was for the jury to decide whether or not to accept and act upon the evidence of a witness; it therefore followed that the judge's direction that they should not lightly brush aside the evidence of an expert witness was a material misdirection. The court further noted that since the misdirection had related to the only material evidence against the appellant, and she had denied being at the scene of the murder on the day in question, it could not be said that a properly-directed jury would inevitably have arrived at the same verdict. In these circumstances, the appeal was allowed, and the conviction and sentence set aside.

In this Chapter:

Chapter 10
Circumstantial Evidence

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Circumstantial evidence is evidence of particular facts (circumstances) from which inferences and/or conclusions (of certain occurrences) may be drawn. The case against a defendant may rely partially or entirely on circumstantial evidence. Common examples of circumstantial evidence may include evidence that goes to motive, opportunity, state of mind, preparation, identification, and possession of items used to commit a crime.

General Guidelines

Most criminal prosecutions rely on some circumstantial evidence. Others depend entirely or almost entirely on circumstantial evidence; it is in this category that most controversy is generated and specific directions will be required.

A circumstantial case is one which depends for its cogency on the unlikelihood of coincidence. The Prosecution seeks to prove separate events and circumstances which can be explained rationally only by the guilt of the defendant. Those circumstances can include opportunity, proximity to the critical events, communications between participants, scientific evidence, and motive.

Pollock CB in ***Exall*** **(1866) 4 F & F 922; 176 ER 850** at 853, compared circumstantial evidence to a rope comprised of several cords. He went on to say:

> One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence - there may be a combination of circumstances,

> no one of which would raise a reasonable conviction, or more than a mere suspicion: but the whole taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of.

In ***August*** **[2018] CCJ 7 (AJ),** the case for the Prosecution was based solely on circumstantial evidence. The Caribbean Court of Justice (CJ) noted, at [32]:

> It is well established that it is "no derogation of evidence to say that it is circumstantial". The nature and value of circumstantial evidence have been described as follows:
>
> "Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion…[it] 'works by cumulatively, in geometrical progression, eliminating other possibilities' and has been likened to a rope comprised of several cords:
>
> > 'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of.'"

The CCJ further opined at [38]:

> A case built on circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. 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. There was therefore a serious misdirection wholly in August's favour when the trial judge directed the jury that each strand of the circumstantial evidence required its own proof of August's guilt beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt, but the whole10. 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. Accordingly, the circumstantial evidence, as a whole, adduced by the prosecution pointed sufficiently to August's guilt to entitle the jury to convict him.

At the conclusion of the Prosecution's case, the question for the judge is whether, looked at critically and in the round, the jury could safely convict: ***P (JM)*** **[2007] EWCA Crim 3216, [2008] 2 Cr App R 6**. The question for the jury is whether the facts as they find them to be, drive them to the conclusion, so that they are sure that the defendant is guilty: ***McGreevy v DPP*** **[1973] 1 WLR 276** (UK HL). ***Bassett*** **[2020] EWCA Crim 1376**, is a recent example of the Court of Appeal concluding that the judge should

have allowed a submission in a case which depended upon circumstantial evidence. The judgment sets out the correct test to apply (see [17] – [21]).

In a conspiracy, the cases of ***Hunt*** **[2015] EWCA Crim 1950** and ***Awais*** **[2017] EWCA Crim 1585** underline that the judge is required to analyse the evidence to identify whether it could legitimately permit a jury not just to identify the existence of the conspiracy, but also the nature of the crime the agreement is intended to bring about.

The correct question is: 'Could a reasonable jury, properly directed, exclude all realistic possibilities consistent with the defendant's innocence?': ***Masih*** **[2015] EWCA Crim 477** per Pitchford LJ.

Lord Normand in ***Teper*** **[1952] UKPC 15, [1952] AC 480** (GY PC), stated that circumstantial evidence must always be:

> narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. … It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference.

There is no requirement, however, that the judge should direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt, but also inconsistent with any other reasonable conclusion: ***McGreevy v DPP*** **[1973] 1 WLR 276** (UK HL).

Teper and ***McGreevy*** were considered in ***Kelly*** **[2015] EWCA Crim 817, [2015] AllER (D) 127 (May)**, in which Pitchford LJ said at [39]:

> The risk of injustice that a circumstantial evidence direction is designed to confront is that (1) speculation

> might become a substitute for the drawing of a sure inference of guilt and (2) the jury will neglect to take account of evidence that, if accepted, tends to diminish or even to exclude the inference of guilt (see **R v Teper**). However, as the House of Lords explained in McGreevy, circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The ultimate question for the jury is the same whether the evidence is direct or indirect: Has the Prosecution proved upon all the evidence so that the jury is sure that the defendant is guilty? It is the task of the trial judge to consider how best to assist the jury to reach a true verdict according to the evidence.

Directions

The following is an extract from the speech of Lord Morris of Borth-y-Gest in ***McGreevy v DPP*** **[1973] 1 WLR 276** (UK HL) on the subject of summing up in a circumstantial case, at 281:

> The particular form and style of a summing up, provided it contains what must on any view be certain essential elements, must depend not only upon the particular features of a particular case, but also upon the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted

> and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt…

A circumstantial case requires judicial scrutiny and care. It is frequently the case that circumstances, proved or admitted, are of equivocal effect in the absence of a clinching or explanatory piece of evidence. In such cases, the judge should assist the jury to identify the evidence of circumstances upon which the cogency of the Prosecution's case depends.

Where the accuracy or the truth of evidence is in dispute, the jury may be able to derive assistance from other evidence in resolving that dispute (e.g. consistent accounts by different witnesses). Where, however, the accuracy or truth of evidence standing alone is in dispute (e.g. the quality of identification evidence), consideration of other, unrelated evidence may or may not assist. If it does not assist, the jury should reach a conclusion on the disputed evidence without regard to any other category of evidence. If they reject the evidence it can form no part of the 'circumstances' to be assessed.

Where the question is not whether the evidence is accurate or true, but whether the evidence supports an inference of guilt or innocence, the circumstances should be considered in the round, since the final question, whether the jury is sure of guilt, can only be answered by assessment of the effect of all the evidence.

An interpretation of the significance of proved or admitted facts is frequently required. One of the possible dangers is an invitation to the jury by the Prosecution or the Defence to rely upon a single alleged fact to support the heaping of inference upon inference, or to 'fit' the evidence to the theory being advanced without sufficient regard to the cogency of the inference. Where the risk exists a warning may well be required.

Directions should, therefore, include:

i. an explanation of the nature and elements of the circumstantial case;
ii. a summary of the evidence in support of that case;
iii. a direction that the jury must decide what evidence they are sure they accept;
iv. a summary of the Defence's case as to the disputed evidence, the identification of evidence which may rebut the inference of guilt, and the disputed inferences;
v. an explanation that speculation, or attempting to fit the evidence to a particular theory (by either side), is not the same as drawing an inference from reliable evidence; and
vi. a direction that the final question for the jury is whether the evidence they accept leads them to the conclusion, so that they are sure that the defendant is guilty.

Illustration

Explanation what is a circumstantial case - taking care - the categories of evidence which the jury must consider - the Defence's case - example of drawing inferences or reaching conclusions - beware of speculation - the ultimate decision

The Prosecution has sought to prove a variety of facts by evidence from different sources. The Prosecution submits that the effect of that evidence, when considered as a whole, is to lead to the inescapable conclusion that the defendant is guilty. In other words, the variety of facts proved cannot be explained as coincidence. Circumstantial evidence, as it is called, can be powerful evidence but it needs to be examined with care to make sure that it does have that effect.

The categories of evidence on which the Prosecution relies are these (...). The Prosecution places particular emphasis on (...) because (...).

The Defence's case is (...).

You should examine each category of evidence in turn and decide whether you accept it. Clearly, if you reject a significant part of the Prosecution's evidence, that will affect how you approach your final conclusion.

In the course of their submissions to you, the advocates on both sides suggested what inferences you should draw from particular parts of the evidence. Drawing an inference is simply the process by which you find, from evidence which you regard as reliable, that you are driven to a further conclusion of fact. You need to be careful to ensure that the evidence really does lead to the conclusion the Prosecution invites you to reach.

[Let me give you an example of drawing inferences which does not arise on the facts of this case, but which illustrates the need for care in judging

whether the fact proved supports the inference of guilt: If my fingerprint is found in the living room of my neighbour's home, it is a sound inference that at some stage I had been in their living room. It would not, however, support an inference that I was the burglar who stole their DVD recorder from their living room. If you accepted my neighbour's evidence that I had never been invited into their home, then, in the absence of some acceptable explanation from me, you might infer that at some stage I had been in my neighbour's home uninvited. You may or may not be driven to the further conclusion that I was the burglar. But, if you also accept that there was found a second fingerprint of mine at the point of entry or, that in my shed there was found a DVD recorder which my neighbour recognises as the one stolen from their living room, you would, no doubt, conclude that you were sure that I was the burglar. You will notice how the inference of guilt becomes more compelling depending upon the nature and number of the facts proved.]

What conclusions you reach from the evidence is entirely for you to decide. When you are considering what inferences you should draw, or what conclusions you should reach, it is important to remember that speculation is no part of that process. Drawing inferences and reaching conclusions are not the same as fitting the facts to a particular theory. Having decided what evidence you accept, consider whether, looked at as a whole, it drives you to conclude that you are sure that the defendant is guilty.

Barbados

Circumstantial evidence is evidence of relevant facts, that is facts from which the existence or non-existence of facts in issue may be inferred: ***Shepherd*** **(1991) LRC (Crim) 332** (AU HC); ***Baugh-Pellinen*** **(2011) JMCA Crim 260**.

Brown JA (Ag) in ***Harrison*** **(2022) JMCA Crim 15**, noted at [33]:

> The distinguishing feature of circumstantial evidence is that no one circumstance is probative of guilt. Its efficacy is in an accumulation of circumstances from which the ultimate inference of guilt beyond a reasonable doubt may be drawn. Accordingly, the jury need not be sure of guilt in relation to individual items relied on by the prosecution. Instead, they may draw the inference of guilt upon a consideration of the whole of the evidence while holding the prosecution to the requisite incidence of the burden and standard of proof. In the language of Dawson J in **Shepherd v R**, at pages 337-338:
>
> > "... the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item of evidence separately."

Brown JA (Ag) at [62], further states:

> **AG v Spicer** and **Baugh-Pellinen v R** represent the 'portrait' archetypal circumstantial evidence case (as does this case) in which its proof depends on the view the jury takes of the whole picture. In this type of circumstantial evidence case, it is against the weight of the authorities to assess the probative value of individual items of the evidence relied upon or, for that matter, to artificially disaggregate the evidence into categories of "forensic" and "general". This was made abundantly clear in **Kevin Peterkin v R** [2022] JMCA Crim 5 ('**Kevin Peterkin v R**'). In a judgment which compared and contrasted what is required of the trial judge in circumstantial evidence cases dependent for their proof on inferences to be drawn, on the one hand and, on the other hand, a consideration of the whole picture, by the jury, Edwards JA lucidly declared the law. At para [57], the learned judge of appeal said:
>
> > "... The question for the jury at the end of the case, is whether all the circumstances, as they find them to be, lead them to conclude the prosecution has proven guilt beyond a reasonable doubt. In a case based on circumstantial evidence, where the pieces of evidence together form one picture leading to an inevitable conclusion of guilt, it would not be necessary for a trial judge to tell a jury to examine each piece of evidence and eliminate those consistent with innocence before arriving at an inevitable conclusion of guilt. In such a case, the jury

> would have to examine all the pieces of the evidence together to determine if the prosecution has painted such a picture on which they can feel sure that it leads to an inevitable conclusion of guilt."

Brown JA (Ag) at [43], discussed the issue of withdrawing from the jury, cases which depend wholly on circumstantial evidence:

> It seems, therefore, that a trial judge is required to make a preliminary decision in law whether the quality of the circumstantial evidence, taken cumulatively, is fit to be left for the jury's consideration. If the judge considers that the evidence amounts to no more than mere suspicion, the case should be withdrawn from the jury: **Baugh-Pellinen v R**. This qualitative assessment of the evidence at the end of the case for the prosecution, as an obligation of the trial judge, is the fundamental proposition of what has been styled the canonical judgment of Lord Lane CJ, in **R v Galbraith**.

King CJ in the Supreme Court of South Australia in ***Questions of Law Reserved on Acquittal (No 2 of 1993)*** **(1993) 61 SASR 1** (AU SAS CFC), as noted in ***DPP v Varlack*** **(2008) UKPC 56, [2009] 4 LRC 392** (VG) at [22], states:

> …There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which

> are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.

See also ***Attorney General of BVI v Spicer*** **(Virgin Islands CA, Crim App No 6 of 2001)**.

Points to Consider

i. The question then arises, how therefore should the judge approach the issue of the Standard of Proof in respect of the various strands of circumstantial evidence? See ***Ince*** **(Crim App No 10 of 2018)** (BB) at [48] – [51] and [69] – [72].

ii. The circumstances therefore do not only have to be consistent with the act committed; they must also satisfy the condition that the facts are such as to be inconsistent with any other rational conclusion than the defendant is the guilty person: ***Hodge's Case*** **(1838) 2 Lewin 227, 168 ER 1136**.

iii. In a case dependent upon circumstantial evidence, the jury is required to draw inferences from the total circumstances: ***Belhaven and Stenton Peerage*** **(1875) 1 App Cas 279** (UK HL).

iv. The direction to the jury is that they must be satisfied of guilt beyond a reasonable doubt: ***McGreevy v DPP*** **[1973] 1 WLR 276** (UK HL) per Lord Morris.

Belize

In ***August*** **[2018] CCJ7 (AJ)** (BZ), the court was called upon to determine the ultimate questions of whether August's conviction was safe and his trial was fair. This was in light of the fact that August's conviction was founded on a tapestry of circumstantial evidence. The strands of evidence considered by the jury was the boisterous bullying behaviour of August on the night in question and the ominous threat he made on leaving the premises; Garbutt's evidence (contrary to August's claim that he was at home at the material time) that he saw August riding on a bicycle in the direction of the trail which led from his yard to behind the deceased's house and returning in the opposite direction; the finding of blood of the same type as the deceased's on August's t-shirt and shoes; the shoe print which the jury was told "may" have been made by August's left tennis shoe; and August's failure or inability to give any explanation for the type O blood found on his shirt. The court, in considering the cogency of the evidence against August, noted at [32], [38] and [39]:

> [32] …The nature and value of circumstantial evidence have been described as follows:
>
> "Circumstantial evidence is particularly powerful when it proves a variety of different facts all of which point to the same conclusion…[it] 'works by cumulatively, in geometrical progression, eliminating other possibilities' and has been likened to a rope comprised of several cords:
>
> > 'One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus it may

> be in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a strong conclusion of guilt with as much certainty as human affairs can require or admit of.'"
>
> ...

[38] A case built on circumstantial evidence often amounts to an accumulation of what might otherwise be dismissed as happenstance. 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. There was therefore a serious misdirection wholly in August's favour when the trial judge directed the jury that each strand of the circumstantial evidence required its own proof of August's guilt beyond reasonable doubt. It is not the individual strand that required proof beyond reasonable doubt, but the whole. 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. Accordingly, the circumstantial evidence, as a whole, adduced by the prosecution pointed sufficiently to August's guilt to entitle the jury to convict him.

> [39] The strong circumstantial evidence provided a rational basis for the finding of the jury and we are satisfied that there was sufficient evidence to support the verdict…

In ***Williams*** **(Belize CA, Crim App No 16 of 2012)** at [4] – [29], the Court of Appeal noted that the Crown's case contained additional evidence in the form of various pieces of circumstantial evidence, the synergism of which was nothing short of overwhelming in the case. The court therefore held that neither singly nor collectively could the appellant's grounds of appeal succeed.

In ***Roches*** **(Belize CA, Crim App No 23 of 2013)**, the Court of Appeal noted:

> [83] Circumstantial evidence is indirect evidence. It is evidence from which a judge or jury may infer the existence of a fact in issue, but which does not prove the existence of the fact directly – see ***DPP v Kilborune [1973] AC 729***. So, circumstantial evidence is evidence about a fact in issue. It is not necessarily weak evidence. Our view was that, there was sufficient circumstantial evidence to establish a *prima facie* case against the 6 respondents.
>
> [84] Where the Prosecution relies on circumstantial evidence to prove a *prima facie* case, the case is not defeated by the fact that an inference that is consistent with innocence is also possible from the evidence that a jury properly directed may properly draw an inference of guilt from – see ***DPP v Selena Varlack [2008] UKPC 56***, an appeal from the British Virgin Islands to the Privy

> Council; and ***R v P [2008] 2 Crim. App. R. 6.*** **(Court of Appeal England and Wales)**.

Further, the court found that the trial judge in his ruling of no case to answer, correctly pointed out that 'the evidence that the Prosecution relied on was circumstantial. But he erred when he took the view that, before the case was one where there was no evidence at all, that the offence of abetment was committed, and that the respondents committed it.' It was also held that the trial judge also erred when he considered that the evidence was not merely tenuous, it was not sufficient. The court noted at [87]:

> …although the judge had acknowledged that, the evidence relied on was circumstantial, he considered whether each item of evidence was proved or not proved, and from that concluded that, there was no proof of all the items of evidence that were required to prove the commission of the offence, that is, all the elements of the offence, and that it was the respondents who committed the offence. The judge did not consider the items of evidence together, and the inference that could be properly drawn from the whole evidence. He did not see the wood for the trees. He erred in his approach to circumstantial evidence, and reached the wrong conclusion – see ***Question of Law Reserved on Acquittal*** **(No. 2 of 1993) (1993) SASRI**.

Guyana

In ***The State v Alfred*** **(2015) 86 WIR 360** (GY CA), Alfred was charged for the murder of Cathedra Parris. The Prosecution relied on circumstantial evidence and a statement made by him to the police to link him to the crime. After a trial by judge and jury, he was found guilty of murder and sentenced to death by hanging. Following his conviction and sentence, Alfred filed an appeal citing numerous grounds of complaints, one of which was that no assistance was given to the jury on the issue of circumstantial evidence. The court stated:

> [41] The authorities emphasise that in directing the jury in cases dealing with circumstantial evidence, it is desirable for the trial judge to tell the jury that they must be satisfied of the guilt of the accused beyond a reasonable doubt. The jury must be sure that guilt is the only reasonable explanation of the facts they found proved. This is so because even though circumstantial evidence may be conclusive of guilt, it must always be narrowly examined. It is necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co existing circumstances which would weaken or destroy the inference (see *Teper v R* [1952] AC 480 at 489 per Lord Normand).
>
> [42] The necessity for a trial judge to give the jury a special direction would depend on the circumstances of the given case…

The court also noted in ***Alfred*** that there might be circumstances where the general direction was not enough. Therefore, the Prosecution's case did not stand or fall on the chain of circumstances. There was other evidence coming from the caution statement which, if believed, would reasonably show that the appellant inflicted injury on the victim. Thus, it was not incumbent on the trial judge to give a special direction since the lack of a special direction caused no harm to the appellant's case.

In this Chapter:
General Guidelines

Chapter 11
Expert Evidence

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Expert evidence refers generally to information provided by someone with special subject matter knowledge about things that are likely to be and generally are outside the common knowledge, understanding, and experience of jurors, a judge, or a judge in a judge alone trial. Expert evidence can be used to assist in determining issues in a case, including the innocence or guilt of a defendant. This type of evidence is given by an expert witness who is duly qualified to do so, and whose opinions in this regard are required to be unbiased and objective.

General Guidelines

Expert evidence requires special preparation and care. Usually, the results of examination, inspection or test are not in dispute, but the conclusions to be drawn from the results certainly are. If those conclusions are based upon opinions expressed by the expert, the jury will need to evaluate the quality of the conclusions.

In many jurisdictions, legislation provides for the admissibility of expert evidence and the circumstances in which a witness can be deemed to be an expert.

The purpose of expert evidence of both fact (e.g. observation, test, calculation) and opinion, is to assist the jury in areas of science or other technical matters upon which they cannot be expected to form a view without expert assistance. Nevertheless, the ultimate decision on the matters about which the expert has expressed an opinion remains one for the jury and not for the expert. The jury should be informed that they are not bound by expert opinion, particularly when the expert has expressed an opinion on the ultimate issue in the trial: ***Stockwell*** **[1993] 97 Cr App R 260** (UK CA), per Lord Taylor CJ at 266. However, when there

is no evidence capable of undermining unchallenged expert opinion, that fact may be, and when the evidence is favourable to the Defence's case, should be, emphasised. It may be important to distinguish between expert examination of physical objects under laboratory conditions and the conclusion drawn by the expert from the results. The jury should be discouraged from attempting to act as their own experts, e.g. in handwriting and fingerprint cases: ***Sanders*** **[1991] 93 Cr App R 245** (UK CA); ***Lanfear*** **[1968] 2 QB 77** (UK CA).

For the limitations of expert evidence at the boundaries of medical knowledge see: ***Cannings*** **[2004] EWCA Crim 1, [2004] 1 WLR 2607** and ***Kai-Whitewind*** **[2005] EWCA Crim 1092, [2005] 2 Cr App R 31**, and, when medical understanding is incomplete, ***Holdsworth*** **[2008] EWCA Crim 971, [2009] Crim LR 195** and ***Harris*** **[2005] EWCA Crim 1980, [2006] 1 Cr App R 55**. It is common for experts from different areas of expertise to give evidence concerning the same or linked issues. For example, a consultant pathologist, neurosurgeon and an orthopaedic surgeon may all give evidence as to the cause of a death or serious injuries. The trial judge will need to be watchful for experts straying outside their areas of expertise and to explain to the jury the possible effect upon their assessment of the evidence.

Forensic scientists have access to information about the frequency with which their findings might be replicated in the UK at large (e.g. the refractive index of glass, a manufacture and model of footwear, DNA profiles). Whenever statistical evidence is produced to support expert conclusions, it will be necessary to closely examine any data produced upon which the evidence is based and to ensure that the conclusion is supported by the data and explained to the jury, with a health warning if necessary.

Marshalling disputed expert evidence in a form calculated to provide the jury with a comprehensible summary of the issues for their decision, is an important and often difficult task which will require careful preparation.

Points to Consider

i. Expert evidence is admitted only on matters that lie beyond the common experience and understanding of the jury: ***Turner*** **[1981] QB 834** (UK CA). The purpose of the expert's opinion evidence is to provide the jury with evidence of findings and the conclusions that may be drawn from those findings. Particular care is needed to avoid expert opinion as to the credibility, reliability or truthfulness of a witness or confession: ***Pora*** **[2015] UKPC 9, [2006] 1 Cr App R 3**. Lord Kerr explained:

> It is the duty of an expert witness to provide material on which a court can form its own conclusions on relevant issues. On occasions that may involve the witness expressing an opinion about whether, for instance, an individual suffered from a particular condition or vulnerability. The expert witness should be careful to recognise, however, the need to avoid supplanting the court's role as the ultimate decision-maker on matters that are central to the outcome of the case.

See also ***H*** **[2014] EWCA Crim 1555, [2014] Crim LR 905**.

ii. Unlike lay witnesses, experts may give evidence of opinion. Where the expert has given evidence of opinion, the jury remain the ultimate arbiter of the matters about which the expert has testified. The jury is not bound to accept the expert's opinion if there is a proper basis for rejecting it. But 'where there simply is no rational or

proper basis for departing from uncontradicted and unchallenged expert evidence, juries may not do so': ***Brennan*** **[2009] EWCA Crim 2553**. The jury must be warned not to substitute their own opinions for those of the experts e.g. by undertaking their own examination of handwriting or a fingerprint. The jury are entitled to rely on an expert opinion which falls short of scientific certainty.

iii. If an expert expresses conclusions in relative terms (e.g. "no support, limited support, moderate support, support, strong support, powerful support") it may help the jury to explain that these terms are no more than labels which the expert witness has applied to their opinion of the significance of their findings and that because such opinion is entirely subjective, different experts may not attach the same label to the same degree of comparability: ***Atkins*** **[2009] EWCA Crim 1876, [2010] 1 Cr App R 8**.

iv. The fact that a Prosecution expert cannot rule out, as a matter of science, a proposition consistent with the defendant being not guilty, does not mean that the case should be withdrawn: ***Vaid*** **[2015] EWCA Crim 298, [2015] Crim LR 532**.

v. In deciding what weight, if any, to attach to the expert's evidence, the jury may take into account the expert's qualifications, experience, credibility, and whether the opinion is based on established facts or assumptions.

vi. Sciences and techniques in their infancy need to be approached with caution, but that does not necessarily mean the expert opinion based on such techniques should not be adduced: ***Ferdinand*** **[2014] 2 Cr App R 23** (UK CA).

vii. If the expert testifies as to primary facts (e.g. that there was no blood on the defendant's boots), the jury cannot reject that and form their own opinion on the matter: ***Anderson*** **[1972] AC 100** (JM PC).

viii. If the expert is someone involved in the investigation of the offence, the jury will need to be aware of that when considering the weight to give to the expert's evidence: ***Gokal*** **[1999] 6 Archbold News 2**.

ix. In an extreme case, where the outcome of the trial depends exclusively or almost exclusively on a serious disagreement between reputable experts, it may be unwise to leave the case to the jury: ***Cannings*** **[2004] EWCA Crim 1, [2004] 1 WLR 2607**; ***Hookway*** **[2011] EWCA Crim 1989**. The content of a summing-up in such cases will require considerable care: see ***Henderson*** **[2010] 2 Cr App R 185** (UK CA) for guidance.

x. Where there is a conflict of opinion between reputable expert witnesses, the expert evidence called by the Prosecution is not automatically neutralised. A dispute between experts about the interpretation of findings does not extinguish those findings which are matters to be evaluated by the jury: ***Kai-Whitewind*** **[2005] EWCA Crim 1092, [2005] 2 Cr App R 31** (UK CA).

xi. The trial judge has a responsibility both to present the expert evidence in terms which will assist the jury to arrive at an understanding and to expose any limitations in its effect. The judge is perfectly entitled to intervene during the evidence to seek explanations with a view to assisting the jury in the summing up. It makes sense to deal with competing expert evidence by category. Only in this way can the jury sensibly follow and resolve any dispute between experts.

xii. The duties of an expert witness in a criminal trial are owed to the court and override any obligation to the person from whom the expert received instructions or by whom the expert was paid: ***B (T)*** **[2006] 2 Cr App R 22** (UK CA).

Illustration

Expert Evidence - Experts on both sides - purpose of expert evidence - distinguishing fact and opinion - decision for jury - weight for jury

Both the Prosecution and the Defence have relied upon the evidence of expert witnesses in the following categories (...). This kind of evidence is given to help you with scientific or technical matters about which the witnesses are experts and we are not. As you have heard, experts carry out examinations and some conduct tests to see whether they yield results which are relevant to the issues you have to consider. They are permitted to interpret those results for our benefit, and to express opinions about them, because they are used to doing that within their particular area of expertise. You will need to evaluate expert evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. Remember that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decisions.

Where, as here, there is no dispute about the findings made by an expert, you would no doubt wish to give effect to them, although you are not bound to do so if you see good reason in the evidence to reject them.

Opinions as to the significance of those findings are certainly in dispute and judging these competing views is a matter for you. Experts are not here to argue the case for one side or the other but to assist you to understand how they have reached the opinions they have expressed. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinions. If, after giving careful consideration to the evidence of an expert, you do not accept their opinion, then you should not act upon it. The weight you attach to any conclusion you do accept is for you to determine.

Illustration

Warning against self-expertise - experts giving evidence

In judging the evidence of the experts, the advocates have invited you to reach conclusions from your own examination of the exhibits. That is a perfectly legitimate request to make. After all, how can you form a view about the accuracy of the experts' conclusions without following what they have demonstrated to you? That does not mean, however, that you should be tempted to draw conclusions without reference to the evidence which the experts have given. We do not have the skills required to carry out an expert examination of the exhibits without the assistance of the experts. Your task is to reach a conclusion based upon an assessment of what evidence or parts of the evidence from the experts you accept; not to reach an independent judgment of your own.

Illustration

Warning against self-expertise - no experts giving evidence

An issue has arisen whether (...) [e.g. handwriting, voice identification].

Neither side has called expert evidence to assist you. This is an area in which you should not attempt to reach any conclusion based upon an inexpert comparison of your own. In deciding whether the Prosecution has proved that (...) was the author of (...) you should concentrate only upon the evidence of (...).

Barbados

Expert evidence is evidence about a scientific, technical, professional or other specialised issue given by a person qualified to testify because of familiarity with the subject or special training in the field: Bryan A Garner, **Black's Law Dictionary** (9th edn Thomson Reuters 2009).

Under s 66 of the **Evidence Act, Cap 121** (BB), opinions are acceptable in evidence once they are based on specialised knowledge. The section states, 'Where a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not prevent the admission or use of evidence of an opinion of that person that is wholly or substantially based on that knowledge.'

Spigelman CJ in ***Tang*** **[2006] NSWCCA 167, (2006) 65 NSWLR 681** (NSW), referring to s 79 of the **Evidence Act 1995** (NSW), which is similar to that of section 66 of the **Evidence Act, Cap 121** (BB), noted at [134]:

> Section 79 has two limbs. Under the first limb, it is necessary to identify "specialised knowledge", derived from one of the three matters identified, i.e. "training, study or experience". Under the second limb, it is necessary that the opinion be "wholly or substantially based on that knowledge". Accordingly, it is a requirement of admissibility that the opinion be demonstrated to be based on the specialist knowledge.

Points to Consider

i. ***Morgan*** **[2011] NSWCCA 257, (2011) 215 A Crim R 33** (NSW), per Hidden J and ***Wood*** **[2012] NSWCCA 21, (2012) 84 NSWLR 581** (NSW) are helpful in this area.

ii. Further, in ***Gilham*** **[2012] NSWCCA 131, (2012) 224 A Crim R 22** (AU) at 346, McClellan CJ noted:

> Even were the evidence admissible under s.79, we are nevertheless satisfied that it ought to have been rejected in the exercise of discretion under s.137 of the *Evidence Act*. Properly analysed, the evidence of the Crown experts that the wounds "appeared similar" was of little probative value, while the risk that the jury would impermissibly use the collective force of the evidence from the three Crown witnesses to infer that the similarity created a pattern, which was explicable only if the applicant was the perpetrator, was overwhelming. This was a risk that the trial judge's directions could not protect against.

iii. In ***Jung*** **[2006] NSWSC 658** (NSW), Hall J noted at [53], 'In the area of expert opinion evidence, the test is whether the court is satisfied on the balance of probabilities that the opinion is based wholly or substantially on such knowledge: s 142 of the Evidence Act.'

Specialised Knowledge

Points to Consider

i. Gaudron J in ***Velevski*** **(2002) 187 ALR 233** (AU HC) stated at [82], 'The concept of "specialised knowledge" imports knowledge of matters

which are outside the knowledge or experience of ordinary persons and which "is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience".' See also ***Quesada* [2001] NSWCCA 216** (NSW) per Smart AJ at [45] – [49].

ii. In ***Jung* [2006] NSWSC 658**, Hall J at [54], also stated:

> ...In determining whether Dr. Sutisno holds the requisite specialised knowledge, an expert witness should not be allowed to stray outside the witness' area of expertise. It is for this reason that the opinion expressed by the witness must be based wholly or substantially on the witness' specialised knowledge, the specialised knowledge in turn being based on training, study or experience....

iii. The article by Judge D Yehia, **Expert Evidence** (2015), may be helpful in this area. Note, at 11 and 12:

> The threshold for the admission of expert evidence is low. The mere fact that cross-examination successfully highlights inadequacies in the process of reasoning, or the fact that other experts may have conflicting opinions does not render the evidence inadmissible. In ***R v Rose*** [2002] NSWCCA 455, Smart AJ said at [390] that even though the appellant's highly qualified experts were extremely critical of the Crown geologist's expert evidence (especially methods etc), this did not make the evidence inadmissible as it was still based on his specialised knowledge and experience.
>
> In my view a court should investigate the reliability of the opinion under this limb. The Crown must demonstrate that the purported linkage between the witness' specialised knowledge and his/her opinion is valid and reliable. In

the absence of a valid and reliable link, the opinion is not based wholly or substantially on specialised knowledge but rather on 'speculation', 'subjective personal views', or 'common sense inferences'.

...

The Court adopted a narrow reading of section 79 saying that

> [137] '[t]he focus must be on the words 'specialised knowledge', not on the introduction of an extraneous idea such as 'reliability',

As Gary Edmond points out ***Tang*** is not an isolated case. Edmonds cites a number of cases involving facial mapping or voice identification evidence where evidence was adduced notwithstanding the absence of '*..a credible field, supporting literature, validation studies, and information about error rates*.' It appears that the Courts are unwilling to exclude 'expert' evidence pursuant to section 137 or the **Evidence Act** for fear of trespassing on the role of the jury. Instead, in considering the 137 discretion, the evidence is taken at its '*highest*', assessment of ***reliability*** being left to the jury to decide.

iv. Section 137 of the **Evidence Act 1995** (NSW) is almost exactly repeated in s 115 of the **Evidence Act, Cap 121** (BB) which states, 'In criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the accused, the court may refuse to admit the evidence.' The trial

judge has to carefully consider the proposed expert evidence in light of the specialised knowledge and whether the evidence is indeed based on the expert's training, study or experience. Speculation or conjecture will not suffice.

v. An opinion of an expert witness is recognised as an exception to the general rule that a witness' opinions are not admissible: ***Clarke v Ryan* (1960) 103 CLR 486** (AU HC).

vi. In ***Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705** (NSW), Heydon JA at [85], set out the requirements of admissibility that should be demonstrated by a witness purporting to express an expert opinion.

vii. A witness must possess the necessary qualifications: Bingham LJ in ***Robb* (1991) 93 Cr App R 161** (UK CA) at 165.

viii. A judge has discretion to direct a voir dire, preferably in the absence of the jury, to determine the qualifications of a witness as an expert upon a particular subject matter and to decide whether the purported expert should be allowed to give evidence as an expert witness: **Archbold (2016)** at 10-65. Lord Hoffman at [25], in ***State of Trinidad and Tobago v Boyce* [2006] UKPC 1, [2006] 2 AC 76** (TT PC), opined:

> .... that the judge's exclusion of the evidence of Dr des Vignes was erroneous in point of law. He had concentrated entirely on whether the doctor had a paper qualification and ignored the possibility that he might, by reason of his knowledge and experience, be able to assist the jury in determining the cause of death.

ix. In ***Bowman* [2006] EWCA 417**, Gage LJ listed at [177], necessary inclusions in an expert report:

1. Details of the expert's academic and professional qualifications, experience and accreditation relevant to the opinions expressed in the report and the range and extent of the expertise and any limitations upon the expertise.

2. A statement setting out the substance of all the instructions received (with written or oral), questions upon which an opinion is sought, the materials provided and considered, and the documents, statements, evidence, information or assumptions which are material to the opinions expressed or upon which those opinions are based.

3. Information relating to who has carried out measurements, examinations, tests etc and the methodology used, and whether or not such measurements etc were carried out under the expert's supervision.

4. Where there is a range of opinion in the matters dealt with in the report a summary of the range of opinion and the reasons for the opinion given. In this connection any material facts or matters which detract from the expert's opinions and any points which should fairly be made against any opinions expressed should be set out.

5. Relevant extracts of literature or any other material which might assist the court.

6. A statement to the effect that the expert has complied with his/her duty to the court to provide independent assistance by way of objective unbiased opinion in relation to matters within his or her expertise and an

acknowledgment that the expert will inform all parties and where appropriate the court in the event that his/her opinion changes on any material issues.

7. Where on an exchange of experts' reports matters arise which require a further or supplemental report the above guidelines should, of course, be complied with.

Belize

Relevant Statutory Provisions

Section 36 of the **Evidence Act, Rev Edn 2020, CAP 95** (BZ) provides for the use of reports of official analysts as prima facie evidence, as follows:

> 36.– (1) Any document purporting to be a post-mortem report, under the hand of a registered medical practitioner or the government pathologist, or any document purporting to be a report under the hand of a government expert, upon any matter or thing duly submitted to him for examination or analysis and report, for the purposes of any trial on indictment, or in any preliminary inquiry before a magistrate in respect of any indictable offence, or in any proceeding in a summary jurisdiction court, or before a coroner, shall be receivable at that trial, inquiry or proceeding as prima facie evidence of any matter or thing therein contained relating to the examination or analysis,

Provided that where the report of any of the aforesaid experts is produced in any trial, such expert shall if within the country be called if the defence so requires.

(2) If, on any inquiry or proceeding mentioned in sub-section (1), of this section any one of those experts is called as a witness to give evidence on the subject-matter of his report, the party calling him shall, unless the magistrate, or the summary jurisdiction court, or the coroner, otherwise expressly orders, pay all costs occasioned by his having been so called.

(3) The provisions of this section shall, with the necessary modifications, apply in the case of a document purporting to be a report by a registered medical practitioner on any injuries received by a person which are the subject of a prosecution in any trial on indictment, in any preliminary inquiry or in any proceeding in a summary jurisdiction court,

Provided that the report purports to have been written on the same day as, or on the day following, that on which the examination was made by the medical practitioner.

(4) The experts mentioned in sub-section (1) may be persons either in the service of the Government of this country or that of any government within the British Commonwealth of Nations.

(5) For the purpose of sub-section (1), a government expert includes the following public officers–

(a) Pathologist;

(b) Analytical Chemist;

(c) Bacteriologist;

(d) Armourer;

(e) Forensic Document Examiner;

(f) Forensic Analyst;

(g) Scientific Examiner (Motor Vehicles);

(h) Finger Print Technician;

(i) Technician (Scenes of Crime Investigation);

(j) Firearm and Tool Mark Examiner; or

(k) the holder of any other public office declared by the Minister by Order published in the *Gazette* to be a public officer to which this section applies.

Section 45 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for the opinion of an expert on any point of science, or art, or foreign law, as follows:

45. – (1) Where there is a question as to any point of science or art, the opinion upon that point of a person specially skilled in the science or art is admissible in evidence.

(2) That person is hereinafter called “an expert”.

(3) The words “science or art” include all subjects on which a course of special study or experience is necessary to the formation of an opinion and, amongst others, the examination of handwriting.

(4) Where there is a question as to a foreign law, the opinion of an expert, who in his profession is

acquainted with that law, is the only admissible evidence thereof, though the expert may produce to the court books which he declares to be works of authority upon the foreign law in question, and those books, the court having received all necessary explanations from the expert, may construe for itself.

(5) It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.

(6) The opinion of an expert as to the existence of the facts on which his opinion is to be given is inadmissible unless he perceived those facts himself.

In ***August*** **[2018] CCJ 7 (AJ)** (BZ) at [16], [19], and [20], the Caribbean Court of Justice outlined the evidence provided by experts in that case, namely, Dr Mario Estradabran, the Forensic Doctor who carried out the post mortem examination; Mrs Diana Bol-Noble, a forensic analyst employed at the National Forensic Science Service, who carried out comparisons of the plaster cast impression of a shoe print, the pair of grey and red Nike tennis shoes and the six ink impressions; and Mr Eugenio Gomez, a forensic analyst also employed at the National Forensic Science Service, who testified that he analysed the cotton swab of the tongue of the shoe taken by Mr Henry and found that it contained type O blood. At [169], Wit JCCJ noted, *inter alia*, the role of a review court:

> Appellate courts in this system are required to be pro-active in the performance of their duty to scrutinise convictions (even if these are based on a guilty verdict of the jury) and to prevent substantial miscarriages of justice. For this reason, the Legislature has given them broad powers, which they can and should use if and when they think it necessary or expedient in the interests of justice (sections 33 and 20 of the Court of Appeal Act of Belize). Admittedly, they are not courts of (re)trial but courts of review. But that should not keep them from actively doing their job of pursuing a thorough and substantive review of the conviction and all the issues related thereto. That is why they are not only *allowed* to receive further evidence if that is offered to them, but they are also *empowered* to order the production of documents they consider relevant and necessary for the determination of the case. That is why they can order witnesses to be called and be examined before the court, whether or not these were called at the trial. That is why they can assign a special commissioner to do an inquiry and file a report with his or her findings or appoint any person with special expert knowledge to act as an assessor in an advisory capacity where it appears to them that such knowledge is required for the proper determination of the case…

Also helpful is ***Parham*** **(Belize CA, Crim App No 3 of 2015)** at [12] – [15] and [20] – [23].

Guyana

Relevant Statutory Provisions

Section 16 of the **Evidence Act, Cap 5:03** (GY) provides as follows:

> 16. (1) When there is a question as to any point of science or art, the opinion upon that point of a person specially skilled in the science or art is admissible in evidence.
>
> (2) The person is hereinafter called "an expert".
>
> (3) The words-science or art include all subjects on which a course of special study or experience is necessary to the formation of an opinion and, amongst other, the examination of handwriting.
>
> (4) When there is a question as to a foreign law, the opinion of an expert, who in his profession is acquainted with that law, is the only admissible evidence thereof, though the expert may produce to the court books which he declares to be works of authority upon the foreign law in question, and those books the court, having received all necessary explanations from the expert, may construe for itself.
>
> (5) It is the duty of the judge to decide whether the skill of any person in the matter on which evidence of his opinion is offered is sufficient to entitle him to be considered as an expert.

> (6) The opinion of an expert as to the existence of the facts on which his opinion is to be given is inadmissible unless he perceived those facts himself.

Section 17 of the **Evidence Act, Cap 5:03** (GY) also provides, 'A fact, not otherwise admissible in evidence, may, with the permission of the judge, be proved if it supports, or is inconsistent with, the opinion of an expert, when that opinion is admissible.'

Section 84(3) of the **Evidence Act, Cap 5:03** (GY) states, 'An expert may refresh his memory by reference to professional treatises.'

In this Chapter:
General Guidelines

Chapter 12
Corroboration and Evidence Requiring Caution

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Corroboration refers to testimony or evidence that supports other evidence in a case and that goes towards establishing those evidential facts or circumstances. Corroborating evidence also has the effect of strengthening, confirming, substantiating, or making more certain the probative value and/or credibility of the testimony of a witness.

General Guidelines

Corroboration is relevant, admissible and credible evidence which is independent of the source requiring corroboration, and which implicates the defendant.

Historically, there were specific categories of cases where, because of the nature of the allegation or the type of witness, a direction was required that the jury should look for corroboration of the evidence in question, for instance evidence of an accomplice, evidence of a complainant in the trial of a sexual offence and evidence of a child; but corroboration is now required by statute only in cases of treason, perjury, speeding and attempts to commit such offences.

Although corroboration in the strict sense is now no longer required in support of the categories outlined above, circumstances may nevertheless require the judge, as a matter of discretion in summing up, to give a warning to the jury about the need for caution in the absence of supporting evidence.

The trial judge should discuss with the advocates the need for, and the terms of, any cautionary direction it is proposed might be given. The direction will be tailored to point out to the jury the particular risk of which they need to be aware, before relying upon the evidence from the 'tainted' source.

The need to direct the jury to be cautious in accepting the evidence of a 'snitch' was a significant part of the decision in ***Small v The DPP; Gopaul v The DPP*** **[2022] CCJ 14 (AJ) GY**. In considering the issue of the 'unreliable snitch evidence', the Court noted that, in the last two decades, there has been an avalanche of research, studies, reports, official police and prosecutorial policies, and academic writings about the notorious unreliability of, what in colloquial language is called, snitch evidence. This is evidence given by a prisoner, the snitch, claiming that a fellow prisoner, the defendant, would have admitted or confessed to them having committed the criminal offence the defendant is charged with. The court opined that:

> [120] The many studies suggest that the adversarial process is ill equipped to effectively expose the unreliability of this kind of evidence. Corroboration or the existence of supporting evidence, as we saw, is often too easily accepted; very robust and serious corroboration is usually not required. Cross-examination of snitches is usually ineffective because possible incentives for the snitch are often undiscoverable and almost all the fabricated evidence is usually of such a 'he said, she said' character that it would be difficult to debunk or impeach it. Even jury directions have generally been found faulting in effectiveness. First, 'Jury instructions can seem legalistic and get easily lost in the sea of other instructions.' Jurors are said to be 'generally …poor at understanding traditional jury instructions or applying those instructions in deliberations' and 'instructions to disregard relevant evidence do not prevent jurors from incorporating that evidence into deliberations.' Another

> academic, Findley, remarks that 'empirical evidence suggests that jurors, even when educated about things like snitch testimony and confessions, still find them compelling.' He points out that 'to the extent the courts do utilise instructions, they must be empirically based and specific, so that they can be a meaningful source of decisional information.'
>
> [121] It is not only academics and judges who have become increasingly aware of the difficulties with snitch evidence. Several prosecution authorities, especially in the United States and Canada, have also been shown to be very critical of it. And many of them have developed policies cautioning prosecutors to curb their natural enthusiasm for using cellmate evidence...

A particular sensitivity also arises when defendants jointly charged give evidence implicating each other: ***Petkar*** **[2003] EWCA Crim 2668**. There is a risk that a direction to exercise caution before acting on the evidence of either defendant will have the effect of diminishing the evidence of both defendants in the eyes of the jury. Judges are expected to give at least the "customary clear warning" to examine the evidence of each with care because each has or may have an interest of their own to serve: ***Knowlden*** **[1983] 77 Cr App R 94** (UK CA); ***Cheema*** **[1994] 1 All ER 639** (UK CA)

It may be implicit that if the first defendant's defence is true, the second defendant must be guilty. In order to acquit the first defendant, the jury need only consider that the first defendant's evidence may be true. Since, however, the Prosecution must prove its case against the second

defendant so that the jury is sure, it does not follow that an acquittal of the first defendant must lead to the conviction of the second defendant. That fact may need emphasising.

Alternatively, the first defendant's denial of participation may not of itself imply the guilt of the second defendant. The first defendant's accusation against the second defendant may stand free from the denial and entirely unsupported by any other evidence. If so, the need for caution when considering the accusation against the second defendant, now also relied on by the Prosecution, might be expressed in more trenchant terms.

The Trinidad and Tobago **Criminal Bench Book 2015**, at page 149, provides a useful summary of authorities as follows:

> 1. **Makanjuola [1995] 1 WLR 1348** (CA): s 32 (Case referred to UK equivalent) abrogates the requirement to give a corroboration direction in respect of an alleged accomplice or a complainant of a sexual offence, simply because a witness falls into one of those categories.
>
> 2. It is a matter for the judge's discretion what, if any warning, they consider appropriate in respect of such a witness, as indeed in respect of any other witness in whatever type of case. Whether they choose to give a warning and in what terms, will depend on the circumstances of the case, the issues raised and the content and quality of the witness evidence.
>
> 3. In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. **This will not be so simply because the witness is a complainant of a sexual offence, nor will it necessarily be so because**

a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestions by cross-examining counsel.

4. If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

5. **Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and their comments as to how the jury should evaluate it, rather than as a set-piece legal direction.**

6. Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

7. A court will be disinclined to interfere with a trial judge's exercise of their discretion, save in a case where that exercise is unreasonable in the **Wednesbury** sense.

8. Where the jury is advised to look for supporting evidence, the evidence which is capable of supporting the witness should be identified.

9. The need to consider a **Makanjuola** direction applies whenever the need for special caution is apparent. An accused may have a purpose of their own to serve by giving evidence which implicates a co-accused.

10. In **Jones [2003] EWCA Crim 1966**, in which each of the accused in part placed blame on the other, Auld LJ (at paragraph 47) commended the suggestion from counsel that in such cases, the jury should be directed:

(a) to consider the cases of each accused separately,

(b) to consider the evidence of each accused was relevant to the case of the other,

(c) that when considering the co-accused's evidence, the jury should bear in mind that the witness may have an interest to serve, and;

(d) that the evidence of a co-accused should be assessed in the same way as the evidence of any other witness.

11. The need for particular caution may arise when a witness' evidence could be tainted by improper motive.

12. Cases of unexplained infant death may give rise to serious and respectable disagreement between experts as to the conclusions which can be drawn from post-mortem findings. Supporting evidence, independent of expert opinion, may be required.

13. **Arnold Huggins and Others v The State CA Crim Nos 26-28 of 2003**: Even before the abrogation of the rule which required that a mandatory warning be given in respect of alleged accomplices, there would have been no obligation to give an accomplice warning where the witness was not a participant or in any way involved with the crime. See also **Wanzar v The State (1994) 46 WIR 439** (CA) per Hamel-Smith JA at pages 450-451.

14. **Stone [2005] EWCA Crim 105**: the Court of Appeal re-iterated the need to examine the particular circumstances of the case before reaching a judgment regarding in what terms the requirement for caution should be expressed.

15. The trial judge should discuss with the advocates the need for and the terms of any cautionary direction it is proposed might be given.

16. The direction will be tailored to point out to the jury the particular risk of which they need to be aware before relying upon the evidence from the 'tainted' source.

Barbados

Corroboration is independent evidence that strengthens or confirms existing evidence which affects the defendant, by connecting them or tending to connect them with the crime. The essential components of corroborative evidence, as outlined in ***DPP v Kilbourne*** **[1973] AC 729** (UK HL), are:

i. it must be relevant to the matters in dispute to be admissible;

ii. it must come from a source independent of the complainant;

iii. it must be credible;

iv. it must implicate the defendant.

Blackstone's (2012), at F5.4, states:

> Where a judge directs a jury on corroboration, he should explain what it means, making clear the requirements of credibility, independence and implication (*Fallen* (1993) Crim LR 591). The judge should also indicate the evidence which is and is not capable of being corroboration (*Charles* (1976) 68 Cr App R 334n; *Cullinane* (1984) Crim LR 420; and *Webber* [1987] Crim LR 412) and, in the case of evidence which is capable of being corroboration, should explain to the jury that it is for them to decide whether the evidence does in fact constitute corroboration (*Tragen* (1956)) Crim LR 332; *Meinnes* (1989) 90 Cr App R 99).

Evidence of Children

Note that under s 15(3) of the **Evidence Act, Cap 121** (BB):

> A person charged with an offence may be convicted upon evidence admitted under subsection (2) but in a trial by jury of a person so charged, the court shall warn the jury of the danger of acting on such evidence unless they find that the evidence is corroborated in some material particular by other evidence implicating that person.

Further, subsection 2 states:

> (2) Where a child who is
>
> (a) under 7 years of age; or
>
> (b) 7 years of age and under 14 years of age, and who does not qualify as a witness under subsection (1),

> is presented as a witness in a proceeding, the court shall conduct an inquiry to determine if in its opinion the child is possessed of sufficient intelligence to justify the reception of his evidence, and understands that he should tell the truth, and where the court so finds, it shall permit the child to give the evidence upon stating:
>
> *I promise to tell the truth.*

Thus, in such a case as set out above, there is a clear duty on the trial judge to warn the jury of the danger of acting on such evidence, that is, evidence of a child under 7 years of age or between 7 years of age and under 14 years of age who does not qualify as a witness under subsection 1, unless the jury finds that the evidence is corroborated in some material particular by other evidence implicating that person, that is the defendant.

Sexual Offences

Section 28 of the **Sexual Offences Act, Cap 154** (BB) also provides for corroboration and states as follows: 'Subject to s 31, where an accused is charged with an offence under this Act, no corroboration is required for a conviction but the Judge shall warn the jury that it may be unsafe to find the accused guilty in the absence of corroboration.'

Section 31 of the Act states:

> 31. (1) Where upon the hearing of a complaint under this Act a minor in respect of whom the offence is alleged to have been committed or any other minor of tender years who is tendered as a witness does not in

> the opinion of the court understand the nature of an oath, the evidence of the minor may be received though not given upon oath, if, in the opinion of the court
>
> (a) the minor is possessed of sufficient intelligence to justify the reception of the evidence; and
>
> (b) the minor understands the duty of speaking the truth.
>
> (2) No person shah be liable to be convicted of an offence under this section unless the testimony admitted by virtue of subsection (1) in respect of a minor of 16 years or under and given on behalf of the prosecution is corroborated by some other material evidence in support thereof implicating the accused.
>
> (3) Any witness whose evidence has been admitted under subsection (1) shall be liable to be convicted on indictment and punished for perjury in all respects as if the witness had been sworn.

Section 137 of the **Evidence Act, Cap 121** (BB) makes provision for various kinds of unreliable evidence. Included in this category of evidence, per s 137(1)(d)(i), is evidence of a witness referred to at common law as an accomplice. Note the judgment of ***Sio*** **[2016] HCA 32, (2016) 259 CLR 47** at [65], where it is stated, 'Evidence by an accomplice against his or her co-offender has long been recognised as less than inherently reliable precisely because of the perceived risk of falsification…'

Points to Consider

i. Section 136(1) of the **Evidence Act, Cap 121** (BB) states, 'It is not necessary that evidence on which a party relies be corroborated.'

ii. As to warnings to the jury, generally, s 137 of the **Evidence Act, Cap 121** (BB) provides guidance. The entire section is applicable in respect of a judge's obligation to warn the jury of certain aspects of the evidence and certain types of evidence. Some examples are outlined below:

a. Section 137(1)(b) deals with a judge's obligation to warn or caution the jury with respect to identification evidence;

b. Section 137(1)(d) applies in criminal proceedings with respect to:

> (i) evidence given by a witness called by the prosecutor, being a person who might reasonably be supposed to have been concerned in the events given rise to the proceeding; or
>
> (ii) oral evidence of official questioning of a defendant, where the questioning is recorded in writing that has not been signed or otherwise acknowledged in writing by the defendant;

c. Section 137(2) provides:

> (2) Where there is a jury the Judge shall, unless there are good reasons for not doing so,
>
> (a) warn the jury that the evidence may be unreliable;
>
> (b) inform the jury of matters that may cause it to be unreliable; and

(c) warn the jury of the need for caution in determining whether to accept the evidence and the weight to be given to it.

d. The confession of a defendant which also implicates a co-defendant, is only evidence against that particular defendant and not against the co-defendant.

e. **Recent Complaint Evidence** – a judge has a duty to warn the jury as to the limited purpose for which this evidence is introduced and how it is to be dealt with.

f. **Uncorroborated Confessions** – duty of judge: Paul Taylor, Caribbean Case Commentary***: Vincent Leroy Edwards; Richard Orlando Haynes v The Queen [2017] CCJ 10 (AJ), Criminal Appeals Bulletin of Doughty Street Chambers***. The Commentary notes:

(a) "Contemporary standards of fairness": The audio or video recording of police interviews, (or at least the presence of a Justice of the Peace during the questioning) was said to have been implemented in every other regional jurisdiction and every Commonwealth jurisdiction [paragraph 18 CCJ judgment]. Whilst this case centred on the changes brought about by the Evidence Act, it is arguable that wherever there is such a wide spread practice of providing a defendant with any procedural safeguard it is evidence of recognised "contemporary standards of fairness" [see generally Bentley [2001] 1 Cr App R 307, para 4 an 5; Mattan (M) [24th February 1998]. Consequently, the absence of such a safeguard is a powerful factor to take into account when assessing the fairness of the trial.

(b) The Judge's warnings: Saunders J sets out important directions on the nature of the judicial warnings in cases where an unrecorded, unsigned, challenged interview is admitted [paragraphs 50-53]. Particular analysis is made of the reasons why such evidence is potentially unreliable. This is crucial if the jury is to understand the dangers involved in relying on such evidence.

This follows the approach required in identification evidence cases [*Turnbull* (1976) 63 Cr App R 132] as well as in "new" sciences such as DNA. In the latter type of cases, it is advisable that expert evidence should identify the specific dangers in relying on such evidence and the safeguards that are necessary (and / or absence in a particular case). This provides a basis for the Judge's warning direction to the jury.

g. Some challenges may also arise in that, having warned the jury about the lack of corroboration and that the evidence relating to a sexual complaint (in most circumstances) does not require corroboration, the issue then arises, how does one erase from the jury's mind, the fact that there is a warning to them, but that they can still proceed to act on the uncorroborated evidence. In Dominica, an amendment to s 28 of the **Sexual Offences Act 1998 Act No. 1 of 1998** (DM) was done to address this dilemma: ***Fontaine v The State* DOMHCRAP 2015/0007**. Furthermore, Guyana has treated the issue of corroboration in section 69(1) of the **Sexual Offences Act, Cap 8:03** (GY) as follows:

No corroboration of the evidence of the complainant or the sworn or unsworn evidence of a child shall

> be required for a conviction of an offence under this Act, **and the judge shall not direct the jury that it is unsafe to find the accused guilty in the absence of corroboration.** [Emphasis added]

Belize

Relevant Statutory Provisions

Section 92 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides specifically for corroboration and states as follows:

> 92.– (1) No plaintiff in any action for breach of promise of marriage shall obtain judgment, unless his or her testimony is corroborated by some other material evidence in support of that promise.
>
> (2) No order against any person alleged to be the father of an illegitimate child shall be made by a summary jurisdiction court, unless the evidence of the mother of the illegitimate child is corroborated in some material particular, to the satisfaction of the court.
>
> (3) Where at a trial on indictment–
>
> *(a)* a person is prosecuted for rape, attempted rape, carnal knowledge or any other sexual offence, and the only evidence for the prosecution is that of the person upon whom the offence is alleged to have been committed or attempted; or

> *(b)* an alleged accomplice of the accused gives evidence for the prosecution,
>
> the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution.
>
> (4) In any case where at the summary trial of a person for an offence it appears to the court that a warning under sub-section (3) would be appropriate if the trial were on indictment, the court shall treat the case as one in which there is a special need for caution before convicting the accused on the evidence of such person.
>
> (5) Nothing in sub-sections (3) and (4) applies in relation to any trial on indictment, or any proceeding before a magistrate, which began before the 1st day of August, 1998.

Section 93 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for corroboration in perjury cases and states:

> 93. If on any trial for perjury the only evidence against the defendant or the accused person is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate that witness, the defendant or the accused person, as the case may be, is entitled to be discharged or acquitted.

Section 96 of the **Evidence Act, Rev Ed, CAP 95** (BZ) makes provision for sexual cases complaints and provides as follows:

> 96.– (1) The particulars and details of a complaint made soon after the commission of an alleged offence in the absence of an accused person by the person in respect of whom the crime is alleged to have been committed may be admitted in evidence in prosecutions for rape, indecent assault, other offences against women and boys and offences of indecency between male persons.
>
> (2) Such particulars and details are not to be taken in proof of the facts in issue, but merely as showing the consistency of the conduct of the person complaining and supporting his credibility.

Section 97 of the **Evidence Act, Rev Ed 2020, CAP 95** provides for possession of stolen property and states as follows:

> 97. Possession by a person of property recently stolen is, in the absence of a reasonable explanation by that person as to how it came into his possession, some evidence that he either stole it or handled it knowing it to have been stolen according to the circumstances of the case, but if the accused gives an explanation which raises a reasonable doubt as to his guilt, the judge shall direct the jury that it ought not to say that the case has been proved to its satisfaction on that evidence alone.

Section 103 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) states that:

103. – (1) Where a child or other person is tendered as a witness in a civil or criminal cause and in the opinion of the court that child or other person does not understand the nature of an oath, the evidence of that child or other person may be received without the oath being taken if, in the opinion of the court, the child or other person is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) The evidence of that child or other person, although not given on oath but otherwise taken in accordance with the provisions of the law, shall have the same effect as the evidence of a person duly given upon oath, however, no accused person in a criminal cause shall be liable to be convicted of any offence upon the unsworn evidence of a child or such other person unless that evidence is corroborated in some material particular implicating the accused person.

(3) A child or other person whose unsworn evidence is received in accordance with sub-sections (1) and (2), who wilfully gives false evidence under such circumstances that, if the evidence had been given on oath, he would have been guilty of perjury shall, notwithstanding that the evidence has been given without oath, be guilty of an offence and be liable on summary conviction to a fine not exceeding two hundred and fifty dollars or to imprisonment for a term not exceeding six months.

In ***NLN*** **(Belize CA, Crim App No 3 of 2012)**, Justice of Appeal Awich

considered the sixth ground of appeal, 'The learned trial judge…failed to direct the jury that in sexual cases, it is dangerous to convict without corroboration, and that this danger arose from the fact that sexual allegations were easy to make and hard to disprove and in a number of cases innocent persons had been convicted on uncorroborated evidence of complainants in sexual cases. The court noted:

> [25] This ground was drafted in the usual formulation of the complaint under the old law about lack of a mandatory warning by a trial judge to the jury, of the danger of acting on uncorroborated evidence of a complainant in a sexual case. But the law has been changed in 1998, by ***Act No. 18 of 1998***, which amended the ***Evidence Act Cap. 95***, ***Laws of Belize***.
>
> [26] The old law regarding evidence of a complainant in a sexual case was that, the trial judge was required to warn the jury of the danger of acting on, that is, convicting an accused on, the evidence of the complainant without corroboration; failure to give a warning was fatal to a conviction – see ***R v Trigg, 47 Cr App R 94,*** and ***R v Birchall and Others, 82 Cr App R 208 CA.***
>
> [27] The new law introduced by ***Act No. 18 of 1998*** is now ***s. 92 of Evidence Act…***
>
> [28] This Court has since interpreted ***s. 92 (3) of Evidence Act*** to mean that, in sexual cases the trail *(sic.)* judge is no longer bound to caution the jury of the danger of acting on the uncorroborated evidence of the complainant, the judge now has discretion to give the warning, "where he considers it appropriate.".

[29] In **Mark Thompson v The Queen, Cr App No. 18 of 2001**, one of the grounds of appeal was that: "the judge failed to give the *mandatory warning* to the jury, of the need for caution before acting on the sole evidence of the victim, and that the judge failed to explain the meaning of corroboration." This Court (Rowe P, Motley and Sosa JJA) in the judgement prepared by Rowe P stated at paragraph 11 as follows:

> ***"In our view a trial judge is given a discretion to determine the cases in which a caution is required under section 92 (3) (a). If the section were to be interpreted that it becomes mandatory to give the warning in every case in which the prosecution evidence comes solely from the victim, the words, 'when he considers it appropriate to do so,' would be meaningless, and the statute would have made no change whatsoever to the rule at common law, which prior to the statue, required a mandatory warning to be given in such cases."***

In ***Ax* (Belize CA, Crim App No 5 of 2017)**, the court noted at [16] to [19]:

> [16] The application of S.92(3) of the **Evidence Act**, by a trial judge, was recently restated in this court in the matter of **Antonio Gutierrez v The Queen**, delivered on the 27th October, 2017 at par 8, inter alia.
>
> *"This Court has consistently held that the section gives a discretion to a trial judge to determine the cases in which*

a caution is required. However, in some circumstances it becomes more 'necessary' to point out to the jury those aspects of the evidence led that might undermine the credibility or reliability of the witness."

[17] Before the coming into force of **Section 92(3) (a) of the Evidence Act** there was an obligation placed on a judge to direct the jury that it would be dangerous to convict the accused on the uncorroborated evidence of a complainant in a sexual case. This mandatory requirement, was abrogated by S.92(3)(a).

[18] In 2009, this court in **Jimmy Jerry Espat v The Queen**, Criminal Appeal No 3 of 2009 , heard a complaint that the trial judge had failed to give the jury a direction in law based on section 92(3)(a). The Court of Appeal indicated it was guided by the principle enunciated in **R v Makanjuola and R v Easton [1995] 2 Cr App 469**. Carey JA, commented that appellants counsel having failed to show why the circumstances of the case warranted a warning of special caution to the jury, and that the Court,' had not been astute to discover any," said at paragraph 17,

"[17] A helpful case in this regard is **Makanjuola** and **E v R [1995] 2 Cr. App. 469** where Taylor LCJ said this:

'*Whether, in his discretion a judge should give any warning and, if so, its strength and terms had to depend on the content and manner of the witness's evidence, the circumstances of the case and the issues raised.* ***The judge would often consider***

that no special warning was required at all.

Where, however, the witness has been shown to be unreliable, the judge might consider it necessary to urge caution. In a more extreme case, if the witness was shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning might be thought appropriate and the judge might suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence.' " (emphasis added)

[19] On the question of corroboration, the evidence of the witness in a case where sexual offence is charged, is to be treated no differently, from that of "*any other witness in whatever type of case*". It is in the sole discretion of the judge, whether any warning, in whatever terms, should be given. The exercise of the judicial discretion will only be impeached on appeal, if it is found to be Wednesbury unreasonable. The authorities are clear that there is no special formulation for the judge to employ, when dealing with corroboration in his directions to the jury. It has been shown, that the mandatory warning in these cases, had the effect of confusing juries and producing unfairness.

Guyana

Section 62 of the **Evidence Act, Cap 5:03** (GY) provides for corroboration required in case of perjury and states:

> 62. If on any trial for perjury the only evidence against the defendant or the accused person is the oath of one witness contradicting the oath on which perjury is assigned, and if no circumstances are proved which corroborate that witness, the defendant or the accused person, as the case may be, is entitled to be discharged or acquitted.

Section 93(2) of the **Evidence Act, Cap 5:03** (GY) provides for the weight to be attached to evidence and outlines as follows:

> (2) For the purpose of any rule of law or practice requiring evidence to be corroborated or regulating the manner in which uncorroborated evidence is to be treated, a statement rendered admissible as evidence by sections 90 to 94 (inclusive) shall not be treated as corroboration of the evidence given by the maker of the statement.

According to s 69 of the **Sexual Offences Act, Cap 8:03** (GY), there is no longer a need for corroboration warnings for convictions of sexual offences under the Act.

Persaud v The State **(1976) 24 WIR 97** (GY CA), treats with corroboration warnings for evidence of accomplices and lies told by the defendant.

In this Chapter:
General Guidelines

Chapter 13
Bad Character of the Defendant

Sources

Supreme Court of Judicature of Jamaica, *Criminal Bench Book* 2017 (Caribbean Law Publishing Company 2017)

PJ Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* 1997 (1st Supplement, Sweet and Maxwell 1996)

PJ Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice* 1995 (1st Supplement, Sweet and Maxwell 1994)

Legislation in each jurisdiction determines the approach to the treatment of evidence of bad character. The following general guidelines are therefore subject to each jurisdiction's legislative stipulations.

General Guidelines

Bad character evidence generally refers to evidence of a disposition towards misconduct which is neither related to the facts of the offence charged, nor is in relation to the investigation of the alleged offence. Once admitted, the uses or purposes to which it can be put are largely determined by issues of relevance.

Misconduct is the commission of an offence or other reprehensible behaviour. The word "reprehensible" connotes culpability or blameworthiness. If the misconduct alleged "has to do with the offence", it may still be admissible as evidence relevant to proof that the defendant committed the offence.

Judges must have in mind that no evidence is admissible unless it is relevant to the issues in the case and there is a duty to consider in advance all evidence that the parties propose to place before the jury.

The Prosecution is not generally permitted to introduce evidence of the bad character of the defendant. The defendant's previous convictions, previous misconduct, disposition towards immorality, or the defendant's foul reputation within their community may not form part of the case against them. However, some of the exceptions to this rule at common law are:

i. Evidence of other misconduct forming part of the same transaction of the offence charged is also admissible;

ii. The defendant puts their character in issue; evidence of bad character may be admitted.

Where the defendant has given evidence, the jury should be told that the defendant's bad character, if in evidence, goes solely to their credibility and not as to whether they are likely to have committed the offence. The judge must direct the jury that evidence of previous convictions is relevant to the defendant's credibility and that they may, not must, take such evidence into account: ***Prince*** **[1990] Crim LR 49** (UK CA).

The sole purpose of such evidence is to show that the defendant should not be believed on their oath: ***Cook*** **[1959] 2 QB 340** (UK CA).

Where, however, evidence of good character has been elicited or called on behalf of the defendant who has not given evidence, the evidence of good character can only be relevant as to the likelihood of their having committed the offence, and the evidence of bad character can only be relevant to rebut the evidence of good character, i.e. to neutralise it: **Archbold (1997)** at 4-421.

At common law, evidence which shows that a defendant has a propensity to misbehave is generally to be excluded on grounds of fairness, unless there is some reason to admit it beyond mere propensity. Mere propensity to behave badly is to be excluded as unfair.

It is helpful to state the time-honoured formulation of Lord Herschell in ***Makin v Attorney General for New South Wales*** **[1894] AC 57** (NSW PC) at 65 which is applied in jurisdictions governed by the common law:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered

> by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.
>
> On the other hand the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

Barbados

Relevant Statutory Provisions

Sections 88, 89, and 90 of the **Evidence Act, Cap 121** (BB) provide for character evidence.

In particular, s 88 provides for an exception with respect to the character of the defendant and states as follows:

> 88. (1) This section applies in criminal proceedings.
>
> (2) The hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence adduced by an accused that tends to prove that the defendant is, either generally or in a particular respect, a person of good character.

(3) Where evidence that tends to prove that the accused is generally a person of good character and the tendency rule do not prevent the admission or use of evidence that tends to prove that the accused is not generally a person of good character.

(4) Where evidence that tends to prove that the accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that the accused is not a person of good character in the respect.

Section 89 provides for an exception with respect to the character of the co-defendant and states as follows:

89. (1) In criminal proceedings, the hearsay rule and tendency rule do not prevent the admission or use of evidence of an opinion about an accused adduced by some other accused

(a) the person whose opinion it is has specialised knowledge based on the person's training, study or experience; and

(b) the opinion is wholly or substantially based on that knowledge.

(2) Where evidence of an opinion as mentioned in subsection (1) has been admitted, the hearsay rule, the opinion rule and the tendency rule do not prevent the admission or use of evidence that tends to prove that

evidence should not be accepted.

Section 90 provides for the cross examination of a defendant by leave only and states: 'An accused in criminal proceedings may not be cross-examined as to matters arising out of evidence to which section 88 or 89 applies unless the court gives leave.'

Section 94(4) of the Act further states:

> (4) Leave shall not be given for cross-examination by the prosecutor as to any other matter that is relevant only to the credibility of the accused unless
>
> (a) evidence has been adduced by the accused that tends to prove that the accused is, either generally or in a particular respect, a person of good character; or
>
> (b) evidence has been admitted that
>
> (i) was given by the accused,
>
> (ii) tends to prove that a witness called by the prosecutor has a tendency to be untruthful, and
>
> (iii) was adduced solely or mainly to impugn the credibility of that witness.

Previous convictions of a defendant are only relevant to their credibility and not to whether they committed the offence for which they are charged: ***Prince*** **[1990] Crim LR 49** (UK CA).

In ***Gill*** **(Barbados CA, Crim App No 15 of 2007)**, the court referred to ***Nelson (John Holmes) v HM Advocate*** **1994 SLT 389**, where Lord Justice

General (Hope) restated the rule as follows:

> The Crown can lead any evidence relevant to the proof of a crime charged, even although it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character, and that other crime is so different in time, place or character from the crime charged that the libel does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime.

In ***Alleyne*** **(Barbados CA, Crim App No 9 of 2016*)*** at [39] and [40], it was stated:

> [39] This Court went on at **paras 26** and **27** to state that the test is as follows:
>
> (1) Was the evidence relevant to prove the offences with which a defendant has been charged; and
>
> (2) Would fair notice require that the other crime be charged or otherwise expressly referred to in the indictment?
>
> [40] In relation to the second question, this Court stated that this would be necessary if the other crime would tend to show that the defendant was of bad character and was so different in time, place or character from the

substantive offence that the defendant would not have fair notice that the evidence would be led.

See also ***Phillip v DPP*** **[2017] UKPC 14, [2017] 3 LRC 692** (KN PC).

Points to Consider

i. Judges should always discuss with counsel in the absence of the jury, when such issues (as outlined above) arise, or are likely to arise.

ii. However, the court should always be aware of the exception to tendency evidence which is set out at s 84 of the **Evidence Act, Cap 121** (BB).

iii. Also, the court must always be aware of s 86 of the **Evidence Act, Cap 121** (BB), which gives further protections in relation to the conduct of a defendant as set out at ss 84 and 85 under the heading Conduct Evidence.

iv. The court will be minded to observe s 87 pertaining to Notice, and whether notice to adduce has been given, and if not, how should the Court proceed in the absence of such notice. This aspect is more fully dealt with under Cross Admissibility, where tendency and conduct evidence also arise.

v. The legislation is silent on "bad character" evidence; it mainly speaks of good character evidence.

vi. Further, the legislation fails to define character, thereby placing reliance on the common law definition which does not seem to clearly define what should constitute "character".

vii. A challenge will arise between co-defendants, especially where there is a cut-throat defence and one defendant seeks to introduce

evidence of the bad character of another.

viii. Generally, a judge's duty is to point out the evidence of bad character, and explain why the evidence is before the jury. Also, to explain to the jury the particular purpose for which bad character, such as convictions, may be used. It should be noted that where convictions or evidence of bad character relates to matters which took place many years ago, these should be treated with care, or the jury should be told to disregard them.

ix. Why should a conviction, for example handed down 10-15 years prior to the offence before the court, be relied on by the Prosecution, or another co-defendant for that matter, to determine the credibility of a defendant? Where the evidence of bad character is disputed, it must be pointed out to the jury, and they must be told that they must be sure about such evidence or such matters before they can rely on that evidence. Possibly a review of the legislation to encapsulate a definition of "character", which may look at bad character evidence and its impact, are considerations for any future discussions on amendments.

Belize

Relevant Statutory Provisions

Section 51 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ), deals with evidence of character in criminal cases and provides as follows:

> 51. – (1) In criminal causes or matters, the fact that the defendant or the accused person, as the case may be,

has a good character may be proved, but the fact that he has a bad character is inadmissible in evidence, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

(2) Where evidence of his good character is given by any person who–

(a) being on his trial for any felony not punishable with death, has been previously convicted of felony;

(b) being on his trial for any offence involving fraud or dishonesty punishable under the Summary Jurisdiction (Offences) Act or the Criminal Code has been previously convicted of any offence punishable on summary conviction or on indictment; or

(c) being on his trial for any offence in respect of coin punishable under either of the said Acts, has been previously convicted of any offence in respect of coin,

the complainant or prosecutor, or the Crown, may, in answer to the evidence of good character, give evidence of any of those previous convictions before the magistrate gives his decision, or before the jury return its verdict, in respect of the offence for which the offender is being tried.

(3) In this section, the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.

Further, s 58(e) of the Act states:

> (e) a person charged and called as a witness in pursuance of this Act shall not be asked and, if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless-
>
> (i) the proof that he has committed or been convicted of that other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his attorney asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or
>
> (iii) he has given evidence against any other person charged with the same offence…

In ***Ramirez*** **(Belize CA, Crim App No 5 of 2006)**, the appellant was convicted on an indictment on counts charging aggravated burglary (count 1) and rape (count 2). He was sentenced to respective terms of 10 years' and 12 years' imprisonment and he appealed against his 2 convictions. The DPP was invited to address the Court of Appeal on the trial judge's directions

on the jury's proper approach to evidence of bad character with respect to the appellant, which caused the Court some concern. At [11] to [16], the Court of Appeal noted:

> 11. This brings us to the trial judge's direction as to bad character which is taken from the Crown Court Bench Book prepared by the Judicial Studies Board for the guidance of Crown Court judges in the United Kingdom. The specimen directions, it should be noted, were prepared in anticipation of the Criminal Justice Act 2003 (UK). There is no equivalent legislation in Belize. The directions of the Judicial Studies Board, can be of immeasurable assistance to judges in this jurisdiction but care must be taken to ensure that the law in both countries, is in *pari materia*.
>
> 12. The learned trial judge in addressing the jury on the issue of bad character stated as follows:
>
> > "You have also heard the evidence that the accused has a bad character in the sense that he used to beat up Jovita Jones and there was in fact a Restraining Order against him from the Family Court and you heard of this because the defendant asked questions which brought it up. You may use this evidence of the defendant's bad character in the following ways.
> >
> > If you think it right, you may take it into account when deciding whether or not the defendant's evidence to you was truthful. A person with a bad character may be less likely to tell the truth but it doesn't follow that he is incapable of telling the truth. It is for you to decide to what extent, if at all, his character helps

> you when judging his evidence.
>
> If you think it is right, you may also take it into account when deciding whether or not the defendant committed these offences with which he is presently charged. He is charged with aggravated burglary and rape and you must decide to what extent, if at all, his character helps you when you are considering whether or not he is guilty of these offences but bear in mind that his bad character cannot by itself prove that he is guilty. It will therefore be wrong for you to jump to the conclusion that he is guilty just because of his bad character." (Emphasis added)

13. It is right to say that this does not represent the law in Belize which is to be found in section 51 of the Evidence Act, Cap. 95...

We understand from this provision that unless the character of the accused is in issue, the prosecution cannot lead evidence of bad character. In the instant case, the prosecution did not lead such evidence. The evidence that the appellant used to "beat up" the victim was suggested to the jury as amounting to bad character by the trial judge but section 51(3), does not, we think, support that categorisation...

Nor do we think that the Restraining Order issued by the family court qualifies as evidence of bad character in the sense of a general bad reputation. It could also be said that these acts could show he had a disposition to violence which would have rendered that evidence altogether inadmissible. The position stands thus: the

trial judge has treated as evidence of bad character, evidence which is not, and gone on to give directions on the effect of that bad character. In doing so, however, we are of opinion that she gave directions which, based as they are on UK legislation, were not only inappropriate but were likely also to confuse rather than to be helpful to the jury.

14. The fact of the matter, is that the conditions section 51(1) required to exist so as to allow bad character evidence to be admitted, did not exist. Further, there was, as we have indicated, no evidence of bad character on the part of the appellant. What is to be understood, from all this, is that no directions on bad character were called for. In the event, what was stated was, we think, confusing. The first paragraph of the directions quoted above, told the jury that bad character evidence goes to credibility. The second part suggests that the same bad character evidence can properly be taken into account when deciding whether the appellant committed the offence with which he was charged. That second particular of the directions was inapplicable given that there was no evidence of other similar behaviour on which the prosecution relied and which evidence the prosecution would have had to adduce if the UK legislation was the law of Belize.

15. Where bad character is admissible as is allowed by section 51(1) of the Evidence Act, then the first paragraph represents the law. That direction would be correct. We repeat, for emphasis, that evidence of bad character

> properly so called, can only go to credit; it cannot go to prove that an accused committed the offence.
>
> 16. This matter has given us anxious concern as to its effect on the trial. We think we should commend the judge in taking the time to refer to the specimen directions prepared by the Judicial Studies Board, but we fear, that we must suggest that judges take care to satisfy themselves that these directions represent the law of Belize, which is the only proper law. We are satisfied however that in the instant case, no miscarriage of justice has occurred. The evidence against the appellant was overwhelming, the injuries to the victim could never be explained on anything said by the appellant who gave evidence on oath. The jury would, we think, despite the confusing and incorrect directions as to bad character which was not an issue in the case, inevitably have come to the same decision.

In ***Olivarez*** **(Belize CA, Crim App Nos 27, 28 & 29 of 2006)**, on appeal, counsel for Jesus Olivarez put forward that the appellant was prejudiced and suffered a miscarriage of justice at his trial when evidence of bad character and direction of bad character was presented to the jury contrary to s 51(1)(a) of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ). The Court of Appeal, accepting that what had occurred at the trial was regrettably, highly improper, noted:

> 11. There can be no doubt that section 51(2)(a) was wholly inapplicable in this situation. The appellant was on his trial for a felony punishable with death. Thus

> the previous convictions were inadmissible in evidence and demonstrably prejudicial to this appellant. The circumstances in which the injuries were caused to the victim were the same in respect to all the appellants, but he alone was convicted of murder.
>
> 12. We would wish to point out that although section 51(1) permits evidence of bad character to be adduced where evidence has been given that the defendant has a good character, section 51(3) only allows evidence of reputation and not particular acts. Previous convictions would qualify as facts showing that his disposition was bad, and would accordingly be inadmissible.

Guyana

Relevant Statutory Provisions

Section 21 of the **Evidence Act, CAP 5:03** (GY), deals with the general rule as to inadmissibility of evidence of character and provides: 'The fact that a person is of a particular character is inadmissible in evidence on any inquiry respecting his conduct, except in the cases hereinafter mentioned.'

Section 22 of the Act provides for the evidence of character in criminal cases and states as follows:

> 22. (1) In criminal causes or matters, the fact that the defendant or the accused person, as the case may be, has a good character may be proved; but the fact that he

has a bad character is inadmissible in evidence, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

(2) When anyone gives evidence of his good character who -

(a) being on his trial for any felony not punishable with death, has been previously convicted of felony; or

(b) being on his trial involving fraud punishable under for any offence or dishonest the Summary Jurisdiction (Offences) Act, or the Criminal Law (Offences) Act, has been previously convicted of any offence punishable on summary conviction or on indictment; or

(c) being on his trial for any offence in respect of coin punishable under either of the said Acts has been previously convicted of any offence in respect of coin;

the complainant or prosecutor, or the State, may, in answer to the evidence of good character, give evidence of any of those previous convictions before the magistrate gives his decision, or before the jury return their verdict, in respect of the offence for which the offender is being tried.

(3) In this section, the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation, and not of particular

acts by which reputation or disposition is shown.

Section 52(f) of the Act provides:

> 52. Everyone charged with an offence, and his wife or her husband, as the case may be, shall be a competent witness for the defence at every stage of the proceedings, whether he or she is charged solely or jointly with any other person:
>
> ...
>
> (f) a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked, shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character, unless-
>
> (i) the proof that he has committed or been convicted of that other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or
>
> (ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution;

or

(iii) he has given evidence against any other person charged with the same offence; …

In this Chapter:
General Directions

Chapter 14

Bad Character of a Person other than the Defendant

Sources

Supreme Court of Judicature of Jamaica, *Criminal Bench Book* 2017 (Caribbean Law Publishing Company 2017)

PJ Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 1997* (1st Supplement, Sweet and Maxwell 1996)

PJ Richardson (ed), *Archbold: Criminal Pleading, Evidence and Practice 1995* (1st Supplement, Sweet and Maxwell 1994)

Bad character evidence in relation to witnesses other than a defendant may be used to undermine the credibility of such a witness, or because it is relevant to a fact in issue. In some jurisdictions, legislation permits the questioning of a witness as to whether they have been convicted of any offence, and if necessary, for the convictions to be proved. In such instances, the judge has a discretion to excuse an answer when the truth of the matter suggested would not in the judge's opinion affect the credibility of the witness as to the subject matter of their testimony.

General Directions

i. Identify the evidence of bad character;

ii. Where the evidence is disputed the jury must decide:

   a. if the evidence is adduced by the Prosecution, whether they are sure it is true;

   b. if the evidence is adduced by the Defence, whether it may be true.

iii. Identify the issue/s to which the evidence is potentially relevant;

iv. The jury should be directed that it is for them to decide the extent to which, if any, the evidence of bad character of the non-defendant assists them in resolving the potential issue/s; and

v. Depending on the nature and extent of the convictions or other evidence of bad character, there may need to be a direction as to the effect on the credibility of the person if they were a witness.

Illustration

You have heard that W has convictions for offences of violence, namely [specify]. You heard about W's convictions because D claims that it was W who started this incident and says that W's convictions support this. The fact that W has these convictions does not mean that they must have used unlawful force on this occasion, but it is something that you may take into account when you are deciding whether or not the Prosecution has made you sure that it was D, and not W, who started the violence and that D's use of force was unlawful.

Barbados

Relevant Statutory Provisions

Section 91(1) of the **Evidence Act, Cap 121** (BB) provides for the exclusion of evidence relevant to credibility and states: 'Evidence that relates to the credibility of a witness is not admissible to prove that the evidence of the witness should or should not be accepted.'

This relates to the credibility rule, but there are exceptions to the credibility rule at ss 91(2), 92, and 93 of the Act. These are outlined below.

Section 91(2) provides: 'Where such evidence is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove that the evidence of the witness should or should not be accepted.'

Further, s 92 which applies in criminal proceedings states as follows:

> 92. ...(2) The hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence adduced by an accused that tends to prove that the accused is either generally or in a particular respect, a person of good character.
>
> (3) Where evidence that tends to prove that the accused is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the accused is not generally a person of good character.
>
> (4) Where evidence that tends to prove that the accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the accused is not a person of good character in that respect.

Section 93 specifically provides for exceptions to cross-examination as to credibility and states as follows:

> 93. (1) The credibility rule does not prevent the admission or use of evidence that relates to the credibility of a witness and that has been adduced in cross-examination of the witness.
>
> (2) Evidence referred to in subsection (1) is not admissible if it
>
> (a) is relevant only to the credibility of the witness; and

> (b) does not have substantial probative value as to the credibility of the witness.
>
> (3) In determining whether the evidence referred to in subsection (1) has substantial probative value the court shall have regard to *inter alia*, the following matters
>
> (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation at a time when the witness was under an obligation to tell the truth; and
>
> (b) the period that has elapsed since the acts of events to which the evidence relates were done or occurred.

Section 96(1)(b) also provides for exceptions which deal with convictions for offences, including offences against the law of a foreign country. In addition ss 96(2) and 98 deal with re-establishing credibility in re-examination. See also Mark Dennis, **Credibility Evidence in Criminal Proceedings**, which deals with the New South Wales position in Australia. At page 8, Dennis notes:

> As to what "could" substantially affect the assessment of the credibility of the witness, it is important to note the decision of ***R v Beattie* (1996) 40 NSWLR 155 at 163**. The accused had been arrested for guns and drugs. The defence case that the guns and drugs were planted by police, that alleged oral admissions were a fabrication or "verbal" and that the police had in fact stolen a significant sum of cash from the accused. A police officer was cross-examined as to whether he had ever illicitly seized money from others during the course of investigations.

His Honour James J stated at 163:

> *"In my opinion, an admission made by the witness in an answer to either of the questions I am now dealing with would have had substantial probative value on the question of the witness' credibility and the fact that the witness might have been unlikely to make any such admission did not affect the admissibility of the questions."*

Later at 163 his Honour stated:

> *"...a judge should be slow to reject an otherwise admissible question on the ground that the judge anticipates that the answer the witness will give will not assist the questioner's case."*

In ***El-Azzi*** **[2004] NSWCCA 455** (NSW), Simpson J commented on the earlier form of the section concerning "substantial probative value", and noted at [183]:

> In my opinion, for this evidence to have had substantial probative value within the meaning of s103(1), it must have had the potential to have a real bearing upon the assessment of the appellant's credibility – and, particularly, to the appellant's credibility in relation to the evidence he had given, or would give, at the trial. It cannot have had substantial probative value for the purposes of s103(1) unless it was capable, in a significant way, of bearing upon that assessment.

Points to Consider

i. When a judge is summing up to a jury in any trial, they must direct them on how to use the evidence. In a joint trial, the summing up must also include directions on what evidence is admissible and what is not admissible in the case against each defendant. If one defendant introduces evidence of the criminal disposition of another, careful directions must be given.

ii. For instances when the other person is a co- defendant, see ***Varley* [1982] 75 Cr App Rep 242** (UK CA) and ***Crawford* 1998 1 Cr App R 338** (UK CA).

iii. **Character of a Co-defendant**: guiding unrepresented defendant who may wish to introduce evidence from a witness, pursuant to s 89 of the **Evidence Act, Cap 121** (BB). The reference in section 89(1) to the evidence refers to character of a co-defendant, and the introduction of such evidence can be admitted. Again, this is an area which should be handled with care to enable a fair trial for all concerned.

iv. Note ***Douglass* [1989] 89 Cr App Rep 264** (UK CA) and ***Randall* (2004) 1 WLR 56** (UK HL), which are good examples of a "cut-throat defence" in which bad character of the other was introduced.

v. In considering whether such evidence is always admissible, the trial judge can exercise their discretion to exclude the evidence: ***Darrington* [1980] VR 353** (CCA) (Jenkinson J); ***Corak and Palmer* (1982) 30 SASR 404** (SA SCFC); David Ross, **One Accused's Evidence of Another's Criminal Disposition** (2006) 11 Deakin L Rev 179.

vi. A judge may exclude Prosecution evidence against one defendant because it is too prejudicial. However, the other defendant can compel the admission of this evidence because it advances that

other defendant's defence: ***Question of Law Reserved*** **(1998) 70 SASR 555** (SA CCA).

vii. Note ***Corak and Palmer*** at 413 for the Australian approach. At 190 of **One Accused's Evidence of Another's Criminal Disposition**, it was noted:

> *Corak and Palmer* was a joint trial on a charge of possession of indian hemp for trading. The accused Mr Palmer gave evidence. He was cross-examined on behalf of another accused that she acted as she did because of his duress. To that end he was taken to various other wrongdoings. King CJ referred to Mr Palmer's evidence and said:
>
> > The evidence could properly be used by the jury as tending to support the evidence of duress and also in their assessment of the credibility of Palmer as a witness. It could not properly be used as supporting the truth of the charge by way of its tendency to show a propensity on the part of Palmer to commit crime in general or to commit crime involving unlawful drugs in particular. The admission of the evidence placed an obligation on the trial judge to give a direction to the jury as to the uses to which it could properly be put and as to the use which is impermissible.

viii. Dennis in **Credibility Evidence in Criminal Proceeding** notes at 8 – 9:

> It is also important for defence practitioners to note that they are entitled to some leeway in cross-examination as to credit. In this regard, the decision of ***R v RPS*** **(unreported, NSW CCA, 13 August 1997) BC9703571** is

of assistance. In this decision his Honour Hunt CJ at CL (Gleeson CJ and Hidden J concurring) stated:

> *"Counsel must, however, be given some freedom in cross-examination — whether it relates to a fact in issue or to credit. They are not obliged to come directly to the point; they are entitled to start a little distance from the point and to work up to it."*
>
> *"Some counsel are more succinct than others. Some will put the point quickly and clearly. Others will worry the point, like a dog with a bone, and will set the teeth of everyone (including the jury) on edge. Trial judges are expected to have the patience (but, hopefully, not the poverty) of Job. That is not always an easy role to perform. Counsel will sometimes - either through incompetence or quite deliberately - stretch a trial judge's patience to the extent that it will produce an adverse reaction. These are things which we have all faced at one time or another, and no doubt we have all succumbed to that temptation or lost our patience at times. That is only human nature, but if the consequence is unfairly to influence the jury's verdict then a miscarriage of justice may well result.*
>
> *There is, of course, nothing wrong with an intervention by the judge in order to clarify some ambiguity in the question or the answer. Otherwise, the judge is treading on dangerous ground if it is counsel for the accused who is being challenged and if there has been no objection by the Crown prosecutor."*

Belize

Relevant Statutory Provisions

Section 68 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) deals with cross-examination and provides as follows:

> 68. When a witness is cross-examined, he may, in addition to the questions referred to in section 66, be asked any questions which tend–
>
> (a) to test his accuracy, veracity, impartiality or credibility; or
>
> (b) to shake his credit, by injuring his character,
>
> but the judge has the right to exercise a discretion in those cases, and to refuse to compel the witness to answer any of those questions when the truth of the matter suggested would not in his opinion affect the accuracy, veracity, impartiality, credibility or credit of the witness in respect of the matter as to which he is required to testify.

Further, s 69 of the Act states:

> 69. When a witness under cross-examination has been asked and has answered any question referred to in section 68, no evidence can be given to contradict him, except in the following cases–
>
> *(a)* if a witness is asked whether he has been previously convicted of any felony or misdemeanour, and

denies or does not admit it, or refuses to answer, evidence may be given of the previous conviction; and

(b) if a witness is asked any question tending to show that he is not impartial and answers it by denying the facts suggested, he may, by permission of the judge, be contradicted by evidence of those facts.

In ***Wade*** **(Belize CA, Crim App No 1 of 2011)**, the Court of Appeal found that the learned trial judge gave "impeccable directions" to the jury regarding the evidence given by the Prosecution's main witness (Mr. Barry Rosales). At [44] – [45], the court noted:

> [44] In leaving the case to the jury, the learned trial judge gave them full and accurate directions on how they should approach that evidence. Thus, in relation to inconsistencies, the jury were told that, where there were inconsistencies in the testimony of a witness, "it is your task to determine whether or not the witness is lying or just confused or simply does not remember"; and that it was for them to make up their minds "whether or not to accept the testimony of that witness as being testimony of truth". As regards Mr Rosales' personal habits, the jury were reminded that, as far as the defence was concerned, "Barry Rosalez [sic] is a liad man, don't believe him, crack head…not to be believed. You might say yes, that is how I see it too…a matter for you". And, at the very end of the summing up, there was a final word on Mr Rosales:

"I just want to repeat about reaching the verdict, to find the defendant guilty, you must be sure of his guilt and I've told you the five elements that you must be sure that the Crown through Mr. Cave have proven each element to you beyond a reasonable doubt.

If you are not sure, or to put it another way, if you have a reasonable doubt of any of the elements you must find the accused as I said not guilty.

I went further and say that if you don't believe the evidence of Mr. Barry Rosales, you find the accused not guilty. If you have a reasonable doubt about his evidence, that means you are not too sure about it or you have some doubts about his evidence, find him not guilty. To find him guilty relying on Barry Rosales' evidence, you are to believe it. You must be sure that he is telling the truth.

You will recall too that Mr. Barry Rosales was giving evidence here confessed to you through the cross-examination of the defence counsel that he have [sic] previous convictions. He even said that he had gone to jail. The issue then, with respect of Barry Rosales who has previous conviction [sic] is one of credibility. It is within your domain or purview to determine whether his previous conviction affects, adversely affects his credibility. So you give it serious consideration. You might say, I can't believe that man or I have a reasonable doubt of what he say, it is affecting the credibility. So you won't be able

> to rely on his evidence. And of course, as I said, if you cannot rely on his evidence you are to find the accused not guilty.
>
> Of course, a person with a criminal history may not affect his credibility and as such you may rely on it, on his evidence. We are talking about Barry Rosales, but that again is a matter for you the jury. It is for you to say whether Mr. Barry Rosales criminal record, pass criminal, he being a convict, whether or not it affects his credibility. That is a matter for you and I have told you how to treat it because if it affects his credibility, you may say you cannot believe his evidence and as such you find the accused not guilty. Because his evidence is really, what you would say trump card, that is essential to the prosecution case, if you accept it. But you may say, even though he has previous conviction, I still believe his evidence. That's a matter for you. Then you can act on it."

[45] In our view, this was an impeccable direction, striking the entirely appropriate note at the end of a case in which everything turned on the evidence of a single – potentially suspect - witness.

Guyana

Relevant Statutory Provisions

Sections 77, 78, and 81 of the **Evidence Act, Cap. 5:03** (GY) provide as follows:

> 77. When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend -
>
> (a) to test his accuracy, veracity, impartiality, or credibility; or
>
> (b) to shake his credit, by injuring his character; but the judge has the right to exercise a discretion in those cases, and to refuse to compel any of those questions to be answered, when the truth of the matter suggested would not in the opinion of the judge, affect the accuracy, veracity, impartiality, credibility, or credit of the witness in respect of the matter as to which he is required to testify.
>
> 78. When a witness under cross-examination has been asked and has answered any question referred to in the preceding section, no evidence can be given to contradict him, except in the following cases:
>
> (a) if a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it; or refuses to answer, evidence may be given of the previous conviction; and

(b) if a witness is asked any question tending to show that he is not impartial and answers it by denying the facts suggested, he may, by permission of the judge, be contradicted by evidence of those facts.

81. (1) The credit of any witness may be impeached by the opposite party by the evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath, but those persons may not, upon their examination in chief, give reasons for their belief; they may, however, be asked their reasons in cross-examination and their answers cannot be contradicted.

(2) The evidence may not be given by the party by whom any witness is called, but, when it is given by the opposite party, the party who called the witness may give evidence in reply to show that the witness is worthy of credit.

In this Chapter:

Chapter 15
Good Character of the Defendant

Sources

Judicial College, Crown Court Bench Book*: directing the jury* (Judicial Studies Board 2010)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (May 2016)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Generally, a defendant may have absolute or effective good character. Absolute good character applies where there are no proven or admitted prior convictions, cautions, or instances of reprehensible behaviour. Effective good character applies where there exist minor, old, or irrelevant prior convictions. A defendant's good character can be relevant in two ways: it can go to determinations of credibility and/or propensity, both of which could be pivotal to findings of guilt or innocence. Good character influences credibility by increasing the likelihood of the defendant being believed, and it influences propensity by decreasing the likelihood that they acted as alleged.

For centuries, it has been accepted that evidence of the defendant's good character is admissible in criminal trials. In the modern era, the courts have accepted that good character evidence may be admissible (i) to bolster the defendant's credibility and (ii) as relevant to the likelihood of guilt. This has been repeatedly accepted, most prominently in ***Vye*** **[1993] 1 WLR 471** (UK CA), by the House of Lords in ***Aziz*** **[1996] AC 41** (UK HL), and by the five-member Court of Appeal in ***Hunter*** **[2015] EWCA Crim 631, [2015] 1 WLR 5367**.

As is well known, the good character direction contains two limbs: the credibility direction, that a person of good character is more likely to be truthful than one of bad character; and the propensity direction, that a person of good character is less likely to commit a crime, especially one of the nature with which they are charged, than a person of bad character: ***Hall*** **[2020] CCJ 1 (AJ)** (BB) at [42].

In ***Hall***, the CCJ considered the issue of whether the failure to give the good character direction was fatal to the conviction. The court in ***Hall***, referring to its dicta in ***August*** **[2018] CCJ 7 (AJ)** (BB), where it commented on the utility of the good character direction, stated as follows:

> *The concept of good character*
>
> [43] Justice Wit has already raised, in *August and Gabb v R*, some of the material issues, noting that the good character defence is 'quite artificial' and 'grossly overrated'. The learned Justice said:
>
> > As far as the "good character" defence is concerned, it is unnecessary for me to deal with it as I have already on substantive and genuine grounds concluded that the conviction of August is unsafe. More fundamentally, however, I am of the view that this defence is quite artificial and, frankly speaking, grossly overrated. To start with, it is a misnomer. The fact that a defendant has a clean criminal record does not say much, if anything at all, about his "character" (although this might be different with a "bad" criminal record). Surely, a clean criminal record alone does not mean that the defendant is credible. At best, it might be a minor indication in combination with more relevant and weighty factors. But that is as far as it goes.
> >
> > …

> A clean record may be a somewhat stronger indication that the defendant does not *seem* to have a propensity to commit crimes or certain crimes but, depending on other more important aspects of the case, it could just mean that he was smart enough to stay out the hands of the police. I would assume that it is only in a very rare and very close case, that the defendant's clean record would make any impact on the final decision of guilt or innocence.

[44] As evident from these remarks, the whole area of 'good character' directions requires quite detailed scrutiny and, possibly, re-evaluation…

[45] …Where good character is established by the evidence it will properly be the subject of appropriate directions by the judge.

[46] But what is euphemistically referred to as 'good character' is usually, as Justice Wit suggests, a misnomer in that it is based on nothing more that the absence of a criminal record: see *Ramdhanie (Mantoor) v The State*; *Re Nurse.* Obviously, the mere fact that a person has not been convicted of a crime does not mean that he is of good character in the sense of being possessed of positive intrinsic moral qualities. It is not a matter of inexorable logic that because a person has no previous criminal convictions that he is likely to be truthful or unlikely to commit the crime with which he is charged. If it were otherwise there would be no first-time offenders and the prisons would all be empty.

> [47] As foreshadowed earlier, an exhaustive pursuit of the questions of whether there is need for good character directions at all and, if there is, whether on both limbs, and in any case, the precise nature of those directions, and the complexities that arise when there is more than one accused, are matters best left for another day. For the present, we shall proceed based on the present law as to good character.

General Guidelines

A person is almost always to be treated as having a good character if they have no previous convictions.

The words of Lord Steyn in ***Aziz*** should always be borne in mind: Judges 'should never be compelled to give meaningless or absurd directions.' No direction should be given if it is 'an insult to common sense' or misleading. Whenever a direction is given, the judge must adopt an appropriate form of words to convey the significance of the evidence of good character.

It is the duty of the trial judge to inform the jury of the relevance of the defendant's good character to the issues they are trying: ***Vye***. It is a matter which should be discussed with the advocates before their speeches, particularly when the judge has in mind a qualified direction.

Good character is relevant to credibility, as well as to propensity. Credibility is in issue both when the defendant has given evidence and when, although evidence has not been given, the defendant relies upon an account given in interview. Propensity is in issue whether or not the defendant has given evidence or an account in interview.

In ***August***, the CCJ decided that the appellant was not entitled to a good character direction on credibility but that he was entitled to a good character direction on propensity. Regarding the propensity limb of the good character direction, Sir Dennis Byron (then PCCJ) and Rajnauth-Lee JCCJ stated the decision of the court at [52]:

> …We have considered what the proper test should be. We are of the view that we must be satisfied, not that the case against August was overwhelmingly strong, but that, had the jury been given a good character direction on propensity, they would have reached the same conclusion. In other words, the proper test should be that the case against August must have been sufficiently strong that this Court could safely say that the jury would have inevitably convicted him.

In ***Moustakim*** **[2008] EWCA Crim 3096**, the Court of Appeal allowed an appeal on the sole ground that the trial judge's direction upon the defendant's good character was insufficiently emphatic. The court observed, following ***Vye and Lloyd*** **[2000] 2 Cr App R 355** (UK CA):

i. There is no explicit positive direction that the jury should take the appellant's good character into account in her favour.

ii. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.

iii. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than

otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was perhaps less likely to have committed the crime. The use of the word "perhaps" is a significant dilution of the required direction.

iv. In the judge's direction each limb is expressed as what the defendant is entitled to say or argue, not as it should have been a direction from the judge himself.

The terms in which the jury are directed will depend upon developments in the evidence in the particular case. In ***Vye***, Lord Taylor CJ said:

> Having stated the general rule, however, we recognise it must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances. He would probably wish to indicate, as is commonly done, that good character cannot amount to a defence... Provided that the judge indicates to the jury the two respects in which good character may be relevant, i.e. credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case.

Qualifying remarks will be appropriate where the evidence reveals that while the defendant has no previous convictions, there is indisputable evidence of previous criminal conduct. In ***Aziz*** at page 53E-G, Lord Steyn said:

> Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture

> before the jury by giving directions in accordance with *R v Vye* and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with *Vye*, the judge may in his discretion dispense with them.
>
> Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which must be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions.

For the requirements of the standard good character direction, see ***Moustakim***.

The specially constituted five-judge court of the English Court of Appeal in ***Hunter*** **[2015] EWCA Crim 631, [2015] 1 WLR 5367**, conducted a truly comprehensive and erudite study of the development of the subject and provided general conclusions to guide future decision-making. Lady Hallet in delivering the judgment of the court said:

> 38. The Board's principle i) has been interpreted by some as meaning that a defendant who has a long record of offending but not for offences in the same category as the offence charged is entitled to a good character direction on propensity. That is a misunderstanding of

principle i). **The defendant must be a person of good character, or, if he has previous convictions, deemed to be a person of effective good character, before he will be entitled to benefit from a good character direction.** [emphasis added]

39. As for the stark assertion at the Board's principle ii) above as to the consequences of a failure to give the direction, in *Singh v the State* [2006] 1 WLR 146 at paragraph 30 Lord Bingham on behalf of the Board added a rider:

> The significance of what is not said in a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated.
>
> ...

64. A judge's directions on good character relate to the law not the facts; nevertheless the extension of the circumstances in which advocates demand of judges a direction on good character has not helped effective trial management. It has led to lengthy discussions at trial

about directions to juries, some convoluted directions to a jury, and a flood of applications for leave to appeal. As stated in the current edition of the Bench Book at page 162:

> The application of the (good character) principles is not always straightforward in practice. The exercise of judgement as to the terms in which the good character direction will be framed usually arises where the defendant argues that he should be treated as being of good character notwithstanding the presence of (usually minor and/or spent) convictions or where a defendant with previous convictions seeks a favourable direction as to propensity.

65. Our review of the case law leaves us in no doubt that those observations are justified. The application of the principles is not straightforward; attempts by this court to promote consistency of approach have failed.

66. The *Vye* and *Aziz* principles began life as good practice. Good practice became a rule of practice in *Vye* because the court needed a pragmatic solution to a problem of inconsistency and uncertainty. The underlying principle was not, as some have assumed, that a defendant who had no previous convictions could never receive a fair trial unless he benefited from a good character direction. Yet, the principles in *Vye* and *Aziz* have now been extended to the point where defendants with bad criminal records (as in these appeals) or who have no right to claim a good character are claiming an

entitlement to a good character direction. Many judges feel that, as a result, they are being required to give absurd or meaningless directions or ones which are far too generous to a defendant. *Fairness does not require a judge to give a good character direction to a man whose claim to a good character is spurious* (per Lord Steyn in *Aziz* page 488 E and Taylor LJ in *Buzalek and Schiffer*.

67. Further, many have questioned, with some justification in our view, whether the fact someone has no previous convictions makes it any the more likely they are telling the truth and whether the average juror needs a direction that a defendant who has never committed an offence of the kind charged may be less likely to offend.

(b) Impact of Vye and Aziz

68. We return therefore to the principles we derive from Vye and Aziz and by which we remain bound.

a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements.

b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements.

c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.

d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction.

e) A jury must not be misled.

f) A judge is not obliged to give absurd or meaningless directions.

69. It is also important to note what Vye and Aziz did not decide:

a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;

b) that a defendant with previous convictions is entitled to good character directions;

c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged;

d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt;

e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction; (emphasis added)

70. It is clear to us that the good character principles have therefore been extended too far and convictions have

been quashed in circumstances we find surprising. The decisions in *H* and *Durbin* are usually cited as justification but it is sometimes forgotten that the previous conviction in *H* was old, minor and irrelevant to the charge. The defendant H fell into the category of someone with an effective good character. His conviction was not simply irrelevant to the charge. Further, the court in *Durbin*, perhaps unaware of the decision in *Buzalek and Schiffer*, does not seem to have appreciated that the principle of giving a good character direction only applied where the defendant was of previous good character "in the proper sense". This led the court in *Durbin* to proceed on the false basis that a man with an undoubtedly bad character as far as propensity and credibility were concerned was entitled to the benefit of a good character direction. We are satisfied that the law thereby took a wrong turn.

71. In any event, *Durbin* was decided before *Aziz* in which Lord Steyn stated expressly that judges should not be required to give absurd or meaningless directions. A good character direction on the facts of *Durbin* and, in our view, *PD* would have been absurd and meaningless. Subsequent reliance upon Durbin in cases like *Gray* and *PD* (in so far as *PD* relied on *Gray*) to extend the principles of good character to defendants who do not have a good character was therefore misplaced.

...

> 96. An appellate court should only interfere if, on the facts, it was not properly open to the judge to reach the conclusions he did, for example to refuse to treat the defendant as a person of effective good character or to refuse to give a particular limb of the direction. As Sir Igor Judge then President of the Queen's Bench Division observed in *Renda* the circumstances in which this Court would interfere with the exercise of a judicial discretion or a fact specific judgment are limited. Context is all and the trial judge is likely to have a far better feel for the dynamics of a criminal trial and the interests of justice than an appellate court.
>
> ...
>
> 98. We should also add that if defence advocates do not take a point on the character directions at trial and or if they agree with the judge's proposed directions which are then given, these are good indications that nothing was amiss. The trial was considered fair by those who were present and understood the dynamics. In those cases this court should be slow to grant extensions of time and leave to appeal.

It is to be noted however, that the failure to give a good character direction does not affect the fairness of the trial and does not render the conviction unsafe. There is no mathematical or scientific formula that can prescribe the fate of the conviction; everything depends on the peculiar facts and

circumstances of the individual case. Specifically, it is permissible to compare the relative strengths and weaknesses of the case put forward by the Prosecution and the Defence to get a sense of the approach likely to have been taken by the jury had the appropriate direction been given: ***Hall*** **[2020] CCJ 1 (AJ)** at [63] – [68].

1. Default by Defence to Raise the Issue of Good Character of Defendant

In ***Hall***, the CCJ noted at [53]:

> …The lawyer who fails at trial to raise the good character of his client, whether for tactical reasons, or because of incompetence, or because of just plain inadvertence, may properly be subject to sanctions by the court but, as the law and practice now stands, the accused will, in principle, remain entitled to the good character direction, unless, perhaps, the client was knowingly a participant in the strategy to withhold information from the court…

The failure of counsel to discharge their duty to raise the issue of good character, which duty lies on counsel, can lead to the conclusion that there may have been a miscarriage of justice.

Points to consider:

i. ***Stewart*** **[2011] UKPC 11, (2011) 79 WIR 409** (JM PC), wherein the defendant's good character only emerged when his antecedent report was read at the subsequent sentencing hearing. In the

Board's view, this was a straightforward case, and it could safely be said that, even had a full character direction been given, the jury would inevitably still have convicted;

ii. ***Reid*** **(Jamaica CA, SCCA No 113/2007)**, wherein the defendant stated that his attorney informed him that in relation to character witnesses that he did not think this would make any difference;

iii. ***Maye*** **[2008] UKPC 36, [2009] 3 LRC 92** (JM PC), wherein there was a failure on the part of Defence counsel to call a highly material witness and to adduce evidence of the appellant's good character;

iv. ***Muirhead*** **[2008] UKPC 40, (2008) 74 WIR 394** (JM PC), wherein the appellant made an unsworn statement on advice from his counsel, (by which he was, he said, "surprised and disconcerted") and no evidence of his good character was called.

v. ***Brown*** **[2005] UKPC 18, [2006] 1 AC 1** (JM PC), wherein there was a failure to advance evidence of good character at the appropriate time which was a regrettable omission on the part of counsel; their Lordships concluded that on balance there was no substantial miscarriage of justice, and they regarded it as appropriate to apply the proviso.

Directions

i. According to ***Bailey*** **[2017] EWCA Crim 35, [2017] 1 WLR 4545** (UK CA), full good character directions are as follows:

   a. good character is not a defence to the charge.

   b. however, evidence of good character counts in the defendant's favour in two ways:

- The defendant's good character supports the defendant's credibility and so is something which the jury should consider when deciding whether they believe the defendant's evidence (the "credibility limb"); and
- The defendant's good character may mean that the defendant is less likely to have committed the offence with which the defendant is charged (the 'propensity limb').

c. it is for the jury to decide what weight they give to the evidence of good character, taking into account everything they have heard about the defendant.

ii. It is inadvisable to dilute the good character direction by extraneous words to the effect that everyone has good character to begin with. In ***Neumann*** **[2017] EWCA Crim 1533**, the Court of Appeal said it would be rare that such a reference would be helpful, and it is possible that it could be positively unhelpful or even dangerous. The same point may also arise in respect of character witnesses called by a defendant: ***AB*** **[2019] EWCA Crim 875**

iii. A defendant of good character who has not given evidence is entitled to:

a. a full good character direction if relying on an out of court statement (usually to the police); or to

b. a good character direction limited to the "propensity limb" if the defendant has not made such a statement. It will be necessary to give the jury a direction at some stage of the summing up about the inferences that may, or must not, be drawn from the defendant not having given evidence.

iv. Where the Prosecution rely on disputed evidence of previous misconduct on the part of a defendant otherwise entitled to a good character direction, the judge should direct the jury that:

   a. if they are sure the evidence is true, they may take it into account as evidence of bad character, adding an appropriate bad character direction; whereas

   b. if they are not sure the evidence is true, they should disregard it, adding an appropriate good character direction.

v. A good character direction must never mislead the jury or lead to absurdity.

vi. The judge should discuss with the advocates, in the absence of the jury and before closing speeches, the need for and form of any good (and bad) character direction to be given.

vii. If a defendant who receives a good character direction has a co-defendant about whom there is no evidence of character, the judge should discuss with the advocate for the co-defendant whether the jury should be directed "not to speculate" about their character, or whether, as will commonly be the preferred option, no direction should be given. Practices differ as to whether, if given at all, such a direction should be given immediately after the good character direction or at some different point of the summing up. It is suggested that juries will have recognised by this stage of the case that whereas they have evidence about one defendant's good character, they know nothing about the character of a co-defendant, and so any direction can properly be given immediately after the good character direction.

The Trinidad and Tobago **Criminal Bench Book 2015** at 159, provides a useful summary of additional authorities as follows:

> 1.The essence of the standard direction is that good character is relevant to credibility and propensity, and should be considered in those respects in favour of the accused, but it is for the jury to assess what weight they give to it – **Miah [1997] 2 Cr App R 12** (CA).
>
> 2.Where the judge agrees to treat the accused as of good character, the full good character direction should be given – **M (CP) (Practice Note) [2009] 2 Cr App R 54 (3)** (CA).
>
> 3.In a joint trial, where one accused is of good character and the other not, an accused of good character is entitled to the full standard direction. If an accused of good character has been interviewed but elects not to give evidence, the good character direction should be given. There is no inconsistency between the good character direction, a direction on lies and a direction in compliance with **s 13** of the **Evidence Act Chapter 7:02** on the right to remain silent; right against self-incrimination.
>
> 4.**Julia ES Ramdeen a/c J-Lo and David Abraham v The State CA Crim Nos 42 and 43 of 2008** referring to **Teeluck and Another [2005] UKPC 14**:
>
> (i) ...at paragraph 33, the Privy Council set down a series of propositions dealing with the circumstances under which a good character direction ought to be given. These include as follows:

...

(ii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iii) Where credibility is in issue, a good character direction is always relevant: **Berry v The Queen [1992] 2 AC 364,** 381; **Barrow v The State [1998] AC 846, 850**; **Sealey and Headley v The State [2002] UKPC 52**, Para 34.

(iv) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: **Barrow v The State [1998] AC 846, 852** following **Thompson v The Queen [1998] AC 811, 844**. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself. **Thompson v The Queen**, ibid.

5. **Hunter [2015] EWCA Crim 63**: the court of appeal summarised the current state of the law with regard to good character directions and the discretion to give or withhold such a direction. For ease of reference, these directions are restated below:

a) The general rule is that a direction as to the relevance of good character to a defendant's credibility is to be given where a defendant has a good character and has testified or made pre-trial statements.

b) The general rule is that a direction as to the relevance of a good character to the likelihood of a defendant's having committed the offence charged is to be given where a defendant has a good character whether or not he has testified or made pre-trial answers or statements.

c) Where defendant A, of good character, is tried jointly with B who does not have a good character, a) and b) still apply.

d) There are exceptions to the general rule for example where a defendant has no previous convictions but has admitted other reprehensible conduct and the judge considers it would be an insult to common sense to give directions in accordance with Vye. The judge then has a residual discretion to decline to give a good character direction.

e) A jury must not be misled.

f) A judge is not obliged to give absurd or meaningless directions.

The Court also noted that Vye and Aziz did not decide:

a) that a defendant with no previous convictions is always entitled to a full good character direction whatever his character;

b) that a defendant with previous convictions is entitled to good character directions;

c) that a defendant with previous convictions is entitled to the propensity limb of the good character directions on the basis he has no convictions similar or relevant to those charged;

d) that a defendant with previous convictions is entitled to a good character direction where the prosecution do not seek to rely upon the previous convictions as probative of guilt;

e) that the failure to give a good character direction will almost invariably lead to a quashing of the conviction.

Barbados

Relevant Statutory Provisions

The defendant is permitted to adduce evidence to prove good character as an exception to the hearsay rule, the credibility rule and the opinion rule. Section 92(2) of the **Evidence Act, Cap 121** (BB) provides as follows: 'The hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence adduced by an accused that tends to

prove that the accused is either generally or in a particular respect, a person of good character.'

However, ss 92(3) and 92(4) of the Act permit the use of evidence to prove otherwise:

> 92. ...(3) Where evidence that tends to prove that the accused is generally a person of good character has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the accused is not generally a person of good character.
>
> (4) Where evidence that tends to prove that the accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule and the credibility rule do not prevent the admission or use of evidence that tends to prove that the accused is not a person of good character in that respect.

Also, s 94(2) provides for further protections in relation to the cross-examination of the defendant, as follows: 'Subject to this section, an accused may not be cross-examined as to a matter that is relevant only to the credibility of the accused unless the court gives leave.'

There is strict adherence to s 94 regarding circumstances in which leave should or should not be granted by the court for the Prosecutor to cross examine the defendant. Note carefully section 94(6), where leave is required for cross examination by another defendant. The section specifically states: 'Leave shall not be given for cross-examination by some other accused unless the evidence that the accused to be cross-

examined has given include evidence adverse to the first-mentioned accused and that evidence has been admitted.'

Section 96 is also instructive in relation to rebuttal evidence and the care to be exercised in the use of such evidence. Further, section 98 clearly states that the credibility rule does not prevent the admission or use of evidence adduced in the re-examination of a witness.

Therefore, the trial judge should be acutely aware of the above, particularly in relation to self-represented persons, as well as trials which involve more than one defendant who may be employing cut-throat defences, or otherwise attacking each other.

In ***Aziz*** **[1996] AC 41** (UK HL), Lord Steyn opined:

> ...The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance.

With regard to the role of the Defence, Lord Woolf in Gilbert **[2006] UKPC 15, (2006) 68 WIR 323** (GD PC) noted at [21], 'that it is up to defending counsel and the defendant to ensure that the Judge is aware that the defendant is relying on his good character.' However, as noted at [11], this has to be 'qualified...in relation to the cases where counsel defending

the appellant at his trial had been guilty of what has been described as serious misbehaviour or ineptitude.'

In ***Worrell*** **(Barbados CA, Crim App19 of 2010)**, Moore JA notes ***Sealey v The State*** **[2002] UKPC 52, (2002) 61 WIR 491** (TT PC) where at [29], Lord Hutton states, '…There is no duty on the trial judge to give directions on good character when the issue of good character has not been raised in evidence by the defence.'

The principles to be applied regarding good character directions have been much more clearly settled by a number of decisions in recent years, and what might have been properly regarded at one time as a question of discretion for the trial judge, has crystallised into an obligation as a matter of law: ***Aziz*** **[1996] AC 41** (UK HL) per Lord Steyn; ***Teeluck v The State*** **[2005] UKPC 14, (2005) 66 WIR 319** (TT PC) per Carswell LJ.

Further, in ***Nurse*** **(Barbados CA, Crim App No 34 of 2004)**, it was held that no special verbal formula is required for a good character direction and such a direction must be tailored to suit the facts of the particular case. The Court of Appeal highlighted that ss 88 and 92 have identical language, and allow the defendant to adduce evidence in proof of good character without the restriction of the hearsay, opinion, and tendency rules. ***Nurse*** referenced the case of ***Teeluck*** where Lord Carswell at [33], laid down five (5) propositions for "good character" directions which are outlined below:

> (i) When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of a 'good character' direction from the judge when summing up to the jury, tailored to fit the circumstances of the case; *Thompson v. R*. (1998) 52 WIR

203, following *R v. Aziz* [1996] AC 41 and *R. v. Vye* [1993] 1 WLR 471.

(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given; *R. v. Fulcher* [1995] 2 Cr. App. Rep.251 at 260. If it is omitted in such a case it will rarely be possible for an appellate Court to say that the giving of a 'good character' direction could not have affected the outcome of the trial; *R. v. Kamar* The Times 14 May 1999.

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a good character direction is always relevant: Berry v The Queen [1992] 2 AC 364, 381; Barrow v The State [1998] AC 846, 850; Sealey and Headley v The State [2002] UKPC 52, para 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: Barrow v The State [1998] AC 846, 852, following Thompson v The Queen [1998] AC 811, 844. . It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from

> it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: Thompson v The Queen, ibid.

Notably, however, Lord Brown of Eaton at [17] in ***Bhola v The State [2006] UKPC 9,* (2006) 68 WIR 449** (TT PC), advised that proposition (ii) in ***Teeluck*** should be applied with caution.

In Dennis Morrison, **New Wine in Old Wineskins - Some Developments in the Common Law of Evidence** (2014), the applicable principles when dealing with matters pertaining to good character and whether in certain cases, the trial judge can exercise their discretion and dispense with the need for a good character direction, are set out. Morrison JA notes at [30]:

> However, Lord Carswell's statement that, where there has been an omission to give a good character direction, "it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial", has since been modified by reference to the important consideration that, where it is omitted, it will be necessary to consider in each case the impact that a good character might have had on the conviction. As Lord Mance demonstrated from an examination of some relevant authorities in **Noel Campbell v R** "[t]he absence of a good character direction is by no means necessarily fatal."

Further, at [37], Morrison JA raises the issue of jurisdictions which still allow the use of the unsworn statement by a defendant:

A related problem arises in jurisdictions, such as Jamaica, in which the defendant is still permitted to make an unsworn statement from the dock, as an alternative to giving sworn evidence. It is clear that a defendant in this position, whose character is in issue, is fully entitled to the propensity limb of the good character direction. But there is greater uncertainty with respect to the credibility limb and there is in fact no direct authority from the Privy Council as to whether in these circumstances the credibility direction is required at all. While there have been appeals based on counsel's alleged failure to advise the defendant that, had he given sworn evidence, he would unequivocally have been entitled to both limbs of the good character direction, the Board's standard response has been, as Lord Brown put it in **Stewart v R** "the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence". Similarly in **Lawrence** the most recent example of such a case, Lord Hodge observed in relation to the appellant, who did not give evidence on oath, that a direction "on the relevance of good character to his credibility would therefore have been of less significance than if he had… [since]…as counsel would have known, the trial judge would have reminded the jury that the appellant had not submitted to cross-examination.

Barbados falls directly into this category, as the use of the unsworn statement has so far been retained. Instructive guidance is outlined at [42] of Morrison's article, where he concludes:

> To summarise:
>
> (1) A defendant who is of good character is prima facie entitled to a standard good character direction from the trial judge; that is, a direction as to the relevance of his good character to (i) his propensity to commit the offence for which he is charged; and (ii) his credibility; however, the judge does have a residual discretion as to whether to give the direction in a particular case in the light of the other evidence on the case.
>
> (2) The obligation to bring forward the defendant's character as an issue is that of counsel and not the judge and an appeal may be allowed in an appropriate case on the ground of counsel's failure to do so.
>
> (3) Failure to obtain or give a good character direction in appropriate cases is not necessarily fatal to a conviction and the Court of Appeal will have regard to the issues and other evidence in the case in order to assess the impact of the failure on the safety of the defendant's conviction.

Kerr LJ in ***Brown v The State*** **[2012] UKPC 2, (2012) 82 WIR 418** (TT PC), also noted at [33]:

> …Where there is a clash of credibility between the prosecution and the defendant in the sense that truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case.

Points to Consider

i. See ***Hunter*** **[1993] 1 WLR 471** and ***Vye*** **[1993] 1 WLR 471** per Lord Taylor CJ;

ii. Richard Glover, **The good character backstop: directions, defeasibility and frameworks of fairness** (2020) 40 (4) Legal Studies 675.

Belize

Relevant Statutory Provisions

Section 51 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) deals with evidence of character in criminal cases and provides as follows:

51. – (1) In criminal causes or matters, the fact that the defendant or the accused person, as the case may be, has a good character may be proved, but the fact that he has a bad character is inadmissible in evidence, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.

(2) Where evidence of his good character is given by any person who–

(a) being on his trial for any felony not punishable with death, has been previously convicted of felony;

(b) being on his trial for any offence involving fraud or dishonesty punishable under the Summary Jurisdiction (Offences) Act or the Criminal Code has been previously convicted of any offence punishable on summary conviction or on indictment; or

(c) being on his trial for any offence in respect of coin punishable under either of the said Acts, has been previously convicted of any offence in respect of coin,

the complainant or prosecutor, or the Crown, may, in answer to the evidence of good character, give evidence of any of those previous convictions before the magistrate gives his decision, or before the jury return its verdict, in respect of the offence for which the offender is being tried.

(3) In this section, the word "character" means reputation as distinguished from disposition, and evidence may be

> given only of general reputation, and not of particular acts by which reputation or disposition is shown.

In ***August*** **[2018] CCJ 7 (AJ)** (BB) at [42] – [53], the CCJ considered the issue of whether the absence of a good character direction affected the safety of the conviction and the fairness of the trial. In particular, the court noted:

> [48] The question which remains for us is whether a defendant who has given an unsworn statement from the dock should be entitled to the credibility limb of the good character direction. The jurisprudence coming out of Jamaica suggests that where a defendant either did not give sworn evidence or gave unsworn evidence of his character, a good character direction as to credibility would have a *"reduced value"*, would be "*altogether less helpful*" or would be *"qualified".*
>
> [49] It is understood that the aim of a good character direction is to ensure fairness of the trial process. It is the duty of the trial judge to ensure that the trial is fair and even-handed and an appropriate good character direction plays an important part in ensuring that fairness and even-handedness. Where a defendant, of good character, has given sworn testimony and has subjected himself to cross-examination, the trial judge maintains fairness and balance in the trial by directing the jury that, because of his good character, the defendant is a person who should be believed. Where however the defendant is not willing to place himself in a position where his

credibility can be tested, we do not think that he should benefit from a good character direction as to credibility. Where a defendant does not give sworn testimony therefore, it is in our view, unnecessary to ensure the fairness of the trial process, for the trial judge to direct the jury on the defendant's credibility. The defendant is, however, still entitled to the propensity limb whether or not he has given sworn evidence.

[50] Bearing those principles in mind, we move on to examine whether the failure to give a good character direction as to propensity affected the safety of August's conviction or the fairness of the trial. In this regard, we agree with the useful guidance given in the Privy Council appeal of *Bally Sheng Balson v The State*...

...

[53] August, having given unsworn evidence, was therefore not entitled to a good character direction on credibility but should have been given the benefit of the propensity limb of the direction. As for the impact of the absence of the propensity limb of the good character direction, we have examined the circumstantial evidence adduced by the prosecution and have formed the view that such evidence led inexorably to August's guilt. We are convinced that the case against August was sufficiently strong, and that it was inevitable, even if a good character direction on propensity had been given, that the jury would have returned the same verdict.

> This view is buttressed by the fact that the jury returned their guilty verdict notwithstanding several serious mis-directions by the trial judge that were all unduly favourable to August. In our view, the circumstantial evidence was sufficient to outweigh any assistance that would have been afforded by a good character direction on August's propensity to violent conduct. Accordingly, the conviction was safe and the trial fair. August therefore fails on this ground.

In ***Parham*** **(Belize CA, Crim App No 3 of 2015)**, the appellant gave a dock statement and stated that he had been in the Belize Police Department for 18 years and had no previous convictions. One of the grounds of appeal raised was that the trial judge failed to give a modified good character direction. The court noted at [26]:

> The Court examined the evidence in the instant case as suggested by the Privy Council in **Nigel Brown**, and as rightly pointed out by the learned Director, the evidence led by the prosecution was not overwhelming. The evidence led by the prosecution from Dr. Estrada Bran was the only evidence led to dispute the statement made by the appellant from the dock. As shown above, the evidence led by the doctor was highly prejudicial to the accused. If the jury had been given a direction that the appellant was a police officer for 18 years and had never engaged in conduct similar to what he had been charged, and therefore, he was less likely to have committed the act alleged by the prosecution, this may have impacted on the manner in which the jury viewed

> the version of events as stated by the appellant. In the view of the Court, if the direction had been given, it is likely that the jury would have accepted the appellant's version of events and returned a favourable verdict. Hence the reason, the propensity limb direction was crucial in this case. In the opinion of the Court, the lack of propensity direction had affected the fairness of the trial and therefore, the conviction of the appellant was unsafe.

In ***Torres*** **(Belize CA, Crim App No 4 of 2002)**, the first ground of appeal concerned the omission of a good character direction from the summing up. The court noted at [37] and [40]:

> 37. There can, nevertheless, be no doubt that trial judges have, as was recognised in ***R v H****, supra*, a discretion as regards the giving of a good character direction. The crucial question in the instant case is as to the circumstances in which such a discretion becomes exercisable. **R v H** was, in fact, cited by Lord Steyn in his leading speech in ***Aziz***. He referred to it as a decision which recognised the existence of this very judicial discretion. His Lordship however described the discretion as merely residual in nature. As he put it, at page 53:
>
> > 'Prima facie the [good character] directions must be given.'
>
> His Lordship elaborated by saying, *ibid,* that the discretion is only to be exercised 'where the defendant's claim to a good character is spurious', or where 'the

> judge considers it an insult to common sense to give directions in accordance with ***Vye***, or where 'it would make no sense to give [such] character directions'.
>
> ...
>
> 40. We consider that the position as to previous convictions in the present case, as revealed by the almost enigmatic disclosures made by the appellant in his unsworn statement, is analogous to those in ***R v H*** and ***Barrow*** respectively. The appellant had an undetermined number of past convictions, as against the single convictions in ***R v H*** and ***Barrow*** but, on the evidence, none of them was other than described by the appellant in his unsworn statement, that is to say minor and related to offences involving no violence. Like the defendants in the two cases cited, the appellant should, in our opinion, have been treated by the trial judge as a man of good character. In those circumstances, the trial judge ought to have given the jury a good character direction and his failure to do so amounted inevitably to a misdirection.

In ***August*** and ***Parham*** noted above, good character was raised in each defendant's dock statement. In ***Torres***, the defendant's good character emerged from cross-examination of a Prosecution's witness.

Guyana

Sections 22 of the **Evidence Act, Cap. 5:03** (GY) provides for evidence of character in criminal cases and states as follows:

> 22. (1) In criminal causes or matters, the fact that the defendant or the accused person, as the case may be, has a good character may be proved; but the fact that he has a bad character is inadmissible in evidence, unless it is itself a fact in issue, or unless evidence has been given that he has a good character, in which case evidence that he has a bad character is admissible.
>
> (2) When anyone gives evidence of his good character who -
>
> (a) being on his trial for any felony not punishable with death, has been previously convicted of felony; or
>
> (b) being on his trial involving fraud punishable under for any offence or dishonest the Summary Jurisdiction (Offences) Act, or the Criminal Law (Offences) Act, has been previously convicted of any offence punishable on summary conviction or on indictment; or
>
> (c) being on his trial for any offence in respect of coin punishable under either of the said Acts has been previously convicted of any offence in respect of coin;
>
> the complainant or prosecutor, or the State, may, in answer to the evidence of good character, give evidence of any of those previous convictions before the magistrate

gives his decision, or before the jury return their verdict, in respect of the offence for which the offender is being tried.

(3) In this section, the word "character" means reputation as distinguished from disposition, and evidence may be given only of general reputation, and not of particular acts by which reputation or disposition is shown.

In this Chapter:
General Guidelines

Chapter 16
Cross-Admissibility

Sources

Judicial College, Crown Court Bench Book*: directing the jury* (Judicial Studies Board 2010)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (May 2016)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Cross-admissibility addresses the use of evidence in one charge (count) against a defendant in another charge (count) against them. This is generally permissible once the evidence sought to be relied on is admissible, relevant, and of sufficient probative value. For example, evidence may be 'cross-admissible' if it is relevant to issues of credibility (improbability of coincidence) in relation to more than one charge (count), or if it can go towards establishing a propensity in a defendant to commit that type of offence.

General Guidelines

If the indictment against the defendant comprises more than one count, the issue may arise as to whether the evidence relating to one count is "cross-admissible" in relation to another, and if so to what uses it may legitimately be put by the jury.

Cross-admissibility is not an appropriate term to describe the admissibility of evidence from a previous incident that does not form part of the indictment: ***Suleman*** **[2012] EWCA Crim 1569, [2012] 2 Cr App R 381**.

These difficulties have largely been resolved by guidance given by the Court of Appeal in ***Freeman*** **[2008] EWCA Crim 1863, [2009] 1 WLR 2723**. Latham LJ said:

> In some of the judgments since *Hanson*, the impression may have been given that the jury, in its decision making process in cross-admissibility cases should first determine whether it is satisfied on the evidence in relation to one of the counts of the defendant's guilt before it can move on to using the evidence in relation to that count in dealing

> with any other count in the indictment. A good example is the judgment of this court in *S.* We consider that this is too restrictive an approach. Whilst the jury must be reminded that it has to reach a verdict on each count separately, it is entitled, in determining guilt in respect of any count, to have regard to the evidence in regard to any other count, or any other bad character evidence if that evidence is admissible and relevant in the way we have described. It may be that in some cases the jury will find it easier to decide the guilt of a defendant on the evidence relating to that count alone. That does not mean that it cannot, in other cases, use the evidence in relation to the other count or counts to help it decide on the defendant's guilt in respect of the count that it is considering. To do otherwise would fail to give proper effect to the decision on admissibility.

Further, the Court of Appeal in ***Freeman*** confirms that evidence may be cross-admissible in one or both of the following ways:

i. The evidence may be relevant to more than one count because it rebuts coincidence, as for example, where the Prosecution asserts the unlikelihood of a coincidence that separate and independent complainants have made similar but untrue allegations against the defendant. The jury may be permitted to consider the improbability that those complaints are the product of mere coincidence or malice (i.e. a complainant's evidence in support of one count is relevant to the credibility of another complainant's evidence on another count as an important matter in issue); and/or

ii. The jury may be sure of the defendant's guilt upon one count and if, but only if, they are also sure that guilt of that offence establishes the defendant's propensity to commit that kind of offence, the jury may proceed to consider whether the defendant's propensity makes it more likely that they committed an offence of a similar type alleged in another count in the same indictment.

Whichever approach is employed, the jury must reach separate verdicts on each count and for each defendant.

In ***Adams*** **[2019] EWCA Crim 1363, [2020] Crim LR 69**, the court allowed an appeal in circumstances where the evidence had the potential to be considered as being cross-admissible, but the Prosecution did not seek to rely upon it as being so and the judge simply directed the jury to give separate consideration to each of the counts/complainants. Leggatt LJ (as he then was) stated at [22]:

> Looking at the matter more broadly, the general tendency of the criminal law over time has been towards a gradual relaxation of rules of evidence and an increasing willingness to trust to the good sense and rationality of juries to judge for themselves whether particular evidence is relevant to an issue they have to decide and if so in what way. But we have not yet reached the point where evidence of a defendant's bad character can be left as a free for all. The particular ways in which evidence that a person has committed one offence may or may not be relevant in deciding whether that person is guilty of another offence are not always immediately obvious even to legal professionals and have had to be worked

> out by the courts in a number of cases. Lay jurors are entitled to assistance on these questions and cannot be expected to work out the approach which the courts regard as proper for themselves. It therefore seems to us to be essential that, in a case of this kind, the jury should be given clear directions on whether, and if so how, evidence relating to one count may be taken into account in deciding guilt on another count.

See also ***Gabbai*** **[2019] EWCA Crim 2287, [2020] 4 WLR 65** at [83] – [88]. In both ***Gabbai*** and ***Adams*** (above), the requirement for Prosecution notice was emphasised.

The first question which the trial judge needs to resolve is whether the evidence the Prosecution has adduced in support, say, of Count 1, is evidence of "a disposition towards misconduct" by the defendant, not having "to do with the facts of the offence with which the defendant is charged," charged on, say, Counts 2 and 3. If it is, then, for the purposes of Counts 2 and 3, it is evidence of bad character. If, therefore, the evidence of complainant A (Count 1) is to be admitted in support of the evidence of complainant B (Count 2), and complainant C (count 3), it must pass through one of the gateways to admissibility, and a bad character direction may be required. Commonly, A's evidence will be relevant to an important matter in issue between the defendant and the Prosecution upon Counts 2 and 3, because it is supportive of the truth of B's and C's complaints.

The second question for the judge is for what purpose the jury may use the evidence. It is at this point that it is important to distinguish between (i) evidence which tends to negative coincidence (or to rebut a defence)

and for that reason strengthens the Prosecution's case and (ii) evidence of propensity to commit the offence:

i. The fact that several complaints of a similar kind are made by different witnesses who have not colluded or been influenced deliberately or unintentionally by the complaints of the others, may be powerful evidence that coincidence or malice towards the defendant (or innocent association between the defendant and the complainants) can be excluded. In ***DPP v Boardman*** **[1975] AC 421** (UK HL), Lord Cross at page 421 said:

> ...the point is not whether what the appellant is said to have suggested would be, as coming from a middle-aged active homosexual, in itself particularly unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion into his mouth.

Thus, the evidence of each complainant is supportive of the truth of the others.

ii. A propensity to commit an offence is also relevant to guilt on other counts but, before the propensity can be utilised by the jury, it must be proved. Only if the jury is sure that the evidence of A is true can they conclude that the defendant had a propensity to commit the kind of offence alleged by complainant B.

The third question for the judge is whether the evidence of bad character may be used by the jury both (i) to negative coincidence or rebut a defence and (ii) to establish propensity. If so, the jury may require an explanation how the evidence should be approached in these two different ways.

Finally, if the evidence may be used to establish propensity, the jury should receive the conventional warnings about its limitations based on the factual context of the case.

When to Give Both Directions?

The judgment whether to explain that a conclusion favourable to the Prosecution on one count, may be evidence from which the jury can in addition find a propensity to commit the offences charged in other counts, is not always straightforward.

It is suggested that where the evidence on say, Count 1, is independently compelling and consequently, the jury is likely to wonder how a verdict of guilty in respect of Count 1 may affect their consideration of Counts 2 and 3, the propensity direction should be given, because it is only if the jury is sure of the propensity that they can utilise the evidence for that purpose.

On the other hand, where there is little to choose between the strength of the evidence supporting each of the counts, the propensity direction may serve only to confuse, because (1) the direction, if given, will be burdened with conditional clauses and (2) in any event, the real question for the jury in such a case is whether the evidence supporting each count tends to strengthen the Prosecution's case on the others.

In ***Freeman***, the defendant was charged with two street robberies, three weeks apart and committed in similar circumstances. Each complainant identified her attacker. There was little, if anything, to choose between the strength of the evidence in each count. However, the Prosecution was permitted to adduce evidence of previous convictions for similar offences. The trial judge gave both a propensity direction in relation to

the previous convictions and a cross-admissibility direction in relation to the two counts in the indictment. His directions were upheld.

The jury should always be reminded of the need to return separate verdicts on each count.

Barbados

Relevant Statutory Provisions

Section 84 of the **Evidence Act, Cap 121** (BB) provides:

> 84. Where there is a question whether a person did a particular act or had a particular state of mind and it is reasonably open to find that
>
> (a) the person did some other particular act or had some other particular state of mind, respectively; and
>
> (b) all the acts or states of mind, respectively, and the circumstances in which they were done or existed, are substantially and relevantly similar,
>
> the tendency rule does not prevent the admission or use of evidence that the person did the other act or had the other state of mind, respectively.

Further, s 85 of the Act provides for the exclusion of evidence of conduct to prove improbability of co-incidence, while s 86 provides for further protections for the Prosecution evidence of conduct of the defendant.

Notably, s 87 provides:

> 87. (1) Subject to subsection (2),
>
> (a) section 84 does not apply in relation to evidence adduced by a party; and
>
> (b) evidence adduced by a party to which section 86 applies is not admissible,
>
> unless that party has given notice in writing in accordance with the regulations to each other party of the intention to adduce the evidence.
>
> (2) The court may, on the application of a party and subject to conditions, direct that section 84 or 85, or both is or are to apply
>
> (a) notwithstanding the failure of the party to give such notice; or
>
> (b) in relation to specified evidence, with such modifications as the court specifies.

Context, Tendency, and Coincidence Evidence

The article, Arjun Chhabra, **Context Evidence (and how it differs from Tendency or Coincidence Evidence)** (2016), offers a full discussion on Context Evidence, Tendency Reasoning, and Coincidence Evidence in relation to the Australian jurisdiction. This article may be of assistance to trial judges in Barbados dealing with ss 84 and 85 of the **Evidence Act, Cap 121** (BB), as the Australian legislation discussed in the article contains similar provisions. Notably, the **Evidence Act, Cap 121** (BB) is similarly fashioned to the **Criminal Procedure Act 1986** (NSW).

Points to Consider

i. See the following cases:

   a. ***Fletcher* (2005) NSWCCA 338** as an example of tendency evidence;

   b. ***Perry* (1982) 150 CLR 580** (AU HC) and ***Straffen* [1952] 2 QB 911** (UK CA) as examples of coincidence evidence;

   c. ***Shamouil* (2006) NSWCCA 112** at 228 (issues often found when dealing with tendency and coincidence);

   d. ***Martin* (2000) NSWCCA 332**;

   e. ***Ellis* [2003] 58 NSWLR** (NSW CCA);

   f. ***Ellis* [2004] HCA Trans 488**;

   g. ***MM* [2004] NSWCCA 364**;

   h. ***Beserick* [1993] NSWLR 510** (NSW CCA)at 516;

   i. ***Greenham* [1999] NSWCCA 8** at [28] – [29];

   j. ***Qualtieri* (2006) 171 A Crim R 138** (NSW CCA);

   k. ***Walters* [2002] NSWCCA 291** (state of mind).

ii. Note sections 4-1100 – 4-1180 (Tendency and Coincidence) of the **Civil Trials Bench Book** (Judicial Commission of New South Wales 2007).

iii. With respect to context evidence in sexual assault cases, evidence of the defendant's sexual interest or attraction for the complainant may be admitted: ***AN* (2000) 117 A Crim R 176** (NSW CCA) at [36] – [53].

iv. For the admissibility of uncharged acts as tendency evidence, see ***Dennis Bauer* (a pseudonym) (2018) 266 CLR 56** (AU HC) at [48].

v. It is important to note that there are distinctions in dealing with

single complainants in sexual offence cases and also multiple complainants and multiple sexual offences: ***Hughes*** **[2017] 20 HCA 263, (2018) 218 CLR 56**.

State of Mind

The Australian case of ***Walters*** **(2002) NSWCCA 291** may be instructive. This case involved multiple charges of defrauding the Commonwealth of group tax payable by a number of companies of which the defendant was the principal, and in which the issue of the defendant's intention was common to each charge. The trial judge commented that the defendant's accumulated knowledge and experience over the time to which the charges related, made it logically more difficult for him to say that he did not understand what the situation was. It was argued on appeal that separate trials should have been ordered to avoid any tendency reasoning as to the defendant's state of mind, but it was held, at [48] – [50], that the evidence in relation to the early counts was highly relevant and highly probative of the intention of the defendant in relation to the later counts, and that a trial in which the Prosecution was deprived of the opportunity to rely on that evidence would have been unfair (to the community).

Note that Special Leave to Appeal was refused: ***Walters*** **(2002) HCA Trans S277**.

In relation to ss 84 and 85 of the **Evidence Act, Cap 121** (BB), as adapted from the **Civil Trials Bench Book**, the trial judge may first assess whether the evidence has the capacity rationally to affect the probability of the existence of the fact in issue, and second, assess the probative value that the jury might ascribe to the evidence: ***IMM*** **(2016) 257 CLR 300** (AU HC) at [51]. The evidence will usually be tendered before the full picture can be seen, and it is only then that the jury might ascribe to the evidence

a significance of more than mere relevance. Although something less than substantial relevance, the tendency evidence is admissible, and that assessment will depend on the nature of the fact in issue to which it is relevant, and the significance (or importance), which that evidence may have in establishing that fact.

The test was stated in ***Ford* (2010) 201 A Crim R 451** (NSW CCA) at [125], and affirmed in ***Hughes* [2017] 20 HCA 263, (2018) 218 CLR 56** at [40]: 'All that is necessary is that the disputed evidence should make more likely, to a significant extent, the facts that make up the elements of the offence charged.'

Belize

Relevant Statutory Provisions

Sections 41 to 43 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provide as follows:

> 41. –(1) Whenever any person is being proceeded against for handling stolen goods, knowing or believing them to have been stolen, or for having in his possession stolen property, for the purpose of proving guilty knowledge there may be given in evidence at any stage of the proceedings–
>
> (a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession;
>
> (b) the fact that within the five years preceding the

date of the offence charged he was convicted of any offence involving fraud or dishonesty.

(2) The fact referred to in sub-section (1)(b) may not be proved unless–

(a) seven days' notice in writing has been given to the offender that proof of such previous conviction is intended to be given;

(b) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.

(3) No person shall be liable to be convicted of–

(a) stealing any will;

(b) stealing any document of title to land;

(c) conversion of any property; or

(d) conversion whilst a trustee of any property,

upon any evidence whatever in respect of any act done by him, if at any time previously to his being charged with such offence he has first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity in any action, suit or proceeding which has been bona fide instituted by any person aggrieved.

(4) In any proceedings in respect of any of the offences mentioned in sub-section (3), a statement or admission made by any person in any compulsory examination or deposition before any court on the hearing of any matter in bankruptcy shall not be admissible in evidence against that person.

(5) In any proceedings for the theft of anything in the course of transmission (whether by post or otherwise) or for handling stolen goods from such a theft, a statutory declaration made by any person that he despatched or received or failed to receive any goods or postal packet, or that any goods or postal packet when despatched or received by him were in a particular state or condition, shall be admissible as evidence of the facts stated in the declaration, subject to the following conditions–

(a) a statutory declaration shall only be admissible where and to the extent to which oral evidence to the like effect would have been admissible in the proceedings; and

(b) a statutory declaration shall only be admissible if at least seven days before the hearing or trial a copy of it has been given to the person charged, and he has not, at least three days before the hearing or trial or within such further time as the court may in special circumstances allow, given the prosecutor written notice requiring the attendance at the hearing or trial of the person making the declaration.

42. –(1) Upon the trial of any person for any crime or offence, the court may admit evidence of any former acts done by the accused person which, in the opinion of the court, are relevant as showing knowledge of the probable effect of anything or act, or as proving or disproving good faith or claim of right, or as showing the purpose or intent with which the accused person

has formerly done acts similar to the act of which he is accused.

(2) Upon the prosecution of an accused person for receiving stolen property knowing it to have been stolen, evidence that the accused person received at different times different articles from the same thief may be given to prove guilty knowledge.

43. In criminal cases, after proof that the offence has been committed, evidence may be given to show that the accused person–

(a) had or had not a motive for committing the offence;

(b) had or had not the means and opportunity of committing the offence;

(c) that he made preparations, or threatened, to commit the offence; or

(d) possessed or did not possess the special knowledge, skill or peculiarity revealed by the offence itself or the mode of committing it.

In ***Morris*** **(Belize CA, Crim App No 19 of 1993)**, the second ground of the appellant's appeal was that, '…the learned trial Judge erred in law, in having allowed the evidence of Julian Hernandez to be given, as such evidence was irrelevant, and the prejudicial nature of such evidence, far exceeded any probative value which it may have had.' The evidence referred to was as to the prior relationship between the appellant, the deceased and 'one Ethel'. Further, the court noted at 2:

The evidence of Julian Hernandez was as to the prior relationship between the Appellant, the deceased and one Ethel, and a particular occasion in December 1991 when the Appellant forced Ethel to leave the deceased and return to live with him and also forced the witness at gunpoint to assist him. The object of this evidence as stated by prosecuting counsel at the trial was to prove the "long time thing" of which the Appellant spoke when handing over his shot gun to the police, and to negative provocation by seeking to establish a previous purpose on the Appellant's part. In our view the evidence was clearly relevant and admissible for this purpose. As Lord Herschell observed in ***Makin v. Attorney General for New South Wales*** **(1894) A.C. 57 at 65**:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

Guyana

Section 6 of the **Evidence Act, Cap 5:03** (GY) provides as follows:

> 6. (1) Where proceedings are taken against anyone for having received anything knowing it to be stolen, or for having in his possession any stolen thing, evidence may be given, at any stage of the proceedings, that there was found in the possession of that person any thing stolen within the twelve months immediately preceding, and that evidence may be taken into consideration for the purpose of proving that the person knew the thing to be stolen which forms the subject of the proceedings so taken against him.
>
> (2) Where proceedings are taken against anyone for having received anything knowing it to be stolen, or for having in his possession any stolen thing, and evidence has been given that the stolen thing has been found in his possession, then, if that person has, within the five years immediately preceding, been convicted of any offence involving fraud or dishonesty, evidence of the previous conviction may be given at any stage of the proceedings and may be taken into consideration for the purpose of proving that the person knew the thing to be stolen which forms the subject of the proceedings so taken against him:
>
> Provided that not less than two days' notice in writing has been given to the person that proof is intended

to be given of the previous conviction; and that proof may be given in the manner prescribed in the Summary Jurisdiction (Procedure) Act, or in the Criminal Law (Procedure) Act, as the case may be.

(3) It shall not be necessary, for the purposes of this section, to charge the previous conviction in the complaint, or information, or indictment.

In this Chapter:

Chapter 17
Hearsay

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

General Guidelines

Hearsay evidence is any statement that is made by a person other than the person giving oral evidence and is tendered to prove the truth of some fact that has been asserted. Such evidence is generally not admissible: ***Shaw v Roberts* [1818] 2 Stark 455, 171 ER 703**.

The reason for the hearsay rule is that the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross examination, since the speaker is not, or cannot be called as, a witness: ***Teper* [1952] 2 All ER 447** (GY PC) at 449.

The rule is based on an awareness that hearsay, if admitted, would carry with it two formidable difficulties: first, the inherent danger of unreliability through repetition, which increases in proportion to the number of repetitions and the complexity of the statement; second, the court cannot see and hear the evidence directly tested and the defendant is denied their right to confront the witness: ***Blastland* [1986] AC 41** (UK HL) at 54 per Lord Bridge of Harwich. Accordingly, the primary purpose of the rule is to ensure that witnesses give evidence as to facts that are within their own knowledge. This exclusionary rule applies equally to the Defence and the Prosecution.

Despite the general rule, judges must determine the purpose for which the evidence will be used before peremptorily excluding it under the hearsay rule. For instance, evidence of a statement made to a witness by a person who is not themselves called as a witness, is not hearsay if it is tendered only to prove the fact that the statement was made, and not to prove the truth of its contents: ***Subramaniam v Public Prosecutor* [1956] 1 WLR 965** (MY CA).

Hearsay evidence may also be given to challenge, or support, a witness who is present and does give evidence. The factors to be considered by the jury will therefore be different from case to case depending upon the purpose for which the evidence is being used.

The emphasis to be given to the reliability and effect of hearsay evidence may, by reason of the burden and standard of proof, depend upon whether the hearsay is relied upon by the Prosecution or the Defence or between defendants. Thus, hearsay evidence may pose a particular threat to the fairness of a criminal trial. It is necessary for courts to be vigilant, first that hearsay is recognised and treated as such, and second that it is received in evidence only where the appropriate safeguards are in place.

Many jurisdictions have legislated guidelines for judges when assessing whether the hearsay evidence should be admitted. Judges must exercise care in crafting directions in order to ensure that hearsay evidence is considered fairly. The task of the trial judge in examining the appropriate statutory route to admissibility, is to consider whether there is enough evidence on which a jury could be satisfied that the hearsay is reliable. Although it is permissible to rule a hearsay statement admissible and give reasons later in the trial, the detailed ruling should be given before the advocates make their speeches, so that they can tailor their submissions accordingly: ***Kiziltan*** **[2017] EWCA Crim 1461, [2018] 4 WLR 43** and ***Nguyen*** **[2020] EWCA Crim 140, [2020] 1 WLR 3084**.

In ***Salazar*** **[2019] CCJ 15 (AJ)** (BZ) at [41], the CCJ noted:

> ...the law of evidence has gone through many changes especially in the last two decades. The rule against hearsay is certainly no longer what it used to be and surely not in Belize. The crime situation in the country as in so many other countries, has made it imperative to make more

> and more inroads into that rule. Many rules of evidence can only be understood against the background of the concept of a trial by lay jurors who needed to be guarded from evidence that they would not be able to properly assess. In the course of time, many rules of evidence were developed with an eye on the reliability of the evidence and the fairness of the trial.

Therefore, in this context, the task of the jury is to assess the probative value (weight) and reliability of evidence admitted as hearsay. The courts have on several occasions reminded judges of the need for care in crafting directions in order to ensure that hearsay evidence is considered fairly and that the jury is warned about the limitations of such evidence. The strength of the warning depends on the facts of the case and the significance of the hearsay evidence in the context of the case as a whole. In general, a warning should be given prior to the hearsay evidence being adduced as to what have been described as the three key limitations of such evidence, namely: the inability of the jury to assess the demeanour of the witness; the fact that the statement was not made on oath and the lack of any opportunity for the evidence to be tested on oath; The warning should be repeated in the summing up: ***Daley*** **[2017] EWCA Crim 1971, [2018] Crim LR 403**. In ***Wilson*** **[2018] EWCA Crim 1352, [2018] 2 Cr App R (S) 228**, the court emphasised that the strength of the warning that ought to be given to the jury depends upon the facts of the case and the significance of the hearsay to the case as a whole.

When summing up, the judge should not refer to the statutory provisions under which hearsay came to be admitted. While in many cases it is possible for the jury to know the reason for admitting the evidence (e.g. a witness

has died), or the reason why a witness could not be expected to remember the information recorded, in some cases (e.g. fear), this cannot be done. Any consideration of hearsay should encompass the learning found in the judgment of ***Riat*** **[2012] EWCA Crim 1509, [2013] 1 WLR 2592, [2013] Cr App R 2**.

Examples of Hearsay

i. In ***Turner*** **[1975] 61 Cr App R 67** (UK CA), it was held that evidence that a third party, not called as a witness, had admitted that he had committed the robbery with which the defendant was charged, was inadmissible.

ii. In ***Sparks*** **[1964] AC 964** (BM PC), a "white man" was charged with indecent assault on a four-year-old girl. About an hour and a half after the event, the girl told her mother when questioned about her assailant that a "coloured boy" did it. The girl did not give evidence. Sparks sought to lead evidence from the girl's mother of what the child had said. Their Lordships held that the trial judge had rightly rejected the evidence as inadmissible hearsay (the appeal was allowed on other grounds). Note, if the girl had given evidence, the mother's evidence might have been admissible as recent complaint.

iii. Where, however, as happened in ***Myers*** **[1997] 4 All ER 314** (UK HL), the Prosecution does not seek to admit a confession made by a defendant because there had been breaches of the Codes of Practice, a co-defendant may elicit evidence of the confession by way of exception to the hearsay rule, provided it is relevant to their defence or undermines the Prosecution's case against them.

iv. Statements in documents are subject to the rule against hearsay. The leading case is ***Myers v DPP*** **[1965] AC 1001** (UK HL). In ***Patel v Comptroller of Customs*** **[1966] AC 356** (FJ PC), the Board held that labels on bags were inadmissible hearsay to prove what they asserted, namely the country of origin.

Directions

Directions should include the following:

i. Whether the evidence is agreed or disputed and, if disputed, the extent of the dispute.

ii. The source of the evidence should be identified (e.g. a deceased witness or business records) and the jury reminded of any evidence about the maker of the statement, so that they may be assisted in judging whether the witness was independent, or may have had a purpose of their own or another to serve.

iii. Where the statement is oral, evidence about the reliability of the reporter should be identified.

iv. Any other evidence which may assist the jury to judge the reliability of the evidence should be identified (e.g. any mistakes that had been found elsewhere in the business records, or information as to the circumstances in which the statement was made).

v. Reference should not be made to the statutory provisions under which hearsay came to be admitted.

vi. In some cases, it is possible for the jury to know the reason for admitting the evidence (e.g. the witness has died), or the reason why a witness could not be expected to remember the information recorded; in other cases (e.g. fear) this cannot be done.

vii. Where it is the Defence who is seeking to rely on hearsay evidence, the directions must be tailored to reflect the fact that the burden of proof is on the Prosecution.

viii. It is suggested that as well as giving a direction about hearsay in the summing up, it is helpful to give the jury a summary of the direction, by way of explanation, just before such evidence is adduced.

ix. According to ***Grant*** **[2006] UKPC 2, [2007] 1 AC 1** (JM), the jury needs to be directed that hearsay evidence may suffer from the following limitations when compared with evidence given on oath by a witness at trial:

   a. There is usually no opportunity to see the demeanour of the person who made the statement.

   b. The statement admitted as hearsay is not made on oath.

   c. There is no opportunity to see the witness's account tested under cross-examination, for example as to accuracy, truthfulness, ambiguity, or misperception, and how the witness would respond to this process. In some cases, the credibility of the absent witness and/or their consistency would be challenged under a specific piece of legislation. In such cases, the jury needs to be reminded of those challenges and of any discrepancies or weaknesses revealed.

1. Witness Absent

The hearsay statement is given in evidence in lieu of oral evidence from the witness. Once admitted, the issue for the jury is whether they can rely on the evidence as truthful and reliable. Additional matters for the jury will include:

i. when the statement was oral, the reliability of the reporter;
ii. the extent to which the hearsay is supported by or is consistent with other evidence;
iii. the scope for error or the existence of a reason to be untruthful.

Thus, the jury's attention will be drawn to the risks of:

i. Insincerity
ii. Faulty recollection
iii. Ambiguity
iv. Misperception

Evidence is admissible to challenge the credibility of the absent witness, including hearsay evidence of any matter which could have been put in cross-examination and any previous inconsistent statements. If such evidence is adduced, it will be relevant to the jury's task.

The source of evidence admitted as *res gestae* may be unknown. The reliability of the evidence is derived from the spontaneity of the statement and the unlikelihood of calculation. The reliability and accuracy of the witness reporting the statement is, however, relevant.

In ***Grant***, at 21(4), Lord Bingham described the requirements of a direction when a statement is given in evidence in lieu of the witness, as follows:

> The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: for example, *Scott v The Queen,* ...p 1259; *Henriques v The Queen,* ...p 247...It is necessary to remind

> the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may.

Where the hearsay evidence is the basis for the Prosecution's case, the importance of caution should be emphasised. Where, however, the statement is relied upon by the defendant, or by one co-defendant against

another, care will need to be taken with the terms of the direction so as to adequately reflect the burden and standard of proof.

Evidence admitted by agreement is nonetheless hearsay and the jury should be told how they should approach and how they may make use of it.

Care is needed to ensure that prejudice does not arise from any assumption that the defendant is the cause of the absence of the witness. This may be especially true of cases in which the witness cannot be found or is in fear. It will not be appropriate to disclose the reason for the absence of the witness unless the defendant has introduced that in evidence: ***Jennings and Miles*** **[1995] Crim LR 810** (UK CA).

The terms of a direction should be discussed with the advocates not only when the evidence is controversial, but also when hearsay is admitted by agreement, so that the judge and the parties are clear about the purposes for which it may legitimately be used.

Witness Unavailable

A distinction must be drawn between a witness who is absent (not present) and a witness who is unavailable (usually provided for by statute). A witness may be absent from proceedings for a number of reasons: illness, fatigue, traffic, or otherwise inaccessible or unavailable.

Computer Records & Electronic Recordings

In some jurisdictions, legislation provides for the admissibility of computer records and electronic recordings. The benefits of electronic recordings

are now well-known: ***Sealy*** **[2016] CCJ 1 (AJ) (BB), (2016) 88 WIR 70** at [42] – [44].

In Barbados, for example, at the second reading of the **Evidence (Amendment) Bill 2014**, concerns were raised by Barbadian parliamentarians over the reliability of unacknowledged and unrecorded verbal admissions given to police whilst in custody and the impact of such unreliability on the constitutional right to a fair trial.

The CCJ in ***Edwards*** **[2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115**, similarly noted at [31]:

> The absence of electronic verification of alleged verbal admissions and the absence of corroborative evidence of guilt have both been sources of serious concern for the legislature and the judiciary…the integrity of the criminal justice system would be considerably enhanced by the electronic recording of oral confessions and that it was time to replace the policeman's notebook with electronic recording devices…

2. Witness Present

When composing directions about the effect of previous out of court statements received in evidence, it is necessary to consider the question whether the previous statement is relied upon by the Prosecution or the Defence. If the effect of the previous statement would be to assist the Prosecution, the question, depending on the centrality of the issue, may be whether the jury is sure it is an accurate account. If the effect would be to assist a defendant, the question may be whether the previous

statement is or may be an accurate account: ***Billingham*** **[2009] EWCA Crim 19, [2009] 2 Cr App R 341** at [68].

Previous Inconsistent Statement

At common law, it was open to a cross-examiner to put to a witness their previous inconsistent statement. In most jurisdictions, the use of previous inconsistent statements in cross-examination is now governed by legislation.

After examining cases on previous inconsistency, White JA in ***Henriques*** **(Jamaica CA, Crim App Nos 97 and 98 of 1986)** at 25.3.88 said:

> ...whether the inconsistency is explained or not, the matter of its immateriality or materiality is for the jury. And where the witness gives an explanation accounting for the discrepancy between a previous inconsistent statement and his evidence at the trial, the Judge must leave it for the jury's determination as a question of fact, in that, it is for them to decide whether the inconsistency, discrepancy or contradiction is of so material a nature, that it goes to the fundaments of the Crown's case resulting in the jury not being able to accept the witness' evidence on that point, and in the long run, maybe, reject him as a witness of truth. The issue of credibility is a matter for the jury. Insubstantial contradictions do not, in any way, or to any extent, cancel the effect of the witness' testimony at the trial.

Thus, the statement would have been put to the witness, either because the opposite party is challenging the consistency of the witness, or because the witness is hostile to the party calling them.

Directions to the jury will concern the reliability of the witness's present and previous accounts, and the jury's ability to make a judgment regarding which account, if either, they accept.

Illustration

Statement by Prosecution witness inconsistent with oral evidence

It emerged that there are inconsistencies between A's oral evidence and the statement they made two days after the incident you are considering. In some respects, A accepted that their memory at the time of the statement was fresher and therefore more likely to be accurate than it is now. In other instances, they insisted that their statement was wrong and that their present recollection is right.

A's statement was made almost 12 months ago. You may think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. Where there is an inconsistency, it is necessary to decide first whether it is significant.

If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation for the change, you may conclude that the underlying reliability of the account is unaffected. But what if the inconsistency is fundamental to the issue you are considering? You will be less willing to overlook it. To what extent such inconsistencies in A's account influence your judgment of their reliability, is for you to decide.

The fact that on an important subject A has been inconsistent, and the inconsistency is not satisfactorily explained, may lead you to conclude that you cannot rely on A's oral evidence on that subject. However, the account given in A's statement also forms part of the evidence in the case. You are not bound to accept either account, but if in any respect you conclude that A's statement is accurate and their oral evidence is not, then you may act upon the statement in preference to their oral evidence. You may think that the change between A's statement and their oral evidence is fundamental to your consideration of count 2. If you consider that A's statement is, or may have been, the accurate account and that their oral evidence is, or may have been, mistaken, it follows that A's evidence cannot support the Prosecution's case upon count 2.

Previous Inconsistent Statement of a Hostile Witness

A party producing a witness may, by leave of the judge, prove that the witness has made at other times a statement inconsistent with their present testimony, if they do not distinctly admit that they have made such statement.

In ***Pestano* and Others [1981] Crim LR 397** (UK CA), it was held that the application for a witness to be regarded as hostile must be made at the instant it is obvious that such witness is showing unmistakable signs of hostility. See also, ***Alfred George Thompson* [1977] 64 Cr App Rep 96** (UK CA) and ***Prefas* (1988) 86 Cr App Rep 111** (UK CA). Such a witness may by leave of the judge be cross-examined as to: (1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting their accuracy, veracity, or credibility in the particular circumstances of the case; and (3) whether they have made any former statement, relative to the subject-

matter of the proceeding and inconsistent with their present testimony. The previous statement may be oral or written: ***Prefas***.

There is no rule in law that where a witness is shown to have made a previous statement inconsistent with that made at the trial, the jury should be directed that evidence given at the trial should be regarded as unreliable. The explanation given by the witness for the previous statement might be acceptable to the jury but where no explanation is given, the trial judge would be acting consistent with their responsibility to ensure a fair trial, to direct a jury that the effect of the evidence is negligible: ***Parkes*** **(1991) 28 JLR 47, (1976) 23 WIR 153** (JM PC). The evidence should be left with the jury to give it whatever weight they think fit, along with a warning that they should be cautious in acting upon it: ***Samuels*** **(1991) 28 JLR 61** (CA), or ***Beckford*** **[1988] AC 130** (JM PC), per Carey J at 22.

Where a witness has been declared hostile and prosecuting counsel has been permitted to cross-examine them, the cross-examination must be restricted to matters affecting the witness's credibility. It should not bring out matters which are of no evidential value, but which may prejudice the trial: ***Godfrey*** **(1960) 2 WIR 263** (JM FSC).

Illustration

Inconsistent statement of hostile witness for the Prosecution

You will recall that A was an unwilling witness. When they first entered the witness box, they said nothing. Eventually they agreed that they had made a statement, which they identified. I permitted counsel to ask him questions about that statement. In it, A said they had seen the incident which took place a matter of yards from where they were standing outside the public house. They saw the defendant run towards V and

deliver a haymaker of a punch to the left side of V's face. V went to the ground, striking their head on the pavement with a sickening thud, and there they remained motionless. A told you in evidence that they had seen no such thing. They only made the statement because they thought that is what the police wanted to hear. I will remind you in more detail of their evidence in a moment.

A is a witness who has changed sides. They have given one account in their statement and a different account in the witness box. One approach would be to treat their evidence as completely unreliable and therefore worthless. If that is your conclusion, A's evidence could be of no assistance to you. It is, however, open to you to reach a contrary view. A's statement is evidence on which you are entitled to act if, after careful consideration, you think it right to do so.

Points to Consider

i. The importance of judicial guidance to the jury as to the use to which any previous inconsistent statement/s may be put, was also emphasised in ***Croft*** **[2007] EWCA Crim 30** at [41] and ***Coates*** **[2007] EWCA Crim 1471**, **[2008] 1 Cr App R 52**. The burden of proof must be reflected in the direction: ***Billingham*** **[2009] EWCA Crim 19, [2009] 2 Cr App R 341**.

ii. In a rare case where the jury retires with the documentary evidence of the earlier statement, they should be directed not to place undue weight on that by comparison with the other evidence: ***Hulme*** **[2007] EWCA Crim 1471**.

iii. The following cases are instructive:

a. ***Chandler v The State*** **(Trinidad and Tobago CA, Crim App No 19 of 2011)**;

b. ***Daniel v Roody Sookdeo*** **PC No 13935 (Trinidad and Tobago CA, Mag No 66 of 2012)**.

Statement to Refresh Memory

The rules which govern the grant of leave to a witness to refresh their memory from a document, were originally established as part of the common law. The Court of Appeal of Jamaica in ***Harvey*** **(1975) 23 WIR 437** (JM CA) at 440, summarised the common law as follows:

> It is, perhaps, convenient to start with the proposition that certainly for more than 200 years a witness has not been allowed to give his evidence by reciting the contents of some document previously prepared. See, for example, ***Anon*** **((1753), 3 Keny 27, 96 ER 1295)**. During the course of his evidence, however, a witness has always been permitted to refresh his memory by reference to documents or memoranda of one kind or another, subject to certain well-defined conditions, eg contemporaneity, and the production, if required, of the document to the other party to the cause or his attorney to enable him to inspect it and, if he so wishes, to cross-examine the witness as to its contents. The jury are also entitled to see the document– if the witness is cross-examined as to parts of it not used by him to refresh his memory with the consequence that the document is rendered admissible *as an item of evidence* and may

> be so admitted at the instance of the party calling the witness— since it may assist them in assessing the witness's credit-worthiness.
>
> But the first and essential prerequisite that must be demonstrated to the court *by the witness* is the necessity for *him* to refresh *his* memory. Unless it becomes manifest that his memory is faulty with respect to some particular matter on which he is being examined (including cross-examination and re-examination) no question can arise as to his memory being refreshed. Unless, therefore, a witness indicates *his* desire to refresh his memory because of *his* imperfect recollection as to some fact about which he is required to testify, it would be quite improper for an attorney to suggest to a witness that he consult some previously prepared document in order to confirm his testimony. Clearly, any such course must be calculated to offend the rationale of the well-established rule against proof of consistency or, as it is sometimes called, the rule against self-corroboration...

The CCJ has given precise guidelines on how a judge should treat with applications to refresh memory and to read aloud from unsigned written records of disputed oral admissions. The factors include the context within which the 'verbals' were made, whether proper procedures were followed, the presence of independent corroborating evidence other than that of a 'back up' police officer and whether the police were engaging in a subtle ploy to impress the jury by requesting to read aloud from the document. The judge need not expressly state that they considered these factors: see ***Francis* [2009] CCJ 9 (AJ) (BB), (2009) 74 WIR 108**; ***Sealy***

[2016] CCJ 1 (AJ) (BB), (2016) 88 WIR 70; ***Edwards*** **[2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115**.

Notably, the CCJ has stated that there is a difference between refreshing one's memory from a document and putting that document into evidence: ***Francis*** at [62] per Saunders JCCJ. In ***Francis***, the issue raised was whether a police officer, who was permitted to refresh his memory, effectually adduced inadmissible evidence by reading out the entirety of his notebook. There was no evidence to suggest that the officer had in fact read out loud from his notebook and so that ground failed. While the case was determined primarily on statutory provisions enacted in Barbados, Saunders JCCJ noted that if and when a witness is permitted to read out loud from such a document, the impact on the jury is not very different from a situation where the inadmissible document itself is placed before the jury.

Illustration

WPC E was permitted to refresh her memory from a statement made approximately a month after the alleged incident. Two years have since passed. When counsel for the defendant asked questions about it, WPC E declined to adopt it in full and was taken through the relevant parts of the statement in some detail. As a result, I have decided that you can only make sense of WPC E's responses to counsel's questions if you have the statement before you.

I will remind you of WPC E's evidence and the differences between the statement and her oral evidence in a moment. In these circumstances, you are entitled to have regard to the contents of the statement for two purposes: first, to assess the effect of WPC E's oral evidence and, second, to treat the statement as part of her evidence. It follows that

after careful consideration, you may prefer any part of the account given in the statement or any part of WPC E's present recollection given orally in evidence, as you think right.

I will explain when we arrive at the relevant parts of the statement, how that direction may have an impact on your deliberations. However, that previous statement is evidence you may take into account, if you think fit, when considering the case.

Points to Consider

i. A witness giving evidence may refresh their memory by reference to any writing concerning the facts to which they testify, made or verified by themselves at a time when their memory was clear: ***Attorney-General's Reference (No 3 of 1979)*** **(1979) 69 Cr App R 411** per Lord Widgery CJ at 414.

ii. A witness is entitled to refresh their memory from an earlier document or recording before testifying: ***Richardson*** **[1971] 2 QB 484** (UK CA). If mention of this is made in the course of the evidence, the jury should be directed that this is normal practice.

iii. The judge retains a discretion as to whether a witness should be permitted to refresh their memory while giving evidence: ***McAfee*** **[2006] EWCA Crim 2914**. It is not necessary for the witness to have faltered before they are permitted to do so: ***Mangena*** **[2009] EWCA Crim 2535**, **(2010) 174 JP 67**. It is nonetheless important for the correct procedure to be adopted, the case of ***Campbell*** **[2015] EWCA Crim 2557** being an example of a Recorder adopting a somewhat interventionist approach to the issue.

iv. If the witness refreshes their memory during the course of, or during a break in testifying, the earlier document may, in some circumstances, become admissible if cross-examination takes place on other parts of the document other than those parts used by the witness to refresh their memory. The statement will only be admissible if:

   a. the witness has succeeded in refreshing their memory from an earlier document or recording, and

   b. the witness has been cross examined about the contents of the document from which they have refreshed their memory, and

   c. the content has therefore been received in evidence: ***Pashmfouroush*** **[2006] EWCA Crim 2330**; ***Chinn*** **[2012] EWCA Crim 501, [2012] 3 All ER 502**.

v. The jury may inspect a memory-refreshing document if necessary: ***Bass*** **[1953] 1 QB 680** (UK CA).

vi. If the jury will find it difficult to follow the cross-examination of the witness who has refreshed their memory without having the record, this may be provided to them. However, it would not be placed before them as evidence of the truth of the contents of the record: ***Sekhon*** **(1987) 85 Cr App R 19** (UK CA).

vii. A document exhibited under this exception to the hearsay rule (see iv. above) should not accompany the jury when they retire, other than in exceptional circumstances (e.g. it would help them follow translated text). If the jury does retire with the document, they need to be warned not to attach disproportionate weight to it: ***Hulme and Maguire*** **[2005] EWCA Crim 1196**.

viii. At common law, where a memory–refreshing document is put in evidence, it is evidence only of the consistency of the witness. In ***Virgo*** **(1978) 67 Cr App R 323** (UK CA), the conviction was quashed where the trial judge directed the jury, by necessary implication, that the diary of a Prosecution witness, used by the witness to refresh his memory, could be regarded as evidence of the truth of the facts contained in it: Peter Murphy, **A Practical Approach to Evidence** (3rd edn, Blackstone Press 1998) at 330.

Statement to Rebut an Accusation of Fabrication

If in cross-examination it is suggested to a witness that their evidence is a recent fabrication, evidence of a previous consistent statement will be admissible in re-examination to negative the suggestion and confirm the witness's credibility: ***Y*** **[1995] Crim LR 155** (UK CA).

The principle has no application where a witness is cross-examined on the basis that their account was fabricated from the outset, unless the effect of the cross-examination is in fact to create the impression that they invented their story at a later stage: ***Athwal*** **[2009] EWCA Crim 789, [2009] 1 WLR 2430**. In a trial for a sexual offence, in which the previous statement amounts to a complaint, it may be admissible to rebut the allegation of recent fabrication, notwithstanding that it is inadmissible as a recent complaint: ***Tyndale*** **[1999] Crim LR 320** (UK CA).

At common law, the evidential effect of the earlier statements is limited to the rebutting of the suggestion made of recent concoction and cannot extend to evidence of the truth: ***Murphy*** **[1985] Crim LR 270**.

Maurice Kay LJ at [58] of ***Athwal***, stated:

> …The touchstone is whether the evidence may fairly assist the jury in ascertaining where the truth lies. It is for the trial judge to preserve the balance of fairness and to ensure that unjustified excursions into self-corroboration are not permitted, whether the witness was called by the prosecution or the defence.

Directions

i. It should be explained to the jury that the reason that they heard about the witness's previous statement is because it was suggested to the witness that they had invented their evidence and it is relevant to the question whether the witness had in fact done so, and whether or not their evidence is true or false. It is implicit that the statement would have been made before the point at which the witness is alleged to have invented the evidence.

ii. It is for the jury to decide, depending on what they make of the statement, whether it rebuts the suggestion that the witness's evidence is invented.

iii. The jury should be directed that the statement, or that part of it which has been used for this purpose, is evidence of the matter/s stated in it (but not evidence of the truth) and they are entitled to use it to decide whether or not the witness has been consistent and, if they are satisfied that the witness has been, that is something they may keep in mind when deciding whether or not the witness's evidence is truthful.

3. Statements in Furtherance of a Common Enterprise

Acts done and statements uttered in furtherance of a common criminal enterprise are admissible to prove the participation of a defendant not then present. The common law exception admitting hearsay statements made in furtherance of a common enterprise, is usually preserved by the Evidence Act in some jurisdictions. In short, the acts and declarations of a person engaged in a joint enterprise and made in pursuance of that enterprise, may be admissible against another party to the enterprise, but only where the evidence shows the complicity of that other in a common offence or series of offences: ***Gray* [1995] 2 Cr App R 100** (UK CA); ***Murray* [1997] 2 Cr App R 136** (UK CA); ***Williams* [2002] EWCA Crim 2208**.

Before admitting the evidence, the judge must be satisfied that there is evidence that the defendant participated in the enterprise. That evidence may include the act or statement in question, provided there is some other evidence (e.g. circumstantial evidence) that the defendant participated. Once admitted, the evidence may be considered by the jury when deciding upon the existence of the conspiracy, its objects and purpose, and when deciding whether the defendant was a conspirator.

The jury will need direction on several matters:

i. It is for the jury to decide whether the acts and declarations were made by a conspirator: ***King* [2012] EWCA Crim 805**; ***Smart* [2002] EWCA Crim 772** at [30]. The hearsay evidence may be used when considering whether there was a conspiracy and whether the actor/speaker was a conspirator.

ii. The jury must not convict the defendant solely on the basis of this evidence; they may only convict the defendant if there is other

evidence which is implicative, and they are sure on all of the evidence that the defendant is guilty.

The jury will also need careful directions to guard against the risk that they will treat the statement as primary evidence of the defendant's involvement, without regard to the limitations of the hearsay evidence: ***Jones* [1997] 2 Crim App R 119** (UK CA); ***Williams* [2002] EWCA Crim 2208**. These include, for example, that the defendant was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made; that the statement may be ambiguous or incomplete; that the defendant would not have had any opportunity to test the evidence in cross-examination, where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

If it turns out that there is in fact no reasonable evidence of participation by the defendant other than the act or statement of a joint participant, the case should be withdrawn from the jury.

Directions to the jury should explain that the potency of the evidence derives from its character as the enterprise in action. The jury should not, therefore, rely solely upon the hearsay evidence.

In light of the guidelines above, directions are as follows:

i. A statement, whether made orally or in writing by one party to a common enterprise may, if a reasonable interpretation is that it was made in furtherance of the common enterprise, be put in evidence to prove that a defendant who was not party to the statement participated in the common enterprise, provided there is some other evidence of the defendant's involvement. Such evidence commonly

arises out of telephone communication (text or speech) between alleged co-conspirators.

ii. The purpose for which the evidence was adduced must be explained to the jury.

iii. The limitations of the evidence must also be explained, for example:

   a. the defendant was not present when the statement was made and so was not in a position to respond, challenge or disagree with it at the time that it was made;

   b. the statement may be ambiguous or incomplete;

   c. the defendant would not have had any opportunity to test the evidence in cross-examination, where the maker was unknown or was not a witness (or a co-defendant) who gave evidence.

iv. This evidence is only part of the evidence and the jury must consider the evidence as a whole.

v. The jury must not convict the defendant solely on the basis of this evidence; they may only convict the defendant if there is other evidence which is implicative and they are sure on all of the evidence that the defendant is guilty.

Points to Consider

i. Acts or declarations in the course or furtherance of any conspiracy are admissible against a co-conspirator to prove their participation in the joint enterprise: ***Donat*** **(1986) 82 Cr App R 173** (UK CA); ***Gray and Liggins*** **[1995] 2 Cr App R 100** (UK CA); ***Devonport and Pirano*** **[1996] 1 Cr App R 221** (UK CA);***Jones*** **[1997] 2 Crim App R 119** (UK CA). See also **Chapter 7 (Joint Enterprise)** and **Chapter 8 (Conspiracy)** above.

ii. Statement of the law in **Archbold (2009)** at 33-68, approved by the court in ***Smart*** **[2002] EWCA Crim 772** at [8]:

> It is a matter for the trial judge whether any act or declaration is admissible to prove the participation of another. In particular, the judge must be satisfied that the act or declaration (i) was made by a conspirator, (ii) that it was reasonably open to the interpretation that it was made in the furtherance of the alleged agreement and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other party was a party to the agreement.

See also ***Jones*** at 127.

4. Res Gestae

Introduction

In ***Andrews*** **[1987] AC 281** (UK HL), Lord Ackner noted:

> Of course, having ruled the statement admissible the judge must....make it clear to the jury that it is for them to decide what was said and to be sure that the witnesses were not mistaken in what they believed had been said to them. Further, they must be satisfied that the declarant did not concoct or distort to his advantage or the disadvantage of the accused the statement relied upon and where there is material to raise the issue, that he was not activated by any malice or ill-will. Further where there are special features that bear on the

possibility of mistake then the juries' attention must be invited those matters.

It is to be noted that once a statement is an out of court statement and in that sense, hearsay evidence as well as an excited utterance, it can under certain conditions, be admitted under the "res gestae" doctrine but that does not mean that an excited utterance is hearsay evidence: ***Salazar* [2019] CCJ 15 (AJ)** (BZ) at [33].

The basis for admissibility under this exception – the res gestae exception - is that hearsay can be regarded as more likely to be reliable if the statement was made spontaneously. To be admissible, such a statement must:

i. have been made by a person "so emotionally overpowered" by an event that the possibility of concoction or distortion can be disregarded; or
ii. have accompanied an act which can be properly evaluated as evidence only if considered in conjunction with the statement; or
iii. relate to a physical sensation or mental state such as intention or emotion.

The law governing admissibility is stated in ***Andrews* [1987] AC 281** (UK HL) at 300–301.

It is not always necessary to give a specific direction about the risks of mistaken identification if the speaker was dying at the time of making the statement: ***Mills* (1995) 46 WIR 240** (JM PC). In ***Stoutt* [2014] UKPC 14** (VG PC), their Lordships stated that the trial judge needs to explain to the jury that the absence of the opportunity to test the accuracy of what the

deceased said represents a significant disadvantage to the defendant, and that it needs to be taken into account when assessing what the deceased had said.

The res gestae exception should not generally be relied upon where the maker of the statement is available as a witness: ***Tobi v Nicholas*** **(1988) 86 Cr App R 323** (UK QB – DC).

In ***Andrews***, the declarant was the victim of the offence. However, the declarant need not be the victim: see obiter dicta in ***Ratten*** **[1972] AC 378** (AU-VIC PC) and ***Glover*** **[1991] Crim LR 48** (UK CA).

Directions

i. Depending on the reason for the statement having been admitted in evidence, the jury should be reminded of the evidence about the statement, in the context of the situation in which it was made.

ii. The jury should be directed that:

   a. before they decide to rely on the statement, they must be sure:

      - that the statement has been reported accurately;
      - that the statement was spontaneous and genuine and not the result of [insert as appropriate: deliberation, invention, distortion, rehearsal, malice or ill-will];
      - that, if they believe it was genuine and spontaneous, it was not made as a result of a mistake as to the circumstances in/about which it was made.

      If they cannot be sure about these things, they must ignore the statement completely.

b. If, having considered these factors, they are sure that they can rely on the statement, they must decide what weight/significance they should attach to it, bearing in mind any limitations revealed by the evidence e.g. that the maker of the statement is unidentified or is dead and so has not given evidence in relation to the subject matter of the statement or been tested by cross-examination.

Points to Consider

i. The principles recited in ***Andrews*** **[1987] AC 281** (UK HL), at 300 by Ackner LJ, provide guidance to trial judges when determining the admissibility of a statement via the res gestae exception to the rule against hearsay. See also the summation in the case of ***The State v Borneo*** **(Trinidad and Tobago HC, Crim No 42 of 2008 (Ruling (Transcript))**. The principles were adopted by the Court of Appeal in ***Borneo v The State*** **(Trinidad and Tobago CA, Crim App No 7 of 2011)**.

ii. The following are also instructive:

a. ***Ratten*** **[1972] AC 378** (AU-VIC PC);

b. ***Tickle v Tickle*** **[1968] 2 All ER 154** (UK PDA);

c. ***Spittle v Spittle*** **[1965] 3 All ER 451** (UK ChD);

d. **Halsbury's Laws of England** (5th edn, 2009) vol 11 at 759 for a further definition of Res Gestae.

Barbados

Witness Not Present

Section 52 of the **Evidence Act, Cap 121** (BB) applies to criminal proceedings where the person who made a previous representation is not available to give evidence about an asserted fact.

Section 54 of the **Evidence Act, Cap 121** (BB) provides for notice to be given in writing to each other party of the intention to adduce the evidence where the maker is not available.

Section 55 of the **Evidence Act, Cap 121** (BB) deals with the exception regarding documentary records.

In ***Henriques*** **(1991) 39 WIR 253** (JM PC), on an application to admit the deposition of an absent witness, it was noted that the trial judge should weigh all the factors relevant to its grant and refusal before reaching a decision. In weighing the relevant factors, the court noted that the judge:

> ...(...should seek as far as possible to do justice between the parties and ensure a fair trial); the relevant factors include the importance of the evidence to be given and the availability within a reasonable time of the witness to give it, and also (in an appropriate case) the holding of another principal prosecution witness in prison to ensure his attendance. Following the admission of deposition evidence, the judge in his summing-up should warn the jury that they have neither had the benefit of seeing the deponent nor of hearing his evidence tested in cross-examination; and that they must take this into

> consideration when evaluating the reliability of his evidence. If the deponent has not been cross-examined at the time of making the deposition, the judge (if he refers to the lack of cross-examination) should direct the jury that no inference adverse to the accused should be drawn.

It is also to be noted that, the mere fact that the deponent will not be available for cross-examination is an insufficient ground for excluding the deposition, for that is a feature common to the admission of all depositions, which must have been contemplated and accepted by the legislature, when it gave statutory sanction to their admission in evidence: ***Scott* [1989] AC 1242** (JM PC). The court further noted at 1259:

> If the courts are too ready to exclude the deposition of a deceased witness it may well place the lives of witnesses at risk particularly in a case where only one witness has been courageous enough to give evidence against the accused or only one witness has had the opportunity to identify the accused. It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition. No doubt in many cases it will be appropriate for a judge to develop this warning by pointing out particular features of the evidence in the deposition which conflict with other evidence and which could have been explored in cross-examination: but no rules can usefully be laid down to control the detail to

> which a judge should descend in the individual case. ...The deposition must of course be scrutinized by the judge to ensure that it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative and any such material should be excluded from the deposition before it is read to the jury.

Therefore, the learned trial judge, in determining the admissibility of the statement of an absent witness, is required to take into account the following factors:

i. That it is the only material which identifies the defendant as being the perpetrator of the crime or even being present on the occasion of the crime;

ii. That the jury would not have the opportunity of determining the credibility of the maker of the statement, not only in respect of what they stated but also by an assessment of their demeanour;

iii. That the witness would not be available for cross-examination;

iv. That the efforts stated in terms of attempts to locate them were not concrete enough or detailed enough to satisfy a judge that "all reasonable steps" had been taken in this regard, bearing in mind that a consequence of a failure of these efforts would be an ingredient upon which it could be determined that this crucial evidence would be admissible in a paper document, and would indeed be, if admitted, the only evidence of identification in the case.

The following cases are instructive on the issue of a witness not being present:

i. ***Neshet* [1990] Crim LR at 579** (UK CA), **The Times 14 March 1990**;

ii. ***Grant* [2006] UKPC 2, [2007] 1 AC 1** (JM PC);

iii. ***Webster* [1997] CILR 109** (KY CA) – Witness was absent and out of the jurisdiction for medical reasons;

iv. ***Jones* (Barbados CA, Crim App No 16 of 1991)** – Deposition as evidence in trial without further proof, since Prosecution witness was in prison;

v. ***Grazette* (Barbados CA, Crim App No 15 of 2006)** per Williams JA;

vi. ***Boyce* (Barbados CA, Crim App Nos 7 and 8 of 2001)**;

vii. ***Barrett* (Jamaica CA, Crim App No 76 of 1997)**.

Witness Present

Section 53 of the **Evidence Act, Cap 121** (BB) provides:

> (1) Where the conditions specified in subsection (2) exist then, in criminal proceedings, if the person who made a previous representation is available to give evidence about an asserted fact, the hearsay rule does not apply in relation to evidence about an asserted fact, the hearsay rule does not apply in relation to evidence of the previous representation that is given by
>
> (a) that person; or
>
> (b) a person who saw, heard or otherwise perceived the representation being made.

(2) The conditions referred to in subsection (1) are

(a) that at the time when the representation was made, the occurrence of the asserted fact was fresh in the memory of the person who made the representation; and

(b) that the person who made the representation has been or is to be called to give evidence in the proceeding.

(3) Subsection (1) and (2) do not apply in relation to evidence adduced by the prosecutor of a representation that was made for the purpose of indicating the evidence that the person who made it would be able to give in legal or administrative proceedings.

(4) Where subsections (1) and (2) apply in relation to a representation, a document containing the representation shall not, unless the court gives leave , be tendered before the conclusion of the examination in chief leave, be tendered before the conclusion of the examination in chief of the person who made the representation.

Statement in Furtherance of a Common Enterprise

Statements in furtherance of a common enterprise and conspiracy can be used by the Prosecution for the case of one defendant against another co-defendant in certain circumstances.

It is to be noted that where the defendant gives an unsworn statement, such a statement cannot be used against the co-defendant and must be entirely disregarded as regards them: ***Gunewardene* [1951] 35 Cr App R 80** (UK CA). In ***Gunewardene***, it was noted that the trial judge has a duty to remind the jury that such an unsworn statement of the defendant, cannot be used against the co-defendant. In fact, the judge also has a duty to ensure that the Prosecution does not cross examine the defendant on matters that appeared in their core interview: ***Gray and Evans* (1998) Crim LR 570** (UK CA).

In ***Quintyne* (Barbados CA, Crim App Nos 44 and 45 of 1996)**, the Court of Appeal found that the judge was in error in failing to issue to the jury a strong warning that nothing of what one defendant allegedly told the witness was evidence against the other defendant or could be used in establishing a case against them. The judge's failure to give such a warning was a serious flaw in the summing up.

The general rule that out of court confessions of a court defendant cannot be used against the defendant, does not apply to statements made by a co-defendant in the course of pursuance of a joint enterprise. This includes statements made in the presence or the absence of the defendant: ***Rudd* (1948) 32 Cr App R 138** (UK CA).

The following cases are also instructive:

i. ***Taitt* BB 2011 CA 23**;

ii. ***Bolden and Cumberbatch v The Queen* BB 2010 CA 12**;

iii. ***Foster et al* BB 2004 CA 29**;

iv. ***Bootman and Moseley* BB 1998 CA 6**;

v. ***Stewart et al v The Queen* BB 1993 CA 10**;

vi. ***Trotman v The Queen* BB 1987 CA 7**.

Points to Consider:

i. In the House of Lord's decision in ***Hayter*** **[2005] UKHL 6**, **[2005] 1 WLR 605**, there was a modest modification of the common law rule that a confession of one defendant may not be used against the other. In this case, it was held that in a joint trial of two or more defendants, the jury is entitled to consider first, the case in respect of defendant A which is solely based on A's own out of court admissions and then use their findings of A's guilt and the role A played, evidentially in respect of co-defendant B. Effectively, this would mean that a jury would be entitled, in certain circumstances, to use evidence contained in the out of court confession of one defendant as evidence in the case against another. See also ***Persad v The State of Trinidad and Tobago*** **[2007 UKPC 51, [2007] 1 WLR 2379**.

ii. Note ***Rowson*** **[1985] 3 WLR 99** (UK CA), where the party seeking to adduce evidence of the inadmissible confession is not the Prosecution but a co-defendant of the maker, different considerations apply. The rule is that the co-defendant is to be allowed to cross examine the defendant on that statement where it is relevant to the co-defendant's defence, which would include putting the fact of the statement to the defendant.

iii. In ***Myers*** **[1997] 4 All ER 314** (UK HL), the defendant was able to adduce evidence of his co-defendant's confession in his own case, by way of cross examination of witnesses (including Prosecution witnesses) to whom the confession was made, so long as it was relevant to his defence (and not for instance, in an attempt to implicate another person). This is specifically important where the co-defendant has not yet testified and may not testify.

Res Gestae

The Privy Council in the case of ***Ratten*** **[1972] AC 378** (AU-VIC PC) opined that where a hearsay statement is made either by the victim of an attack or by a bystander, indicating directly or indirectly the identity of the attacker, the admissibility of the statement is said to be dependent on whether it was made as part of the res gestae (all facts so connected with a fact in issue as to introduce it, explain its nature, or form in connection with it one continuous transaction).

In ***Bascombe*** **(Barbados CA, Crim App No 2 of 1989)**, the Court of Appeal affirmed the trial judge's decision to admit an oral statement by the victim in evidence as part of the "res gestae". The court relied upon the case of ***Andrews*** **[1987] AC 281** (UK HL), where it was held that a trial judge faced with an application to admit hearsay evidence under the res gestae doctrine, must consider whether the possibility of concoction or distortion can be disregarded, taking into account the circumstance in which the statement was made. For the statement to be sufficiently "spontaneous", it must be so closely associated with the event that the declarant's mind was still dominated by that event. Some special features, such as the possibility of malice in the declarant, may affect the possibility of concoction or distortion and therefore the admissibility of the statement.

The following cases are also instructive:

i. ***Alleyne*** **(Barbados CA, Crim App No 9 of 2016)**;

ii. ***Holder*** **(1976) 11 Barb LR 117 (CA)**;

iii. ***Fernander*** **(The Bahamas CA, MCCrApp & CAIS No 43 of 2014)**.

Belize

Witness Not Present

Section 123(2) of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ) and s 105A of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) both provide for a statement of a person who is not called as a witness.

In ***Salazar* [2019] CCJ 15 (AJ)** (BZ), the Prosecution's case was based, to a great extent, on the evidence of Dougal's common law wife, Ms Keisha Bahado, Omar Rodriguez, a former police officer who at the time was on mobile patrol near to the scene, and a deposition (police statement) of Dean Dougal, who had died (of causes unrelated to the shooting) prior to the start of the trial. The court noted at [36] – [40]:

> [36] It would appear that in Belize the unsworn statement of a person to a police officer is in principle admissible as evidence in criminal proceedings if the maker of the statement dies before the trial. However, the statement needs to contain a declaration by that person to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true. The printed forms that are used by the police in Belize, to write down a witness statement contain that declaration. Such out of court statements are regularly used in Belize and are admitted either under section 123 IPA or section 105 Evidence Act. Section 123 IPA is restricted to those cases

where the accused has been committed for trial for any crime. In such a case the deposition, which under section 1 IPA includes a written statement recorded by the police, of a witness may without further proof be read as evidence at the trial of the accused, "provided that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence". The provision does not say anything about the weight of such evidence.

[37] Section 105 Evidence Act has a wider and a narrower range. It applies to all criminal proceedings (including a preliminary inquiry but also a summary trial and a trial upon committal). However, it is limited to statements "made by a person in a document", which is not further defined in the legislation. Section 105(5) provides that "section 85 of this Act shall apply as to the weight to be attached to any statement rendered admissible as evidence by this section." ...

[38] It would appear that in Belize written statements and statements by a person in a document are seen as overlapping, so that such a statement can be admitted under either provision, depending on whether a justice of the peace was present when the statement was taken. This is somewhat awkward because the IPA makes a difference between a "written statement' which needs to comply with section 36 IPA (requiring the declaration) and "statements" that need to comply with section 38 IPA. This section *inter alia*, requires that before the committal proceedings begin, the prosecutor

notifies the magistrates court and each of the parties to the proceedings that he believes (a) that the statement might by virtue of sections 83 and 105 of the Evidence Act (statements in certain documents) be admissible as evidence if the case came to trial; and (b) that the statement would not be admissible as evidence otherwise than by virtue of sections 83 and 105 of the Evidence Act if the case came to trial. Given section 38(2)(a) and (b) IPA, it would follow that a written statement complying with section 38 IPA, even if it contains a declaration co-signed by a justice of the peace or magistrate, could not be tendered at the preliminary inquiry as a statement (because it is otherwise admissible as a "written statement"). This would seem to indicate that a distinction must be made between a "written statement" and a "statement in a document". In that case, it would not be possible to have an overlap between sections 123 IPA and section 105 Evidence Act.

[39] A second remark to be made is that although it is clear that section 105 Evidence Act does not have the proviso "that the court is satisfied that the accused will not be materially prejudiced by the reception of such evidence" it is clear that that proviso also exist with respect to that provision. Albeit, under the aegis of the common law. After our decision in *Bennett v the Queen* it must also be clear that this proviso, in whichever emanation, is no longer limited to the longstanding rule that a judge in a criminal trial has an overriding discretion to exclude evidence if the prejudicial effect outweighs the probative value and the exclusion of evidence which is judged to

be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. The proviso also extends to the situation wherein it is clear that the statement cannot in reason safely ever be held to be reliable.

[40] A third remark is that although section 123 IPA, in contradistinction to section 105 Evidence Act, does not prescribe the application of section 85 Evidence Act or any other rule for the assessment of the weight of the admitted hearsay evidence, that does not mean that depending on the circumstances these rules should not be applied. These are rules of thumb and common sense that should always be applied whether legislatively prescribed or not.

Witness Present

Section 73A of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides:

> 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.

In ***Bennett*** **[2018] CCJ 29 (AJ) (BZ), (2019) 94 WIR 126**, the crucial evidence upon which Bennett was convicted, was a previous statement of a witness to the police, which the witness, under oath, retracted at the trial (a previous inconsistent statement). In his appeal before the Court of Appeal, Bennett argued that this statement should not have been admitted, or alternatively, that his no case submission should have been upheld by the trial judge. The Court of Appeal did not agree with him and dismissed his appeal against the conviction. He then appealed to the CCJ, where divergent views emerged about the correctness of the decisions in the lower courts. Nevertheless, the court noted:

> [12] In Belize, no statutory provisions exist that limit or qualify the circumstances under which a previous inconsistent statement, or more generally hearsay evidence, can be admitted. Nevertheless, the power of the judge not to admit admissible evidence was correctly recognized by the Court of Appeal in *Tillett v R*, a case which dealt with a hearsay statement admissible under section 73A, where the court stated, referring to its earlier decision in *Micka Lee Williams*, that
>
> > "the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage of depriving him unfairly of the ability to defend himself."
>
> [13] So far as the power to stop the case upon a no case submission is concerned, the trial judge in Belize must

> rely on the *Galbraith* tests as a "safety valve" similar to section 125 CJA has not been adopted by the Belize legislature. It appears to us, however, that the second limb of *Galbraith* allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy.

A court should therefore not allow a trial to proceed on the untested previous statement of a witness who abandons all material parts of it, where it is the sole evidence of identification, there is no other evidence to support the statement, it has not been shown by the circumstances or other factors to be reliable, and there is no other evidence against the defendant. In such a situation, it is unfair to admit the statement and the judge should halt the trial: ***Bennett*** at [147].

Res Gestae

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for the operation of the common law rules and principles.

It is to be noted that once a statement is an out of court statement, and in that sense, hearsay evidence as well as an excited utterance, it can under certain conditions be admitted under the "res gestae" doctrine, but that does not mean that an excited utterance is hearsay evidence: ***Salazar* [2019] CCJ 15 (AJ)** (BZ) at [33]. See also, ***Faux* (Belize CA, Crim App No 3 of 2007)**.

Guyana

Witness Not Present

Section 95(1) of the **Evidence Act, Cap 5:03** (GY) provides:

> Where any person has been committed for trial for any offence, the deposition of any person taken before a magistrate may, if the conditions hereinafter set out are satisfied, without further proof be read as evidence on the trial of that person, whether for that offence or for any other offence arising out of the same transaction or set of circumstances as that offence.

The admissibility of deposition evidence is not a matter of right. If the statutory provisions have been satisfied, the court may in the exercise of its discretion have that evidence admitted: ***The State v Albert Stanislaus Browne*** **(1977) 25 WIR 51** (GY CA); ***Edwin Ogle*** **(1968) 11 WIR 439** (GY CA).

Witness Present

Previous Inconsistent Statement

See ss 79 and 80 of the **Evidence Act, Cap 5:03** which speak to the proof of any inconsistent statement and proof of previous consistent statement made in writing, respectively.

Note ***The State v George Mootoosammy and Henry Budhoo*** **(1974) 22 WIR 83** (GY CA), where the court stated:

> In my judgment, where there is a previous inconsistent statement, the material portions should be put to the witness, and an opportunity afforded him to explain the inconsistency. The inconsistency may be only apparent, and the witness may be able to explain it away, in which case the inconsistency is dissipated. All this is done before the jury who will themselves have heard the explanation and will be able to assess the consequent weight of the testimony. Where the inconsistency is irreconcilable, then the direction becomes all-important and necessary, and acting on proper directions, the jury may well reject the testimony as being inconsistent with the previous statement. But I am unable to hold that a judge should tell a jury that a previous inconsistent statement automatically nullifies the sworn testimony of a witness.

Unfavourable or Hostile Witness

See ss 21, 79, and 80 of the **Evidence Act, Cap 5:03**.

Note ***The State v Solomon*** **(1982) 33 WIR 149** (GY CA) at [159]:

> It sometimes happens that a witness who is called by one of the parties to prove a particular fact in issue or relevant to the issue "in good faith", fails to prove such fact, or proves the contrary of that which is expected of him. In that event, he is said to be an unfavourable witness to the party that called him. *Per contra*, if a witness called to prove a particular fact purposely refrains from speaking truthfully on behalf of the side that calls him, he is said

to be an adverse or hostile witness; although, it is not enough that the evidence he gives is unfavourable to the party who called him, his manner and tone of voice must also show hostility to that party (*Greenough v Eccles* (1859) 5 CBNS 786).

Evidential Rule of Practice

However, whether the witness proves unfavourable or hostile in the witness-box, there is a rule of practice which has hardened into a rule of the common law. It directs that as a general rule a party has no right to impeach or discredit their own witness, or to call any evidence to contradict the witness, for they have voluntarily placed the witness before the court as worthy of belief. But it sometimes happens that a party calling a witness to prove certain facts may be disappointed by the witness's failure to do so. When a witness proves unexpectedly adverse to the party calling them, the rule may be relaxed and counsel who called the witness may be permitted by the judge to attack the character and dispute the veracity of the witness, in fact, to cross-examine them: see sections ss 21, 79, and 80 of the **Evidence Act, Cap 5:03**.

Res Gestae

In ***Singh v The State*** **(1999) 59 WIR 245** (GY CA), the deceased had received a serious gunshot injury to his left arm from which he died a day or two later. In addition to that, he had been beaten by the bandits and he and his two daughters had also been terrorised when demands were made of them for jewellery and money after he had been shot. The statement in question appeared to have been uttered about two minutes after the

intruders had left and about nine or ten minutes after the deceased had been shot. The court noted that the trial judge did not err in admitting the utterance of the deceased in evidence, since she had followed the rule when she noted, 'I have addressed my mind to the possibility of concoction, distortion or error and I am satisfied beyond reasonable doubt that in the circumstances of this case there is no room for such'. The court therefore held that, although the deceased might have disclosed to the police on their arrival at the scene the identity of the person who had fired the shot, his statement to his daughters could be admitted as part of the res gestae, as it had been sufficiently contemporaneous and spontaneous and the trial judge had clearly satisfied herself that there was no room for concoction, distortion or error on the part of the deceased.

See also:

i. ***Martin (Frank)* (1987) 43 WIR 201** (GY CA) which discussed the desirability of holding a voir dire to determine whether a statement that was made by a person who was not called as a witness is properly admissible as part of the res gestae.

ii. ***Price v The State* (1982) 37 WIR 222** (GY CA) which treats with Dying Declaration vs Res Gestae.

In this Chapter:

Chapter 18
The Defendant's Statements and Behaviours

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

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Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

1. Confessions

Admissions relevant to the issue of guilt in criminal cases are known as confessions. A confession made by a defendant may be given in evidence against them in so far as it is relevant to any matter in issue in the proceedings.

In ***Sharp*** **[1988] 1 All ER 65** (UK HL), the House of Lords stated that if an out of court statement by the defendant is partly adverse and partly exculpatory, both the adverse parts and the exculpatory parts are to be taken together as one confession.

Where the admissibility of a confession is to be challenged, the jury should not be made aware of it at that stage and the judge should determine its admissibility on a voir dire: ***Adjodha v The State*** **[1982] AC 204** (TT PC), per Lord Bridge at 223.

The CCJ noted in ***Edwards*** **[2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115**:

> [51]…It is not enough to tell jurors that an unacknowledged oral confession is potentially unreliable, or that jurors must exercise caution when treating with such confessions. Even when one warns at length about the unreliability and need for caution, these admonitions will have less than their intended effect if the jury are not given in full the reasons why the confession may be unreliable. To inform the jury that they must exercise caution because the oral statements may be unreliable does not give jurors enough assistance. What really helps is to tell the jury about the matters that underpin the potential unreliability and need for caution.

> [52] Why is such evidence potentially unreliable? Why should the jury exercise caution when treating with this evidence? What are these "matters" that the second requirement references? Each case will produce its own peculiar set of matters to which the trial judge must be alert. These matters are infinite and so it would be futile to attempt to catalogue them here. But there are some that are likely to be constant. They arise out of the circumstance that the jury are called upon to assess the truthfulness of the confession in the context of an adversarial system. The jury, un-schooled in the science of fact finding, must decide whether the police officer(s) or the suspect is telling the truth about what was said in the police station...

Admissibility of Confessions

A confession may be excluded if it was or may have been obtained:

i. by oppression of the person who made it; or

ii. in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by a person in consequence thereof.

In ***Nervais*** **[2018] CCJ 18 (AJ) (BB)**, the controversy in the trial was centred on the admissibility of the repudiated confession statements given by Nervais, which the trial judge admitted as voluntarily made, and on the last-minute defence of alibi. The court noted at [16]:

> …The submission that the judge erred in so stating raises issues of whether the law requires corroboration of a confession which is repudiated, what amounts to corroboration, and whether Holder's evidence could be so regarded. The judge's reference to corroboration may have come from the Australian case of *McKinney v R* in which a narrow majority of the High Court determined to establish "a general rule of practice" that judges should warn juries to exercise caution when considering a disputed confession which was not corroborated. However, it was expressly decided in that case that corroboration of a confession is provided by the accused signing the confession, though in some cases this may not amount to sufficient corroboration. In this case, Nervais signed the confession at multiple places. More, he wrote at the end of the statement the certificate that he had given the statement of his free will and he signed that certificate, thereby corroborating that he had given the statement voluntarily. It is the case, therefore, that there was no need for the Prosecution to rely on Holder's testimony as corroboration, because the accused's signature satisfied that requirement.

The CCJ later stated at [39]:

> This was a straight case of whether Nervais voluntarily made the written confession which he signed and whether he made the oral statements which the police officer recorded in his notebook which Nervais also signed. Once the judge ruled that the oral and written

> confessions had been voluntarily made the issue was reduced to what weight to give to these statements which included, of course, whether what he said in these statements was true. As counsel noted, the judge repeatedly told the jury they must decide whether they accepted it as true that Nervais made the statements but, contrary to the submission for Nervais, the judge went further and told the jury that if they did not believe Nervais made the statements they must reject the statements and find Nervais not guilty. There was, accordingly, no failure by the judge to tell the jury, in the clearest terms, what to do if they did not accept the statements.

At common law, therefore, a judge has residuary discretion to exclude admissible evidence if, in their view, its prejudicial effect outweighs its probative value: ***Sang*** **[1979] 3 WLR 263** (UK CA) at 269.

Points to Consider

i. Juries should be directed that if they think the confession was or may have been obtained by oppression, they should put it aside and place no reliance upon it.

ii. Where breaches of Judges' Rules/Police Standing Orders (where applicable) which are capable of affecting the reliability of admissions are explored before the jury, the judge should explain their relevance since they may affect the weight which the jury can attach to the evidence.

iii. Where the confession of a defendant who is mentally handicapped was not made in the presence of an independent person but is nevertheless admitted in evidence, and the case against the defendant depends wholly or substantially on the evidence of confession, 'the court shall warn the jury that [for these reasons] there is a special need for caution before convicting the defendant in reliance on the confession'.

iv. Any evidence which is reasonably capable of undermining the reliability of a confession should be pointed out to the jury.

v. The question may legitimately be posed whether, if during a confession obtained by oppression, the defendant reveals information only the culprit could have known, their guilty knowledge is admissible while the confession is not.

2. Out of Court Statement by Another Person as Evidence for or Against the Defendant

The normal rule is that an out of court statement by one defendant (made, for example, in an interview or confession) is not evidence against any other defendant. Where, however, the maker of the statement gives evidence in a joint trial, their evidence is admissible for all purposes, including proof of guilt of other defendants: ***Rudd* (1948) 32 Cr App R 138** (UK CA); ***Gunewardene* (1951) 35 Cr App R 80** (UK CA); ***Rhodes* (1960) 44 Cr App R 23** (UK CA). Where in evidence one defendant implicates another, note that a **Makanjuola** warning to the jury may be required to the effect that the former may have a purpose of their own to serve.

In the usual case, the jury will require a specific direction that the out of court statement of one defendant is not admissible in the case of another.

In a joint trial, there may have been, at the close of the evidence, an application by D1 for a direction that a hearsay statement in the interview of D2 which implicates D3 is admissible in D1's case (supporting D1's case that D3 was responsible). The trial judge will need to ascertain the purpose for which the defendant is seeking to rely on the evidence. In the example given, if the statement is admitted, the legal directions will need to be framed to reflect the burden and standard of proof in the cases of D1, D2 and D3 respectively. If the statement is true, it may exonerate D1; D2, however, may have had an interest of their own to serve; and in the case of D3, the Prosecution must satisfy the criminal burden and standard of proof.

3. Oral Statements by the Defendant

Oral statements should be approached with extreme caution. This type of evidence may be easy to fabricate. As such, the Prosecution has a heavy burden to prove that the defendant did in fact make an oral statement to secure a conviction on the statement alone.

In ***Francis*** **[2009] CCJ 9 (AJ) (BB), (2009) 74 WIR 108**, where the appeal was based on the claim that, inter alia, the admission of the oral statements into evidence was wrongful, the CCJ noted at [7]:

> ...With regard to the oral statement, the challenge to its admission (as argued before us) had two limbs. The first was that the effect of the judge granting Sergeant Catwell leave to refresh his memory from his notebook, was tantamount to admitting into evidence the contents of a document which was rendered inadmissible by section 73(1) of the Evidence Act ("the Act") for lack of

> authentication by the appellant. The second limb was that the judge never considered, as he was required to by section 145 of the Act, whether it was fair to the appellant to grant leave to the Sergeant to refresh his memory from his notebook and that had he done so, he would or ought to have come to the conclusion that the grant of such leave would in all the circumstances of the case result in unfairness to the appellant.

At [19] and [20], the court further stated:

> ...One of the instructions which the judge is required to give to the jury in such a case is a warning that the evidence may be unreliable. Here we have a provision in the Act which contemplates that there may be oral evidence given of oral admissions of which an unauthenticated record has been made. The only way in which a judge and jury are likely to become aware of the existence of such a record, is as a result of it being used by a witness to refresh his memory, the record itself being inadmissible under section 73 (1).
>
> The policy of the Act appears to be to place on the trial judge the responsibility of ensuring by his directions to them that the jury are alive to the weaknesses of evidence of "verbals" given by a police witness after reference to his unauthenticated notes.

Further guidance was provided in the case of ***Boodram v The State*** **(Trinidad and Tobago CA, Crim App No 17 of 2003)**. The following cases may also be instructive:

i. ***Delaney*** **(1989) 88 Cr App R 338** (UK CA);

ii. ***Keenan*** **[1990] 2 QB 54** (UK CA);

iii. ***Ward*** **(1994) 98 Cr App R 337** (UK CA).

4. Mixed Statements by the Defendant

The evidential effect of a 'mixed statement' (i.e. comprising both admissions and exculpatory/self-serving assertions) was explained by Lord Lane CJ in ***Duncan*** **(1981) 73 Cr App R 359** (UK CA) at 365 (since approved by the House of Lords in ***Sharp*** **[1988] 1 All ER 65** (UK HL)): '…the simplest, and, therefore, the method most likely to produce a just result, is for the jury to be told that the whole statement, both the incriminating parts and the excuses or explanations, must be considered by them in deciding where the truth lies.'

While ***Duncan*** concerned a defendant who had not given evidence, the principle that the whole statement is admissible as evidence of the truth of the matters stated, applies whether the defendant gives evidence or not. As to the weight to be attached to the exculpatory part of a mixed statement, Lord Lane CJ, at 365, held that: '…where appropriate, as it usually will be, the judge may, and should, point out that the incriminating parts are likely to be true (otherwise why say them?), whereas the excuses do not have the same weight.'

In ***Hamand*** **(1986) 82 Cr App R 65** (UK CA), the Court of Appeal held that the exculpatory parts of a mixed statement were capable of discharging

an evidential burden on the defendant (e.g., to raise the issue of self-defence or loss of control).

In ***Papworth*** **[2007] EWCA Crim 3031, [2008] 1 Cr App R 439**, applying ***Garrod*** **[1997] Crim LR 445** (UK CA) (see also ***Shirley*** **[2013] EWCA Crim 1990)**, it was held that the rule is based on fairness to the defendant and simplicity for the jury. The judge should be encouraged to estimate at the end of the evidence whether the Prosecution placed significant reliance on the incriminating statements; if so, 'the more it is likely that the jury should be told that the parts which explain or excuse those incriminating parts are also evidence in the case.'

Where the Prosecution relies on a series of inculpatory remarks made in the interview, the judge should not direct the jury to dismiss them as merely reactionary: ***Gijkokaj*** **[2014] EWCA Crim 386**. Care needs to be taken not to misdescribe mixed statements. See also ***Greenhalgh*** **[2014] EWCA Crim 2084**, where the judge was in error by describing a mixed statement as 'not capable of being evidence in the case.'

In ***Hamilton*** **[2012] UKPC 37** (JM), the Privy Council quoted with approval the following passage from ***Pearce*** **(1979) 69 Cr App R 365** (UK CA): 'A statement that is not an admission is admissible to show the attitude of the defendant at the time when he made it. This is however not to be limited to a statement made on the first encounter with the police.'

In ***Whittaker*** **(1993) 43 WIR 336** (JM PC), the Privy Council stated that a pre-trial mixed statement by a defendant to the police had the same evidential value outlined in ***Sharp***, whether or not the defendant remains silent or gives evidence in his defence at trial.

Where a defendant person makes an unsworn statement and a mixed statement, the mixed statement is to be admitted in totality. Even if the defendant in their unsworn statement at the trial denies making the earlier

admissions or explanations and sets up an entirely different defence, the defendant does not thereby deprive themselves of the benefit of the exculpatory aspects of the mixed statement: ***Von Starck*** **[2000] UKPC 5, (2000) 56 WIR 424** (JM).

As an example, the entire statement 'mi stab him but mi never mean fi kill him' ought to have been left for the jury to consider: ***Simmonds*** **(Jamaica CA, Crim App No 198 of 2000)**.

The following cases are instructive:

i. ***Sharp*** **[1988] 1 All ER 65** (UK HL);

ii. ***Duncan*** **(1981) 73 Cr App R 359** (UK CA);

iii. ***Whittaker*** **(1993) 43 WIR 336** (JM PC);

iv. ***Aziz*** **[1996] AC 41** (UK HL);

v. ***Von Starck*** **(2000) 56 WIR 424** (JM PC);

vi. ***Gordon*** **[2010] UKPC 18, (2010) 77 WIR 148** (BZ).

5. Post-Offence Conduct

The Trinidad and Tobago **Criminal Bench Book 2015** provides a summary of instructive authorities in this area at 218:

> 1. **Franklyn Gonzales v The State (1994) 47 WIR 355** (CA): a case which dealt with the issue of post-offence conduct which was admitted to by the appellant in a statement given to a police officer. It was held that although admissible evidence, where the prejudicial effect of the evidence outweighed its probative value, it might be excluded by a trial judge in the interests of a fair trial. In this case, in the interests of fairness (which

were not restricted to fairness to the defendant), the trial judge had properly admitted evidence of the appellant setting fire to the curtains in the deceased's house even though it occurred after the killing, as it tended to show his behaviour at the time to be consistent with a sense of revenge.

2. **Apabhai [2011] EWCA Crim 917**: the trial judge was entitled to find that the evidence relating to the blackmailing of the appellant by a co-defendant was "connected with" the Prosecution or investigation of the offence of conspiring to cheat the Public Revenue.

3. **White [1998] 2 SCR 72** (SC Canada): the locus classicus on post-offence conduct in that jurisdiction. At paragraph 19 of its judgment, the Supreme Court stated that under certain circumstances, the conduct of a defendant after a crime has been committed may provide circumstantial evidence of the culpability of the defendant for that crime. For example, an inference of guilt may be drawn from the fact that the defendant fled from the scene of the crime or the jurisdiction in which it was committed, attempted to resist arrest, or failed to appear at trial. Such an inference may also arise from acts of concealment, for instance where the defendant has lied, assumed a false name, changed his or her appearance, or attempted to hide or dispose of incriminating evidence; it went on to cite the dicta of Weller JA in **Peavoy (1997) 117 CCC (3d) 226** (CA Ontario) at p. 238, in which it was stated that:

> Evidence of after-the-fact conduct is commonly admitted to show that an accused person has acted

> in a manner which, based on human experience and logic, is consistent with the conduct of a guilty person and inconsistent with the conduct of an innocent person.

6. Silence of the Defendant

At common law, a statement made in the presence of a defendant, accusing them of a crime upon an occasion which may be expected reasonably to call for some explanation or denial, is not evidence against them of the facts stated, save in so far as the defendant accepts the statement so as to make it in effect their own – **Archbold (2009)** at 15-409. See also ***Christie*** **[1914] AC 545** (UK HL).

In ***Hall*** **[1971] 1 All ER 322** (JM PC), the Privy Council said at 324:

> It is a clear and widely known principle of the common law in Jamaica, as in England, that a person is entitled to refrain from answering a question put to him for the purpose of discovering whether he has committed a criminal offence. *A fortiori* he is under no obligation to comment when he is informed that someone else has accused him of an offence. It may be that in very exceptional circumstances an inference may be drawn from a failure to give an explanation or a disclaimer, but in their Lordships' view silence alone on being informed by a police officer that someone else has made an accusation against him cannot give rise to an inference that the person to whom this information is communicated accepts the truth of the accusation…The caution merely serves to remind the accused of a right

> which he already possesses at common law. The fact that in a particular case he has not been reminded of it is no ground for inferring that his silence was not in exercise of that right, but was an acknowledgment of the truth of the accusation.

Where a defendant is informed by a police officer, who does not caution them, of an allegation made by a third person (e.g. a co-defendant), the defendant's silence cannot per se amount to an acknowledgment by them of the truth of the allegation, within the principle enunciated in ***Christie***.

Where persons are speaking on equal terms, the defendant's silence, when confronted with an accusation of a crime, may be left to the jury to decide whether it amounted to an acceptance of the truth of what was said. In ***Parkes*** **(1976) 23 WIR 153** (JM PC), the mother of a girl who was found with stab wounds had asked the defendant why he had stabbed the girl. The defendant made no reply, but when the mother threatened to hold him until the police arrived, he drew a knife and tried to stab her. The Privy Council approved the judge's direction to the jury that the defendant's silence, coupled with his subsequent conduct, was a matter from which it could be inferred that the defendant had accepted the truth of the accusation. See also ***Horne*** **[1990] Crim LR 188** (UK CA).

Where the defendant had the benefit of the presence of an attorney-at-law, the question is: should the learned judge have directed the jury to consider whether the defendant's silence or refusal to answer amounted to an acceptance or admission of aspects of the Prosecution's case? If the jury so found, the next question for them would have been whether guilt could reasonably be inferred from such acceptance or admission. Therefore, the next question of whether guilt could be inferred from such

refusal did not arise. The refusal to answer those specific questions was of no evidential value: ***Stewart*** **(Jamaica CA, Crim App No 98 of 2004)**.

Barbados

Confessions

Section 2 of the **Evidence Act, Cap 121** (BB) defines "admission" or "confession" as a previous representation made by a person who is or becomes a party to proceedings, being a representation that is adverse to the person's interest in the outcome of the proceedings.

Section 69 of the **Evidence Act, Cap 121** (BB) restates the well-known principle that admissions and confessions constitute an exception to the hearsay and opinion evidence rules.

Section 70 of the **Evidence Act, Cap 121** (BB) provides:

> Evidence of an admission is not admissible unless the court is satisfied that the admission, and the making of the admission, were not influenced by violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admissions towards some other person, or by a threat of conduct of that kind, or by any promise made to the person who made the admission to any other person.

Section 71 of the **Evidence Act, Cap 121** (BB) applies only in criminal proceedings and only in relation to evidence of a confession made by a defendant.

Section 77 of the **Evidence Act, Cap 121** (BB) states:

> (1) In criminal proceedings, where evidence of confession is adduced by the prosecution and, having regard to the circumstances in which the confession was made, it would be unfair to an accused to use the evidence, the court may
>
> (a) refuse to admit the evidence; or
>
> (b) refuse to admit the evidence to prove a particular fact.

Section 116 of the **Evidence Act, Cap 121** (BB) provides for the discretion to exclude improperly obtained evidence.

The CCJ in ***Edwards [2*017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115**, in applying s 77 of the **Evidence Act, Cap 121** (BB) noted:

> [38] Section 77 provides that in criminal proceedings, where evidence of a confession is adduced by the prosecution and, having regard to the circumstances in which the confession was made, "it would be unfair to an accused to use the evidence, the court may refuse to admit the evidence; or refuse to admit the evidence to prove a particular fact." The question of fairness was considered by this Court in *Francis* and *Sealy* in the related but different context of permitting a police officer to refresh his memory and read aloud from his notebook.

> The legislative preoccupation with the fairness of the trial process is relevant to the present context because fairness is anchored to certain broad and fundamental constitutional considerations. Even a guilty defendant is entitled, before being found guilty, to have a trial which conforms with at least the minimum standards acceptable for a criminal trial: *R v Hanratty*.
>
> [39] For all of the foregoing reasons, we conclude that under the criminal justice system of Barbados, it is not permissible for a person charged with an offence to be convicted of that offence in circumstances where the only evidence against him is an unsigned and otherwise unacknowledged and uncorroborated confession which the prosecution allege was made to investigating police officers whilst in police custody but which he denies making. Something more is required either in the way independent verification that the admission was actually and voluntarily made, or in the way of other evidence that independently corroborates or otherwise points to the guilt of the accused.

Out of Court Statement by Another Person as Evidence For or Against the Defendant

Section 115 of the **Evidence Act, Cap 121** (BB) provides that, in criminal proceedings, where the probative value of evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, the court may refuse to admit the evidence.

Statements made by one defendant either to the police or to others (other than statements made in the course and in pursuance of a joint criminal enterprise to which the co-defendant was a party) are not evidence against a co-defendant unless the co-defendant either expressly or by implication adopts the statements and thereby makes them their own: ***Gunewardene*** **[1951] 2 KB 600** (UK CA).

It is the duty of the judge to impress on the jury that the statement of one defendant not made on oath in the course of the trial (and not falling within any other recognized exception), is not evidence against a co-defendant and must be entirely disregarded: ***Gunewardene***; ***Taitt*** **(Barbados CA, Crim App Nos 13 and 12 of 2008)** at [79].

A jury should not be directed that they may test the credibility of a Prosecution witness whose evidence affects all defendants by considering it in the light of a statement under caution made by one of them: ***Daniel*** **[1973] Crim LR 627** (UK CA).

To minimize the prejudicial effect, the judge may order separate trials: ***Buggy*** **(1961) 45 Cr App Rep 298** (NI Cr CA); ***Small v The DPP; Gopaul v The DPP*** **[2022] CCJ 14 (AJ) GY** at [132] – [135].

A judge in a criminal trial has a discretionary power to refuse to admit relevant evidence on which the Prosecution proposes to rely, if they consider that its prejudicial effect outweighs its probative value, but they have no discretionary power on that basis at the request of a defendant in a joint trial, to exclude evidence tending to support the defence of a co-defendant or to edit a co-defendant's statement on which the co-defendant wishes to rely: ***Lobban*** **(1995) 46 WIR 291** (JM PC) per Lord Steyn.

It is also noteworthy that in a joint trial, while a statement made in the absence of the defendant by one of their co-defendants cannot be

evidence against them, yet if a co-defendant goes into the witness-box and gives evidence in the course of a joint trial, then their sworn evidence becomes evidence for all purposes of the case, including the purpose of being evidence against their co-defendants: ***Edwards*** **(Barbados CA, Crim App Nos 35 and 36 of 2004)**, per Mason JA at [18].

Oral Statements by the Defendant

Note s 137 of the **Evidence Act, Cap 121** (BB) which deals with unreliable evidence.

Whenever police evidence of a confessional statement allegedly made by a defendant while in police custody is disputed, and its making is not reliably corroborated, the judge should, as a rule of practice, warn the jury of the danger of convicting on the basis of that evidence alone. The basis of the rule lies in the special position of vulnerability of a defendant to fabrication when involuntarily held in police custody, in that the detention would have deprived the defendant of the possibility of the corroboration of a denial of the making of all or part of an alleged confessional statement: ***Sealy*** **(Barbados CA, Crim App No 16 of 2012)**.

In ***Edwards*** **[2017] CCJ 10 (AJ) (BB), (2017) 90 WIR 115**, the CCJ noted at [27]:

> ...If the oral admissions are inadmissible, no warning pursuant to section 137 is ever necessary; the oral admissions are simply excluded. If, however, the admissions are admissible, then the warning contemplated by section 137 is not relevant at the stage of the no-case submission but rather is given later during the judge's summing up of the case to the jury.

See also ***Sealy*** **[2016] CCJ 1 (AJ) (BB), (2016) 88 WIR 70**.

Mixed Statements by the Defendant

Note s 69 of the **Evidence Act, Cap 121** (BB) which restates the well-known principle that admissions and confessions constitute an exception to the hearsay and opinion evidence rules.

The following cases are instructive in this area:

i. ***Ibanez*** **(1998) 53 WIR 83** (BZ PC), where the trial judge had adopted the purist approach and directed the jury to disregard certain aspects of the unchallenged mixed statement of the defendant, which could arguably be favourable to him. The defendant had told the police that a third party had in effect made him commit the murder by some form of duress. On appeal, the Privy Council held that the trial judge's direction was a misdirection.

ii. ***Sinanan v The State (No 2)*** **(1992) 44 WIR 383** (TT CA), where the Trinidad Court of Appeal held that not only the mixed statement of the defendant was admissible, but also the circumstances of its making.

iii. See also ***Whittaker*** **(1993) 43 WIR 336** (JM PC), a Jamaican case which went to the Privy Council. The defendant had given a statement to the police in which he claimed that he had been attacked by the deceased and it was during this struggle that he realised that the deceased had been injured. The trial judge directed the jury to ignore the statement as it had been wholly self-serving. On appeal, it was held, applying ***Sharp*** **[1988] 1 All ER 65** (UK HL), that the judge should have left the whole statement to the jury to consider where the truth was.

iv. ***Aziz* (1996) AC 41** (UK HL).

vi. ***Garrod* [1997] Crim LR 445** (UK CA) and ***Western v DPP* [1997] 1 Cr App Rep 474** (UK QB-DC).

vii. ***Duncan* (1981) 73 Cr App R 359** (UK CA) per Roskill LJ.

viii. ***Sparrow* [1973] 2 All ER 129**.

ix. ***Sharp* [1988] 1 All ER 65** (UK HL).

See Darshan Ramdhani, **Confession Evidence: Practice and Procedure in the Commonwealth Caribbean** (Aequitas Professional 2008) at 71-86.

Post-offence Conduct

In ***Jordan* (Barbados CA, Crim App No 22 of 2012)** at [11], the judge took into account the post-offence actions and behaviour of the appellant, who drove away the deceased's vehicle, returning to the scene soon afterwards, striking the deceased, albeit accidentally according to him, but driving away leaving the deceased motionless on the road and not seeking to assist him by, for example, making an anonymous call to the police. In the judge's opinion, these actions "showed a callous and reckless disregard for human life" and "greatly aggravated the seriousness of the offence."

See also:

i. ***Griffith* (Barbados CA, Crim App No 6 of 2007)** at [18] and [19];

ii. ***Turcotte* [2005] 2 SCR 519**;

iii. ***Marcoux* [1976] 1 SCR 763, 60 (DLR) (3d) 119**.

Silence of the Defendant

Note s 76 of the **Evidence Act, Cap 121** (BB) which deals with evidence of silence and provides:

> (1) An inference unfavourable to a party may not be drawn from evidence that the party or some other person failed or refused to answer a question, or respond to a representation put or made to the person in the course of official questioning.
>
> (2) Where evidence of the kind referred to in subsection (1) may only be used to draw an inference referred to in that subsection, it is not admissible.
>
> (3) Subsection (1) does not prevent the use of the evidence to prove that the persons failed or refused to answer the question or respond to the representation if the failure or refusal is a fact in issue in the proceedings.

The right to silence is guaranteed to the defendant at trial and a careful approach to this should be observed by all parties involved in the trial process: Trinidad and Tobago **Criminal Bench Book 2015** at 220**.**

In the case of ***McCollin*** **(Barbados CA, Crim App No 20 of 2005)**, the appellant contended that the trial judge and the prosecutor were in breach of s 76(1) of the **Evidence Act Cap 121A**. The prosecutor made comments in an attempt to draw a 'negative inference in the minds of the jurors from the appellant's exercise of his right to remain silent.' The Court of Appeal held that the trial judge should have given a strong and explicit direction along the lines of s 76 for the prosecutor not to make such inappropriate comments.

Belize

Confessions

Section 90 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for the confession of a crime.

In ***Matu*** **(Belize CA, Crim App No 2 of 2001)**, the appellant was charged with murder, the allegation being that he and his brother Luis had murdered the deceased. The only evidence which connected the appellant to the killing was the alleged oral statement to the police, which the appellant denied making. Mottley JA observed (at page 2) that, '[n]o attempt was made by counsel for the prosecution to lay the appropriate evidential foundation for the receiving of this statement into evidence'. On appeal from his ensuing conviction, the appellant contended that the trial judge had erred in law by admitting the alleged oral statement without first ascertaining whether the conditions set out in section 88 of the Evidence Act (the exact equivalent of the current section 90) had been satisfied. Mottley JA agreed at page 4:

> In our view, it is not permissible for the judge to assume that the admission was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of a person in authority. The use of the word 'affirmatively' suggests that the prosecution must lead evidence which satisfied the judge that the admission was not induced by any promise of favour or advantage or by the use of fear, threat or pressure by or on behalf of a person in authority. This subsection makes it absolutely clear that before the admission is

> received into evidence certain things must be proved affirmatively. If there is no affirmative proof of the factors set out in the subsection, then the evidence relating to the admission cannot be given in evidence.

After a discussion of some of the older authorities dealing with confessions, Mottley JA concluded at [16] – [18], as follows:

> 16. Counsel for the prosecution did not lead any evidence regarding the circumstances surrounding the making of the alleged admission. No evidence was led to show that the alleged admission was not induced by any promise of favour or advantage by any person in authority. Evidence should also have been led to show that no fear, threat or pressure was used by anyone of authority.
>
> 17. In the absence of such evidence, we hold that it cannot be said that there was affirmative evidence upon which the judge could have been satisfied beyond reasonable doubt that the admission 'was not induced by any promise of favour or advantage or by use of fear threat or pressure by or an [sic] behalf of a person in authority. Failure to lead such evidence meant that, the condition required prior to the introduction of the alleged admission into evidence was not met.
>
> 18. The trial judge did not direct his mind to the requirement of section 88 of the Evidence Act. He permitted the prosecution to introduce the alleged

> admission into evidence without satisfying that provision of the section.

See also ***Pook* (Belize CA, Crim App No 25 of 2011)**.

Out of Court Statement by Another Person as Evidence For or Against the Defendant

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides: 'Subject to the provisions of this Act and of any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.'

In ***Eiley* [2009] UKPC 40, (2009) 76 WIR 179** (BZ), the JCPC noted at [49]:

> A judge enjoys a discretion to exclude evidence if the circumstances in which it has been obtained are such as to render its admission contrary to the interests of justice. One circumstance where it may be appropriate to do so is where the witness has received an inducement to give evidence for the prosecution that will render the evidence suspect – see *R v Turner* (1975) 61 Cr. App. R. 67 at p. 78. The discretion is one that should be used sparingly. Such promises, when made to an accomplice to a crime, have been described as distasteful – see *Turner* at p. 80. They are nonetheless capable of being justified in the public interest...

In ***Harris*** **(Belize CA, Crim App Nos 1 and 2 of 2004)**, both Fairweather and Castellanos were charged with the murder of one Chin. Pursuant to an agreement signed with the Prosecution the charges of murder were withdrawn in consideration of these witnesses giving evidence on behalf of the Prosecution. These witnesses therefore had their own interest to serve in this matter, and this would require the judge to give the caution as required by section 93(3)(b) of the Evidence Act. The court noted:

> 28. This Court accepts that the direction which the judge gave to the jury and to which we earlier adverted was correct. Our attention was also drawn to **Chan Wai-Keung v. Reginan [1995] 2Cr. App. R. 194**, where it was held by the Privy Council:
>
> > *" ....that the courts had recognized that circumstances might justify the calling of a witness who stood to gain by giving false evidence, but that what was required was that the potential fallibility of that witness's evidence should be put fairly before the jury."*
>
> 29. The judge had, in our view, properly drawn it to the attention of the jury that Fairweather and Castellanos had signed an agreement with the prosecution as a result of which "the murder charges against them had been withdrawn" in consideration of both of them giving evidence for the prosecution. He correctly warned the jury that they had to approach the evidence of these two witnesses with caution and care because, by signing the agreement, they had their own interest to serve. He reminded the jury that these two witnesses "had an axe to grind".

See also ***Trapp*** **(Belize CA, Crim App No 6 of 1981)**.

Oral Statements by the Defendant

Section 90 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for the confession of a crime.

In ***Pook***, the court noted that the judge did tell the jury more than once that it was for them to decide whether the appellant made the statement and, if so, whether it was true. However, the Court of Appeal stated:

> [42] In our view, these directions were unsatisfactory in at least two respects. The first relates to the judge's repeated characterisation of the statement allegedly made by the appellant as an "admission/confession" (see para [39] above). As this court also had occasion to point out (in relation to a summing up by the same judge) in **Bermudez** (at para [8]) –
>
> > "...the finding as to whether a statement...amounts to a confession is one for the jury and not for the judge. Repeatedly to tell a jury that such a statement is in fact a confession is unnecessarily to imperil the fairness of a trial."
>
> [43] We specifically adopt and repeat these words in this judgment, in the fervent hope that the judge's lapse in this regard, which now shows clear signs of becoming a habit, will not recur.
>
> [44] Perhaps more substantially for present purposes, it is clear, as the learned Director readily conceded, that the judge did not in terms warn the jury of the dangers

> of convicting on the strength only of the appellant's oral statement. The question of the need for such a warning in an appropriate case was discussed by the Board, in a judgment delivered by Lord Kerr, in **Benjamin & Ganga v The State of Trinidad & Tobago [2012] UKPC 8**, (paras 23-27)...

Mixed Statements by the Defendant

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides for the operation of the common law rules and principles.

See ***Herrera*** **(Belize CA, Crim App No 2 of 2009)**.

Post-offence Conduct

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) is also relevant in this area.

See ***Williams*** **(Belize CA, Crim App No 16 of 2012)**.

Silence of the Defendant

Section 6(6) of the **Belize Constitution Act, Rev Ed 2020, CAP 4** (BZ) states that a person who is tried for a criminal offence shall not be compelled to give evidence at the trial.

See ***Gonzales*** **(Belize CA, Crim App No 3 of 1985)**.

Guyana

Confessions

Note the Judges' Rules, 1964.

In ***Shivnarine v The State*** **(2012) 80 WIR 357** (GY CA), the court held:

> ...a confession statement was not admissible in evidence against an accused person unless it was proved by the prosecution beyond a reasonable doubt to have been voluntarily obtained. If the trial judge was satisfied that the confession was not obtained by any of the prohibited means, the matter however did not end there. He had to take it further and consider the issue of fairness: whether it was unfair in the circumstances of the case and in the interest of justice to admit that statement into evidence. The judge might in the exercise of his discretion admit the statement if he found that it was voluntarily given and it was fair to admit it. Or he might refuse to admit the statement even if he found it was voluntarily given but it was unfair in the circumstances to admit it. That a trial judge was under an obligation to rule on the question of voluntariness was a rule that admitted of no exception. Whether the admissibility of a statement was challenged or not, it remained a condition precedent that a trial judge addressed the question of voluntariness and should record that he had considered the question whether the statement was freely and

voluntarily made. The trial judge was also under an obligation to give reasons for that ruling as well.

Moreover, although an accused denied he made any confession and made no allegation, the prosecution was still bound to satisfy the trial judge that the confession was voluntary. In the instant case, the accused persons before the court had been young persons, giving statements in the absence of their parents and guardians, albeit that a justice of the peace had been present. The trial judge had made no reference to the Judges' Rules in general and in particular to provisions relating to children and young persons in the Administrative Directions annexed to those Rules. A breach of the Judges' Rules did not lead to an automatic exclusion of an accused person's statement and each case would turn on its own facts. However, in the specific circumstances of the instant case the trial judge should have indicated the relevant considerations. The failure of the trial judge to rule on the admissibility of the statements could not be excused given the circumstances of the case. He should have indicated whether the statements had been free and voluntary and he had admitted them on that basis as well as on the ground of fairness.

Further, concerns about the age of the appellants, whether they had been told of their right to counsel and the relationship between the justice of the peace and the deceased relatives, might cause the criterion of fairness to be compromised. The overarching criterion was that of the fairness of the trial, the most important facet of

> which was the principle that a statement made by the accused had to be voluntary in order to be admitted in evidence. With respect to the oral statement of N, given the circumstances that the confession appeared to have been uttered spontaneously, the spontaneity per se was proof of voluntariness and the principles upon admission of a confession statement had no relevance. A confession which was simply blurted out by a criminal caught in flagrante delicto was not the sort of confession to which those principles applied.

Out of Court Statement by Another Person as Evidence For or Against the Defendant

Legislation is being developed at present in this area: see the **Evidence (Amendment) Bill No 3 of 2022**.

To minimize the prejudicial effect, the judge may order separate trials: ***Buggy* (1961) 45 Cr App Rep 298** (NI Cr CA); ***Small v The DPP; Gopaul v The DPP* [2022] CCJ 14 (AJ) GY** at [132] – [135].

Mixed Statements by the Defendant

In ***Ali v The State* (Guyana CA, Crim App No 40 of 2000)**, the court held:

> ...the trial judge failed to bring to the attention of the jury the full import of the oral statement made by the Appellant to the policeman and to direct them as to what weight, if any, should be given to it, or what use should be made of it in considering the defence of consent raised in it. This was fatal, and not in the overall interest

> of justice. With proper direction the jury may well have come to the same conclusion, but they ought to have been given the option of so deciding after being directed about the possibility of the issue of consent raised in the voluntary statement.

Ali is also instructive in the areas of Post-offence Conduct and Silence of the Defendant.

Oral Statements by the Defendant

The following cases are instructive:

i. ***The State v Mohamed Omar*** **(1987) 40 WIR 207** (GY CA);

ii. ***The State v Cyril Dennan*** **(1979) 26 WIR 384** (GY CA) which treats with spontaneous statements made by the defendant;

iii. ***Rodrigues (Randolph) v The State*** **(2000) 61 WIR 240** (GY CA): the jury must not be told of the Judge's ruling in a voir dire;

iv. ***The State v Colin Joseph De France*** **(1978) 26 WIR 179** (GY CA);

v. ***The State v Abdool Azim Sattaur And Rafeek Mohamed*** **(1976) 24 WIR 157** (GY CA): revisiting rulings in relation to admissibility;

vi. ***Shivnarine and another v The State*** **(2012) 80 WIR 357** (GY CA): statements by young defendants; the need for judges to give reasons for their rulings in the voir dire.

In this Chapter:

Chapter 19
Lies

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

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Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Guidelines

A defendant's lie, whether made before the trial or in the course of giving evidence or both, may be probative of guilt: ***Goodway*** **[1993] 4 All ER 894** (UK CA).

In ***Goodway***, the court held that where lies are relied on by the Prosecution as supportive of guilt, the conditions set out in ***Lucas*** **[1981] QB 720** (UK CA) must be fully met. These are that: the lie must be deliberate; the lie must relate to a material issue; the motive for the lie must be a realisation of guilt and a fear of the truth; and the statement must be clearly shown to be a lie by admission or by evidence from an independent witness.

The direction should be tailored to the circumstances of the case, but the jury must be directed that only if they are sure that these criteria are satisfied can the defendant's lie be used as some support for the Prosecution's case; the lie itself cannot prove guilt: ***Strudwi*****ck (1994) 99 Cr App R 326** (UK CA) at 331. It is important that care is taken to make clear these criteria.

If the issue for the jury is whether to believe the Prosecution witnesses rather than the defendant, and if doing so will necessarily lead them to conclude that the defendant was lying in the account they gave, such a direction is not necessary: ***Harron*** **[1996] 2 Cr App R 457** (UK CA).

Similarly, a lies direction is not needed where the defendant's explanation for their admitted lies can be dealt with fairly in summing-up: ***Saunders*** **[1996] 1 Cr App R 463** (UK CA) at 518–19.

In the case of ***Burge*** **[1996] 1 Cr App R 163** (UK CA), Kennedy LJ at 173-174, identifies the circumstances in which a ***Lucas*** direction may be required:

i. Where the Defence relies on an alibi.

ii. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.

iii. Where the Prosecution seeks to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

iv. Where although the Prosecution has not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

See also Judge LJ in ***Middleton*** **[2001] Crim LR 251** (UK CA).

Directions

i. Whether a direction should be given to the jury in respect of any admitted or proved lie/s should be the subject of discussion with the advocates before speeches. In particular, care should be taken to identify with the advocates the lie/s in respect of which the direction is to be given.

ii. Before the jury may use an alleged or admitted lie against the defendant, they must be sure of all of the following:

   a. that it is either admitted or shown, by other evidence in the case, to be a deliberate untruth: i.e. it did not arise from confusion or mistake;

   b. that it relates to a significant issue; and

c. that it was not told for a reason advanced by or on behalf of the defendant, or some other reason arising from the evidence, which does not point to the defendant's guilt.

iii. The jury must be directed that unless they are sure of all of the above, the [alleged] lie is not relevant and must be ignored.

iv. If the jury is sure of all of the above, they may use the lie as some support for the Prosecution's case, but it must be made clear that a lie can never by itself prove guilt.

1. Motive to Lie

Evidence which may raise a witness's motive to lie must be approached with caution as there is a possibility that such evidence may be tainted by an improper motive. Therefore, the jury must be directed to consider whether the witness has fabricated or embellished their evidence in the hope of gaining an advantage for themselves, for example, a lighter sentence, prosecution for a lesser offence, or immunity from prosecution.

2. Lucas Direction

In ***Burge***, the Court of Appeal held that a ***Lucas*** direction is usually required in four situations, which may overlap. At 173, Kennedy LJ noted:

> 1. Where the defence relies on an alibi.
>
> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence from other evidence in the case, and amongst that other evidence

draws attention to lies told, or allegedly told, by the defendant.

3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.

4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.

The Court of Appeal held that the direction (if given) should, so far as possible, be tailored to the circumstances of the case, but that it will normally suffice to make two points: first that the lie must be admitted or proved beyond reasonable doubt, and secondly that the mere fact that the defendant lied is not in itself evidence of guilt since defendants may lie for innocent reasons; so only if the jury is sure that the defendant did not lie for an innocent reason can a lie support the Prosecution's case. The court also stressed that the need for the direction arises only in cases where the Prosecution says, or the judge envisages that the jury may say, that the lie is evidence against the defendant, in effect using it as an implied admission of guilt. The direction is not needed in run of the mill cases where the Defence's case is contradicted by the evidence of Prosecution witnesses in such a way as to make it necessary for the Prosecution to say that, insofar as the two sides are in conflict, the defendant's account is untrue.

3. Lies and Bad Character

In ***Campbell*** **[2009] EWCA Crim 1076, [2009] Crim LR 822**, the defendant was charged with murder. He had earlier pleaded guilty to unlawful possession of firearms and ammunition found in his possession 11 days after the shooting. There was also found on a glove in his possession, firearms residue. The Prosecution relied on these convictions and the glove as evidence of bad character, from which the jury could infer a propensity to commit firearms offences. The defendant advanced explanations which, if accepted, would remove the potential for a finding of propensity. It was argued on appeal that the trial judge should have given a lies direction. The court held that an occasion for a lies direction had not arisen. Either the jury could not exclude the defendant's explanation (in which case the defendant had not lied), or the jury would disbelieve the explanation (in which case the jury would find propensity). Since the jury would be given a propensity warning (as they had been) the defendant was adequately protected against an assumption of guilt.

It may not be that in all such situations both a bad character and a lies direction would be inappropriate. There *may* be a risk that the jury would find not only propensity, but also that the defendant would not have lied about their bad character unless guilty. A lies direction in ***Campbell*** could simply have pointed out that the defendant had an obvious possible motive for placing an 'innocent' gloss on the bad character evidence. Even if the defendant had lied about his access to and familiarity with unlawful firearms, it did not automatically follow he was guilty of this murder.

Directions

i. Discussion with the advocates is essential both as to the question whether a ***Lucas*** direction is required at all and, in any event, as to the terms in which the issue of lies is to be left to the jury.

ii. The lies on which the Prosecution relies, or which the judge considers may be used by the jury to support an inference of guilt, should be identified for the jury.

iii. The jury must be sure that a deliberate lie was told either because the lie is admitted or because it is proved.

iv. Any explanation for the lie tendered by the defendant or advanced in argument on their behalf should be summarised for the jury.

v. The jury may be told that the defendant's lie is relevant to the credibility of the defendant's account in interview and/or evidence.

vi. The jury should be directed that before they can treat the defendant's lie as additional support for the Prosecution's case they must exclude, so that they are sure, the possibility that the lie was told for an 'innocent' reason (meaning a reason other than guilt). Such directions should always be framed within the context of the facts of the case.

vii. Should the defendant advance a reason why they lied, it is not incumbent upon the judge to list others, unless it is a reasonable possibility that others may arise on the facts; nor, when none is advanced, is it necessary to cover every theoretical possibility, only those which might reasonably arise on the facts.

viii. What weight the jury attaches to the lie is a matter for them. However, it may be necessary to ascertain whether the lie alleged is capable of supporting an adverse inference on some, or all, of the issues between the Prosecution and Defence. Where, therefore,

the offence charged requires specific intent and the motive for the lie could have been an attempt to avoid a charge even of the lesser offence, the jury should receive a direction to be cautious before using the lie as any support for the inference of specific intent.

ix. The jury should be told that lies cannot of themselves prove guilt. They may, depending on the jury's view, provide support for the Prosecution's case or a specific part of it.

x. One of the reasons why directions in relation to lies can be confusing to juries is that concepts such as 'credibility', 'consciousness or realisation of guilt', 'the defendant's lies may support an inference of guilt', and 'support for the Prosecution's case', are unfamiliar and capable of being misunderstood unless explained through the factual context of the case.

Illustration

Allegation of wounding with intent – defendant admits lying in interview when claiming to have been elsewhere – defendant denies having knife in his possession – evidence that he left his home with a knife – lies direction – warning against using lies to infer specific intent

Miss A gave evidence that she saw a fight between V and Y taking place outside the pub. A man she later identified as the defendant approached. She saw the glint of something shiny in his right hand. With the same hand the defendant appeared to deliver a blow to V's stomach and V went to the ground suffering a wound to the abdomen.

The Prosecution invites you to conclude that when he was interviewed under caution, the defendant lied about important matters. First, he maintained throughout his first interview that he was not present at the

scene of the assault on V. Secondly, the defendant said in interview, and has maintained in his evidence, that he did not take a knife to the scene of the assault on V. The Prosecution has suggested to you that these lies were told in an attempt to conceal the defendant's guilt.

I need to provide you with a specific direction on how you should approach evidence of alleged lies.

Barbados

Motive to Lie

The Court of Appeal in the case of ***Springer*** **(Barbados CA, Crim App No 17 of 2005)**, noted at [27]:

> In our opinion, on the evidence adduced, the lie cannot be relied on as a link in the chain of proof In the Court of Appeal of New Zealand, the headnote of *R. v. Toia* [1982] 1 NZLR 555 illuminates this area of criminal evidence. The Court held:
>
> "Lies should not be too readily relied on as links in a chain of proof It is only when a lie is more consistent with guilt than innocence that it can strengthen the case against an accused.
>
> If a lie is of this type the Judge will need to give a detailed direction to make it clear to the jury that before using it in that way they must be satisfied of two things: first, that it has been proved to be a lie (and in corroboration cases the proof cannot come

> from the complainant alone); and second, that it is the sort of lie which naturally indicates guilt rather than innocence. However, most lies are not in this category. More commonly, proved lies by an accused, whether in evidence or in statements out of Court, may be relevant to credibility. But whenever lies by an accused figure in a case it is customary and advisable to give a warning to the jury on the lines that people may have various motives for lying and that a lie does not necessarily mean guilt. A summing up must always be adapted to the particular case and no specific formula is automatically suitable in dealing with lies.
>
> But generally a more elaborate direction is needed only where it is suggested that the alleged lie adds to the prosecution case."

Points to Consider

i. See ***Goodway*** **[1993] 4 All ER 894** (UK CA), where the UK Court of Appeal set out the position where lies are relied on by the Prosecution as supportive of guilt, and thus, the conditions set out in ***Lucas*** **[1981] QB 720** (UK CA) must be fully met.

ii. ***Burge*** **[1996] 1 Cr App R 163** (UK CA), which sets out the circumstances in which a ***Lucas*** direction should be given. The Trinidad and Tobago **Criminal Bench Book 2015** at 226-229.

iii. Note ***Borneo v The State*** **(Trinidad and Tobago CA, Crim App No 7 of 2011)**, which held that the trial judge was correct in not giving a ***Lucas*** direction, as the Prosecution did not rely on any utterance

of the appellant as corroboration of any aspect of its case, or as evidence of guilt. Nor was there any real danger that the jury might have relied on any lie as evidence of guilt.

iv. ***Richens*** **[1993] 4 All ER 877** (UK CA) is also instructive. In that case, it was noted that, in all cases where the jury were invited to regard, or there was a danger that they might regard, lies told by the defendant, or evasive or discreditable conduct by them, as probative of their guilt of the offence in question, the judge ought to direct the jury that before they could treat the lies as tending towards proof of guilt of the offence charged, they had to be sure that there was not some possible explanation for the lies which destroyed their potentially probative effect. On the facts, the issue for the jury had been whether they could be sure that the appellant's attempts to conceal the killing and his lies, were inconsistent with his case that he had killed as a result of provocation, and pointed to murder. The trial judge's failure to direct the jury to consider whether there was any explanation for the appellant's lies other than guilt of the offence charged, and his indication that the jury might regard the appellant's lies as probative of murder rather than manslaughter, amounted to a material misdirection.

Lucas Direction

In ***Lucas***, Lord Lane, CJ explained:

> To be capable of amounting to corroboration, the lie told out of court must first of all be deliberate. Secondly, it must relate to a material issue and thirdly, the motive for the lie must be a realisation of guilt and a fear of the truth. The jury should in appropriate cases be reminded

> that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame or out of a wish to conceal disgraceful behaviour from their family. Fourthly, the statement must be clearly shown to be a lie by evidence other than that of the accomplice who is to be corroborated, that is to say, by admission or by evidence from an independent witness.

The following cases are instructive:

i. ***Springer*** **(Barbados CA, Crim App No 17 of 2005)**;

ii. ***Goodway*** **[1993] 4 All ER 894** (UK CA).

Lies and Bad Character

See ***Bolden*** **(Barbados CA, Crim App Nos 4 and 5 of 2007)**.

Belize

Motive to Lie

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides:

> Subject to the provisions of this Act and of any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.

See ***Ramirez*** **(Belize CA, Crim App No 18 of 2002)**.

Lucas Direction

Note s 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ).

See ***Neal*** **(Belize CA, Crim App Nos 4-5 of 1993)**.

Lies and Bad Character

Section 92 (3)(b) of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides:

> ...(3) Where at a trial on indictment–
>
> ...
>
> (b) an alleged accomplice of the accused gives evidence for the prosecution,the judge shall, where he considers it appropriate to do so, warn the jury of the special need for caution before acting on the evidence of such person and he shall also explain the reasons for the need for such caution.

See ***Ramirez***.

Guyana

Motive to Lie

See ***The State v Gowkarran Persaud, Jowalla Persaud And Michael Boodram*** **(1976) 24 WIR 97** (GY CA) at 111 and 112, which provides directions in cases where lies told by the defendant are being relied on.

Lucas Direction

See ***Shivnarine and another v The State*** **(2012) 80 WIR 357** (GY CA) at [63] and [64].

Bad Character

Section 22 of the **Evidence Act, Cap 5:03** (GY) prohibits questions of the bad character of the defendant.

In this Chapter:

Chapter 20
Defences

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

1. Alibi

Guidelines

Where the defendant merely states that they were not at the place where the offence was committed, this does not raise the defence of alibi. Alibi means more than being not present, but rather the defendant was at a specific place elsewhere.

The first requirement of the direction to the jury is that they understand that there is no burden on the defendant to prove that they were elsewhere. The Prosecution must prove its case beyond a reasonable doubt and that includes the need to prove that the defendant was not elsewhere, but was at the scene committing the offence.

The second requirement is to guard against the danger that, if the jury disbelieves the alibi evidence of the defendant, whether it is a mere denial of presence or a positive assertion that the defendant was elsewhere, they might assume the defendant is guilty. Particular care is required when the contest is between identifying witnesses and the evidence of alibi. The members of the jury should be reminded that if they are convinced that the defendant has told lies about where they were at the material time, this does not by itself prove that the defendant was where the identifying witness said they were.

In a case in which identification evidence is crucial, if the defendant seeks to establish an alibi, it is not necessary for the trial judge to direct the jury expressly that the rejection by them of the defendant's alibi would not prove that the defendant was where the identifying witness said that the defendant had been, unless there are circumstances which create a risk that the jury might use the rejection of the alibi in an unwarranted manner as confirmation of guilt: ***London v The State*** **(1999) 57 WIR 424**

(TT CA). See also ***Brown*** **(2001) 62 WIR 234** (JM CA); ***Turnbull*** **[1977] QB 224**.

A false alibi warning should be given where the fact of rejection of the alibi is seen as capable of supporting the identification evidence, or where the alibi evidence is in such a state that there is a risk that the jury may conclude that a rejection of the alibi necessarily supports the identification evidence.

In ***Turnbull***, Lord Chief Justice Widgery said at 230:

> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury is satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward can fabrication provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

The Board of the Privy Council in ***Mills*** **(1995) 46 WIR 240** (JM PC), did not give the above direction. However, the Board did direct the jury in the following terms:

> Mr Arthur Mills and the two sons, Garfield and Julius, they say that we were not present. We were elsewhere. Alibi. Now, a person can't be in two places at one and the same time. Although they have raised the alibi, they don't have to prove the alibi. The prosecution must satisfy you that they were present, they were not, as Mr Mills said, at some lady's house talking, or as the boys said, in their house with their mother.

The Board went on to state:

> Counsel submitted that this direction was insufficient and that there was a material failure to direct the jury properly. The Court of Appeal had rejected a similar argument as misconceived. The Court of Appeal observed:
>
> > Where an accused makes an unsworn statement, no such directions [about the impact of the rejection of the alibi] can or should be given. The jury is told to accord to such statement such weight as they fully consider it deserves…

Lord Steyn delivering the advice of the Board that, 'The jury is told to accord to such statement such weight as they fully consider it deserves' reflected the guidance given by the Privy Council in ***DPP v Walker*** **(1974) 21 WIR 406** (JM PC) at 411. See also ***Brown*** **[2010] JMCA Crim 38** at [15].

Directions

i. The first requirement of the direction to the jury is that they understand there is no burden on the defendant to prove that the defendant was elsewhere. The Prosecution must prove its case and that includes the need to prove that the defendant committed the offence.

ii. Note ***Broadhurst*** **[1964] AC 441** (MT PC) at 457:

> It is very important that a jury should be carefully directed upon the effect of a conclusion, if they reach it, that the accused is lying. There is a natural tendency for a jury to think that if an accused is lying, it must be because he is guilty, and accordingly to convict him without more ado. It is the duty of the judge to make it clear to them that this is not so. Save in one respect, a case in which an accused gives untruthful evidence is no different from one in which he gives no evidence at all. In either case the burden remains on the prosecution to prove the guilt of the accused. But if upon the proved facts two inferences may be drawn about the accused's conduct or state of mind, his untruthfulness is a factor which the jury can properly take into account as strengthening the inference of guilt. What strength it adds depends, of course, on all the circumstances and especially on whether there are reasons other than guilt that might account for untruthfulness.

Thus, the warning should be given whenever there is a risk that the jury will, having rejected the alibi evidence, assume guilt of the offence charged.

iii. If the jury is not satisfied with the evidence and is in doubt, the jury must acquit.

iv. If the jury is sure that the defendant was present as the Prosecution allege, the jury must be satisfied of any other elements of the offence that are in issue.

The following cases are also helpful in this area:

i. ***Goodway*** **[1993] 4 All ER 894** (UK CA);

ii. ***Lucas*** **[1981] QB 720** (UK CA).

2. Self-Defence

Guidelines

It is always the obligation of the trial judge to consider whether the evidence advanced at the trial raises any possible defence to the charge even where the defendant has not specifically raised that defence. Once there is such evidence, the trial judge is under a duty to direct the jury on that defence: ***Stanford*** **[2017] CCJ 7 (AJ) (BB), [2017] 3 LRC 443** at [19]; ***Palmer*** **[1971] AC 814** (JM PC). This duty exists even when that defence is inconsistent with the one relied on by the defendant: ***Stanford*** at [21].

In ***Stanford,*** the CCJ noted:

> [22] The common law has always recognised the right of a person to protect himself or another person from imminent attack and if necessary to inflict violence to repel that attack. No crime is committed where the person uses no more force than is reasonable in the situation. Accordingly, if the person honestly believed

that the circumstances, if true, would justify his use of force to defend himself or that other person and that it was reasonable to resist the attack, he was entitled to be acquitted of murder.

[23] In *Bonnick,* the English Court of Appeal suggested a useful threshold as to the evidence required for a trial judge to direct a jury on an issue, for example, self-defence. In the court's view, the question was one for "the trial judge to answer by applying common sense to the evidence in the particular case." Self-defence should be left to the jury when there was "evidence sufficiently strong to raise a prima facie case of self-defence" if it was accepted. They observed that to invite the jury to consider self-defence upon evidence which did not "reach this standard would be to invite speculation."

[24] A similar approach was adopted by the Privy Council in ***DPP v Bailey***, an appeal from the Court of Appeal of Jamaica. In that case, the accused was a special constable who had been threatened by the deceased's brother the day before the altercation. When he encountered the brothers the following day, he was attacked and the brothers attempted to take his gun from him. He contended that the shot went off accidentally. The trial judge summed up on accident and provocation, but informed the jury that self-defence did not arise. At the end of the summing up, counsel for the prosecution told the judge that she had heard nothing about self-defence, the judge repeated that self-defence did not arise. The jury found the accused not guilty of murder, but guilty of

> manslaughter. The Court of Appeal of Jamaica quashed his conviction, taking the view that it was "too clear for words that self-defence arose on the unsworn statement [of the accused]." The DPP appealed.
>
> [25] The Privy Council warned against leaving "perfectly hopeless defences which have no factual basis of support" to the jury. Where however the accused's account of what happened raised a prima facie case of self-defence, the jury should be directed on self-defence. Even if the evidence from which self-defence could be deduced was not strong, on the facts of this case where there had been an earlier threat, the Court of Appeal was entitled to conclude that self-defence ought to have been explained to and left to the jury.

In ***Robinson v The State*** **(Trinidad and Tobago CA, Crim App No 12 of 2009)**, the Court of Appeal of Trinidad and Tobago noted at 5 – 7, as follows:

> The classic exposition of the law of self defence is contained in the much cited dictum of Lord Morris of Borth-y-gest in the case of **Palmer v. The Queen (1971) 1 All E.R. 1077**, a decision of the Privy Council sitting on an appeal from Jamaica:
>
> > **"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts**

and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing-up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self-defence. If there has been no attack, then clearly there will have been no need for defence, If there has been attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weigh to a nicety the exact measure of

> **his necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."**

The Trinidad and Tobago **Criminal Bench Book 2015** at 244, provides important cases in the area as follows:

1. **Beckford [1988] 1 AC 130** (PC Jamaica): The Court of Appeal approved the following passage from the judgment of Lord Lane CJ in **Williams [1987] 3 All ER 411** (CA), as correctly stating the law of self-defence:

   > The reasonableness or unreasonableness of the defendant's belief is material to the question of whether the belief was held by the defendant at all. If the belief was in fact held, its unreasonableness, so far as guilt or innocence is concerned, is neither here nor there. It is irrelevant. Were it otherwise, the defendant would be convicted because he was negligent in failing to recognise that the victim was not consenting or that a crime was not being committed and so on. In other words, the jury should be directed, first of all, that the prosecution have the burden or duty of proving the unlawfulness of the defendant's actions, second, that if the defendant may have been labouring under a mistake as to the facts he must be judged according to his mistaken

view of the facts and, third, that that is so whether the mistake was, on an objective view, a reasonable mistake or not. In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked or that a crime was being committed, and that force was necessary to protect himself or to prevent the crime, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

Even if the jury come to the conclusion that the mistake was an unreasonable one, if, however, the defendant may genuinely have been labouring under it, he is entitled to rely on it.

(Mistaken belief does not arise in every case of self-defence.)

2. It is critical that the judge directs the jury that an intention to kill or cause grievous bodily harm is not inconsistent with self-defence: **Shiffie Roberts v The State CA Crim No 1 of 2009** at paras. 39 – 50, per Yorke-Soo Hon JA:

Direction on Intention to Kill and Self-Defence

39. Self-defence in Trinidad and Tobago is governed by the common law and thus a trial judge's direction to the jury must accurately reflect the common law. **Palmer v R [1971] AC 814** is still regarded as the classic

pronouncement upon the common law relating to self-defence. Lord Morris approved as correct the self-defence direction given by the trial judge, who had stated:

> 'A man who is attacked in circumstances where he reasonably believes his life to be in danger or that he is in danger of serious bodily harm, may use such force as on reasonable ground he believes is necessary to prevent and resist the attack; and if in using such force he kills his assailant **he is not guilty of any crime even if the killing was intentional**'.

It must be clearly conveyed to the jury that a man can act in self-defence even if he has the intention to kill.

40.It was in **Baptiste (1983) 34 WIR 253** that the Court noted that it is "important" for the trial judge to direct the jury that on a charge of murder, a plea of self-defence is not inconsistent with finding an intention to kill. Although the appeal in **Baptiste** was allowed primarily on another ground, this does not reduce the applicability of the Court's obiter statements on self-defence and intention to kill. It was said:

> **Another important direction that the judge must give to a jury in appropriate cases is that an intention to kill is not inconsistent with the establishment of the plea, not only of self-defence, but also of provocation…**

41. The phrase in appropriate cases above must be taken to mean cases where the facts give rise to the need for the jury to be told in the clearest of terms

that the intent to kill is not inconsistent with the plea. On these facts, the jury could easily have found that there was an intention to kill, hence it became necessary for the trial judge to make it abundantly clear that such an intention was not inconsistent with the plea of self-defence.

42. Further, it was said:

> On the question of ***mens rea*** the judge should direct the jury that whereas an intention to kill negatives the plea of accident, this is not so in respect of self-defence and of provocation, where the pleas may succeed even though the defendant had formed the intention to kill.

43. The point was re-emphasised nine years later in **Sinanan v The State (1992) 44 WIR 383** where the main ground of appeal was the failure of the trial judge to direct the jury that an intention to kill was not necessarily inconsistent with a plea of self-defence. It was contended that since the trial judge had rightly pointed out to the jury that intent to kill was an essential ingredient in proof of murder, it was fatal to the conviction that he, nevertheless, failed to tell them what was the consequence in law if this mental element existed when a person was acting in lawful self-defence. **The Court of Appeal held that a failure to direct the jury with regard to intent to kill where self-defence had been pleaded was a miscarriage of justice. Indeed, Bernard CJ regarded it as a "grave error".**

44. The issue arose again for consideration in **Allan Phillip v The State Cr. App. No. 88 of 1995**. The trial judge in his summing-up did not use the form of words suggested in **Baptiste** and although the Court of Appeal found the direction to be a bit muddled, in the end their Lordships held that the trial judge gave a sufficient direction. Ibrahim JA said:

> 'Before us three grounds of appeal were argued. The first ground of appeal was that the learned trial judge misdirected and confused the jury by giving them conflicting directions on the issue of intent in relation to self-defence. He told them:
>
> > "In considering the plea of self-defence you must finally decide whether the act done was really done with **the intent to defend or with the intent to kill or inflict grievous bodily harm which constitutes aforethought** [...] By way of summary, in considering the issue of justification, you must clearly differentiate between an intent to kill or inflict grievous bodily harm on the one hand, and an intention to defend oneself on the other hand [...] **The intent to kill or cause grievous bodily harm to an attacker is not inconsistent with the intent to defend oneself, and is often included with the intent to defend**. The issue is on self-defence".'

The above demonstrates that there are no precise words a trial judge must use when giving a direction on intention to kill in relation to self-defence. It is

clear that what is of paramount importance is that the jury understands that an intention to kill or to do grievous bodily harm and a plea of self-defence are not mutually exclusive concepts.

45. **In the instant case, we find that no such direction was given in relation to self-defence. There can be no doubt that it is important for a trial judge to generally convey to the jury that the intention to kill is not inconsistent with the issue of self- defence. However there is certainly no "magic formula of words" as to how this is to be communicated. The specificity with which such a direction need be given will invariably turn on the evidence proffered in the given case. In this particular case, aside from alibi, the trial judge was called upon to deal with three different justifications for the death of the deceased: accident, provocation, and self-defence.**

46. The trial judge in her summing up stated:

> 'Now, the issue of provocation can be raised when an accused is charged with the offence of murder. Even where you the jury find that in fact the accused did in fact kill the deceased with the intention to kill him or cause serious bodily harm the fact that the action of the killing with the intent is there does not preclude the defence of provocation being available to the accused.'

The clear import of these words is to indicate to the jury that the plea of provocation is not inconsistent with an intention to kill.

47. In a case such as this, where both self-defence and provocation were raised, it was even more critical for the trial judge to clearly direct the jury on the compatibility of an intention to kill with respect to both pleas and perhaps, its incompatibility with accident. Not having done so, the jury may have erroneously given weight to the fact that such direction was applicable only to the plea of provocation. That is, the jury may have considered that of these two defences, if they found that the accused formed an intention to kill, only provocation, and not self-defence, would have been available to the appellant. This approach would have the effect of depriving the appellant of the jury's full consideration of the plea of self-defence.

48. It is true that the trial judge defined the various elements of murder and in discussing the meaning to be attributed to the word "unlawfully" she pointed out:

> 'Now, of course, a killing may be justified where it is either in defence of oneself or in defence of another. Another example of unlawful killing, of course, may be, that carried out by some lawful authority. The allegation on the Prosecution's case is, of course that these two accused, without any issue of self defence arising, ambushed, together with three other men, the deceased and his friends, and they chopped him until he died. It would be a matter for you, Ladies and gentlemen of the Jury, at the end of the day, having considered all of the evidence, whether you are satisfied to the extent that you feel sure that this

killing was carried out unlawfully, that it was done by the accused.'

Although the judge attempted to explain the lawfulness of self-defence and intention, we find the above insufficient in light of the specific direction to provocation. When contrasted with the clear and express direction on intention in relation to provocation, we consider that the direction given on self-defence and intention had the potential to confuse the jury.

49. We are therefore of the view that, in the circumstances of this case the trial judge ought to have given a specific direction on intention to kill in relation to the plea of self-defence. This was a material omission and is fatal to the conviction.

50. This ground therefore succeeds on the basis that the learned trial judge failed to direct the jury on the correlation between an intention to kill and the plea of self-defence.

3. Provocation

Guidelines

Provocation is some act or series of acts done or words spoken by the deceased to the defendant which would cause in any reasonable person and actually causes in the defendant, a sudden and temporary loss of self-control, rendering the defendant so subject to passion as to cause them to retaliate: ***La Roche v The State*** **(Trinidad and Tobago CA, Crim App No 32 of 2009)** at [47].

Provocation is a partial defence to murder only. Once there is evidence of provocation to be left to the jury, the burden is on the Prosecution to disprove provocation to the required criminal standard. If the elements of murder are proved and provocation is not disproved, the defendant is entitled to a verdict of manslaughter.

4. Duress by Threats

Guidelines

A defendant who commits a crime under duress may, in certain circumstances, be excused liability. The defence can arise where the duress results from threats or from the defendant's circumstances: ***Hasan*** **[2005] UKHL 22, [2005] 4 All ER 685**; ***Martin*** **(1989) 88 Cr App R 343** (UK CA).

Duress in either form is not a defence to those charged with murder, attempted murder, and a limited number of other very serious offences. It is available to a conspiracy to murder: ***Ness*** **[2011] Crim LR 645** (UK Cr Ct). If manslaughter is left as an alternative then the jury must be directed to consider duress, where it arises, as a defence to this charge.

The defence is not available to a person who becomes voluntarily involved in criminal activity where they knew or might reasonably have been expected to know that they might become subject to compulsion to commit a crime: ***Hasan***; ***Ali*** **[2008] EWCA Crim 716**.

The elements of the defence, set out in full in ***Hasan*** at [21], are:

i. That the defendant reasonably believed that threats of death or serious injury had been made against himself or a member of his immediate family or someone for whom he might reasonably feel

responsible. False imprisonment **(*Dao* [2012] EWCA Crim 1717)** or threat of serious psychological injury **(*Baker* [1997] Crim LR 497** (UK CA)) is insufficient. Also, there is no substantive law defence for someone who commits a crime as a result of having been trafficked (***Baker***).

ii. That the defendant reasonably believed the threats would be carried out (almost) immediately and the threat was effective in the sense that there was no reasonable avenue of escape open to the defendant to avoid the perceived threat. It should be made clear to the jury that if the retribution threatened against the defendant or his family or a person for whom he feels responsible, is not such as he reasonably expects to follow immediately or almost immediately on his failure to comply with the threat, there may be little if any room for doubt that he could have taken evasive action, whether by going to the police or in some other way, to avoid committing the crime with which he is charged **(Z [2005] UKHL 35, [2005] 2 AC 645** at [28], per Lord Bingham of Cornhill). It is not necessary to spell out for the jury all the risks that the defendant claims he faced if he did not take a reasonable opportunity **(*Aldridge* [2006] EWCA Crim 1970**).

iii. That the threat (or belief in the threat) of death or serious violence was the direct cause of the defendant committing the offence. It is not correct to direct the jury that the threat of death or serious injury must be the sole cause: ***Ortiz*** **(1986) 83 Cr App R 173** (UK CA).

iv. That a sober person of reasonable firmness of the defendant's age, sex and character would have been driven to act as the defendant did. On characteristics, see ***Bowen*** **[1996] 2 Cr App R 157** (UK CA), the reasonable person will not share the defendant's vulnerability to pressure, timidity, or emotional instability. Characteristics

attributable to addiction to drink or drugs, are also irrelevant: ***Flatt* [1996] Crim LR 576** (UK CA).

It is for the Defence to raise the issue of duress. Once raised, it is for the Prosecution to disprove. The defence ought to be left to the jury if there is any evidence of it.

If the jury considers that the evidence of each of the above four matters is or may be true, the defendant is not guilty. If the Prosecution satisfies the jury so they are sure that one or more of the above four matters is untrue, the defence fails, and the defendant is guilty.

5. Insane and Non-Insane Automatism

There are in law two types of automatism, namely, insane and non-insane automatism. A judge is under a duty to leave the issue of automatism of either type to the Defence once the Defence has laid a proper foundation for so doing, by adducing positive evidence in respect of either, which is a question of law for the judge to decide.

Points to Consider

i. See ***Attorney General's Reference (No 2 of 1992)* 1994 QB 91** at 434 where the LCJ said: '...the defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough.' In this case the court decided that reduced or imperfect awareness, described by an expert as 'driving without awareness' is incapable of founding a defence of automatism.

ii. Malfunctioning of the mind caused by a disease cannot found a defence of non-insane automatism. Temporary impairment of the mind, resulting from an external factor, may found the defence, e.g. concussion from a blow, therapeutic anaesthesia but not self-induced by consumption of alcohol or drugs (see below): ***Sullivan* (1983) 77 Cr App R 176** (UK HL).

iii. The evidential burden is on the Defence, and it is for the judge to decide whether the medical evidence supports a disease or an "external factor" (if the former, the jury may require a direction as to the defence of insanity).

iv. The Prosecution must disprove automatism.

v. Malfunctioning of the mind which does not amount in law to insanity or automatism and does not cause total loss of control is not a defence: ***Isitt* (1978) 67 Cr App R 44** (UK CA).

vi. Automatism due to self-induced intoxication by alcohol and/or dangerous drugs:

   a. is not a defence to offences of basic intent, since the conduct of the defendant was reckless, and recklessness constituted the necessary mens rea;

   b. may be raised where the offence is one of specific intent.

vii. Automatism not due to alcohol, but caused by the defendant's action or inaction in relation to drugs (e.g. failure by a diabetic to eat properly after insulin) may be a defence to offences of basic intent unless the Prosecution proves that the defendant's conduct was reckless. For example, in assault cases the Prosecution must prove that the defendant realised that their failure was likely to make them aggressive, unpredictable, or uncontrolled: ***Bailey* (1983) 77 Cr App R 76** (UK CA).

The following cases are also helpful:

i. ***Thompson* (1986) 40 WIR 265** (JM CA);

ii. ***Gaston* [1978] 24 WIR 563** (GD CA);

iii. ***Roach* [2001] EWCA Crim 2698**.

6. Diminished Responsibility

The term "diminished responsibility" absolves a defendant of part of the liability for their criminal act if they suffer from such abnormality of mind as to substantially impair their responsibility in committing or being a party to an alleged violation. The doctrine of diminished responsibility provides a mitigating defence in cases in which the mental disease or defect is not of such magnitude as to exclude criminal responsibility altogether.

7. Insanity

The illustration below, found in the Trinidad and Tobago **Criminal Bench Book 2015** at 269, is helpful in this area:

> Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved. In order to establish insanity, it must be clearly proved that, at the time of the committing of the act, the accused was labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the acts he was doing, or if he did know, that he did not know that what he was doing was wrong.

Therefore, the first thing you need to consider is whether the accused was suffering a disease of the mind, in other words an impairment of mental functioning caused by a medical condition. If you consider that it is more likely than not that the accused was suffering from a disease of the mind then you need to consider the second question which is whether the degree of impairment of the accused's mental faculties was such that when he committed the act, he did not know what he was doing or did not know that it was wrong. If you conclude it is more likely than not that he did not know what he was doing or did not know it was legally wrong, your verdicts on both counts would be 'not guilty by reason of insanity'.

If, on the other hand, you decide that it is more likely than not either (1) that the accused was not suffering a disease of the mind or (2) that he knew what he was doing and knew that it was wrong, then you will have rejected the defence of insanity.

In order for you to consider the question of insanity, there must be evidence placed before you which you must then consider. However, once the evidential foundation has been laid so that the question of insanity is before you, then the burden of proof is on the prosecution to show that the accused acted consciously and voluntarily.

8. Felony Murder

The felony murder rule was abolished generally in Barbados by s 3(1) of the **Offences Against the Person Act, Cap 141** (BB). However, by subsection (2), the doctrine survives for certain specific types of killing namely, resisting an officer of justice, resisting or avoiding or preventing lawful arrest, or of effecting or assisting an escape or rescue from legal custody. In these types of cases, the killing 'shall be treated as a killing in the course or furtherance of an offence': ***Cadogan*** **(Barbados CA, Crim App No 16 of 2005)**.

In Belize, this rule was also abolished pursuant to **Criminal Code, Rev Ed 2020, CAP 101 (BZ) as amended by Act 22 of 2017**. Note "Class A murder" at s 106 sub-ss (1) & (3).

Barbados

Alibi

An alibi is where it is said by the Defence that at the time when the offence is alleged to have been committed, the defendant was somewhere else and therefore could not have committed it.

Section 157 of the **Evidence Act, Cap 121** (BB) provides:

> evidence in support of an alibi" means evidence tending to show that by reason of the presence of the accused at a particular a place or in a particular area at a particular time he was not, or was unlikely to have been, at the place

> where the offence is alleged to have been committed at the time of its alleged commission.

Section 158 of the **Evidence Act, Cap 121** (BB) provides for notice of an alibi to be given by the defendant.

The court in ***Walker*** **(Barbados CA, Crim App No 12 of 2004)** opined:

> Evidence that merely indicates that the defendant was not present at the place where the offence was committed is not evidence in support of an alibi. The evidence must be that the defendant was at some other particular place at the particular time of the commission of the offence. The particular feature of alibi as a defence is that it requires the defendant to produce evidence and provide details of a potential witness or witnesses in support of the defence.

The court in this matter dismissed the ground of appeal that the trial judge failed to direct the jury on alibi and that the statement did not amount to evidence in support of a defence of alibi.

Further, guidance can be gleaned from ***Bayley*** **(Barbados CA, Crim App No 2 of 2013)**, where the Court of Appeal affirmed the trial judge's following direction on the issue of alibi:

> The law requires me to give you special directions where the defence of alibi is advanced. An alibi is where it is said by the defence that at the time when the offence is alleged to have been committed the accused was somewhere else and therefore could not have committed it. Let me

remind you here of my earlier direction to you on the burden of proof. It is the duty of the prosecution to prove their case beyond reasonable doubt so that it is not for the accused to prove that he was somewhere else. It is for the prosecution to prove that the accused was in fact where they say he was. In other words, the prosecution must disprove alibi. So if you believe the alibi put forward by the defence based on the statement of the accused, if you believe that the accused was somewhere else then your verdict will be a verdict of not guilty. If you are in doubt as to whether he was somewhere else or not your verdict will also be a verdict of not guilty. You can only convict the accused members of the jury, that is, return a verdict of guilty if you completely reject the defence which has been put forward and you are convinced and feel sure of the guilt of the accused on the strength of the case of the prosecution. So that even if you reject the alibi defence that is not the end of the matter. That does not of itself entitle you to convict the accused. You still have to look at the evidence for the prosecution to see whether the prosecution has established its case beyond a reasonable doubt.

Now, Madam Foreman and members of the jury, I must tell you that an alibi is sometimes invented to bolster a genuine defence. And, I must tell you that it is possible for an accused to give a false alibi and not be the perpetrator of the offence charged…It is only when you are satisfied that the sole reason for the fabrication was to deceive you and there is no other explanation for its (sic) being put forward can fabrication provide any support for alibi

> evidence. So I must remind you that disbelieving the accused does not mean that he was where the virtual complainant says he was on that night.

The trial judge's directions must therefore state as follows:

i. That the Prosecution must disprove alibi;

ii. That the jury is to determine if they believe the defence and if they do, they are to return a verdict of not guilty;

iii. That if they have doubt of the defendant's whereabouts, their verdict must also be not guilty;

iv. That a verdict of guilty can only be returned if the jury completely rejects the defence;

v. That a false alibi can be given, that the defendant does not have to be perpetrator of the offence charged and that disbelieving the defendant does not mean that they were present at the time of commission of the offence.

The following cases are also instructive:

i. ***Beckles* (Barbados CA, Crim App No 56 of 2004)**;

ii. ***Woodall* (2005) 72 WIR 84** (BB CA);

iii. ***Bernard* (1994) 45 WIR 296** (JM PC) per Lord Lowry.

Self-defence

It is always the obligation of the trial judge to consider whether the evidence advanced at the trial raises any possible defence to the charge,

even where the defendant has not specifically raised that defence. Once there is such evidence, the trial judge is under a duty to direct the jury on that defence. This duty exists even when a defence is inconsistent with that relied on by the defendant: ***Stanford*** **[2017] CCJ 7 (AJ) (BB), [2017] 3 LRC 443** at [19] and [21].

The court in ***Palmer*** **[1971] AC 814** (JM PC) opined that for the issue of self-defence to be raised, there must have been an attack upon the defendant, and as a result, the defendant must have believed on reasonable grounds that they were in imminent danger of death or serious bodily harm. The force used by the defendant must have been to protect themselves either from death or serious bodily injury intended towards them by the attacker, or from the reasonable apprehension of it induced by the words and conduct of the attacker, even though the latter may not have in fact intended death or serious bodily injury.

Points to Consider

i. A person who acts reasonably in self-defence commits no unlawful act. By a plea of self-defence, the defendant is raising in a special form the plea of "Not Guilty". Since it is for the Prosecution to show that the plea of "Not Guilty" is unacceptable, the Prosecution must convince the jury beyond reasonable doubt that self-defence has no basis in the case being considered: ***Abraham*** **(1973) 57 Cr App R 799** (UK CA) per Edmund Davies, LJ.

ii. A sentencing court can take into account as a mitigating factor some element of self-defence, even when rejected by a jury: ***Lorde*** **(2006) 73 WIR 28** (BB CA).

iii. Note the following cases:

a. ***Cadogan* (Barbados CA, Crim App No 1 of 2018)**;
b. ***Baptiste v The State* (1983) 34 WIR 253** (TT CA);
c. ***Roberts v The State* (Trinidad and Tobago CA, Crim App No 1 of 2009)** per Yorke-Soo Hon JA at [39] – [50].

Provocation

Section 5 of the **Offences Against the Person Act, Cap 141** (BB) provides as follows:

> Where on a charge of murder there is evidence on which the jury can find that the accused was provoked, whether by things done or by things said or by both together, to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question, the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

In ***Griffith* (Barbados CA, Crim App No 6 of 2007)**, it was stated at [11]:

> The law is now regarded as definitively stated in *Holley* which requires a jury "to assess the gravity of the provocation by reference to [the defendant's] particular characteristics, but to judge his loss of self-control by applying a uniform, objective standard of the degree of self-control to be expected of an ordinary person of the defendant's age and sex with ordinary powers of self-control.

A judge when sentencing a defendant who is not guilty of murder but guilty of manslaughter by reason of provocation, must make certain assumptions in the defendant's favour such as:

i. the defendant had, at the time of the killing, lost their self-control. Mere loss of temper or jealous rage is not sufficient;

ii. the defendant was caused to lose their self-control by things said or done, normally and as in the cases with which we are concerned, by the person whom he has killed;

iii. the defendant's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions, and that as society advances, it ought to call for a higher measure of self-control;

iv. the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the defendant's offence from murder to manslaughter.

Moreover, the sentencing judge must make these assumptions, whether the defendant has been found not guilty of murder but guilty of manslaughter by reason of provocation by a jury after a contested trial, or the Prosecution has accepted a plea of not guilty of murder but guilty of manslaughter by reason of provocation: ***Griffith***.

Points to Consider

i. It is critical that that the trial judge directs the jury that an intention to kill or cause serious bodily harm is not inconsistent with provocation: ***Roberts v The State*** **(Trinidad and Tobago CA, Crim App No 1 of 2009)**.

ii. In the case of ***Lorde*** **(2006) 73 WIR 28** (BB CA), the courts highlighted provocation as a mitigating factor to be taken into account.

iii. The Court of Appeal in ***Yard*** **(Barbados CA, Crim App No 14 of 2014)** held that the evidence on provocation was properly directed to the jury and instructed on how to deal with this evidence to find the appellant guilty of manslaughter. The court highlighted that where there is powerful evidence of provocation, the trial judge was duty bound, both at common law and by statute, to place it before the jury. See also, ***Bullard*** **[1957] AC 635** (TT PC), per Lord Tucker.

iv. Note the following cases:

   a. ***Scantlebury*** **(Barbados CA, Crim App No 34 of 2002)**;

   b. ***Baptiste v The State*** **(1983) 34 WIR 253** (TT CA);

   c. ***Miller*** **(Barbados CA, Crim App Nos 3 and 4 of 1992)**;

   d. ***Richens*** **[1993] 4 All ER 877** (UK CA).

Duress

A defendant who commits a crime under duress may, in certain circumstances, be excused liability. This defence can arise where the duress results from threats: ***Hasan*** **[2005] UKHL 22, [2005] 4 All ER 685**.

Points to Consider

i. It is available however, to a defendant who is charged with conspiracy to murder: ***Ness*** **[2011] Crim LR 645** (UK Cr Ct).

ii. The classic statement of the law is that in ***Martin*** **(1989) 88 Cr App R 343** (UK CA).

iii. The threat that arises from the circumstances must be extraneous to the defendant: ***Rodger*** **[1998] 1 Cr App Rep 143** (UK CA).

iv. The threat must also be operative at the time of the offence: ***Pommell*** **[1995] 2 Cr App Rep 607** (UK CA).

Insane and Non-insane Automatism

In ***Worrell*** **(1972) 8 Barb LR 20** (CA), the Court of Appeal noted:

> ...Each case must in the last resort depend on its circumstances. But to allow the unsworn, untested and unsupported statement of an accused person to qualify as evidence which raises the defence of automatism which the Crown must negative, is in our view to take to an unjustifiable extreme the right of an accused person to make a statement from the dock.

In ***Bratty v Attorney General for Northern Ireland*** **[1961] 3 All ER 523** (UK HL) at 528-529, Viscount Kilmuir, LC opined as follows:

> ...In my opinion, this analysis of the two defences (insanity and automatism) shows that where the only cause alleged for the unconsciousness is a defect of reason from disease of the mind, and that cause is rejected by the jury, there can be no room for the alternative defence of automatism...

In ***Bratty***, Lord Denning at 535 quoted the words of Devlin J in ***Hill v Baxter*** **[1958] 1 All ER 193** (UK QBD) at 197, wherein it was stated: 'I do not doubt

that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.'

Lord Denning went on to state:

> When the only cause that is assigned for it [an involuntary act] is a disease of the mind, then it is only necessary to leave insanity to the jury and not automatism. When the cause assigned is concussion or sleepwalking, there should be some evidence from which it can reasonably be inferred before it should be left to the jury. If it is said to be due to concussion, there should be evidence of a severe blow shortly beforehand.

The evidential burden is therefore on the Defence, and it is for the judge to decide whether the medical evidence supports a disease or external factor. If the former, the jury may require a direction as to the defence of insanity.

It is also for the Prosecution to disprove automatism. The defence of automatism requires that there was a total destruction of voluntary control on the defendant's part. Impaired, reduced or partial control is not enough: ***Attorney General's Reference (No 2 of 1992)*** **1994 QB 91** (UK CA).

Diminished Responsibility

Section 4 of the **Offences Against the Person Act, Cap 141** (BB) deals with diminished responsibility. Section 4(1) provides:

> Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind, whether arising from a condition of arrested or retarded development of mind or any inherent cause or induced by disease or injury, as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.

See also:

i. **Criminal Appeal (Amendment and Miscellaneous Provisions) Act, 2009** (BB) as it relates to s 4 above;

ii. Section 13 of the **Mental Health Act, Cap 45** (BB) regarding detention in mental hospital.

Points to Consider

i. There are cases where, on an indictment for murder, it is perfectly proper where the medical evidence is plainly to the effect of abnormality of the mind, to treat the case as one of substantially diminished responsibility and accept, if it be tendered, a plea of manslaughter on that ground, and avoid a trial for murder: ***Bourne* (Barbados HC, Indictment No 77 of 2012 (Sentencing remarks))**.

ii. See ***Phillips* (1989) 24 Barb LR 212** (CA) at 6, where it is noted that the evidence of the experts called by the Defence placed the appellant's mental condition within the ***Byrne*** definition of abnormality, and it was for the jury to decide whether the defendant killed the deceased, and whether his abnormality of mind substantially impaired his mental responsibility for the killing.

iii. In ***Rose*** **[1961] 1 All ER 859** (BS PC), the appellant was deprived of his right to have his defence of diminished responsibility properly considered by the jury, and thus, the verdict of guilty of murder and the sentence of death passed on the appellant was quashed, and a verdict of guilty of manslaughter and a sentence of imprisonment for life was substituted.

iv. In ***Walton*** **(1977) 29 WIR 29** (BB PC), when the defendant raised diminished responsibility, the jury was required to consider not only the medical evidence, but also the whole evidence of the facts and circumstances of the case, including the nature of the killing, the conduct of the defendant before, at the time of and after it and any history of mental abnormality.

v. See ***Byrne*** **[1960] 2 QB 396** at 404, per Lord Parker, where he noted that, '...such abnormality as 'substantially impairs his mental responsibility' involves a mental state which in popular language (not that of the M'Naghten Rules) a jury would regard as amounting to partial insanity or being on the border-line of insanity.'

Insanity

Section 9A of the **Criminal Procedure Act, Cap 127** (BB) provides as follows:

> Where, in an indictment, any act is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible according to law for his actions at the time when the act was done , then, if it appears to the jury before whom such person is tried that he did the act charged, but was insane when he

> did the act, the jury shall return a special verdict to the effect that the accused person is not guilty of the act charged against him, by reason of insanity.

See also:

i. **Criminal Appeal (Amendment and Miscellaneous Provisions) Act, 2009** (BB);

ii. Section 13 of the **Mental Health Act, Cap 45** (BB);

iii. Section 9A of the **Criminal Procedure Act, Cap 127** (BB).

Felony Murder

Section 3 of the **Offences Against the Person Act, Cap 141** (BB) provides for the abolition of constructive malice and states:

> 3. (1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought, expressed or implied, as is required for a killing to amount to murder when not done in the course or furtherance of another offence.
>
> (2) For the purposes of subsection (1), a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.

The felony murder rule was therefore abolished generally in Barbados by section 3(1) **of the Offences against the Person Act Cap 141**. Note ***Cadogan*** **(Barbados CA, Crim App No 16 of 2005)**, where it was stated:

> However, by subsection (2), the doctrine survives for certain specific types of killing namely, resisting an officer of justice, resisting or avoiding or preventing lawful arrest, or of effecting or assisting an escape or rescue from legal custody. In these types of case, the killing "shall be treated as a killing in the course or furtherance of an offence.

In the case of ***Griffith*** **(Barbados CA, Crim App Nos 24-30 of 1992)**, the appeal was based the grounds that the learned trial judge erred in law by misdirecting the jury as to what is capable of constituting proof of malice, in so far as he relied on the constructive malice or felony murder rule. The Court of Appeal dismissed their submissions and held that, 'we are of the view that at the date of the commission of this offence the constructive malice rule formed part of the common law offence of murder in Barbados and was not contrary to the provisions of our constitution.'

Belize

Alibi

Section 44 of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ) provides for the defendant to be given a warning as to alibi.

Section 125 of the **Indictable Procedure Act, Rev Ed 2020, CAP 96** (BZ) deals with notice of alibi.

See ***Ramsey*** **(Belize CA, Crim App No 5 of 2013)**.

Self-defence

Section 36 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides for the prevention of or defence against a crime.

In ***Shaw*** **[2001] UKPC 26, [2001] 1 WLR 1519** (BZ), counsel for the appellant put self-defence at the forefront of the case. The court noted:

> 14. It was common ground between the parties to this appeal that, as pithily expressed in Smith and Hogan, Criminal Law, 9th Edition (1999) at page 253:
>
> > the law allows such force to be used as is reasonable in the circumstances as the accused believed them to be, whether reasonably or not. For example, if D believed that he was being attacked with a deadly weapon and he used only such force as was reasonable to repel such an attack, he has a defence to any charge of an offence arising out of his use of that force. It is immaterial that he was mistaken and unreasonably mistaken.
>
> 15. Counsel for the appellant put the matter even more pithily in his closing address to the jury:
>
> > You see, the law of self-defence is very peculiar in that you will judge him as he saw it and only how he saw it.

...

> 20...Self-defence was the crux of the appellant's defence to these very grave charges. The rudiments of that defence should have been stated in clear and simple terms which left no room for doubt. In the Board's opinion this was not done. There was accordingly a misdirection. But that conclusion does not, without more, entitle the appeal against either conviction to succeed.

In ***Pharham*** **(Belize CA, Crim App No 3 of 2015)**, a ground of appeal raised was that the trial judge erred in law in his failure to properly direct the jury on the issue of self-defence. The court, relying on ***Shaw*** **[2001] UKPC 26, [2001] 1 WLR 1519** (BZ), noted:

> [28] The case for the appellant was that the deceased finger had *"slipped and hit the trigger and I heard the explosion."* However, at the end of the dock statement he said, *"Put yourself in my shoe where my life is in great danger. What would you do? I only acted in self-defence."* It was proper therefore, for the trial judge to give a direction on self-defence. However, the directions given were wholly inadequate. In the view of the Court, it was necessary for the trial judge to pose the two essential questions for the jury's consideration, as laid out by the Board in **Norman Shaw v The Queen**, Privy Council Appeal No. 58 of 2000. As shown at paragraph 19 of **Shaws's** judgment, the two essential questions are:

> (1) Did the appellant honestly believe or may he honestly have believed that it was necessary to defend himself?
>
> (2) If so, and taking the circumstances and the danger as the appellant honestly believed them to be, was the amount of force which he used reasonable?
>
> [29] The trial judge did not direct the jury in relation to the appellant's belief and though he focused on the issue of reasonable force he failed to direct the jury as to what amounted to reasonable force. The learned DPP rightly conceded that the direction was deficient. It was incumbent on the trial judge to pose the above questions, in some form, to the jury. Since this was not done, there was a misdirection.

Provocation

Section 117 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) defines murder as follows:

> Every person who intentionally causes the death of another person by any unlawful harm is guilty of murder, unless his crime is reduced to manslaughter by reason of such extreme provocation, or other matter of partial excuse as in the next following sections mentioned.

Section 119 (a) and (b) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) states:

> 119. A person who intentionally causes the death of another person by unlawful harm shall be deemed to be guilty only of manslaughter, and not of murder, if there is such evidence as raises a reasonable doubt as to whether–
>
> (a) he was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120 of this Act; or
>
> (b) he was justified in causing some harm to the other person, and that in causing harm in excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control…

See also ***Sabido*** **(Belize CA, Crim App No 6 of 2016)** at [41] – [48] and [52] – [59].

In ***Gordon*** **[2010] UKPC 18, (2010) 77 WIR 148** (BZ), one of the grounds raised on appeal was that the trial judge misdirected the jury as to the partial defence of loss of self-control. At the trial, the defence relied upon the partial defence contained in section 119(b) of the Criminal Code quoted above. In considering the applicable test, the court noted:

> 21. Section 119(b) is quoted above. It provides that an accused is guilty of manslaughter and not murder where he intentionally causes death by unlawful harm and there is such evidence as raises a reasonable doubt as to whether he was justified in causing some harm to the other person, and that in causing harm in

excess of the harm which he was justified in causing he acted from such terror of immediate death or grievous harm as in fact deprived him, for the time being, of the power of self-control. Section 119(b) is to be contrasted with section 119(a), which also reduces murder to manslaughter but does so where there is such evidence as to raise a reasonable doubt as to whether the accused was deprived of the power of self-control by such extreme provocation given by the other person as is mentioned in section 120. Section 120 provides a list of matters which may amount to extreme provocation for the purposes of section 119(a). They include, in section 120(a), an unlawful assault or battery committed upon the accused by another person, either in an unlawful fight or otherwise, which is of such a kind either in respect of its violence or by reason of words, gestures or other circumstances of insult or aggravation, as to be likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control. Section 121(1)(a) makes it clear that the accused must in fact be deprived of the power of self-control by the provocation.

22. It can immediately be seen that there is a distinction between section 119(a) and section 119(b). By reason of section 120(a), the unlawful assault or battery must be of such a kind as to be 'likely to deprive a person, being of ordinary character, and being in the circumstances in which the accused person was, of the power of self-control'. The test is thus to that extent objective. There is no similar provision in section 119(b), where it is sufficient

> for there to be a reasonable doubt as to whether the accused 'acted from such terror of immediate death or harm as in fact deprived him, for the time being, of the power of self-control'. The Board emphasises the words 'in fact' because they demonstrate that, for the purposes of this part of section 119(b) the test is entirely subjective and has no objective element.

Note ***Pasos v The Queen*** **(Belize CA, Crim App No 11 of 2016)** at [12], where the Belize Court of Appeal advised that provocation as a mitigating factor, where murder is reduced to manslaughter, is "double dipping".

The following cases also provide instructive guidance:

i. ***Logan*** **(1996) 47 WIR 92** (BZ PC);

ii. ***Gaynair*** **(Belize CA, Crim App No 18 of 2018)**.

Duress by Threats

Section 12(c) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) states, 'A consent shall be void if it be obtained by means of deceit or of duress'.

Section 15 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) defines "Duress" as 'any force, harm, constraint or threat, used with intent to cause a person against his will to do or to abstain from doing any act.'

In ***De La Rosa Diaz*** **(Belize CA, Cr App Nos 8 and 9 of 1987)**, the court made the following instructive remarks in the concluding paragraph of its decision:

> Before parting with this case we would like to refer to the decision of the House of Lords in *R. v. Howe* (1987) 1 ALL

> E.R. 771 in relation to the defence of duress advanced at the trial on behalf of the second appellant. In *R.v. Howe* a majority of the House held that the defence of duress is not available to a person charged with murder whether as a principal in the first degree (the actual killer) or as a principal in the second degree (aider and abettor).

Insane and Non-insane Automatism

Section 4 of the **Evidence Act, Rev Ed 2020, CAP 95** (BZ) provides as follows: 'Subject to the provisions of this Act and of any other statute for the time being in force, the rules and principles of the common law of England relating to evidence shall, so far as they are applicable to the circumstances of Belize, be in force therein.'

See also ***Samuels*** **(Belize CA, Crim App No 9 of 1975)**.

Diminished Responsibility

Section 118 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) deals with diminished responsibility and provides as follows:

> 118. - (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omission in doing or being a party to the killing.

> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.
>
> (4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.

The discussions in the following cases provide useful learning in this area:

i. ***Reyes*** **(Belize CA, Crim App No 5 of 1999)**;

ii. ***O'Neil*** **(Belize CA, Crim App No 5 of 1991)**.

Insanity

Section 26 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) deals with insanity and provides as follows:

> 26. A person accused of crime shall be deemed to have been insane at the time he committed the act in respect of which he is accused–
>
> (a) if he was prevented by reason of idiocy, imbecility or any mental derangement or disease affecting the mind, from knowing the nature or consequences of the act in respect of which he is accused;

(b) if he did the act in respect of which he is accused under the influence of a delusion of such a nature as to render him, in the opinion of the jury, an unfit subject for punishment of any kind in respect of such act.

Section 27 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) deals with intoxication.

The following cases are instructive in this area:

i. ***Reyes* (Belize CA, Crim App No 5 of 1999)**;

ii. ***Patten* (Belize CA, Crim App No 5 of 1976)**.

Felony Murder

In Belize, this rule was also abolished pursuant to **Criminal Code, Rev Ed 2020, CAP 101 as amended by Act 22 of 2017**. Note "Class A murder" at s 106 sub-ss (1) & (3).

Guyana

Alibi

See ***The State v Hansraj Ori And Tulsie Persaud* (1975) 22 WIR 201** (GY CA), which provides guidance on directions to the jury.

Self-defence

The State v Alfred **(2015) 86 WIR 360** (GY CA) at 361, states:

> The court considered the following grounds of appeal: (i) accident: the appellant contended that accident did not arise on the defence case and the judge had erred in addressing the issue of self-defence prior to that of accident; (ii) self-defence: the appellant contended the issue of self defence did not arise on the facts and should not have been left to the jury; (iii) confession: the appellant contended the trial judge erred in telling the jury she had admitted the confession statement and in failing to make a finding on the voluntary nature of the oral statement; (iv) circumstantial evidence: the appellant contended the trial judge failed to give adequate directions to the jury on what constituted circumstantial evidence and how that evidence had to be treated; (v) inconsistency: the appellant contended that the trial judge had not pointed out to the jury previous inconsistent statements on oath; (vi) provocation: the appellant contended that the requirements of provocation had been established as a factual basis and the trial judge ought to have put the issue before the jury; (vii) recklessness: the appellant contended that the trial judge ought to have placed the issue of recklessness for the jury's consideration; and (viii) the appellant contended that the sentence was severe.

In considering the first two grounds of appeal, the court held:

> (1) (i) Whether or not the defence relied on an issue or a particular defence, once there was material on which it reasonably arose, the trial judge had to deal with it. In the instant case, the primary defence as gleaned from the caution statement had been that of accident and whilst that statement was objected to and not relied upon by the defence, it had been put before the jury for their consideration. The issue of accident therefore arose and it had been incumbent on the trial judge to put it before the jury (see [15] of the judgment).
>
> (ii) Self-defence and accident were both complete defences but on the particular facts of the instant case the order of each defence was important. The way in which the judge had dealt with both defences might have resulted in some confusion in the minds of the jury. The trial judge should have dealt with the issue of accident first, and should have told the jury that if they rejected accident then they could go on to consider the issue of self-defence. However, the jury had rejected both defences and therefore no harm befell the appellant (see [17], [18] of the judgment).
>
> (2) Although the defence had been a complete denial of the prosecution case, the fact that the judge had instructed the jury on self-defence was not irregular. There had been evidence on which the basis of such a defence could stand; the surrounding circumstances detailed in the caution statement had given rise to the suggestion of acting in self-defence. It had therefore

> been the duty of the judge to direct the jury on self-defence and leave it open to them to return a verdict in that regard (see [22], [24], [25], of the judgment).

See also the dicta of the court in ***Ward v The State*** **(Guyana CA, Crim App No 32 of 2013)**.

Provocation

In ***George v The State*** **(Guyana CA, Crim App No 8 of 2013)**, the Court of Appeal in considering the trial judge's directions to the jury on the issue of provocation, noted:

> [56]…The following point are of crucial importance:
>
> - The trial judge described provocation as (at page 87 of the record) 'words spoken or acts done which would cause the Accused to lose his self-control and kill.' While we appreciate the judge's efforts to speak in terms understandable to laypersons, this definition is too loose and incomplete. It behoves a trial judge to give a full direction of a legal defence, which was not done in this instance.
> - The trial judge then told the jury that 'the issue of provocation has been excluded from the Prosecution's case…'. This is an unclear direction. The only evidence for the prosecution linking the appellant to the crime came from his statements, which contained elements of provocation.

- The effect of the mis-direction above must be considered in light of another. At a different stage the learned judge directed the jury that the appellant testified that the deceased 'did not hit him during the scuffle'. But this was incorrect. In answer to the jury the appellant said affirmatively that the deceased had hit him during their scramble – but by contradicting this in the summing-up, the judge may have misled the jury (albeit inadvertently) on an aspect of the evidence that was central to the defence of provocation. The judge's slip could have had the effect of erasing the evidential basis of the defence. Given that the jury was so alert to this issue that they asked about it, the appellant may have been denied the chance of an acquittal of the offence of murder and conviction of the lesser offence of manslaughter.

Bulkan JA (Ag), noted that, read as a whole, the directions of the trial judge on the issue of provocation were largely generic, and the judge therefore failed to analyse the evidence of the defence in this regard. The court found that with respect to the imbalanced summing-up in relation to provocation, the effect of that imbalance was more acute, in that, there was a distinct possibility that the jury may have been more open to the defence of provocation had they obtained the benefit of some discussion of the evidence bearing upon it. The court further noted that the cumulative effect of the mis-directions and non-directions, may have required the judge withdrawing the defence of provocation from the jury's consideration.

See also ***Assign v The State*** **(Guyana CA, Crim App No 27 of 2014)**.

Insanity

See ss 179 and 180 of the **Criminal Law (Procedure) Act, Cap 10:01** (GY).

Felony Murder

See ***Tyrone Rowe c/d Cobra v The State*** **(Guyana CA, Crim App No 23 of 2013)**.

In this Chapter:

Chapter 21
Sexual Offences

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

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Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

Introduction

There is no doubt that there has been an astronomical rise in sexual offences and rape in the Caribbean region. Sexual violence in the Caribbean has engaged our courts and attracted comments from the judiciary regarding the alarming statistics. In ***Pompey v DPP*** **[2020] CCJ 7 (AJ) GY**, Rajnauth-Lee, JCCJ noted:

> [37] ...As a result, governments throughout the Caribbean have taken on board the need to address this worrying trend. Some jurisdictions in the Caribbean have specialized police units comprised of officers trained in the investigation of sexual offences and the interviewing of victims of sexual offences. Jamaica made a very early start in this regard in establishing the Centre for the Investigation of Sexual Offences and Child Abuse ("CISOCA"), a branch of the Jamaica Constabulary Force. Established in 1989, the objectives of CISOCA are: to create an atmosphere which will encourage victims to report incidents of sexual offences and child abuse; to ensure efficient and effective investigation into allegations of abuse; to enhance the rehabilitation of victims through counselling and therapy and to conduct public education programmes on sexual offences and child abuse. In addition, Child Protection Units operating within Caribbean Police Services have been established in some jurisdictions. For example, in Trinidad and Tobago, the Child Protection Unit (an investigative unit) was established in May 2015 and operates within the Police Service with officers specially trained in the investigation of crimes against children. Statistics from

> the Child Protection Unit16 for the period May 2015 to July 2016, revealed that there were 2595 reports made to the Child Protection Unit. The majority of those reports were of child sexual abuse.
>
> [38] International organizations have been at the forefront of addressing gender-based violence and child sexual abuse. Among the international conventions which have sought to focus on gender-based violence is the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women*, which was adopted by the General Assembly of the Organization of American States in 1994. Better known as the *Convention of Belém do Pará*, the Convention asserts that violence against women violates fundamental human rights and freedoms based on the unequal power relations between women and men. Of note as well is the *Convention on the Rights of the Child* which at Article 19(1) requires States Parties to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'.

Work in this area was also undertaken by the Judicial Reform and Institutional Strengthening (JURIST) Project, a five-year regional Caribbean judicial reform initiative funded under an arrangement with the Government of Canada, and spearheaded by the Caribbean Court of Justice. One

of the key components of the JURIST Project, was the development of model guidelines for managing sexual offence cases (including cases involving children), with the aim of improving the capacity of the courts to deliver gender-responsive and customer-focused court services. In 2017, JURIST published **Model Guidelines for Sexual Offence Cases in the Caribbean Region**, which have undoubtedly played a key role in building public trust and confidence in the justice system and in promoting the rule of law.

1. The Dangers of Assumptions

The CCJ, most recently in ***Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY**, noted at [158]:

> There is compelling research that transactional sex and sexual abuse (sex for money, services, material goods, security) is a feature of Caribbean societies where money is used to legitimize sex. Also, the expressions of 'liking' the victim survivor or being 'hurt' by her rejections are consistent with some Caribbean male notions of sexuality, where females are viewed as available to males for sex, all parts of the patriarchal commodification of both females and sex. Thus, a male offender may not even consider that his demands are something that a female should herself be offended by or reject. We therefore see this divergence of judicial views as indicative of the need for inter-disciplinary research, education, and collaboration in both the sentencing process and its outcomes. We judges must all be careful not to assume

> knowledge or understanding of matters outside of their areas of expertise and competence.

In such instances, judges must therefore be cognisant of the sensitivities, peculiarities and nuances associated with sexual offence crimes, and thus be guided by the learning that has been emanating from our region to address this alarming phenomenon.

In ***D* [2009] EWCA Crim 2557, [2009] Crim LR 591**, the Court of Appeal accepted that a judge may give appropriate directions to counter the risk of stereotypes and assumptions about sexual behaviour and reactions to non-consensual sexual conduct. In short, these directions should include that:

i. experience shows that people react differently to the trauma of a serious sexual assault, that there is no one classic response;

ii. some may complain immediately whilst others may feel shame and shock and not complain for some time; and

iii. a late complaint does not necessarily mean it is a false complaint. The court also acknowledged that a judge is entitled to refer to the particular feelings of shame and embarrassment which may arise when the allegation is of sexual assault by a partner. There may be cases where guidance on myths and stereotypes may be appropriate to benefit a defendant.

This approach has been endorsed on numerous occasions by the Court of Appeal, as explained in ***Miller* [2010] EWCA Crim 1578, [2011] Crim LR 79**:

> In recent years, the courts have increasingly been prepared to acknowledge the need for a direction that deals with what might be described as stereotypical assumptions about issues such as delay in reporting allegations of sexual crime and distress (see, for example, R v. MM [2007] EWCA Crim 1558, R v. D [2008] EWCA Crim 2557 and R v. Breeze [2009] EWCA Crim 255).

Also in ***Miller***, the Court of Appeal endorsed the following passage from the **Crown Court Bench Book: directing the jury:**

> The experience of judges who try sexual offences is that an image of stereotypical behaviour and demeanour by a victim or the perpetrator of a non-consensual offence such as rape held by some members of the public can be misleading and capable of leading to injustice. That experience has been gained by judges, experts in the field, presiding over many such trials during which guilt has been established but in which the behaviour and demeanour of complainants and defendants, both during the incident giving rise to the charge and in evidence, has been widely variable. Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.

It is essential that advice from the trial judge does not implant in the jury's minds any contrary assumption. It is not the responsibility of the judge to appear to support any particular conclusion, but to warn the jury against the unfairness of approaching the evidence with any preconceived notions or assumptions. The judge should take the opportunity to formulate their words carefully, having received the views of the parties, the object being to ensure there is no straying from the commonplace to the controversial and, thus, appear to be endorsing arguments for one side at the expense of the other. It is also important to give the jury appropriate assistance with the contextual aspects of the matter: ***Khan v The State*** **(Trinidad and Tobago CA, Crim App No P-015 of 2013)**.

Judicial advice should be crafted and expressed in a fair and balanced way. The trial judge should not be, or be seen to be, endorsing the arguments deployed by the Prosecution but rather ensuring that the jury is approaching the evidence without being hampered by any unwarranted assumptions.

Points to Consider

i. There is a real danger that juries will make and/or be invited by advocates to make unwarranted assumptions. It is important that the judge alerts the jury to guard against this. This must be done in a fair and balanced way and be put in the context of the evidence and the arguments raised by both the Prosecution and the Defence. The judge must not give any impression of supporting a particular conclusion, but should warn the jury against approaching the evidence with any preconceived assumptions.

ii. Depending on the evidence and arguments advanced in the case, guidance may be necessary on one or more of the abovementioned

areas of stereotyping, which could lead the jury to approach the complainant's evidence with unwarranted scepticism (see **The Crown Court Compendium Part I: Jury and Trial Management and Summing Up**, Chapter 20-1 for further guidance).

iii. Such directions must be crafted with care and should always be discussed with the advocates. Thought should be given as to when may be the most appropriate time to give such directions: whether at the outset of the trial or in the course of summing up.

iv. It is of particular importance in cases of this nature to listen to the closing speeches of the advocates with care and if necessary, to review the directions to be given.

2. Allegations of Historical Sexual Abuse

It is important in cases that are being heard after significant time has passed, that the judge gives full and detailed reasons for decisions and provides clear guidance for the jury on the difficulties faced by the Defence as a result of the lapse of time.

Directions to the jury concerning the evidence of the complainant will need to deal with the circumstances in which the complainant felt unable to reveal the subject matter of the complaint during the period concerned. The complainant will usually be describing events which took place during childhood, and the jury will need to assess the reasonableness of the failure of a child to make a complaint within the context of the physical and emotional environment in which the child was living at the time. Once the complainant left that environment or reached adulthood or both, other reasons may be advanced as to why the complainant remained silent, usually including a wish not to disturb painful memories. The trigger for the decision at last to make a complaint may be an adult relationship in

which past experiences are exchanged, or a concern that the behaviour about which complaint is now made will be visited by the defendant upon the next generation of children in the family.

When providing the jury with such assistance it should be even-handed. What the judge can do is assist the jury with the common experience of the court in dealing routinely with such cases and to point out those features of the evidence which will assist them fairly to assess the complainant's explanations.

The court clearly identified in ***PS* [2013] EWCA Crim 992**, the essential matters that a direction should address:

i. Delay can place a defendant at a material disadvantage in challenging allegations arising out of events that occurred many years before; this was particularly so in this case when the defence was essentially a simple denial (the defendant, in this case, was saying that he had not acted as alleged);

ii. The longer the delay, the more difficult meeting the allegation often becomes because of fading memories and evidence which is no longer available – indeed, it may be unclear what has been lost;

iii. When considering the central question whether the Prosecution has proved the defendant's guilt, it is necessary particularly to bear in mind the prejudice that delay can occasion; and

iv. A summary of the main elements of prejudice that were identified during the trial: at [35] per Fulford LJ

According to Fulford LJ, no two cases are the same and whether a direction on delay is to be given and the way in which it is formulated will depend on the facts of the case. Therefore, the need for a direction, its formulation

and the matters to be included will depend on the circumstances of, and the issues arising in, the trial: ***Henry*** **[1998] 2 Cr App R 161** (UK CA); ***Graham*** **[1999] 2 Cr App R 201** (UK CA); ***Brian M*** **[2000] 1 Cr App R 49** (UK CA).

3. Evidence of Children

The trial judge will need to assess whether it is appropriate to say anything at all to the jury about the evidence of child witnesses. However, a child who gives evidence has always viewed the events described through the eyes and with the mind of a child and, where that is so, it will probably be necessary to give the jury some assistance.

The function of the judge is not to give expert evidence about the child under consideration but to assist the jury with the common experience of the courts. The advice will concern the different stages of intellectual and emotional development of children, the way in which they experience events, and their ability to register and recall them.

4. Consent, Capacity and Voluntary Intoxication

A. Consent

Whilst a majority of the sexual offences legislation in the Caribbean region does not define consent, it does provide for the circumstances in which consent, though present, is ineffectual (see for example, s 4 of the **Sexual Offences Act, Chapter 11:28** (TT)).

Archbold (2000) at [17-58], provides guidance on the direction which a trial judge ought to give the jury regarding consent:

> [I]n summing-up a case for rape which involves the issue of consent, the judge should, in dealing with the state of mind of the defendant, direct the jury that before they can convict, the Crown must have proved either that he knew the woman did not consent to sexual intercourse, or that he was reckless as to whether she consented. If the jury is sure he knew she did not consent, they will find him guilty of rape knowing there to be no consent. If they are not sure about that, they will go on to consider reckless rape.

See also ***Roberts v The State*** **(Trinidad and Tobago CA, Crim App No 19 of 2007)**.

In ***Commissioner of Police v Alleyne*** **[2022] CCJ 2 (AJ) BB,** Barrow JCCJ in discussing the issue of consent in fact and in law, noted at [12]:

> In a hypothetical incest case, it must certainly matter that the victim did not consent to sexual intercourse and the perpetrator persisted despite the lack of consent. The law recognizes that a victim may consent in fact while treating that consent as immaterial to the commission of the offence. Therefore, in a case where there was no consent in fact the prosecutor could charge either the predicate sexual offence of incest or the offence of rape; the possibility of charging the predicate offence does not prevent charging rape. In a case where there has been no consent, a prosecutor may choose to charge rape because it will attract a more severe sentence and that

outcome may be appropriate on the facts of a particular case.

B. Capacity and Voluntary Intoxication

Voluntary intoxication of the complainant

The state of drunkenness of the complainant is relevant in the following ways:

i. Alcohol or drugs may have a disinhibiting effect upon the complainant,

ii. The complainant may be so drunk that their capacity to consent is removed, or they in fact exercise no choice whether to agree or not.

Only a person who has the capacity to make a choice, and agrees by choice freely made, consents to sexual activity. If the issue of capacity arises it must be dealt with in the judge's directions: ***Bree*** **[2007] EWCA Crim 804, [2007] 2 All ER 676**.

Voluntary intoxication of the defendant

The drunkenness of the defendant provides them with no defence. Touching or penetration must be the consequence of a deliberate (as opposed to an accidental) act, drunken or not. It is not necessary that the defendant should have "intended" penetration. The issue of consent by the complainant depends upon the complainant's state of mind. If the defendant claims that they reasonably believed that the complainant consented, there are three issues for the jury to consider:

i. whether the complainant was in fact consenting;

ii. whether the defendant honestly believed the complainant was consenting, a judgment in respect of which the jury will take the defendant as they were, drunk or sober; and

iii. whether the defendant's belief was reasonable in the circumstances, an objective judgment which requires the jury to adopt the standard of a sober, not a drunken, defendant. If the defendant was mistaken as to those circumstances, and the jury is sure that the defendant's mistake was made because they were drunk, they will not be able to rely on the fact that the defendant was mistaken.

The trial judge's directions to the jury on the issue of consent should be expressed within the context of the evidence and should deal with the particular factual issues which the jury will have to decide.

Illustration 1

Students drinking heavily – some consensual sexual contact – complainant drowsy or worse under the effects of sleep and alcohol – issues of capacity and consent – relevance of the defendant's own state of intoxication

In the present case, the Prosecution must prove three things:

i. The defendant penetrated the vagina of the complainant with his penis;

ii. The complainant did not consent;

iii. The defendant did not reasonably believe that the complainant was consenting.

It is necessary to explain how those issues need to be approached in the context of the facts of this case. What is that context? You will be reminded of the evidence in more detail later but here is a summary. The complainant and the defendant met in the students' union bar after they had been playing for their respective teams. They both had a great deal to drink. At the end of the evening the defendant walked the complainant home to her flat. They had coffee together. There was some kissing and fondling between them. The complainant said that she told the defendant she had to go to sleep and lay down on the bed. She recalls nothing else until, in the early hours, she woke to find that she was alone. Her jeans were at the foot of the bed. She had one leg still in her knickers. The complainant has no memory of sexual intercourse taking place, is sure that she would not have consented, but has no awareness whether she consented or not. The defendant accepts that the complainant said she had to go to sleep and lay down on the bed. He lay alongside her. After about an hour he started to fondle the complainant. She made some murmuring noises which he took to be an expression of pleasure. He removed her jeans and partly removed her knickers. Receiving no resistance, which he thought meant that the complainant was consenting, he had sexual intercourse with the complainant to ejaculation. He agreed that no word was spoken between them throughout. Asked why he left the flat, he said that he needed to get back to his own place to sleep it off – he had an assignment to prepare the next day.

Penetration

There is no issue that penetration took place. The issues for you to resolve concern consent and the defendant's reasonable belief in consent.

Consent

The first issue for you to decide is whether the Prosecution has proved, so that you are sure, that the complainant did not give her consent. Consent, you will realise, is a state of mind which can take many forms, from willing enthusiasm to reluctant acquiescence. The agreement need not, of course, be given in words provided that the woman was agreeing with her mind.

You may wonder whether the fact that the complainant had been drinking heavily affects either of those questions. There are two ways in which drink can affect the individual, depending upon the degree of intoxication. First, it can remove inhibitions. A person may do things when intoxicated which they would not, or be less likely to do, if sober. Second, they may consume so much alcohol that it affects their state of awareness. You need to reach a conclusion as to what was the complainant's state of drunkenness and sleepiness. Was she just disinhibited, or had the mixture of sleepiness and drunkenness removed her capacity to exercise a choice?

A complainant clearly does not have the freedom and capacity to make a choice if they are unconscious through the effects of drink and sleep. There are, of course, various stages of consciousness from wide awake to dim awareness of reality. In a state of dim and drunken awareness you may or may not be in a condition to make choices. You will need to consider the evidence of the complainant's state and decide these two questions: Was she in a condition in which she was capable of making any choice, one way or other? If you are sure she was not, then she did not consent. If, on the other hand, you conclude that the complainant chose to agree to sexual intercourse, or may have done so, then you must find the defendant not guilty.

You reach the stage of considering the defendant's state of mind only if you are sure the complainant did not consent.

Belief in consent

The next question is whether the defendant honestly believed that the complainant was consenting. If you are sure that the defendant knew either that (i) the complainant was in no condition to make a choice one way or the other, or (ii) the complainant had made no choice to agree to sexual intercourse, then you will be sure that the defendant did not honestly believe that the complainant was consenting. If that is your conclusion, your verdict would be guilty.

If, on the other hand, you conclude that the defendant did believe, or may have believed, that the complainant was consenting, you need to consider the final question which is whether his belief was reasonable in the circumstances.

Reasonableness of belief and the effect of drink

The defendant had also consumed a great deal of alcohol. However, you need to look at all the circumstances as they would have appeared to the defendant had he been sober. Would or should the defendant have realised that the complainant was at best drowsy and at worst unconscious? If so, would it have been reasonable or unreasonable for the defendant to believe that she was consenting? In considering whether the defendant's belief was reasonable, you should take account of any steps taken by the defendant to ascertain that she was consenting. The defendant does not claim that he checked to see whether the complainant was aware of what was happening.

If you are sure that the defendant should have realised that the complainant was in no condition to make a choice, or that the complainant was not agreeing by choice, then his belief was unreasonable and your verdict would be guilty. But, if you conclude that the defendant's belief was or may have been reasonable in the circumstances, you must find the defendant not guilty.

Prepared for you is a written Route to Verdict which will enable you, if you follow it, to consider each of these questions in the correct sequence and, by that means, to reach your verdict:

Illustration 2

Route to verdict

Please answer Question 1 first and proceed as directed

Question 1

Did the defendant penetrate the vagina of the complainant with his penis? Admitted. Proceed to question 2.

Question 2

Did the complainant consent to the act of penetration? (See i below)

If you are sure she did not consent, proceed to question 3.

If you conclude that the complainant did consent or may have consented, verdict not guilty.

Question 3

Did the defendant believe that the complainant was consenting? (See ii below)

If you are sure the defendant did not believe that the complainant was consenting, verdict guilty.

If you conclude that the defendant did believe or may have believed that the complainant was consenting, proceed to question 4.

Question 4

Was the defendant's belief reasonable in the circumstances? (See iii below)

If you are sure that it was not a reasonably held belief, verdict guilty.

If you conclude that it was or may have been a reasonably held belief, verdict not guilty.

Illustration Notes

i. The complainant consented only if, while having the freedom and capacity to make the choice, she agreed to sexual intercourse. You will need to consider whether the complainant was in any condition (while under the influence of sleep and alcohol) to make and exercise a choice, and whether she did in fact exercise a choice. If she did agree to sexual intercourse, it was not necessary for her to communicate that agreement to the defendant, provided that in her mind she was agreeing.

ii. If the defendant was aware that the complainant was in no condition to exercise a choice or that she was making no choice, then he did not believe that she was consenting.

iii. When judging whether the defendant's belief was reasonably held, you should consider the circumstances as they would have appeared to the defendant had he been sober. Should the defendant have realised that the complainant was exercising no choice, or was in no condition to make a choice, whether to have sexual intercourse with him?

Barbados

Sections 3 to 6 of the **Sexual Offences Act, Cap 154** (BB) provide for rape, sexual intercourse with person under 14, sexual intercourse with person between 14 and 16, and incest, respectively.

Section 3 of the **Sexual Offences Act, Cap 154** (BB) which provides for the offence of rape is particularly instructive and states as follows:

3. (1) Any person who has sexual intercourse with another person. without the consent of the other person and who knows that the other person does not consent to the intercourse or is reckless as to whether the other person consents to the intercourse is guilty of the offence of rape and is liable on conviction on indictment to imprisonment for life.

(2) For the purposes of subsection (l), no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) the personation of the spouse of the complainant;

(d) false and fraudulent representations as to the nature of the act;

(e) the use of the accused's position of authority over the complainant; or

(f) intimidation of any kind.

(3) Notwithstanding section 21, a person under the age of 14 is deemed incapable of committing the offence of rape.

(4) A husband commits the offence of rape where he has sexual intercourse with his wife without her consent by force or fear where there is in existence in relation to them

(a) a decree nisi of divorce;

(b) a separation order within the meaning of section 2 of the Family Law Act;

(c) a separation agreement; or

(d) an order for the husband not to molest his wife or have sexual intercourse with her.

(5) A husband who commits the offence of rape is liable on conviction on indictment to imprisonment for life.

(6) For the purposes of this section "rape" includes the introduction, to any extent, in circumstances where the introduction of the penis of a person into the vagina of another would be rape,

(a) of the penis of a person into the anus or mouth of another person; or

(b) an object, not being part of the human body, manipulated by a person into the vagina or anus of another.

Sections 32 to 37 of the **Sexual Offences Act, Cap 154** (BB) provide for specific procedural requirements.

Points to Consider

i. The greatest challenges in sexual offence cases pertain to corroboration. It is extremely difficult in cases not requiring corroboration, to have to still give the jury the direction that it may be dangerous to act on the uncorroborated evidence of a virtual

complainant. Many jurors, after trial, have discreetly complained that this leads to confusion in the jury room. Other issues relating to sexual offences have already been discussed in Chapters 1 – 4.

ii. The requirement for corroboration in sexual offences has been abolished in Barbados since 13th February, 1992, the enactment date of the **Sexual Offences Act, Cap 154** (BB); ***Sealy* (Barbados CA, Crim App No 16 of 2012)**.

iii. The CCJ in ***Commissioner of Police v Alleyne*** **[2022] CCJ 2 (AJ) BB**, in a judgment authored by Barrow JCCJ, held that on a correct interpretation of s 3(1) of the Sexual Offences Act, a man can be charged for the rape of another man. Barrow JCCJ noted that the Act uses gender neutral language and extends the definition of rape to include anal penetration. The court found that considering the literal meaning of the words used in the Act, their context, and comparable legislation, any person, male or female, can be the offender or victim of rape. The retention in the legislation of the offence of buggery did not prevent males from being charged with rape, as the **Interpretation Act** (s 22) allows offenders to be charged with either offence, once they are not punished twice for the same act.

iv. It is also to be contemplated whether it may be prudent to have these matters dealt with expeditiously, in-camera, and maintaining anonymity in the names of both the complainant and the defendant.

Belize

Section 12 of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ) provides as follows as it relates to 'consent':

> 12. In construing any provision of this Code by which it is required for a criminal act or criminal intent that an act should be done or intended to be done without a person's consent, or by which it is required for a matter of justification or exemption that an act should be done with a person's consent, the following rules should be observed, namely–
>
> (a) A consent shall be void if the person giving it be under nine years of age, or be by reason of insanity or of immaturity, or any other permanent or temporary incapacity, whether from intoxication or any other cause, unable to understand the nature or consequence of the act to which he consents.
>
> (b) In the case of a sexual assault upon a person, a consent shall be void if the person giving it is under sixteen years of age without prejudice to any other grounds set out in this section.
>
> (c) A consent shall be void if it be obtained by means of deceit or of duress.
>
> (d) A consent shall be void if it be obtained by the undue exercise of any official, parental or other authority, and any such authority which is exercised otherwise than in good faith for the purposes for which it

is allowed by law shall be deemed to be unduly exercised.

(e) A consent given on behalf of a person by his parent, guardian, or any other person authorised by law to give or refuse consent on his behalf shall be void if it be given otherwise than in good faith for the benefit of the person on whose behalf it is given.

(f) A consent shall be of no effect if it be given by reason of a mistake of fact.

(g) A consent shall be deemed to have been obtained by means of deceit or of duress or of the undue exercise of authority, or to have been given by reason of a mistake of fact, if it would have been refused but for such deceit, exercise of authority or mistake, as the case may be.

(h) For the purposes of this section, exercise of authority is not limited to exercise of authority by way of command, but includes influence or advice purporting to be used or given by virtue of an authority,

Provided that no person shall be prejudiced by the invalidity of any consent if he did not know and could not by the exercise of reasonable diligence have known of such invalidity.

See also, s 46(b) of the **Criminal Code, Rev Ed 2020, CAP 101** (BZ).

In ***Thompson*** **(Belize CA, Crim App No 18 of 2001),** the appellant was convicted of rape of his 20-year old "god-daughter" and was sentenced to 28 years' imprisonment. The appellant raised six grounds of appeal. The first and third grounds were taken together and in these grounds the complaints were that the learned trial judge failed to give the mandatory warning to the jury of the need for caution before acting on the sole evidence of the victim and that he failed to explain the meaning of corroboration when the jury was told that the evidence of the defendant corroborated that of the victim. On this issue, the Court of Appeal noted that, a trial judge is given a discretion to determine the cases in which a caution is required under s 92(3)(a) of the **Evidence Act**. The court further noted at [11]:

> ...If the section were to be interpreted that it becomes mandatory to give the warning in every case in which the prosecution evidence comes solely from the victim, then words 'when he considers it appropriate to do so' would be meaningless, and the statute would have made no change whatsoever to the rule at common law, which prior to the statute, required a mandatory warning to be given in such cases.

The appellant's fifth ground of appeal was that the judge's directions on s 71(2) of the **Criminal Code** in the context of the appellant's evidence that he believed that the victim was in fact consenting, was depicted in a manner that was biased as if ridiculing the appellant's defence. On this issue, the court in finding no merit on this ground, (at [21]), restated and approved the dicta of Simon Brown LJ in ***Nelson*** **[1997] Crim LR 234** (UK CA), where he stated as follows:

> ...Although every defendant had the right to have his defence, whatever it might be, faithfully and accurately placed before the jury, he was not entitled to demand that the judge should conceal from the jury such difficulties and deficiencies as were apparent in his case. The judge was not required to top up the case for one side so as to correct any substantial imbalance; he had no duty to cloud the merits either; judges existed to see that justice was done and justice required that they assist the jury to reach a logical and reasoned conclusion on the evidence. If judges were unfair to an accused, juries were generally quick to spot it and compensate for it, so that unfairness generally proved counterproductive...

In ***Leiva*** **(Belize CA, Crim App No 16 of 2009)** which dealt with rape, the court noted, on a proper interpretation of both ss 12 and 71(1) of the **Criminal Code**, that those provisions can properly be said to require for a criminal act, that an act should be done without a person's consent for the purposes of s 12. In considering the trial judge's directions to the jury on the issue of consent, the Court of Appeal commented at [36]:

> The trial judge was therefore required to give to the jury directions on the issue of consent which faithfully reflected the law as it is set out in section 12(1)(a)... The judge therefore needed to concentrate on the provisions of section 12(1)(a) only insofar as they relate to temporary incapacity, inability to understand (as there described) and intoxication. To borrow, for the sake of emphasis, a familiar phrase from section 73 of the Code, it is not 'any or the least degree' of intoxication

> that will suffice to render a consent to sexual intercourse void. Intoxication must obviously be to a degree which results in a state of temporary incapacity. What is more, that incapacity must be such that the person labouring under it should be unable to understand either relevant matter, ie the nature or the consequence of the act consented to, in this case sexual intercourse. The jury should have received clear directions to that effect. Instead, they were repeatedly told, as the passages from the summing-up already quoted above plainly demonstrate, that a finding of intoxication per se would mean that there could have been no valid consent to sexual intercourse on the part of EK...

The Court of Appeal concluded that the trial judge's directions were inadequate and that a substantial miscarriage of justice had occurred in that case.

Guyana

See the **Sexual Offences Act, Chapter 8:03** (GY) for the offences covered under the Act.

While matters under the **Sexual Offences Act** have engaged the attention of the court, including the CCJ, they were in relation to issues other than the sexual offences, for example, identification, sentencing and defences. Older cases treat with mis-directions or non-directions on the issue of

corroboration. However, it is important to note that such directions are no longer required under the present legislation.

In November 2017, in response to the prevalence of sexual offences generally, and sexual offences against children specifically, the Judiciary of Guyana established a specialized court to hear sexual offence cases. It is the first of its kind in the English-speaking Caribbean. A Sexual Offences Court was established at the Supreme Court in Georgetown and two other such courts were established in Berbice and in Essequibo in 2019. In this regard, the Parliament of Guyana, in enacting the **Sexual Offences Act** in 2010 (see ss 44 and 87) was "ahead of the curve".

By the Act, a National Task Force for the Prevention of Sexual Violence was also established and given the statutory duty to develop and implement a national plan for the prevention of sexual violence. The Task Force was also mandated to report on proposals for a special court environment to try cases relating to sexual offences.

Having a dedicated Sexual Offences Court with measures to treat with all vulnerable witnesses, paves the way for a smoother process for survivors and other vulnerable witnesses.

See the following cases which provide instructive discussion on the developments in Guyana and how to address issues of sentencing in sexual offence cases:

i. ***Pompey v DPP*** **[2020] CCJ 7 (AJ) GY;**

ii. ***Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY**;

iii. ***Nero v The State*** **(2019) 98 WIR 373** (GY CA).

In this Chapter:

Chapter 22
Jury Management

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

Supreme Court of Judicature of Jamaica, *Criminal Bench Book 2017* (Caribbean Law Publishing Company 2017)

Judicial College, *The Crown Court Compendium Part I: Jury and Trial Management and Summing Up* (August 2021)

A jury trial is one manner of determining the guilt or innocence of a person accused of an offence. Juries are constituted by randomly selected individuals from the community who hear the matter without any vested interest. Their verdicts are considered to be representative of the governing social mores and norms of the society in which they are situated.

General Guidelines

The Criminal Practice Directions 2015 Division VI (UK) sets out at 26G:

> **CPD VI Trial 26G: JURIES: PRELIMINARY INSTRUCTIONS TO JURORS**
>
> 26G.1 After the jury has been sworn and the defendant has been put in charge the judge will want to give directions to the jury on a number of matters.
>
> 26G.2 Jurors can be expected to follow the instructions diligently. As the Privy Council stated in *Taylor* [2013] UKPC 8, [2013] 1 W.L.R. 1144:
>
> > The assumption must be that the jury understood and followed the direction that they were given: … the experience of trial judges is that juries perform their duty according to law. …[T]he law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. To conclude otherwise would be to underrate the integrity of the system of trial by jury

and the effect on the jury of the instructions by the trial judge.

At the start of the trial

26 G.3 Trial judges should instruct the jury on general matters which will include the time estimate for the trial and normal sitting hours. The jury will always need clear guidance on the following:

i. The need to try the case only on the evidence and remain faithful to their oath or affirmation;

ii. The prohibition on internet searches for matters related to the trial, issues arising or the parties;

iii. The importance of not discussing any aspect of the case with anyone outside their own number or allowing anyone to talk to them about it, whether directly, by telephone, through internet facilities such as Facebook or Twitter or in any other way;

iv. The importance of taking no account of any media reports about the case;

v. The collective responsibility of the jury. As the Lord Chief Justice made clear in R v Thompson and Others [2010] EWCA Crim 1623, [2011] 1 W.L.R. 200, [2010] 2 Cr. App. R. 27:

[T]here is a collective responsibility for ensuring that the conduct of each member is consistent with the jury oath and that the directions of the trial judge about the discharge of their responsibilities are followed.... The collective responsibility of the jury for its own conduct must be regarded as an integral part of the trial itself.

vi. The need to bring any concerns, including concerns about the conduct of other jurors, to the attention of the judge at the time, and not to wait until the case is concluded. The point should be made that, unless that is done while the case is continuing, it may not be possible to deal with the problem at all.

1. Discharge of a Juror or Jury

At common law, a judge has a residual discretion to discharge a particular juror who ought not to be serving, but this discretion can only be exercised to prevent an individual juror who is not competent, from serving. It does not include a discretion to discharge a jury drawn from particular sections of the community, or to influence the overall composition of the jury. However, if there is a risk that there is widespread local knowledge of the defendant or a witness in a particular case, the judge may, after hearing submissions from the advocates, decide to exclude jurors from particular areas to avoid the risk of jurors having or acquiring personal knowledge of the defendant or a witness.

The judge has the discretion to discharge a juror when the necessity arises. The size of the jury should not be reduced below nine. Necessity may arise through illness, although an adjournment of a day or so will usually accommodate temporary indisposition. In ***Hambery*** **[1977] QB 924** (UK CA), the trial judge discharged a juror who was commencing her holiday on the next sitting day.

If a juror has personal knowledge of a defendant which should have been disclosed and would have resulted in an invitation from the judge to stand down, it may be necessary to discharge the juror. Misconduct by a juror may give rise to necessity. Jurors are customarily provided with

comprehensive warnings against discussing the case with others and against seeking information about the case from extraneous sources. A disregard of those warnings will amount to misconduct.

The judge will need to consider in each case whether, as a result of the eventuality or misconduct, it is necessary to discharge the whole jury. This will not arise if discharge of the individual juror(s) is caused by personal commitment, indisposition or illness, but may be required if there is a risk that information improperly obtained or personal knowledge has been shared with other members of the jury.

Investigation By The Judge

Where the judge acquires notice of possible misconduct or irregularity among jurors, they will need to investigate it. It is important not to pre-judge the issue. The jury may, with appropriate directions, be able to continue either as originally constituted or without jurors who have been discharged in consequence of the inquiry. The test is whether the jury is subjectively or objectively biased. Objective bias is the appearance to a fair minded and informed observer, having considered the facts, that there is a real possibility that the tribunal is biased.

If the irregularity is external in origin (e.g. overheard conversation between a juror and a member of the public leading to a suspicion of improper discussion of the case), the judge may be able to decide the matter without the involvement of the rest of the jury. In ***Farooq*** **[1995] Crim LR 169** (UK CA), a juror made unauthorised telephone calls to her family from the hotel in which the jury was lodged overnight. The following morning the trial judge conducted a private inquiry of the juror through the court clerk. No harm was found to be done, but the Court held that the judge should have questioned the juror in open court.

Where the suspected irregularity is internal and affects the jury as a whole, it may not be prudent to isolate one or more jurors from the others. In ***Orgles*** **[1994] 1 WLR 108** (UK CA), two members of the jury reported informally to the jury bailiffs that there was friction in the jury room. Those two jurors were questioned in the absence of the others and the Recorder afterwards addressed the whole jury. The Court of Appeal concluded that it would have been more appropriate to have asked the whole jury through their foreman whether they were able to continue and gave general advice as follows:

> Before the court, it was submitted that the procedure adopted by the Recorder was wrong so as to amount to an irregularity. We agree. By way of preface, we have sympathy for him: the problem was unexpected; it was unusual (it is not encompassed within the joint experience of the members of this court); there was no precedent to guide him; and counsel could not provide an agreed submission. That said, in the judgment of this court an appropriate approach to the problem is as follows:
>
> a. Each member of a properly constituted jury has taken an individual oath to reach a true verdict according to the evidence; or has made an affirmation to the like effect.
>
> b. Circumstances may subsequently arise that raise an inference that one or more members of a jury may not be able to fulfil that oath or affirmation.
>
> c. Normally such circumstances are external to the jury as a body. A juror becomes ill; a juror recognises a key witness as an acquaintance; a juror's domestic

circumstances alter so as to make continued membership of the jury difficult or impossible; so far, we give familiar, inevitably recurring circumstances. Less frequent, but regrettably not unfamiliar, is the improper approach to a juror, alternatively a discussion between a juror and a stranger to the case about the merits of the case, in short, that which every jury is routinely warned about.

d. Occasionally, as in the instant case, the circumstances giving rise to the jury problem are internal to such as a body. Whereas the duty common to all its members normally binds the 12 strangers to act as a body, such cannot always occur. From time to time there may be one or more jury members who cannot fulfil the duty, whether through individual characteristics or through interaction with fellow jury members.

e. However the circumstances arise, it is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial, to that end exercising at his discretion his common law power to discharge individual jurors…

f. The question arises as to whether and in what circumstances that duty should be exercised by the trial judge in the absence of the jury as a body. As to this, first, there is no doubt but that the judge's discretion enables him to take the course best suited to the circumstances (see *Reg v Richardson* [1979] 1 W.L.R. 1316 for an extreme course) and frequently it is appropriate to commence and continue the

> inquiry with the juror concerned separated from the body of the jury. Such a course cannot readily be faulted if the circumstance giving rise to the inquiry is external to the jury as a body; indeed if the problem is an approach to a juror, alternatively some external influencing of a juror, only such a course is feasible. The "infection," actual or potential, of one juror must be prevented if possible from spreading to the rest of the jury, and it is common form to have the individual juror brought into open court with the rest of the jury absent so that the trial judge may make an inquiry in the presence of the defendant and counsel without jeopardising the continued participation of the rest of the jury [trial]. Given that there was this further irregularity, was it material so as to provide a further justification for quashing the conviction? We observe that after this trial proceeded there was no reason to think that this jury did not as a body seek to fulfil its duty. There were no further complaints and the range of verdicts are consistent with being true according to the evidence.

Time For Reflection

Such eventualities, by their nature, occur unexpectedly. It is sensible not to take precipitate action unless there is an emergency, and to involve the advocates in the decision-making process as soon as possible. If the source of the problem is believed to be external, it may be necessary to isolate the juror concerned immediately in the hope that contamination

by discussion can be avoided. The advocates should, in any event, be consulted as to the course appropriate to the exigency which has arisen.

On the discharge of a juror or jurors, it would be prudent for the trial judge to warn them not to discuss the circumstances with any person in the court centre in which they are engaged. In some circumstances it may be necessary to discharge them altogether from current jury service. In ***Barraclough*** **[2000] Crim LR 324** (UK CA), the trial judge discharged the jury and gave a warning that they should not discuss the matter with anyone else. A new jury was empanelled the following day. In view of the size of the court centre and the explicit warning given, the Court of Appeal held there was no irregularity threatening the safety of the verdict. If the same were to occur in a smaller centre, the court would have had to discharge the first jury from further attendance in that session or delay the retrial for an appropriate period to avoid the possiblity of contamination.

2. Conducting a View of the Locus in Quo

Guidelines

The judge has a discretion to permit the jury to view the locus in quo at any time during the trial. The object of such a visit is to enable the jury to understand and follow the evidence. It is not a substitution for evidence: ***Warwar*** **(1969) 11 JLR 370**.

A precondition to a decision to visit, is that there is evidence that the locality is unchanged since the commission of the alleged offence. This is so since any variation or alteration to the geographical or structural nature of the locality would more likely confuse than clarify the issues of fact (per Harrison JA in ***Manning*** **JM 2000 CA 14**).

No view of a locus in quo or inspection of any object referred to in evidence may take place after the conclusion of summing up: ***Lawrence*** **[1968] 52 Cr App R 163** (UK CA).

A view of the locus in quo may be requested by one or both of the parties, usually when it is argued that photographs do not give a sufficient impression of scale and proportion, or where the nature of terrain is relevant to issues in the trial. If a view is to be held, it must be held before the jury's retirement.

Arrangements should be made in advance and all those attending should know the itinerary and the procedure to be adopted. It is useful to prepare a proposed timetable for the use of the participants. The court should assemble at court as usual. At a view, the court has simply moved its place of sitting temporarily.

Before any court embarks upon a view, the judge must make clear precisely what is to happen, including where various individuals will be permitted to stand, what actions can be performed at the scene of the view, etc (see ***M v DPP*** **[2009] EWHC 752 (Admin)**). If witnesses are to be present, it must be agreed what demonstrations, if any, they will be permitted to perform.

A view should be attended by the advocates, the judge, the jury, their jury bailiffs and a shorthand writer. The jury must be accompanied at all times by their jury bailiffs. Other travel arrangements are at the discretion of the judge.

All communications between the judge and/or the advocates and the jury should be recorded.

The defendant must be permitted to attend a view if they wish but they are not bound to attend.

It is not usually necessary to receive evidence at a view, but if evidence is taken, it should be within earshot of the judge, jury and the advocates, and recorded. One or both of the parties may wish to point out specific features. Agreement can usually be reached by the parties that a police officer, who has no immediate connection with the case, can perform the function of pointing out those features which can, if practicable, be included in the written itinerary. Otherwise, each side should nominate an advocate to do so. While features can be identified, further comment upon them at the view is undesirable.

The jury may have questions at the view. If so, they can be asked to make a note of their questions and the note handed to the judge. The judge will consider the questions with the parties, to ascertain whether answers can be provided there and then. If so, the jury can be provided with an agreed answer or evidence can be taken. In either case, the communication should be recorded. If the parties require time to consider adducing further evidence on the subject, or to reach agreement, the jury may be told that further evidence will be received at court or a written agreement produced. It may be that a feature has been identified at the view which will require a further plan or photographs.

At the end of the view, the jury should be accompanied by their jury bailiffs back to court. If, however, no further business is to be conducted at court on that day, the jury can be released upon their return to court, until the next sitting day.

3. The Watson Direction

Guidelines

At the commencement of the trial, the jury will usually be advised by the trial judge that it will be their joint responsibility, in due course, to make an assessment of the evidence, but that they should defer judgment until all the evidence has been heard. If the jury has received a majority verdict direction, they would have been informed that it is desirable, if possible, for the jury to be unanimous in their decision but, if that is not possible, the judge can accept such a majority verdict as the circumstances allow. It may not be appropriate to give the jury any further direction about the desirability of reaching a verdict, because the majority verdict direction would have concentrated the jury's mind in that direction.

It is a matter for the trial judge whether to say anything further. If anything further is said, it is essential that no undue pressure is exerted on the jury. In ***Watson*** **[1988] 1 QB 690** (UK CA), Lord Lane CJ formulated a further direction which might be given, as follows:

> Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but also collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily [ten of] you cannot reach agreement, you must say so.

Caution should be exercised if departing from the words used by Lord Lane.

Barbados

Discharge of a Juror or Jury

Section 36 (1) and (2) of the **Juries Act, Cap 115B** (BB), provides for the discharge of a jury before the verdict and states:

> 36. (1) Where, at any time after the jury in any civil or criminal trial has been sworn, any situation of necessity or any misconduct or irregularity or prejudicial matter arises in the course of the trial or for any other reason the Judge deems it proper to do so, he may discharge the jury, and his decision shall not be questioned in any court.
>
> (2) Where a jury has been discharged under this section, the Judge may adjourn the case for trial at the same session or at a future session or, in the case of a civil trial, on such special day as the Judge may deem fit, and the case shall be tried before another array and the Judge may in his discretion excuse from such array any juror who took part in the previous trial.

In ***Doyle*** **(Barbados CA, Crim App No 22 of 2008)**, the issue arose that the foreman of the jury should have been discharged due to his body language, which appeared to have given the impression to junior

counsel for the Defence that he disapproved of the manner in which the complainant was cross examined. It was argued that this body language tainted the trial with bias and resulted in the defendant not having a fair trial. The Court of Appeal referenced the case of ***Webb*** **(1994) 181 CLR 41** (HCA), where the High Court of Australia formulated the following test to determine whether the juror should be discharged, per Mason, CJ at 53:

> [T]he test to be applied in this country for determining whether an irregular incident involving a juror warrants or warranted the discharge of the juror or, in some cases, the jury is whether the incident is such that, notwithstanding the proposed or actual warning of the trial judge, it gives rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror or jury has not discharged or will not discharge its task impartially.

It was held, in ***Doyle***, that the judge had properly ordered the trial to proceed.

Accidental Prejudice

In ***Sargeant*** **(Barbados CA, Crim App No 2 of 2006)**, the issue arose that the judge should have declared a mistrial and ordered a retrial because of resulting severe prejudice, despite his warning regarding the expert's evidence which in effect alluded to at least three cases where the appellant had not complied with the administrative protocol which required worksheets to be signed by the appellant's supervisor. The court referenced the case of ***Weaver*** **(1967) 1 All ER 277** (UK CA), where the

question of accidental prejudice arose. In ***Weaver*** at 280, Sachs LJ stated as follows:

> The decision whether or not to discharge the jury is one for the discretion of the trial judge on the particular facts, and the Court will not lightly interfere with the exercise of that discretion. When that has been said, it follows, as is repeated time and again, that every case depends on its own facts. As also has been said time and time again, it thus depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted what, looking at the case as a whole, is the correct course. It is far from being the rule that, in every case, where something of this nature gets into evidence through inadvertence, the jury must be discharged.

The Court of Appeal in that case held that the trial judge warned the jury and that the warning was adequate.

If counsel for the defendant fails to apply at trial for the jury to be discharged where prejudicial matters are accidentally disclosed, the appeal is liable to be dismissed: ***Wattam*** **[1942] 1 All ER 178** (UK CA).

In ***Wattam***, a police officer gave evidence that he had first seen the defendant's face when looking through an album of photographs. The Court of Criminal Appeal held that, even if the reference to the album could be regarded as an irregularity, in that the jury might have thought that it was a rogue's gallery of convicted criminals, the appeal must fail because the Defence had omitted to apply for a retrial.

Points to Consider

i. Judges should not be pressured by lack of alternates, to continue any trial in light of jurors being discharged beyond the minimum legal number for a panel.

ii. Challenges arise when jurors are chosen, and there is no separate consideration of alternate jurors by the legislation. In practice, there can be nothing wrong with having at least two (2) alternate jurors.

iii. What happens when the defendant is unrepresented and cannot appreciate the fact that they should request a mistrial? As a legal and practical matter, this responsibility rests with a judge, but any declaration of a mistrial will result in the discharge of a jury.

Conducting a View

Whilst there is no provision in the legislation that provides for conducting a view, best practice would be to ensure that all the parties and their attorneys, and all necessary court staff attend, so that the proceedings cannot be in any way questioned or tainted. All evidence should be under oath or affirmation and within the hearing of all defendants, jurors, attorneys and the judge. Requisite security should also be in place.

Adequate logistical and transportation arrangements are to be made in respect of all parties to the case. The court has this responsibility as the locus is deemed to be the court for all practical purposes since evidence will in most cases be taken and must be recorded at the 'View'. It is also important to ensure that if any evidence is to be given it must not be done in the presence and hearing of other witnesses who may be called at the "View".

Watson Direction

Where it is thought necessary or desirable, juries may be directed, in the judge's discretion, on the need to reach a verdict and such direction is probably best included as part of the summing up, or given or repeated after the jury has had time to consider a majority direction as outlined earlier in this chapter by Lord Lane CJ in ***Watson*** **[1988] 1 QB 690** (UK CA).

Points to Consider

i. As cited in ***Watson***, the two public interest issues are: 1) the imperative of a jury to be placed under no pressure, and 2) the desirability of avoiding delay, expense, and uncertainty which are bound to arise if there has to be a second jury trial after a jury disagreement. The direction should only be given in appropriate circumstances.

ii. Note the decision in ***Morgan*** **[1997] EWCA Crim 829**.

Belize

Discharge of a Juror or Jury

See s 34 of the **Juries Act, Rev Ed 2020, CAP 128** (BZ).

In ***Ical*** **(Belize CA, Crim App No 3 of 2016)**, the Court of Appeal referenced ***Lawson*** **[2005] EWCA Crim 84, [2007] 1 Cr App R 20** per Auld LJ, where it was noted at [17]:

> …whether or not to discharge the jury is a matter for evaluation by the trial judge on the particular facts and circumstances of the case …It follows that every case

> depends on its own facts and circumstances, including;1) the important issue or issues in the case; 2) the nature and impact of improperly admitted material on that issue or issues, having regard, inter alia to the respective strengths of the prosecution and defence cases; 3) the manner and circumstances of its admission and whether and to what extent it is potentially unfairly prejudicial to a defendant; 4) the extent to and manner in which it is remediable by judicial direction or otherwise, so as to permit the trial to proceed ...The test is always the same, whether to continue with the trial would or could, by reason of the admission of the unfairly prejudicial material, result in an unsafe conviction.

Conducting a View

The appropriate procedure on a visit to the locus is for the witnesses to be asked questions considered relevant and for them to point out the various places to which they had previously testified. On return to the court, each witness who had participated in the *locus in quo* inquiry should be recalled, and they should be asked questions on the record confirming what they had done in the presence of the court at the locus. The defendant(s) should then be given the opportunity to cross-examine each witness on their testimony of the events at the locus: ***Hines*** **(Belize CA, Crim App No 6 of 2002)**.

See also ***Fernandez*** **(Belize CA, Crim App No 20 of 2009)** at [1] – [4] and [7] – [9].

Watson Direction

See s 21 of the **Juries Act, Rev Ed 2020, CAP 128** (BZ).

In ***Caliz*** **(Belize CA, Crim App No 16 of 2013)**, the appellant complained that the jury had been pressured to reach a verdict, which led to his conviction for manslaughter by negligence. The Court of Appeal noted:

> [9] There are other unhappy aspects about the remarks reproduced at paragraph 5 above and what transpired thereafter. Firstly, immediately after referring to the Watson Direction, which the learned judge implied he would not give, he proceeded to do just that without ever giving the jury an opportunity to explain their concerns. Secondly, in our view, it is not enlightening to a jury to refer to a Watson Direction as, this was not helpful to the jury and was probably confusing. Indeed, as noted at paragraph 4-415 of Archbold, a ***Watson Direction*** should not be given after the jurors' retirement. Thirdly, the Record of Appeal failed to record the time when the Court reconvened. Mr. Banner who had been Counsel at the trial, said the elapsed period for the second retirement, was in excess of 30 minutes before the majority verdict was given.
>
> [10] The events in the instant case bear some comparison with those which unfolded in the Privy Council case of ***Defour v The State of Trinidad and Tobago*** [1999] UKPC 34; 1 W.I.R 1731. In ***Defour*** the jury having retired, deliberated for a period of three hours. They were then brought back into court, and the foreman indicated they had not reached a verdict and expressed certain

concerns to the trial judge. The judge felt unable to assist them further and gave them an additional thirty minutes to return to the jury room and consider the verdict. At paragraph 37 of the ***Defour*** decision the Board expressed the opinion that there was an appreciable risk that the imposition of a time limit placed the jurors under pressure to reach a verdict, although this would not have been the intention of the judge. Consequently, the conviction was considered unsafe and was quashed.

Guyana

Discharge of a Juror or Jury

Section 171 of **Criminal Law (Procedure) Act, Cap 10:01** (GY) provides for the discharge of the jury in certain special cases as outlined below:

> 171. (1) The Court may, in its discretion, in case of any emergency or casualty rendering it, in its opinion, expedient for the ends of justice to do so, discharge the jury without their giving a verdict, and direct a new jury to be empanelled during the same sitting of the Court, or may postpone the trial on such terms as justice may require.
>
> (2) If the judge becomes incapable of trying the cause or directing the jury to be discharged, the Registrar shall discharge the jury.
>
> (3) If one or more of the jurors, before they begin to consider their verdict, becomes or become, in the

> opinion of the Court, incapable of continuing to perform his or their duty, the Court may either discharge the jury and direct a new jury to be empanelled during the same sitting of the Court, or may postpone the trial, or may, in its discretion and with the consent of counsel for the State and of the accused person, in any case other than that of a capital offence, proceed with the remaining jurors and take their verdict, which shall have the same effect as the verdict of the whole number.

In ***Yaseen v The State*** **(1990) 44 WIR 219** (GY CA), the appellants were on trial for murder. The court considered the power of a judge to discharge or excuse a juror after they had been selected or after they had been sworn. The court noted that the power is statutory and is to be found in the proviso to s 33 and in s171(3) of the **Criminal Law (Procedure) Act**. Further, in every instance of the contemplated discharge of a jury during the course of a trial, whether it be due to death, illness or other indisposition of one of the members, or for any other reason, the actual consent of the defendant is necessary. At 228 – 229, the court stated:

> The paramount principle that informs judicial intervention at any stage in a criminal case must be grounded in the pursuit of the goal of fairness of the trial. And this must be applied also in relation to the excusing or discharging of a juror. Whether it be a general query as to any interest that a prospective juror may have in a cause or the adequacy of his or her physical or mental faculties, whether before or during the trial, the interests of justice and a fair trial can be the only relevant considerations in determining whether or not to excuse. And

in the case of the selection process, which cannot but be considered an integral part of the trial, the detailed provisions enacted in order to ensure the impartiality of choice would be nullified if the judge's powers of intervention, after such selections, were not kept within narrow compass. In other words, as with the expression 'any reasons' in section 33 there must be a 'high degree of need' to justify the discharging or excusing of a juror who has been selected to sit in a case. In the present case, it seems clear from the affidavits that were made by the trial judge and counsel that the underlying cause for the request by the first three jurors who were excused was their apprehension that at some time during the course of the trial those chosen might have been kept together for the remainder of its duration.

In my opinion such an apprehension could not be sufficient reason for excusing any juryman and, without more, any excusal based on it, would amount to an arbitrary exercise of the judge's discretion. The position might have been different had the jurors who were excused proffered some pressing business commitment, urgent health reasons, or some special vulnerability of home or family for their absence. But no such reason was given. The decision to excuse was exercised simply because each had expressed a desire not to sit. Although, as Lawton LJ said (rightly in my view) in *R v Hambery* [1977] 3 All ER 561 at page 566 "trial by jury these days depends on the willing co-operation of the public" and "if the administration of justice can be carried on without inconveniencing jurors it should be", these

> views must not be allowed to be whittled down to mean that jurors should be excused from service because they whimsically express an unwillingness to serve. The jury system is too integral a part of the administration of the criminal justice for such excuses to be countenanced. By the very fact that it takes persons away from their ordinary vocation, albeit for a comparatively short period of time, it must be a source of some dislocation and inconvenience to the individual juror. But this is a small price to pay for the preservation of the principle of involvement of the citizenry in the administration of criminal justice and therefore in the maintenance of law and justice in their community.
>
> In my opinion what the trial judge did in the instant case amounted to much more than an irregularity. For wholly insufficient reasons he deprived the appellants of the services of persons who were selected according to law and whom they may have wished to have sit in their cause.

See also

i. ***The State v Rudolph Baichandeen*** **(1979) 26 WIR 213** (GY CA) on the court's jurisdiction to discharge a single juror;

ii. ***Gulliver Jerrick*** **(1968) 13 WIR 45** (GY CA): the consent of the defendant is necessary before the court proceeds with less than twelve jurors.

Conducting a View

Section 44 of the **Criminal Law (Procedure) Act, Cap 10:01** (GY) states:

> (1) Where in any case it is made to appear to the Court or a judge that it will be for the interests of justice that the jury who are to try or are trying the issue in the cause should have a view of any place, person, or thing connected with the cause, the Court or judge may direct that view to be had in the manner, and upon the terms and conditions, to the Court or judge seeming proper.
>
> (2) When a view is directed to be had, the Court or judge shall give any directions seeming requisite for the purpose of preventing undue communication with the jurors:
>
> Provided that no breach of any of those directions shall affect the validity of the proceedings, unless the Court otherwise orders.

The defendant should be present but if they decline to be present, their absence does not make the view unlawful: ***Karamat*** **[1955] UKPC 38; [1956] AC 256** (GY).

Note also ***Tameshwar and Another*** **[1957 UKPC 8]; [1957] AC 476** (GY), which states that the judge must attend the view.

In this Chapter:

Chapter 23
Verdicts

Sources

Judicial College, *Crown Court Bench Book: directing the jury* (Judicial Studies Board 2010)

Judicial Education Institute of Trinidad and Tobago (JEITT), *Criminal Bench Book 2015* (Supreme Court of Judicature of Trinidad and Tobago 2015)

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1. Written Directions

In some jurisdictions the practice has developed for a trial judge to give written directions.

The trial judge determines when written directions should be given. In considering whether written directions should be given, a judge should have regard to the complexity of the case, whether written directions will aid the jury in better understanding difficult legal concepts, and in such circumstances, both counsel and the judge are tasked with considering with some care, how best and in what order to tackle the legal and factual issues in light of the evidence which emerged: ***Green*** **[2005] EWCA Crim 2513**.

In ***N*** **[2019] EWCA Crim 2280**, the court noted:

> 18. We have not in this judgment cited the entirety of the judge's direction in relation to joint enterprise. Some of it, including parts of the critical language under challenge in this case, is characterised by quite informal language. With respect it would have been far preferable for the judge to have devoted time to the preparation of the initial written directions and a route to verdict which should then have been shared with counsel for their due consideration and observations. Indeed, as the Compendium strongly indicates counsel should, if necessary, invite the judge to provide written directions and to assist if needs be. We note that the Court of Appeal is increasingly emphasising that the norm should be the provision of written directions: see e.g. **R v Atta-Dankwa [2018] EWCA Crim 320**, and **R v PP [2018] EWCA Crim 1300**. We anticipate that if that had occurred the

judge would have used greater precision and clarity in his initial directions, the jury would have had valuable written guidance which they could have referred to as they worked their way through the various factual permutations which arose, there would have been no need for the jury to send a note, and this appeal might well not have arisen.

19. Fifth, counsel argues that the failure in and of itself on the part of the judge to give written directions to the jury renders the verdict unsafe in a case such as this. In circumstances in which an oral direction only is provided a conviction will, in normal circumstances, be quashed because that oral direction was wrong or materially confusing, etc. It will not be because of the mere omission of written directions. It might be that the exercise of crafting written directions would have led to the errors being avoided but the errors remain those embedded in the oral directions and not in the mere fact that no written equivalent was given. We do not however rule out the possibility that, exceptionally, a direction might be so complex that absent an exposition in writing a jury would be at a high risk of being confused and misled in a material manner. And nor do we address the situation that occasionally occurs where the judge gives an oral direction which differs in a material respect from the written direction which is also provided.

In ***Atta-Dankwa*** **[2018] EWCA Crim 320**, the court referred at [28] to provisions in Rule 25 of the **Criminal Procedure Rules** which provide the statutory underpinning for the judge to give, in writing, jury directions, questions and other assistance to assist the jury. It also noted at [32] that there are cases that were so straightforward that no written materials for the jury were necessary.

2. Written Route to Verdict

A written Route to Verdict is different from a direction in law.

Where the case is complex, the judge should consider whether there is likely to be an advantage in providing the jury with a written Route (or Steps) to Verdict, which is no more than a logical sequence of questions, couched in words which address the essential legal issues to be answered by the jury in order to arrive at their verdict(s). Occasionally, a judge may also wish to consider providing a written legal definition for the jury's use.

Whether the case demands any written assistance is for the judge to decide. Some judges, in complex or lengthy cases, provide the jury with a written Route to Verdict or with written Directions of Law, or both. If the judge does intend to provide a Route to Verdict or written Directions of Law to the jury, the document should, if circumstances allow, be shown to the advocates in advance of speeches and in any event before the summing-up, so that they can comment and suggest amendments if they wish. The writer has, on several occasions, been much assisted by the advocates in the preparation and amendment of a Route to Verdict, but the suggestions do not, of course, have to be accepted if the judge disagrees with them. Written directions of law should be an integral part of the summing-up which the judge and the jury read together. A Route

to Verdict should be read together at a suitable point following the judge's explanation of the elements of the offence and/or defence, or just before the jury retires.

If the Route to Verdict or written directions do not encapsulate every word of the judge's legal directions, as they almost certainly will not (they will not, for example, include any directions concerning the separation of roles and the jury's proper approach to evidence), the jury should be informed that the document is not intended to be a replacement for, but an addition to, the legal directions given orally.

3. Further Directions

The judge can send for the jury after a prescribed period and give further directions in respect of majority verdicts. If jurors request further directions on matters covered in the summation, the judge should discuss this with both Prosecution and Defence before giving any such directions. Care must be taken regarding when to send for the jurors and how any further directions should be crafted to avoid confusion. In some instances, the judge can repeat the initial directions provided to the jury.

4. Deadlock

Most jurisdictions have statutory provisions which provide for the issue of a deadlock, and how it should be dealt with.

5. Taking the Verdict

A. Unanimous Verdict

The jury must be directed that:

i. their verdict must be unanimous (in respect of each count and each defendant); and

ii. they may have heard of majority verdicts but they should put this out of their minds and concentrate on reaching a unanimous verdict/s. If a time were to come when the court could accept a majority verdict, the jury would be invited to come back into the court room and be given further directions. This would only happen if the judge were to decide that it is an appropriate course to take.

The jury should be advised that the foreman is the chairman for their deliberations and that the foreman will have to speak on their behalf when they return to the courtroom to deliver their verdict. They are to be informed that the foreman's views do not carry any greater weight than that of any other juror; in other words, the foreman does not have any greater say than any other juror.

It would also be helpful to reassure the jury that there will inevitably be some debate in the jury room and, at least initially, different views may be expressed. If they all discuss the case by expressing their own views, but also take account of the views of other jurors, they are likely to find that they will reach a verdict/verdicts on which they all agree.

Case law has provided guidance on how judges should explain the meaning of "unanimous". See, for example, ***La Vende v The State*** **(1979) 30 WIR 460** (TT CA).

However, judges may simply say to the jury: *The evidence is now closed and I must remind you, though I am sure that you need no reminder, that you must decide the case only on the evidence and the arguments that you have seen and heard in court.* ***It is important that you try to reach a verdict/ verdicts on which you are unanimous: that is to say a verdict/s on which all of you agree***.

B. Majority Verdicts

Majority verdicts do not apply in capital cases.

No majority verdict direction should be given to the jury prior to its first retiring. In practice, it is best to allow the jury all the time it wishes in order to consider its verdict. Only in the most extreme circumstances should the jury be sent for to make an enquiry as to whether it will arrive at a verdict. In addition, greater time than the minimum stipulated by the statute should be allowed for the jury to go from the courtroom to their retiring room and vice versa.

Where the minimum time, at least, has elapsed, and the jury has returned, whether of its own volition or not, the clerk should announce the period for which the jury has been deliberating. The foreman should be asked whether they have arrived at a verdict and whether it is unanimous. If the foreman indicates that it is not unanimous, the foreman should be asked "in terms of numbers alone, how are you divided". If the division allows for a majority decision to be taken at that time, and the jury indicates that it is unlikely, with further deliberation, to arrive at a unanimous decision, a majority verdict may be taken.

When taking the verdict, the trial judge should be sensitive to any comments made by the foreman which may suggest that further

assistance is required or may be helpful. There is no stage at which the jury cannot be assisted by guidance from the trial judge: ***Berry*** **[1992] 3 All ER 881** (JM PC).

If the division does not allow for a majority verdict to be taken, the foreman should be asked if allowed further time, the jury could arrive at a verdict. Depending on the answer, the judge may consider giving a majority direction.

It is for the judge to decide if or when a majority direction is to be given, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the judge when they are likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done.

If the judge has decided to give a majority direction, the jury will be sent for and upon returning to court, the clerk will announce the period during which the jury has been deliberating. The clerk will then ask whether the jury has reached a verdict on which all members are agreed. Assuming that the answer to this question is "No", the members of jury should be directed that:

i. they should still, if at all possible, reach a unanimous verdict;

ii. if however they are unable to reach a unanimous verdict, the time has now come when the court could accept a verdict which is not unanimous but one on which a majority of them agree, stating the relevant majority allowed for that case.

C. Alternative Verdicts

The Trinidad and Tobago **Criminal Bench Book 2015** provides useful guidance in this area, at 307, as follows:

It is a preferable practice that the issue of whether an alternative verdict is available, should be dealt with at least prior to closing addresses, in order to avoid possible unfairness to the Defence.

The jury must be specifically warned not to return an alternative verdict as a compromise.

There may be the need to consult with counsel. Alternative verdicts are available for:

1. Attempted murder/wounding with intent;
2. Wounding with intent/unlawful wounding;
3. Murder/manslaughter;
4. Larceny/receiving;
5. Rape/indecent assault.

The alternative verdict need not be on the indictment. It must be made clear to the jury that they can only convict on one or the other. It is necessary to go through the process step by step.

D. Inconsistent Or Ambiguous Verdicts

The judge should put questions to clear up any inconsistency and direct the jury to retire to reconsider the verdicts: ***Shirley*** **(1964) 6 WIR 561** (JM CA).

E. Reasons for Verdict

Currently, judges have no power to question the jury on the basis for the verdict. In exceptional cases, the trial judge possesses the discretion to

request reasons of the jury, but this discretion must be exercised with great care. Judges should deal with this issue using "common sense", experience, and judgment. Cases which provide guidance on this issue are outlined below:

i. ***Isaacs* (1997) 41 NSWLR 374** (NSW CCA);

ii. ***Cawthorne* [1996] 2 Cr App R (S) 445** (UK CA);

iii. ***Byrne* [2002] EWCA Crim 632, [2002] 2 Cr App R 311**.

6. Discharge After Trial

The jury must be discharged immediately upon delivery of verdict. Once discharged, the jury is *functus officio* and cannot be recalled for any purpose: ***Russell* [1984] Crim LR 425** (CA).

In the event that the jury is unable to agree on all/some of the counts, it should be discharged from giving verdicts on those counts.

The judge should always thank the jurors for the work that they have done on the case. Upon being discharged, the jurors should be reminded that although they may now discuss with others their experience of being on a jury and speak about what took place in open court, they must never discuss or reveal what took place in the privacy of their jury room.

Barbados

Written Directions

Note ***Green*** **[2005] EWCA Crim 2513**, where it was stated:

> This was not an easy case to sum-up and no complaint was made about the summing-up, but there was a lot of law for the jury to remember, and the evidence was not easy to distil. Legal directions had to be given, and were given correctly in relation to murder, manslaughter, robbery, joint enterprise, self-defence, lies, the rule against hearsay and a dying declaration and good character, but nothing was reduced to writing in the form of a series of questions or a note which the jury could take with them.

In a case which presents great complexity, particularly in a situation where it was known in advance that the deliberations would be interrupted, it may be useful to consider whether written directions can be of assistance to the jury.

Directions may need to be explained in detail to the jury, particularly in cases involving multiple legal concepts and issues raised on the evidence. Without written Route to Verdict directions in such cases, there may not be full understanding of such directions by a jury. It is not strange, especially with the pervasive nature of gang activity in our societies, for there to be issues of intention to kill, provocation (loss of self-control), manslaughter, unlawful act manslaughter, self-defence (reasonable force), and joint enterprise; not to mention multiple defendants and the need to keep

the cases and issues in relation to each defendant separate and properly compartmentalised.

Similarly, as discussed above, these written directions, although not needed in all cases, where applicable, should be given after thorough ventilation with counsel and unrepresented defendants.

Points to Consider

i. Provide written directions in a timely manner and after they have been properly discussed with counsel, in the cases which may cause jurors to be confused, or which may lead to misunderstanding of the appropriate legal principles and directions.
ii. Refer to the written directions within the summation with careful explanation to the jury.

Written Route to Verdict

In the absence of legislation, it would be wise to have these timely and fully discussed with counsel. Care would have to be taken in relation to unrepresented defendants.

Further Directions

Section 39 of the **Juries Act, Cap 115B** (BB) provides for majority verdicts in certain criminal cases and in civil cases and states:

> 39. Subject to sections 40 and 42,

(a) in a trial for murder, a verdict of manslaughter of the jury need not be unanimous, if not less than 9 of the jury are agreed thereon;

(b) in a trial for a criminal offence other than murder or treason or of a civil action or matter, the verdict of the jury need not be unanimous if not less than 7 of the jury are agreed thereon.

Points to Consider

i. The judge can send for the jury after a prescribed period and give further directions in respect of majority verdicts.

ii. Care still has to be taken as to when to send for the jurors. If jurors request further directions on matters covered in the summation, the judge should discuss this with both Prosecution and Defence before giving any such directions.

Deadlock

Section 43 of the **Juries Act, Cap 115B** (BB), provides for the inability of the jury to agree and states as follows: 'Notwithstanding section 41, where the Judge is satisfied that there is no reasonable probability that the jury will arrive at a verdict, he may discharge the jury at any time after the expiration of 3 hours from the time of its first retirement.'

In ***Holder v The State*** **(1996) 49 WIR 450** (TT PC), the court found that the jury did not feel under undue pressure as was demonstrated by the fact that they retired for more than an hour before bringing in their verdict. The court noted that that time frame was a substantial retirement in local conditions. Their Lordships agreed with the Court of Appeal that no

prejudice to the appellant was caused by the late retirement. Nevertheless, in agreement with the Court of Appeal, their Lordships noted that such a late retirement of the jury in a capital case is undesirable.

Taking the Verdict

See ss 38 – 41 of the **Juries Act, Cap 115B** (BB). Note also that there is a proposed bill, **Criminal Justice (Miscellaneous Provisions) Bill 2020**, intended to provide for majority verdicts in certain cases of murder.

In respect of s 41 of the **Juries Act**, the court in ***Yard*** **(Barbados CA, 25 August 2020)** at [94] – [100], stated that the verdict was unsafe and unsatisfactory because the trial judge recalled the jury after 1 hour and 53 minutes to inquire whether it needed further direction and if a unanimous verdict was possible. The foreman indicated no, and the judge granted the jury more time to continue to attempt to reach a unanimous verdict. The Court of Appeal dismissed the ground that the verdict was unsafe and unsatisfactory.

Note the need for clear questions to be asked of the foreperson, especially in relation to the issue of unanimous verdicts and the need to indicate the numbers in respect of majority verdicts.

Reasons for Verdict

At present, judges have no power to question jurors as to the reason for their verdict.

See the instructive cases of ***Isaacs*** **(1997) 41 NSWLR 374** (NSW CCA) and ***Cawthorne*** **[1966] 2 Cr App R (S) 445** (UK CA).

Discharge after Trial

When the jury returns without having arrived at a verdict, it should be asked whether there is any reasonable prospect of reaching agreement if more time was had. If the jury is to be discharged, this should be kept as brief as possible, only thanking jurors for their service in respect of the actual case. After the jury has been discharged, it is functus officio: ***Russell*** **[1984] Crim LR 425** (CA).

Belize

Section 21(1) of **Juries Act, Rev Ed 2020, CAP 128** (BZ) provides:

> 21. (1) For the trial of the issue in every criminal cause in which the accused person is arraigned for an offence punishable with death, the jury shall consist of twelve persons and the verdict of that jury shall be unanimous, nevertheless on an indictment for murder that jury may, on or after the expiration of four hours from the time when it retired to consider its verdict, return a verdict of manslaughter if it considers that crime proved, whenever it is agreed in the proportion of eleven to one or ten to two, and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein.

In ***Henry*** **[2018] CCJ 21 (AJ) BZ, (2018) 93 WIR 205**, the CCJ noted at [27]:

> …Section 21 plainly provides that in criminal trials for an offence not punishable by death, "the jury shall

> consist of nine persons and that the jury may, on or after the expiration of two hours" return a majority verdict. There is no requirement that deliberation must or even should last for two hours where the verdict is unanimous. The Court of Appeal was therefore in error in its interpretation of section 21(2) of the Juries Act in so far as it interpreted the section as dealing with the rendering of all verdicts by the jury: *R v Raymond Failey*. There is no foundation for the view that once a jury has retired to consider a verdict, it cannot deliver that verdict unless 2 hours have elapsed. Section 21 does not debar a jury from returning a unanimous verdict at any time after it has retired to deliberate.

Written Directions

It is not a practice in Belize to render written directions to the jury.

Further Directions

See s 21 of **Juries Act, Rev Ed 2020, CAP 128** (BZ).

In ***Wade*** **(Belize CA, Crim App No 14 of 2006)**, the court noted at [18]:

> It is indeed the law…that a trial judge who is sent a note from the jury raising a matter connected with the trial should almost invariably state in open Court the nature and content of the communication which he received from the jury and should, if he thinks it useful so to do, seek the assistance of counsel as to how best to deal with the situation before the jury is called back into Court

(see Archbold, Criminal Pleading Evidence and Practice 2000, paragraph 4427).

Deadlock

See s 21 of **Juries Act, Rev Ed 2020, CAP 128** (BZ).

In ***August*** **(Belize CA, Crim App No 7 of 2014)**, one of the appellant's grounds of appeal was that the judge erred when he refused to accept that the jury was a hung jury and by so refusing, exerted pressure on the jury to return a unanimous verdict. The Court in considering the issue noted:

> [64] The language used by the trial judge showed no pressure to take further time. The trial judge said:
>
> "So, if you tell me that you reach a position where the jury is deadlock, in other words there is nothing that you can do, whether if you go back from today until tomorrow it will still be the same proportion, then there is no sense for you to go back. But if you tell me there is hope that the jury could reach a verdict, then I could send you for a time that you will want, 1 minute, 10 minutes, 1 hour, 2 hours, 2 days, whatever you want. I can't limit you to time though, I cannot do that. **Do you think that you need some time? You could quietly consult with the jurors. Just do it quietly, and consult with them**." (emphasis added)

The forelady then replied:

"Can we have a few minutes more?"

[65] The above dialogue showed that no pressure was being exerted. The trial judge had given the forelady options and thereafter posed the question as to whether time was needed…

Taking the Verdict

See s 21 of **Juries Act, Rev Ed 2020, CAP 128** (BZ).

See also the discussion in ***Harris*** **(Belize CA, Crim App No 3 of 1995)**.

Reasons for Verdict

See section 21 of **Juries Act, Rev Ed 2020, CAP 128** (BZ).

In ***Fernandez*** **(Belize CA, Crim App No 10 of 2008)**, the court noted:

> [18] The judge ought to have directed the jury that manslaughter could arise on the evidence in various ways. He could then point out the various ways in which it could arise. However, the judge should have made it abundantly clear that only three verdicts were possible on the evidence - guilty of murder, not guilty of murder but guilty of manslaughter, or not guilty. Nonetheless, in leaving the case to the jury, it is open to the judge to inform the jury that, if they came to the conclusion that the accused was guilty of manslaughter, they should indicate the basis on which they arrived at their verdict, e.g. manslaughter by reason of provocation or

manslaughter due to lack of intent. A verdict given in this way will assist the judge in imposing sentence on the accused. But this is entirely different from leaving the matter to the jury, telling them that they could return one of the verdicts as specified by the judge in his summing-up.

[19] If having returned a verdict of guilty of manslaughter and the jury not indicating the basis for the decision and if the judge considered that, for the purpose of imposing the appropriate sentence, it was necessary to ascertain the basis on which they reached their verdict, it was open to him to so inquire of the jury. See **Regina v Matheson [1958) 1 WLR 474 and R v Byrne [2003] 1 Cr. App. R (5) 68**. However, it should be noted that the jury was not obliged to respond to such inquiry.

[20] The taking of the verdict is an essential part of the trial process. It is therefore incumbent on the judge to ensure that the verdict is clear, unambiguous and not misleading. This is part of the judge's responsibility to ensure that an accused person has a fair trial.

Discharged After Trial

See the discussion in the following cases:

i. ***Sanker*** **(1982) 33 WIR 64** (BZ CA).

ii. ***Henry*** **[2018] CCJ 21 (AJ) BZ, (2018) 93 WIR 205**.

Guyana

Statutory Provisions

Section 154 of the **Criminal Law (Procedure) Act, Cap 10:01** (GY) provides that the judge may sum up the law and the evidence if necessary.

Section 158 of the **Criminal Law (Procedure) Act, Cap 10:01** (GY) provides for the number of jurors required to find a verdict as follows:

> 158. With respect to the deliberation and verdict of the jury, the following provisions shall have effect:
>
> (a) on the trial of a capital offence the verdict for that offence shall be unanimous:
>
> Provided that where a person is arraigned for any offence punishable with death and the jury, by a majority of not less than ten, find such person guilty of a lesser crime, then the finding of the majority shall, subject to the provisions of paragraphs (b) and (c), be taken as the verdict and sentence shall follow accordingly;
>
> (b) on the trial of any offence other than a capital offence, during the first and second hours after the jury begin to consider their verdict, the verdict shall be unanimous; and
>
> (c) on the trial of any offence other than a capital offence, if, on the expiration of two hours from the time when the jury begin to consider their verdict, they are agreed in the proportion of eleven to one or ten to two, or, where the jury consist of eleven

> jurors, in the proportion of ten to one, the verdict of that majority shall be taken and have effect as the verdict of the jury.

In ***Lawrence v The State*** **(1999) 59 WIR 239** (GY CA):

> The appellant was charged with murder. At his trial, the jury returned a verdict of 'Not Guilty of Murder', but returned a verdict of 'Guilty of Manslaughter'. The latter verdict was reached by a majority of 10 to 2 after deliberations lasting a little less than two hours (contrary to the requirements of s 158(b) of the Criminal Law (Procedure) Act). The appellant appealed to the Court of Appeal.
>
> ...
>
> The Court allowed the appeal and quashed the conviction, noting that, there could be no retrial on a charge of murder (see art 144(5) of the Constitution of Guyana, which sets out the rule against double jeopardy), but as the conviction for manslaughter had been a nullity, there was no bar to the appellant being retried for manslaughter; accordingly, a retrial for that offence was ordered.

See also ***The State v Rudolph Baichandeen*** **(1979) 26 WIR 213** (GY CA).

Inconsistent Verdict

See ***The State v George Mootoosammy and Henry Budhoo*** **(1974) 22 WIR 83** (GY CA) at 87 and 88.

In this Chapter:

Chapter 24
Criminal Case Management

1. Overarching Considerations

In Barbados (s 1 of **Constitution of Barbados 1966**), Belize (s 1 of the **Belize Constitution Act 1981**), and Guyana (Art 8 of the **Constitution of the Co-operative Republic of Guyana, 1980**), the constitution is the supreme law. In all three jurisdictions, the minimum expectation is that core constitutional values and principles must influence and be applied by all public bodies, agencies, and authorities. The CCJ has consistently confirmed that this is so (see the judgments of ***Attorney General v Joseph*** **[2006] CCJ 1 (AJ) (BB)**; ***The Maya Leaders Alliance v The Attorney General of Belize*** **[2015] CCJ 15 (AJ) BZ**; ***Nervais*** **[2018] CCJ 19 (AJ) (BB)**; ***McEwan and others v The Attorney General of Guyana*** **[2018] CCJ 30 (AJ) (GY)**;

Belize International Services Limited v The Attorney General of Belize **[2020] CCJ 9 (AJ) BZ S**; ***Solomon Marin Jr*** **[2021] CCJ 6 (AJ) BZ**; ***Calvin Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY**).

The judiciary is not an exception, and the expectation is that in the discharge of its core functions it will integrate and uphold these principles, also bearing in mind relevant and applicable international fundamental obligations and principles: ***The Attorney General of Guyana v Thomas & Jagdeo*** **[2022] CCJ 15 (AJ) GY**. In this way, the courts become and remain rule of law compliant.

Two fundamental constitutional values are the 'protection of the law' and 'fair hearing' principles: ss 11 and 18 of the **Constitution of Barbados 1966**; ss 3(a), 6(1) and 6(2) of the **Belize Constitution Act 1981**; and Arts 40 and 144 of the **Constitution of the Co-operative Republic of Guyana, 1980**. In regard to these, all three jurisdictions, in the context of criminal proceedings and under the guarantee of the protection of the law, specifically provide for an entitlement to 'a fair hearing within a reasonable time'. This demands that judiciaries and courts in relation to each case, and therefore court administrators and judicial officers, as well as all other state agencies that support court systems and the criminal justice system must, as a constitutional imperative, ensure both: (i) timeliness, and (ii) fairness throughout the criminal processes, from inception to final disposition.

2. Performance Standards

These two constitutional standards impose (i) quantitative, and (ii) qualitative performance standards on judiciaries, courts, court administrators, and judicial officers. In relation to the qualitative

performance standards, these speak to matters such as procedural fairness, therapeutic justice principles, and competence. Procedural fairness and therapeutic justice principles are addressed at Chapters **26** and **27** respectively. Competence is assured and sustained through continuing judicial education that is well funded, supported as essential to the core functions of judicial work, understood as integral to sustainable judicial reform and continuing improvement, and judge led. It is not limited to substantive legal competence, and includes the full range of judicial, inter-personal, administrative, and management skills competencies that are needed by judicial officers to meet constitutional standards of fairness and timeliness.

Quantitative performance standards are quintessentially the province of case and caseflow management, though qualitative standards are also essential. These quantitative standards are constitutional, non-negotiable performance standards, for which judiciaries as state institutions, and judicial officers as public officers, are to be held accountable. Indeed, at a secondary level, these are internationally recognised minimum ethical standards for judicial officers, that are also reflected in territorial judicial codes of conduct. See the United Nations Office on Drugs and Crime's **Bangalore Principles on Judicial Conduct** (2002).

3. Some Best Practices

These practices are built on and adapted from the National Centre for State Courts' Models for Court Caseflow Management and Effective Criminal Case Management Project (ECCM).

Management Principles

i. Judicial offices control the judicial process and are required to responsibly demonstrate leadership in doing so (from filing to final disposition).

ii. All cases are equally deserving of individual attention from beginning to end (sufficient to enable a fair and just outcome).

iii. For each case, attention and resource allocation are determined proportionately on the bases of need and capacity (caseloads, time, resources).

iv. All court users, parties, witnesses, attorneys etc are to be equally treated according to the norms and standards of procedural fairness (to maximize institutional and individual judicial legitimacy and systemic public trust and confidence).

v. Performance standards must be set, known, and met consistently.

vi. Both qualitative and quantitative performance standards must be established.

vii. Timeliness is a constitutional standard and essential for courts of excellence (which satisfies both protection of the law and due process rights).

viii. Judicial officers and court officials are responsible and accountable for meeting the performance standards set.

ix. Regular reviews of and shared feedback on judicial and court performance, based on predictable and measurable standards, must be implemented and consistently conducted and distributed.

x. Continuous judicial education is critical to effective and efficient case and caseflow management.

Note: Case and caseflow management are to be considered constitutional imperatives, as well as essential for establishing and sustaining high performing courts of excellence that meet societal needs and expectations. Judicial education and training are necessary supports, as is an underpinning statistical and institutional data collection and analytical capacity. The deployment of sufficient resources for case and caseflow management is required.

Establishing Performance Standards

i. Develop and design case process flow charts for the life cycles of matters, by identifying sequentially key events in the life cycle and activities relevant to each event.

ii. Develop time-based caseflow performance measures and indicators (benchmarks) based on say, typology, e.g., murders, sexual offences, kidnappings, drug offences, arms and ammunition offences, larceny etc.

iii. These time-based measures are to be linked to key procedural events (beginning with the first event in the life cycle) and would indicate the expected time that it should take to move from one event to another, continuously to final disposition. For example, for the assizes, the first event may be the date the indictment is filed, then the date of arraignment, then the date(s) for case management hearings (to plan the case and schedule interlocutory applications etc), then the time for determining all interlocutory matters, then the commencement of trial, then the time for verdict (and for a sentencing hearing if required), then a time for the delivery of reasons – final disposition.

Provided below is an example of a Model Case Life Cycle Event Process Time Flows (time standard to the next following event):

Event	Time for Completion
Indictment Filing Date	A days No. of days from Indictment to Arraignment
Date of Arraignment	B days
First Case Management	C days
Completion Interlocutory Matters	D days
Trial	E days
Verdict	F days
Sentencing	G days
Reasons	H days (Set outer limit time standards, e.g. 1 mth for standard; 3 mths for complex cases)
Total Time	Y days

iv. Establish clear, overall, time-based standards for the completion of the different categories of matters (based say on typology), from inception (the first event) to completion (the last event). The case life cycle event process time flows (above) must fit within these overall case completion time standards.

Provided below is a Model Case Completion Time Standards by Typology:

		Time to Disposition/Case Volume			
		50%	75%	90%	100%
Case Type	Murder	A mths	B mths	C mths	C + X-mths
	Sexual offences	A mths	B mths	C mths	C + X-mths
	Drug offences	A mths	B mths	C mths	C + X-mths

v. Establish **Differentiated Case Management (DCM)** performance standards. Account must be taken of the fact that cases differ substantially from each other in their complexity and in the time required for a fair and timely disposition. Some may be disposed of expeditiously, with very few intermediary events. Others may require extensive court supervision over a myriad of pre-trial processes, and activities. The fact is that all cases do not make the same demands on judicial system resources. Each case is unique. Case management requires judges to pay greater attention to methods for reducing delay, making the courts more accessible to the public, and improving predictability and certainty in calendar management. This concept has developed into systems of Differentiated Case Management (DCM), a technique courts can use to tailor the case management process and the allocation of judicial system resources to the needs of individual cases. A characteristic of this system is the development of different tracks that define procedures and events for disposing of different categories of cases (e.g. simple, standard, complex; or based on typology; or special circumstances). Differentiated case management will enable the court to prioritize cases for disposition based on case specific priorities, even for example the age or

physical condition of the parties or witnesses. For the purposes of classification, e.g., 'Simple' may refer to the completion of a hearing in 1 day, 'Standard' may refer to the completion of a hearing in 2 – 3 days, and 'Complex' may refer to the completion of a hearing in 4 days or more.

Provided below is a Model Case Completion Time Standards by Classification

		Time to Disposition/ Classification (DCM)		
		Simple	Standard	Complex
Case Type	Murder	x mths	y mths	z mths
	Sexual offences	x mths	y mths	z mths
	Drug offences	x mths	y mths	z mths

Note: Case life cycle timeframes and standards are an essential part of any effective and efficient case and caseflow management system. It is essential to set and enforce intermediate life cycle time standards as part of an effective case management strategy. It is also necessary to set and enforce completion time standards. Simply put, timeliness is integral for courts that aspire to perform at sustainable levels of high performance. Performance standards ought to be established as early as possible. They ought to be developed and reviewed periodically, and in a collaborative and iterative process, and should include judicial officers, registry staff, and court administrators. It is recommended that these performance standards be shared judiciary-wide and also made public, in satisfaction of transparency and accountability standards.

Measurement and Evaluation

Having identified, worked out, and specified (i) the main process occurring events and activities in the life cycle of a case, (ii) the relevant performance standards for time flows between events from filing to disposition, as well as (iii) overall case completion time standards, it is important that a process of measurement and evaluation be coupled with this information gathering tool.

Analysing and presenting to judicial and court officers and court administrators, performance results in an interpretable and compelling way by following the same process, allow courts and judicial officers to actively manage criminal cases to achieve their caseflow management goals. This data should be compiled, analysed, and represented periodically, e.g., annually, and shared publicly in annual reports and other publicly assessable spaces.

The development and deployment of measurement and evaluation tools and techniques ought to be managed and overseen by court administration, and in collaboration with judicial officers and the registry.

Outlined below are four key recommendations for continuous monitoring, measurement, and evaluation:

i. **Clearance Rates**

It is recommended that the court take action to ensure that they clear/dispose of at least as many cases as have been filed /reopened/reactivated in a period by having a clearance rate of 100% or higher.

Clearance Rate: the clearance rate is a measure of the files disposed as against the files commenced. It is a good measure of how many matters

have been disposed of during a particular period of time. Expressed as a percentage, the higher the percentage the more matters have been disposed of.

The calculation is performed as follows:

$$\text{\% Clearance Rate} = \frac{\text{Files Disposed}}{\text{Files Started}} \text{ X 100}$$

ii. **Number of Hearings to Disposition**

It is recommended that the court take steps to address any existing culture of adjournment which is contributing to the low clearance rates.

Average number of hearings per disposition: this is a measure of the number of hearings as compared to the number of matters disposed. Although this is not an indicator for specific files, it may be used as an indicator of the overall ratio of hearings to dispositions. It may also be used as an indicator of how efficiently court time is being utilized. The lower the average number of hearings to dispositions, the greater the efficiency in the use of court time.

It is calculated as follows:

$$\text{Average No. of Hearings per Disposition} = \frac{\text{No. of Hearings}}{\text{No. of Matters Disposed}}$$

iii. **Time to Disposition**

Time to Disposition answers the question: “What percentage of the cases disposed of were disposed of within the agreed and established performance time standards?” It calculates the length of time passed from case filing to case resolution, with the recommendation that the result

be compared to some stipulated or agreed upon case-processing time standard.

This measure is used together with the Clearance Rates and the Age of Active/Pending Caseload and is a useful tool to assess the length of time it takes a court to process cases. This measure can be used to compare a court's performance to its own standards, as well as the national guidelines for timely case processing.

iv. **Trial Date Certainty/Credibility**

The Trial Date Certainty Rate (also called Trial Date Credibility Rate) is calculated using the total number of Trial Dates and the number of Trial Dates which have been adjourned to calculate the ratio of trials which have been adjourned.

To calculate the certainty/credibility rate, subtract the number of adjourned trial dates (x) from the number of trial dates set down (y), then divide the result (z) by the number of trial dates set down.

Y – X = Z; Z ÷ Y = Certainty/Credibility Rate

or

(Y-X) ÷ Y = Certainty/Credibility Rate

Certainty/credibility trial date (no adjournments) = a certainty/credibility rate of 1

A number less than 1 indicates that trials have been adjourned. The lower the number the lower the trial date certainty/credibility. If the result

is a negative number, it means there are more adjournments than trial dates set; this is the worst-case scenario.

For the qualitative performance standards, a similar approach can be taken, and the chapter on Procedural Fairness describes some measurement and evaluation tools. See also, P Jamadar and E Elahie, **Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago** (Judiciary of Trinidad and Tobago, 2018) and P Jamadar, K J Braithwaite, T Dassrath, and E Elahie, **Procedural Fairness A Manual A Guide to the Implementation of Procedural Fairness in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago** (Judiciary of the Republic of Trinidad and Tobago, 2018).

4. Judges' Model Checklist for Case Management and Preparation of Decisions

As an aid to facilitating the effective and efficient management and timely delivery of judgments in criminal matters, the following checklist template is offered for consideration. It was developed by the Caribbean Association of Judicial Officers, after consultation with select regional judicial officers who are subject matter experts, and after reflecting on and incorporating feedback from a regional workshop that explained and demonstrated its intent and use.

This generic template is intended to facilitate structure, organization of materials, accuracy of the record, clarity around facts and law, and general efficiency and effectiveness in the management of judge alone proceedings, and the writing of reasons/ judgments in a timely manner. The aspiration is to ensure compliance with constitutional, ethical, and

institutional qualitative and quantitative performance standards in the conduct of judge alone trials. Fulfilment of these standards can eradicate delay, improve case disposition rates, increase respect, regard, and belief in the authority of courts, judicial officers, and the rule of law, and as well enhance public trust and confidence in criminal justice systems.

It must be emphasised that this template is a generic one and should be adapted to suit the particular laws and needs of your jurisdiction. Statements of principle are not authoritative and are only intended as prompts to trigger inquiry. Please confirm the legal correctness of all formulations for your jurisdiction.

Explanatory Note

The intention and purpose of this checklist template is to help judges and their teams manage judge alone criminal trials effectively and efficiently, and as well to support the timely delivery of decisions. It tries to do so in several ways. Organizationally, it creates fourteen discreet sections which follow, generally, the sequential unfolding of a criminal trial, and a fifteenth which has general application. In this way, it serves as a practical checklist of best practices and relevant considerations. It allows for case specific information to be extracted and placed in the template prior to, during, and at the end of a matter, and for this information to be easily and readily accessible and available.

Strategically, it facilitates effective and efficient case and caseflow management, as all relevant steps are easily identifiable, as well as relevant observations and notes. It also facilitates timeliness in the hearing and disposition of matters, as the information recorded addresses issues that commonly arise in cases and encourages preliminary assessments of relevant considerations, facilitating efficient decision making.

Professionally, it supports competence and public trust and confidence.

Having a checklist and a single template that organizes all relevant information both sequentially and in an issue-driven manner allows for improved thoroughness and accuracy in both case management and disposition. All these considerations support the fair hearing and timely disposition constitutional benchmarks and standards. Finally, this checklist template may be used in electronic or hard copy formats.

Checklist Contents

SECTION A: CASE MANAGEMENT DETAILS

	PARTICULARS	NOTES
Case Number		
Name of Defendant		
Offence/Charge		
Special Circumstances of the Defendant		Examples: Disabilities, vulnerabilities, age, interpretation needed etc. Considerations of whether the defendant may be a victim-survivor of sexual exploitation, forced labour, domestic servitude, human trafficking, other forms of modern slavery.
Special Trial Needs		Examples: Open court, in-camera, screens, victim support
Format of Trial		Examples: In-person, Virtual, Hybrid/ Blended
Visit to the locus in quo		
Interlocutory Applications or Motions		Examples: Motion to Quash, Amendment to the Information
Voir dire		

SECTION A: CASE MANAGEMENT DETAILS

	PARTICULARS	NOTES
Plea Discussions		
Trial Commencement Date		
Goodyear/ SI/ MSI See Sentencing Exercise		

Navigation:

SECTION B: CHRONOLOGY

	PARTICULARS	NOTES
Date of Incident/ Allegation/ Offence		
Date of Arrest		
Date of Charge		
Date Indictment Filed		
Date of Arraignment		
Plea	☐ **Not Guilty** ☐ **Guilty** **See Sentencing Exercise**	
Bail Details		
Interlocutory Applications or Motions		Details and outcome, e.g. Bad Character, Amendment of Information/Complaint, Severance, Fitness to Plead.
Commencement of Trial		Example: Note whether there was an opening address etc.
Order of Prosecution Witnesses		List names of witnesses and dates of testimony
Close of Prosecution's Case		
No Case Submission		
Case for Defence		List names of witnesses and dates of testimony

SECTION B: CHRONOLOGY

	PARTICULARS	NOTES
Close of Defence's Case		
Verdict		
Disposition date		

Navigation:

SECTION C: THE OFFENCE (LAW)

	PARTICULARS	NOTES
Statement of Offence		
Particulars of Offence		
Applicable Law		Examples: Statute, common law.
Actus reus The voluntary act or omission that comprises the physical element of the offence		Identify relevant witnesses and exhibits
Mens rea The mental element of the offence, which may involve intent, or (less culpably) negligence or recklessness.		Identify relevant witnesses and exhibits

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SECTION D: GENERAL DIRECTIONS IN LAW

	PARTICULARS	NOTES
Burden of Proof		The general rule is that the burden of proof rests on the Prosecution.
Standard of Proof		The general rule is that the Prosecution must make the fact-finder sure of the guilt of the/each defendant.
Reverse Burden and Standard of Proof		Example 1: Where statute or circumstance reverses the legal burden as an exception to the general rule (e.g. a negative averment or a matter peculiarly within their knowledge), the standard of proof is on a balance of probabilities (it is more likely than not). Example 2: Where the defendant raises certain defences, the burden of disproving them to the criminal standard remains on the Prosecution.
Assessing Credibility		Determine if the evidence is credible/believable and reliable and if so, what weight is to be attached. Consider consistent and corroborating evidence which supports veracity and reliability, as well as conflicting and contradictory evidence which cause doubt about veracity and reliability. Resolve all conflicts. Be fair and even-handed and clearly state why you believe/ disbelieve a witness/part of their evidence.

SECTION D: GENERAL DIRECTIONS IN LAW

	PARTICULARS	NOTES
Drawing Inferences		This is the process by which you draw a conclusion of fact from some evidence you regard as reliable. (Guard against speculation.)
Documentary Evidence		
Expert Opinion Evidence		These are intended to be objective, unbiased opinions of a technical or scientific nature, from a witness with specialist knowledge, experience, and skills within their area of expertise, whether paid/not. While you cannot substitute your own views, you can still, after careful consideration, choose whether to accept the expert's opinions in whole/part, and what weight to attach, if any.
Warning Against Speculation and Assumptions		You must be cautious against making unwarranted, uninformed, or biased assumptions about the behaviour or demeanour of the complainant, defendant, or witnesses.
Impact of Delay		Allowances should be made for the fact that generally, the longer the time since an alleged incident, the more difficult it may be for accurate recollection.

SECTION D: GENERAL DIRECTIONS IN LAW

	PARTICULARS	NOTES
Silence		The defendant is entitled to remain silent and call no witnesses, without adverse inference or consequence. They remain innocent until proven guilty. They do not have to prove their innocence. This is subject to statutory or other exceptions which permit adverse inferences to be drawn in the face of silence.
Other Factors		

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SECTION E: EVIDENCE

Matters Not in Dispute						
	YES/ NO	**PROSECUTION'S CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
	☐ Yes ☐ No					Example: Formal Admission
	☐ Yes ☐ No					
Matters in Dispute						
	YES/ NO	**PROSECUTION'S CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
1. Identification (see **Identification** below for details)	☐ Yes ☐ No	Eyewitness	☐ Yes ☐ No			Example: Identify the witnesses
		ID Parade	☐ Yes ☐ No			
		Confrontation	☐ Yes ☐ No			
		DNA	☐ Yes ☐ No			
		Voice Identification	☐ Yes ☐ No			
		CCTV Footage	☐ Yes ☐ No			
		Visual/ Photograph	☐ Yes ☐ No			

SECTION E: EVIDENCE						
Matters in Dispute						
	YES/ NO	**PROSECUTION'S CASE**		**STRENGTHS**	**WEAKNESSES**	**NOTES**
		Other	☐ Yes ☐ No			
2. Out of Court Statements (see **Section F** below for details)	☐ Yes ☐ No					
3. Direct	☐ Yes ☐ No	Witness 1				
		Witness 2				
		Witness 3				

SECTION E: EVIDENCE					
Matters in Dispute					
	YES/ NO	**PROSECUTION'S CASE**	**STRENGTHS**	**WEAKNESSES**	**NOTES**
4.Circumstantial	☐ Yes ☐ No				Prosecution seeks to prove separate events and circumstances which can, together with other facts, only be reasonably explained by the guilt of the defendant. Identify the specific events and circumstances, indicate if you accept them, consider evidence which may rebut them. Attach weight, if any, only if accepted.

SECTION E: EVIDENCE					
Matters in Dispute					
	YES/ NO	**PROSECUTION'S CASE**	**STRENGTHS**	**WEAKNESSES**	**NOTES**
5. Expert/ Scientific	☐ Yes ☐ No				
6. Exhibits	☐ Yes ☐ No				Identify relevant witness
7. Other	☐ Yes ☐ No				Explain

SECTION E: EVIDENCE			
Material Inconsistencies on the Prosecution's Case			
	STRENGTHS	**WEAKNESSES**	**NOTES** How has the inconsistency been resolved?
1.			
2.			
3.			
4.			
5.			

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SECTION F: OUT OF COURT STATEMENTS

	CHECK	PARTICULARS	ADMISSIBILITY	RELIABILITY	NOTES
Indicate which of the below the State/ Prosecution is relying on		*Name of Witness* *Exhibit Label Inculpatory/ Exculpatory/ Mixed*	*Voluntariness* *Breaches of Judges' Rules Fairness*	*Contents of the statement can be relied upon if accepted as true*	*Was the admission made? Is it true? What weight attaches, if any?*
Written Statement Under Caution	☐ Yes ☐ No				
Interview Notes	☐ Yes ☐ No				
Electronic Interview	☐ Yes ☐ No				
Oral Utterances to Police	☐ Yes ☐ No				
Admission to Other Persons	☐ Yes ☐ No				
Other	☐ Yes ☐ No				

SECTION F: OUT OF COURT STATEMENTS

	CHECK	PARTICULARS	ADMISSIBILITY	RELIABILITY	NOTES
Mushtaq Direction?	☐ Yes ☐ No				Where you believe that the statement was made, that it is true, but you conclude that it was or may have been obtained or was induced by oppression or in consequence of something said or done to render it unreliable, you must disregard it.
	NOTES				
Ruling: Reasons required at time of ruling on a voir dire.	Exercise care in relation to the extent to which reasons given can create the impression of prejudgment, prejudice, or bias. Consider whether it is necessary to give reasons at all, or to reserve until the final determination of the matter. Consider whether to accept the statement conditionally and reserve decision as to admissibility until the determination of the matter. Consider whether another judge should continue the hearing of the matter.				

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SECTION G: IDENTIFICATION

	CHECK	EVIDENCE	STRENGTHS	SPECIFIC WEAKNESSES	NOTES
Nature of Identification Evidence		*Name of Witness Summary*			
Identification of a Stranger **(See Turnbull Assessment)**	☐ Yes ☐ No				It is possible for an honest, even very convincing witness to be mistaken. Mistakes in identification are a human possibility and sometimes, quite innocently so.
Recognition **(See Turnbull Assessment)**	☐ Yes ☐ No				Recognition of someone you know is more reliable than identification of a stranger. However, even then, it is possible to be honestly mistaken about someone you have known for years and quite well.

SECTION G: IDENTIFICATION

	CHECK	EVIDENCE	STRENGTHS	SPECIFIC WEAKNESSES	NOTES
Visual/ Photographs	☐ Yes ☐ No				Are they helpful in understanding the evidence of the witnesses? What weight attaches, if any?
CCTV/Video	☐ Yes ☐ No				Is it helpful in understanding and strengthening the evidence of the witnesses? What weight attaches, if any?
Voice	☐ Yes ☐ No				Lay listeners, scientific acoustic opinion, familiarity, duration of speech
DNA	☐ Yes ☐ No				Scientific terms, match probability, prosecutor's fallacy.
Fingerprints	☐ Yes ☐ No				Ridge similarities, clarity, expert opinion
Other	☐ Yes ☐ No				Examples: use of social media, facial mapping

SECTION G: IDENTIFICATION		
Turnbull Assessment		
	PARTICULARS	**NOTES**
	Opportunity to register and record features *Reliability of recall*	*Fleeting glance, good quality, poor quality*
How long was the period of observation?		
At what distance?		
In what light?		
Was the observation impeded?		
Has the witness ever seen the defendant before?		
How often?		
If only occasionally, had there been any special reason for recall?		

SECTION G: IDENTIFICATION		
Turnbull Assessment		
	PARTICULARS	**NOTES**
Time elapsed between original observation and subsequent identification		
Any material discrepancy between first description and actual appearance?		
Is it supported/corroborated by any other evidence?		
	PARTICULARS	**NOTES**
1.		
2.		

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SECTION H: NO CASE SUBMISSION

	DEFENCE ARGUMENTS	PROSECUTION REPLY	RULINGS/ REASONS	NOTES
First Limb of Galbraith				There is no evidence to prove an essential element of the offence.
Second Limb of Galbraith				The evidence adduced by the Prosecution has been so manifestly discredited or is so weak that it cannot conceivably support a guilty verdict. Credibility issues do not normally result in a finding that there is no case to answer.

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SECTION I: SPECIAL CONSIDERATIONS OR DIRECTIONS

	PARTICULARS	NOTES
Corroboration Warning		Relevant, admissible, and credible evidence which is independent of the source requiring the corroboration and which implicates the defendant.
Joint Enterprise		Principal and Accessory liability. Considerations of joint participation and joint principals. Considerations also of aiding, abetting, counselling, procurement.
Accomplice		Do the circumstances of the case, issues raised, and the content and quality of the witness's evidence require a special care/ caution warning?
Lucas Direction		Is it necessary? If yes: 1. the lie must be deliberate; 2. the lie must relate to a material issue; 3. the motive for the lie must be a realisation of guilt and a fear of the truth; and 4. the statement must be clearly shown to be a lie by admission or by evidence from an independent witness.

SECTION I: SPECIAL CONSIDERATIONS OR DIRECTIONS

	PARTICULARS	NOTES
Post-offence Conduct		1. Is it relevant? 2. Did the defendant actually do or say those things? 3. If you are sure they did, consider any explanation in the context of all the evidence, because they may have done so for a reason other than guilt. 4. If you are sure that it is not for some other reason, then you can consider it together with all the other evidence in deciding its weight and whether the defendant is guilty.
Evidence of Children		The law regards children as being particularly vulnerable. Their evidence must be approached in a careful fashion. In assessing the evidence of a child, have regard to the age and maturity of the child; the child's capacity to observe, recollect, understand, answer intelligently; and the child's sense of moral responsibility.
Persons with Disabilities and Vulnerabilities		

SECTION I: SPECIAL CONSIDERATIONS OR DIRECTIONS

	PARTICULARS	NOTES
Sexual Offences		General caution against bias, stereotypes and behavioural assumptions e.g., the ideal victim.
Any Others		

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SECTION J: DEFENCE'S CASE

	CHECK	PARTICULARS	STRENGTHS	WEAKNESSES	NOTES
Did the Defendant					
Remain Silent	☐ Yes ☐ No				Right to remain silent – in principle, no adverse inferences
Dock Statement	☐ Yes ☐ No				Having made an unsworn statement from the dock, as is their right, the defendant enjoys immunity from cross-examination and for that reason, it may be less cogent than sworn evidence. It is material which may be considered and may show the evidence in a different light. It cannot establish facts, not otherwise proved by evidence.
Give Sworn Testimony	☐ Yes ☐ No				The defendant must be assessed for credibility by the same standard as any other witness who gives sworn evidence.
Adopt Out of Court Statement (or exculpatory parts)	☐ Yes ☐ No				Consider the statement as a whole. Note that it is usually assumed that the incriminating parts are likely to be true, otherwise, why say them, whereas denials and explanations may not have the same weight.

SECTION J: DEFENCE'S CASE

	CHECK	PARTICULARS	STRENGTHS	WEAKNESSES	NOTES
Special Defence (See section on Special Defences)	☐ Yes ☐ No				Consider Burden of Proof and Standard of Proof.
Call any Witnesses	☐ Yes ☐ No				Consider overall credibility, relevance, and support for Defence's Case in raising reasonable doubt, or disproving material aspects of the Prosecution's case.
Put their case during Cross Exam-ination	☐ Yes ☐ No				What is put to a witness is not evidence; rather, it is the witness's answer that is the evidence.

SECTION J: DEFENCE'S CASE

Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Duress				Once the Defence raises duress, it is for the Prosecution to disprove it. a) Was the defendant threatened? b) Was the defendant threatened in a way that they believed that they, or their immediate family, or someone for whom they felt responsible, would be subject to immediate (or almost immediate) death or serious violence and there was no reasonable avenue open to the defendant to avoid the threat/s? c) Was/Were the threat/s the direct cause of the defendant's actions? and d) Would a sober person of reasonable firmness of the defendant's age, sex, gender, and character have been driven to act as the defendant did?

SECTION J: DEFENCE'S CASE

Special Defences

	PARTICULARS	STRENGTHS	WEAKNESSES	NOTES
Self-defence Provocation				a) Was the defendant provoked into losing their self-control? And b) Would a reasonable person have reacted to the same provocation in the same way as the defendant did?
Alibi				There is no burden on a defendant to prove that they were elsewhere. Rather, it is the Prosecution who must prove their case beyond reasonable doubt. Disbelief in or rejection of an alibi does not lead to an assumption of guilt.
Insanity				Was the defendant labouring under such a defect of reason, from a disease of the mind, as not to know the nature and quality of the acts they were doing, or that what they were doing was wrong?

SECTION J: Defence's Case				
Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Diminished Responsibility				a) Did the defendant, at the time of the commission of the offence, suffer from an abnormality of mind? b) Did the abnormality of the mind stem from either a condition of arrested or retarded development of the mind, or any inherent cause, or was it induced by disease or injury? and c) Did the abnormality of mind substantially impair their mental responsibility for what they did (i.e. the acts or omissions which caused the death)?

SECTION J: Defence's Case

Special Defences				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
Accident				In offences which require an intent to produce a certain consequence to be established in order to prove guilt, 'accident' that negates the requisite intentionality may be raised as a defence in some circumstances.
Others				

Aspects of the Prosecution's Case that Support or Corroborate Defence's Case				
	PARTICULARS	**STRENGTHS**	**WEAKNESSES**	**NOTES**
1.				
2.				

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SECTION K: GOOD CHARACTER				
	CHECK	**PARTICULARS**	**WEIGHT**	**NOTES**
Is the Defendant entitled to a Good Character Direction?	☐ Yes ☐ No If Yes ☐ Full ☐Modified			No obligation to give absurd or meaningless directions. Notwithstanding good character a person can still commit a crime.
Credibility Limb				A person of good character is more likely to be truthful.
Propensity Limb				A person of good character is less likely to commit a crime, especially of the nature charged.

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SECTION L: BAD CHARACTER					
	CHECK	**PARTICULARS**	**ADMISSIBILITY** Is it admissible? Reasons on the record.	**EFFECT/ WEIGHT**	**NOTES**
Does an issue of Bad Character arise in the proceedings?	☐ Yes ☐ No				
In relation to the Defendant?	☐ Yes ☐ No				
Does the evidence amount to bad character?	☐ Yes ☐ No				
Which Gateway?					
Credibility Limb	☐ Yes ☐ No				
Propensity Limb	☐ Yes ☐ No				

SECTION L: BAD CHARACTER					
	CHECK	**PARTICULARS**	**ADMISSIBILITY** Is it admissible? Reasons on the record.	**EFFECT/ WEIGHT**	**NOTES**
Is it in relation to a Non-defendant?	☐ Yes ☐ No				
Which Gateway?					Note the Enhanced Relevance Test. Avoid satellite issues. Consider the reputation of the dead.

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SECTION M: VERDICT	
	PARTICULARS/REASONS
Guilty	
Guilty of a Lesser Count	
Not Guilty	

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Section P: Re-Victimisation and Non-Punishment

SECTION N: SENTENCING EXERCISE

	PARTICULARS		NOTES
Charge/Count	Name of Charge		Maximum Penalty:
Separate Hearing			Consider what evidence and information is needed to conduct a fair and just sentencing hearing.
Range/Starting Point (relative to offence only)	Aggravating Factors 1. 2.	Mitigating Factors 1. 2.	Relevant precedents: Range: Starting Point:
Factors Relevant to Offender (upward/ downward or no adjustment)	Aggravating Factors 1. 2.	Mitigating Factors 1. 2.	Adjustment:
Guilty Plea Discount (justify if more or less than one third)			
Discount for Time Spent			
Pre-sentencing Reports			Examples: Probation Reports, Psychosocial Reports

SECTION N: SENTENCING EXERCISE		
	PARTICULARS	**NOTES**
Victim Impact Statements		Consider whether a victim impact statement is useful, both to the sentencing process and decision, and from a therapeutic justice perspective.
Other Relevant Considerations		

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SECTION O: SENTENCE		
	PARTICULARS	**NOTES**
Count 1		Custodial – Concurrent/ Consecutive. Non-custodial - Default
Count 2		
Ancillary Orders		Examples: Compensation, counselling, anger management, community service, referrals to specialist, Restorative Justice courts, tribunals such as Drug Treatment Courts.

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SECTION P: RE-VICTIMISATION AND NON-PUNISHMENT

Relevant throughout the entire process, with both procedural and substantive implications

	CHECK	PARTICULARS	STRENGTHS	WEAKNESSES	NOTES
Consider whether the defendant may be a victim/ survivor of Human Trafficking, Modern Slavery, Sexual Exploitation, Domestic Servitude, or Forced Labour	☐ Yes ☐ No				
Re-victimisation Possibilities	☐ Yes ☐ No				
Non-punishment Applicability	☐ Yes ☐ No				

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Chapter 25
Judge Alone Trials

1. Introduction

The introduction of judge alone trials for criminal matters in the High Courts of the Common Law Caribbean jurisdictions has been incremental, both in terms of jurisdictions which have done so, and as well as within jurisdictions in relation to the types of matters for which they are available, either as an option or compulsorily. The following Caribbean states have all introduced judge alone trials in some form: Jamaica; Belize; Trinidad and Tobago; Cayman Islands; Turks and Caicos Islands; Antigua and Barbuda. Among Barbados, Belize, and Guyana, as of 30 June 2022, only Belize has introduced judge alone trials. Their status in Barbados

and Guyana is as set out below. However, all indications are that both Barbados and Guyana will sooner or later, and to varying extents, move towards introducing judge alone trials.

Before the advent of trials by jury, English criminal courts engaged in trial by ordeal, in which the guilt or innocence of the defendant was determined by subjection to dangerous or painful tests (such as ordeal by hot water, by hot iron, by submersion in water) believed to be under divine control. In June 1215, the Magna Carta was promulgated and it provided for trial by juries and judgment by peers in England. In November 1215, Pope Innocent III convoked the Fourth Council of the Lateran, which among other things, banned trial by ordeals. However, even before the Magna Carta, juries were known in England under King Henry II (1154-1189). Some scholars believe that the jury system may likely have had some originating sources in Islamic law practiced in Sicily, which at the time was a Norman Kingdom with strong relations between its Kings and Henry II (see John A Makdisi, **The Islamic Origins of the Common Law** (1999) 77 NCL Rev 1635).

Juries in those days were witnesses who had knowledge of the committed crime. They informed a travelling judge of the facts, and the judge decided the law. This was an economical system which did not require many judicial officers. This jury of witnesses evolved into the jury systems that we know today.

Many Commonwealth countries have introduced trials without juries. There are several states in the civil law that do not have any form of jury trial. Other states use a collaborative court model of lay adjudicators, a jury, sitting alongside professional judges in criminal matters. At this time in our region, six Commonwealth Caribbean countries have to a certain extent introduced judge alone trials. St Lucia is in the process of drafting

legislation to introduce judge alone trials. However, the approaches to judge alone trials in the Caribbean vary. In Belize, for example, judge alone trials are mandatory with regard to certain offences and discretionary in relation to some others, whereas in other countries such as Trinidad and Tobago, it is available for all indictable offences provided that the defendant elects to choose a judge alone trial.

The shift to judge alone trials is prompted by many factors, including challenges faced in jury trials. In 2020, Saunders PCCJ highlighted some of these challenges in the Belizean case of ***Flowers*** **[2020] CCJ 16 (AJ) (BZ)** at [58], where he opined:

> Jury trials have actually become somewhat fraught. Many Commonwealth countries have abolished this mode of trial. That jurors are absolved from giving reasons for their verdicts does not sit well with society's increasing emphasis on transparency. Today, all manner of information is easily and readily available to jurors. It is impossible to ensure that at least some of them will not be improperly influenced by material they access, whether inadvertently or otherwise, that is pertinent to the trial or the accused. Jury management is expensive and onerous. And jury tampering and juror intimidation have been a problem in some States.

In fact, some forty years ago in 1980, a High Court judge in Bermuda, in a bold and courageous innovation, attempted to hear a criminal matter without a jury because of the difficulty in assembling an impartial jury in a small island state. However, the Court of Appeal in ***Re: Palmer, Ernest Sinclair*** **BM 1980 CA 21** discussed in Ramesh Deosaran's, **Trial by jury**

in a post-colonial multi-racial society (1981) The Lawyer 5, at 9, was unequivocal in denouncing this initiative: 'There has been, and there is now, only one method of trying persons committed for trial at the Supreme Court and that is by a judge sitting with a jury.'

Yet the concerns of the Bermudian judge were clearly prescient. As long ago as 1937, the American jurist, Oppenheimer, in **Trial by Jury (1937) 11 U Cin L Rev 119**, at 142, had this to say:

> We commonly strive to assemble 12 persons colossally ignorant of all practical matters, fill their vacuous heads with law which they cannot comprehend, obfuscate their seldom intellects with testimony which they are incompetent to analyse or unable to remember, permit partisan lawyers to bewilder them with their meaningless sophistry, then lock them up until the most obstinate of their numbers coerce the others into submission or drive them into open revolt.

Some Essential Guidelines

In a criminal judge alone trial, judges no longer sum up to a jury, but instead must produce a written reasoned judgment. There are seminal differences in jury trials and judge alone trials that affect the practice, procedure, and process of case management and judgment writing. In the High Court case from Antigua and Barbuda, ***Powell*** **[2022] ECSC J0112-1**, at [7], Williams J stated: 'In a Judge-alone trial, or a 'Bench Trial', a Judge sits without a jury. The Judge is both the Judge of the law and the forum of fact'.

Judge alone trials are still a relatively recent phenomenon in Caribbean criminal courts, though there are exceptions, as for example, the Jamaican Gun Court. The law is constantly evolving in this area, as is to be expected whenever a new process is introduced. What follows is a summary of the available and accessible case law developments with a focus on appellate decisions. Care needs to be taken to ensure compliance with any jurisdictionally prescribed requirements. This caution is necessary, as the jurisdiction for judge alone trials has been established regionally based on statutory underpinnings.

2. Burden and Standard of Proof

Both judge alone trials and jury trials have the same burden and standard of proof requirements. Williams J in the Antigua and Barbuda High Court case of ***Blanchette*** **[2021] ECSC J0715-1**, stated at [28]:

> Even though this was a 'Bench Trial', conducted by a Judge-alone, sitting without a jury...the burden of proof and the standard of proof remain the same as they were and are in every criminal case. It is the Crown that has the responsibility of satisfying the forum of fact that it was the Defendant who committed the offence as alleged; and the Crown can only do so by making the forum of fact feel sure of the Defendant's guilt.

3. Fact Finding

The CCJ in ***Salazar*** **[2019] CCJ 15 (AJ)** at [35], explained in summary the process of fact finding in a judge alone trial:

> As a rule, the judge will consider the prosecution's evidence first. If that evidence seems strong enough to carry a conviction, the judge will consider the evidence of the defence. The judge will then look at the totality of the evidence to reach a final decision. It is there where the intercommunication and overlapping take place. It is after this polymorphic process that the judge needs to arrange his or her judgment in a logical order which will not always be able to reflect the complicated thinking process as such.

4. Impartiality and Fairness

In judge alone trials, a judge has to be aware of guarding against the appearance of bias and being able to demonstrate that they are keeping an open mind. The Caribbean Court of Justice ('CCJ') decision in the Belizean case of ***Manzanero*** **[2020] CCJ 17 (AJ) BZ**, was concerned with the trial judge's role and the importance of fairness in judge alone trials. The court at [18], stated: 'Attention should therefore be given to ensuring that defendants receive from a judge sitting alone a trial that appears to be no less fair than they would have received at a jury trial.'

Duty to Give Reasons

Unlike juries, a judge conducting a trial without a jury must give reasons for their decision, whether it results in a conviction or an acquittal. In a jury trial, the safeguards for the lack of reasons are found in the strict rules of admissibility and in the summation to the jurors, which provide them with 'clear, precise, sometimes even detailed directions on the legal issues and on the (rules of) evidence. It is to be assumed that jurors usually understand and follow these directions and will do their level best to reach a fair decision, thus satisfying the relevant constitutional requirements: ***Salazar*** at [26].

In ***Public Service Board of NSW v Osmond*** **(1986) 159 CLR 656**, it was explained that reasons are important, as justice must not only be done but also be seen to be done. The extent of the duty to give reasons varies according to the nature and circumstances of the case and decision. The CCJ in ***Salazar*** at [27], quoted the case of ***Taxquet v Belgium*** **(Application No 926/05)** at [91], to provide the following useful clarification:

> In accordance with the European Court of Human Rights, reasoned judgments oblige judges to base their reasoning on objective arguments, and also preserve the rights of the defence. However, the extent of the duty to give reasons varies according to the nature of the decision and must be determined in the light of the circumstances of the case…While courts are not obliged to give a detailed answer to every argument raised …it must be clear from the decision that the essential issues of the case have been addressed.

The Court of Appeal of Northern Ireland in ***Thain*** **[1985] NI 457** at 478, provided the following useful guidance on the extent of a judge's duty to give reasons:

> Where the trial is conducted and the factual conclusions are reached by the same person, one need not expect every step in the reasoning to be spelled out expressly, nor is the reasoning carried out in sealed compartments with no intercommunication or overlapping, even if the need to arrange a judgment in a logical order may give that impression. It can safely be inferred that, when deliberating on a question of fact with many aspects, even more certainly than when tackling a series of connected legal points, a judge who is himself the tribunal of fact will (a) recognise the issues and (b) view in its entirety a case where one issue is interwoven with another.

With respect to the duty of the judge giving judgment in a bench trial, the Court of Appeal of Northern Ireland in ***Thompson*** **[1977] NI 74** at [83], also stated:

> He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that

> if there is an appeal, it may be seen how his view of the law informed his approach to the facts.

The Court of Appeal of the Cayman Islands in ***Richards*** **(2001) CILR 496**, stated at [32]:

> When a trial judge sitting alone has advised himself of the applicable principles of law and given himself any necessary warning, he must indicate clearly in his judgment his reasons for acting as he did, in order to demonstrate that he has acted with the requisite degree of caution in mind and therefore heeded his own warning. No specific form of words is necessary for this demonstration, "what is necessary is that the Judge's mind upon the matter should be clearly revealed".

See also ***Simpson, Powell*** **[1993] LRC 631** at 641, per Downer, JA.

In ***Megrahi v HM Advocate*** **2002 JC 99**, the High Court of Justiciary in Scotland concluded at [18]:

> In our view these observations are relevant to a written judgment under article 5 (6) of the Order in Council by which, in similar language, the trial court is required to state "the reasons for the conviction". It is plain that reasons do not require to be detailed; that the trial court does not have to review every fact and argument on either side; and that reasons do not require to be given for every stage in the decision-making process.

Similarly, in the case ***Chiu Nang Hong v Public Prosecutor*** **[1964] 1 WLR 1279**, the court stated at 1285:

> For in such a case a judge, sitting alone, should, in their Lordships' view, make it clear that he has the risk in question in his mind, but nevertheless is convinced by the evidence, even though uncorroborated, that the case against the accused is established beyond any reasonable doubt. No particular form of words is necessary for this purpose: what is necessary is that the judge's mind upon the matter should be clearly revealed.

Therefore, where a court does not address its mind to a specific fact or matter may not be fatal to the court's conclusion. In the case ***Bekoe v Broomes*** **[2005] UKPC 39**, the Privy Council quoted with approval, Jones JA, at [14]: 'While he [the trial judge] had not stated in his reason that he had given consideration to the matters raised in this appeal by attorney for the Appellant, it cannot be said that they were so compelling that his failure to detail his view on them was fatal to the conclusion to which he came.' The Board commented further at [14], saying:

> Their Lordships regard this expression of opinion as quite supportable and would add in parenthesis that a judge sitting without a jury does not necessarily have to review every fact and argument presented to him. His function is to reach conclusions and give reasons to support his view, not to spell out every matter as if summing up to a jury: cf *R v Thompson* [1977] NI 74, 83, per Lowry LCJ.

These principles were approved in the Cayman Islands case of ***Martin* (Cayman Islands CA, Criminal App No 2 of 2010)**. In this case, the appellant appealed against conviction, alleging that the trial judge sitting without a jury only made brief reference to the evidence of one of the witnesses, in the context of a very short precis of the appellant's submission. It was further contended that the judge made no further finding of fact in relation to any of the evidence of another witness and for this reason, the conviction should be set aside. The court, at [31], summarised the guiding principles as follows:

> A judge sitting in a criminal case without a jury, in rendering his decision and giving his reasons for so concluding, is not required to review every fact and to detail each argument on which the prosecution and defence rely as if her were summing up to a jury. The judge must set out the conclusion reached and make clear the reasons for arriving at the conclusion. He is required to have regard to any difficult or unusual points of law and to show how those points of law have in anyway impacted the conclusion that he has reached.

Applying these principles, the court dismissed the appeal, as the reasons of the judge showed that he clearly appreciated the significance of the evidence relating to the witnesses and the submissions, but was convinced that the Prosecution had proved beyond reasonable doubt that the appellant was guilty.

Similarly, in ***Whittaker* [2010] (1) CILR 29**, the Court of Appeal of the Cayman Islands, in a case concerning burglary and aggravated burglary, had to consider whether the trial judge's failure to explicitly warn herself of why

there was a need for caution when dealing with identification evidence and that a mistaken witness could be a convincing witness, could render reasons flawed. The Court of Appeal held that in the circumstances of the case, the omission was irrelevant, as a judge sitting alone with no jury to direct, was under no obligation when giving judgment to state explicitly every proposition of law and review every fact or argument, but should set out their conclusion and supporting reasoning. The court also noted that the judge generally directed herself on the need for special caution, because identification was made in difficult circumstances, and she had closely examined the quality of each identification.

In ***Salazar*** at [29], the CCJ stated:

> Equally, a judge sitting alone and without a jury is under no duty to "instruct", "direct" or "remind" him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand.

5. Approach to be Taken by Appellate Courts

In ***Murray*** **[2015] NICA 54**, the Court of Appeal of Northern Ireland at [25], summarised the differences between jury and judge alone trials, and the appropriate approach of an appellate court to the reasons of a trial judge:

> …He [the trial judge] is not obliged to state every relevant legal proposition or review every fact or argument on either side. His task is to reach conclusions and to give reasons to support them view and to notice any difficult or unusual points of law. In general terms his obligation is to demonstrate how his view of the law informed his approach to the facts (R v Thompson **[1977] NI 74**). The principles which guide an appellate court in hearing an appeal from the decision of a judge sitting without a jury were summarised in four points by Lord Lowry LCJ in R v Thain **[1985] NI 457 at 474**, [1985] 11 NIJB 31, based on earlier observations by Lord Lowry in the Court of Appeal in Northern Ireland Railways v Tweed [1982] 15 NIJB.
>
> > "1. The trial judge's finding on primary facts can rarely be disturbed if there is evidence to support it. This principle applies strongly to assessments of credibility, accuracy, powers of observation, memory and general reliability of the witnesses.
> >
> > 2. The appellate court is in as good a position as the trial judge to draw inferences from documents and from facts which are clear but even here must give weight to his conclusion.

> 3. The trial judge can be more readily reversed if he had misdirected himself in law or if he has misunderstood or misused the facts and may thereby have reached a wrong conclusion. For this purpose his judgement may be analysed in a way which is not possible with a jury's verdict.
>
> 4. The appellate court should not resort to conjecture or to its own estimate of the probabilities of a balanced situation as a means of rejecting the trial judge's conclusion."

6. Elements Required in a Judgment

The following statements of opinion are informed by both general principles and statutory provisions. Care needs to be taken to ensure compliance with any jurisdictionally prescribed requirements. The cases cited are mainly from Jamaica, where the Court of Appeal has been clear that a trial judge in a judge alone criminal trial, has an obligation to demonstrate that they have sufficiently addressed their minds to the legal principles and warnings that are relevant and applicable to the case under consideration.

The court in ***Simpson, Powell*** **[1993] LRC 631**, outlines that the written reasons following a judge alone trial should include:

i. the applicable legal principles which govern the conduct of the particular case.

ii. the applicable warnings in relation to the special category of evidence.

iii. the evidence relied upon for the decision.

iv. the findings of fact and the inferences drawn.

A judge sitting without a jury ought to use plain words to indicate the applicable legal principles. It was pointed out in ***Balasal*** **(1990) 27 JLR 507** at [10], that it is 'the duty of a judge [sitting without a jury] in his summation in the Gun Court to indicate the principles applicable to the particular facts and demonstrate his application of those principles'. The failure to do this could result in the sentence being set aside and a new trial being ordered.

It is imperative that a judge sitting without a jury, in the reasons for the decision of the court, use words to illustrate that the relevant cautions and warnings were applied. Failure to do so may result in a conviction not being upheld on appeal. In the case of ***Cameron*** **(1989) 26 JLR 453**, it was held at 457, that a judge sitting without a jury must 'demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the defendant he has acted with the requisite caution in mind'.

In ***Donaldson*** **(1988) 25 JLR 274**, in dealing with the question of what was required of a judge sitting alone in the High Court Division of the Gun Court, trying a rape case in which there was no corroboration, the court said at 280:

> It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or

> principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one.

This issue again arose in ***Carroll*** **(1990) 27 JLR 259**, where it was said at 265:

> We hold that given the development of the law on visual identification evidence since the decision in R v Dacres (supra) in 1980, judges sitting alone in the High Court Division of the Gun Court, when faced with an issue of visual identification must expressly warn themselves in the fullest form of the dangers of acting upon uncorroborated evidence of visual identification. In this respect we hold that there should be no difference in trial judge and jury and trial judge alone.

In ***Simpson; Powell***, the court confronted with the same issue, stated at [6]:

> It is against this background of the requirement of a warning in clear terms, that the duties of a Supreme Court judge conducting a trial as judge of law and fact in the High Court Division of the Gun Court must be determined. That he must give reasons for his decisions is not in dispute. Just as the reasons delivered by a judge in civil proceedings differ from his summing-up to the jury, modifications also apply in the reasons for judgment in criminal proceedings. Merely to utter the warning and yet fail to show that the caution has been

> applied to the analysis of the evidence, will result in a judgment of guilty being set aside.

In ***Stewart*** **(1990) 27 JLR 19**, the Court had to consider what was required of the resident magistrate in stating his findings of facts in a case dealing with the uncorroborated testimony of a child. The Court concluded at 22:

> Section 256 of the Judicature Resident Magistrates Act requires that the resident magistrate gives a brief summary of the facts found. It does not require otherwise, but the authorities indicate that where the decision of the tribunal is governed by the application of settled legal principles, e.g., the desirability of corroboration, it must appear that the tribunals mind was adverted to it – *R. v. Donaldson* (supra). Even if there is a presumption that the judge knows the law there is no presumption as to its application.

In ***Campbell*** **(1992) 29 JLR 256**, the court said at 261:

> It is always important to view evidence of identification with caution. It is not enough for a trial judge or a resident magistrate to say that he or she is aware of the caution required in dealing with this particular type of evidence. It is as important to demonstrate that caution.

In ***Craigie*** **JM 1993 CA 54**, it was stated at [30]:

> It is important to make the point that in all of the cited cases the trial judges or the resident magistrate stated

> that they appreciated the need for the tribunal to warn itself of the dangers which were involved in dealing with evidence which fall within the category of special evidence. Notwithstanding this warning, the decisions clearly laid down that merely chanting the need for the warning, to proceed with caution was insufficient. The tribunal was required to go further and demonstrate in a reasoned way the application of the legal principles by a careful analysis and assessment of the evidence.

In ***Cross* JM 1994 CA 28**, Wolfe JA sitting in the Court of Appeal of Jamaica emphasized:

> The sole purpose of putting our reasons in writing is to re-emphasise, once again, the absolute necessity for judges sitting alone to demonstrate in their summing-up that they appreciate the need to warn themselves of the dangers associated with evidence of visual identification and, therefore, in the assessment of the evidence to approach it with caution.

The Court of Appeal in this case on appeal from the Gun Court, found that the judge sitting in the Gun Court did not do this and so the conviction was quashed, and verdicts of acquittal entered.

Failure to give a corroboration warning where required could also result in the conviction being quashed and the sentence set aside. In the case of ***Donaldson* (1988) 25 JLR 274**, the Court of Appeal of Jamaica, on appeal from the Gun Court, quashed the convictions for illegal possession of firearm and rape. The sentences were set aside.

In ***Richards*** **[2001] CILR 496**, the Cayman Islands Court of Appeal held that the trial judge was entitled to reject the exculpatory statements of the defendant by determining same as self-serving; to assign different weight to the evidence as deemed appropriate in the circumstances of the case; and to determine the truth of evidence before the court i.e., make findings of fact. To do this, the court must address its mind to the legal principles and warnings applicable to the evidence and to the relevant standards and burden of proof.

In Trinidad and Tobago, there is a statutory basis underpinning this obligation of a trial judge in a judge alone criminal trial, to demonstrate that they have sufficiently addressed their minds to the legal principles and warnings that are relevant and applicable. Section 42B of the **Criminal Procedure Act, Chapter 12:02, as amended by Act No 10 of 2017** (TT), specifies as follows:

> (1) When the case on both sides is closed in a trial by Judge alone, the Judge shall, as soon as reasonably practicable and in any event before the expiration of fourteen days, deliver his verdict and, in the case of a conviction, he shall give a written judgment stating the reasons for his verdict at the time of conviction.
>
> (2) A judgment by a Judge in any such case shall include the principles of law applied by the Judge and the findings of fact on which the Judge relied.
>
> (3) If any other law requires a warning to be given to a jury in any such case, the Judge is to take the warning into account in dealing with the matter.

The CCJ in ***Salazar***, suggests that the judge need not traverse every piece of evidence in detail as if summing up for a jury. The judge may just highlight the salient evidence relied upon.The judge must therefore take care to set out the findings of fact, the inconsistencies, how these inconsistencies were resolved, and the facts relied on in support of the verdict.

Although some regional jurisprudence emphasises that the trial judges in a bench trial must show the fact that they are aware of and follow up on certain necessary warnings, cautions etc, a question arises whether to impose a formulaic obligation on a judge in a judge alone trial 'to warn, caution, instruct, direct, or remind' themselves, is apposite. ***Salazar*** suggests that this may be language that properly belongs in a jury trial and not to a bench trial. For example, consider whether instead of being expected to write, 'I warn myself of the dangers of acting upon uncorroborated evidence of visual identification', a judge could write, 'This court is fully aware of the dangers of acting upon uncorroborated evidence of visual identification'.

The jurisprudence also seems to make it clear that convictions require fulsome reasoning. In the case of acquittals however, except in those jurisdictions where the law allows an appeal against an acquittal, such as Belize, it may be less necessary to give very detailed reasoning. For example, consider if the offence on the indictment consists of five elements of which only one cannot be proven, whether it is necessary to fully set out the evidence of the other four and whether it would be enough to briefly indicate why the judge found that these elements were proven. The judge would then focus on the single element that could not be proven and that resulted in an acquittal and give a more elaborate reasoning for that.

7. Voir Dires

A *voir dire* is a preliminary examination and assessment of the admissibility of certain evidence. In a jury trial, this is conducted by a judge in the absence of a jury, since the jury is the determiner of facts, and to avoid undermining impartiality in this regard.

In ***Manzanero***, the CCJ accepted that there was no reason why a judge sitting in a judge alone criminal trial in Belize should be considered automatically incompetent to hear the main matter if they hear a *voir dire*. However, the judge should be careful to exclude the evidence given at the *voir dire* when considering the guilt or innocence of the defendant.

In ***Thurton*** **[2017] 91 WIR 141** at [41], the court in Belize stated:

> There is no rule that, in a trial by a judge without jury the judge should not hold a voir dire. It is a matter for the discretion of the judge. It has not been shown to us that, the Chief Justice exercised his discretion wrongly, or that the exercise of the discretion resulted in an unsafe conviction. Given that the judge is both judge of law and fact, there may well be less value in holding a voir dire in a judge alone trial

In ***Craigie***, the Jamaican Court of Appeal opined that as the Resident Magistrate is judge of the law and tribunal of fact, a preliminary test of admissibility by way of a *voir dire* was impractical and unnecessary. See also ***Brown, Litwin*** **[2015] JMCA Crim 30** and ***Cargil*** **JM 1987 CA 95**.

This principle was again emphasised by Panton JA (as he then was) in ***Roy Paharsingh and Michael Hylton*** **(Jamaica, Resident Magistrate's Criminal Appeal No 32/05)**. This approach was informed by the following

statement of Lord Lane CJ in ***SJF (an infant) v Chief Constable of Kent, ex p Margate Juvenile Court*** **(1982) Times, 17 June, DC**, which was quoted in ***Liverpool Juvenile Court, ex parte R*** **[1987] 2 All ER 668 at 671**:

> ...But where the matter is being conducted by the magistrates' court, then there is no question of having a trial within a trial, because the magistrates are the judges both of fact and of law. They are the people who not only have to determine the question of admissibility, but also the question of guilt or innocence, namely the main issue of the trial....

However, there may be a practical reason for the use of *voir dires*, in judge alone trials. A defendant can still maintain their right to remain silent in the main trial, whilst having to give evidence in challenging the admissibility of an out of court statement, based on say, voluntariness. In a *voir dire*, the prosecutor and the court must focus only on the admissibility issue and not on issues of innocence or guilt.

The defendant would be able to freely give evidence to support their claim, and in so far as that evidence is relevant in that context, it is inadmissible in the main trial: ***Brophy*** **[1982] AC 476**.

The *voir dire* isolates the evidence given by the defendant and therefore provides protection, as the defendant can still maintain their right of silence at the main trial. That protection is not absolute. For example, if the defendant would boast of having committed the crimes with which they are charged, or if they use the witness box as a platform for political speech, such evidence could be irrelevant to the issue at the *voir dire*: ***Brophy***. If it is irrelevant to the admissibility issue at the *voir dire*, this means it could well be admitted in the main trial.

As the judge is both judge of fact and law, special precaution must be taken to treat with *voir dires* in a practical and appropriate manner. For example, a judge should not allow questions as to the truth of the impugned statement: ***Wong Kam Ming* [1980] AC 247**.

On the other hand, judges should avoid a rigid approach with respect to ring fencing this part of the criminal procedure.

The duty to provide reasons in judge alone trials also applies to decisions on *voir dires*. Where there is no jury and the same judge has to rule on both the admissibility of the evidence (in a *voir dire*) and then on its probative value (if the evidence was admitted at the *voir dire*):

i. the judge in ruling on the *voir dire* must necessarily withhold their conclusion on the latter until the end of the trial, and
ii. after hearing the entire case, the judge must decide on the probative worth of the evidence.

The judge must also be careful in commenting on the evidence given at the *voir dire* when giving the final decision. Consider whether it may be appropriate in certain circumstances to conditionally admit the impugned statement and make a decision on its admissibility much later, or at the end of the trial *(de bene esse).*

In Trinidad and Tobago, at the High Court, there have been some developments with respect to *voir dires*. In a joint ruling on *voir dires* in ***The State v Mitchell and Chatoo* (Trinidad and Tobago, HCCRS 046/2009** (19 April 2021), the dicta of the Privy Council in ***Wallace and Fuller* [1977] 1 Cr App R 396**, was endorsed at [3]:

> In **Wallace and Fuller v R**, the Privy Council noted that it really is for the judge to decide whether the interest

> of justice demands that reasons be given and in such a case, with what degree of particularity. Indeed, it is settled law that where the only question is whether the judge preferred one set of witnesses over another, that is where the conflict turns on credibility, then there is no strict requirement for reasons. A ruling which announces that the judge accepts one version leaves no room for doubt. However, where principles of law arise, requiring the exercise of a discretion, reasons with sufficient particularity are required. And yet, even so, these are mixed questions of law and fact and involve some fact finding in order to apply the discretion afforded by the application of law.

In ***Mitchell and Chatoo*** at [4], the court opined that a judge in a judge alone trial should say no more than is necessary on factual considerations, citing ***Wallace and Fuller*** as justification:

> In a case hinging on confessions the tasks of the judge and of the jury, although technically distinct, are in reality very much the same. The decision of the jury is announced in a non-speaking verdict at the end of the trial. For the judge to expound in detail almost at the beginning of the trial his reasons for preferring one story to the other would wholly unbalance the proceedings. His reasons, which would be given in the presence of the public, the advocates and the defendants would inevitably leave their mark not only on the future conduct of the trial but also on its atmosphere.

8. Incorporating Voir Dire Evidence in the Main Trial

In ***Mitchell and Chatoo***, the court also suggested that as a practical case management technique, a judge in a judge alone trial should consider and discuss with Counsel, the necessity and usefulness of incorporating evidence given at a *voir dire* into the main trial, to avoid needless repetition. In a judge alone trial, the judge sits as judge of both fact and law, therefore 'Rigid demarcation and ringfencing on issues of admissibility may not always be required': ***The State v Sheldon Williams*** **TT 2019 HC 236** at [17].

In the court's opinion, where the evidence given in a *voir dire* is identical to the evidence that will be given in the main trial, the transcript of the evidence may be incorporated into the main trial and the witness may return to the witness box for cross examination as required: ***Sheldon Williams*** at [17] – [19].

In the judgment of ***Mitchell and Chatoo*** (23 July 2021) at [30], the court explained the procedure that was adopted to incorporate the *voir dire* evidence into the main trial as follows:

> In the case of each witness, the State would apply for the incorporation, noting the agreement of the Defence and where necessary, any further evidence in chief could then be marshalled, to be followed by any further cross-examination. I added one feature in case management. I required Counsel to provide some notice as to which witnesses (both sides) were required to return to the box.

Note: A judge in a judge alone trial in Trinidad and Tobago is required to strictly adhere to the normal procedure with a jury as much as possible, subject to necessary modifications. This strictness is not necessarily to be found in the legislation of other jurisdictions.

9. No Case Submissions

In 1981, the UK Court of Appeal in ***Galbraith*** **[1982] 2 All ER 1060**, set out the general law in respect of no case submissions. This remains applicable throughout the Commonwealth Caribbean (see ***Chaitlal*** **(1985) 39 WIR 295**), and is summarised as follows:

i. If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty - the judge will stop the case.

ii. The difficulty arises where there is some evidence, but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.

iii. Where the judge concludes that the Prosecution's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is their duty, on a submission being made, to stop the case.

Where, however, the Prosecution's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are, generally speaking, within the province of the jury, and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

Lowry LCJ in ***Hassan* [1973] NIJB**, which is cited in ***Chief Constable v Lo* [2006] NICA 3**, expressed his opinion, as follows:

> My own impression is therefore important which would not be relevant in a trial held with a jury: if I am clear (as I am in this case) that in no circumstances could I entertain the possibility of my being convinced beyond reasonable doubt, or indeed to any accepted standard, by the evidence given for the prosecution there can be no justification for allowing the trial to continue.

Kerr LCJ at [13] of ***Lo,*** expressed his view this way:

> Where there is evidence against the defendant, the only basis on which a judge could stop the trial at the direction stage is where he had concluded that the evidence was so discredited or so intrinsically weak that it could not properly support a conviction. It is confined to those exceptional cases where the judge can say, as did Lord Lowry in *Hassan*, that there was no possibility of his being convinced to the requisite standard by the evidence given for the prosecution.

Kerr LCJ then went on to state at [14]:

> The proper approach of a judge or magistrate sitting without a jury does not, therefore, involve the application of a different test from that of the second limb in *Galbraith*. The exercise that the judge must engage in is the same,

> suitably adjusted to reflect the fact that he is the tribunal of fact. It is important to note that the judge should not ask himself the question, at the close of the prosecution case, 'do I have a reasonable doubt?'. The question that he should ask is whether he is convinced that there are no circumstances in which he could properly convict. Where evidence of the offence charged has been given, the judge could only reach that conclusion where the evidence was so weak or so discredited that it could not conceivably support a guilty verdict.

At [8] of the Ruling on No Case Submission in ***Mitchell and Chaitoo***, the High Court of Trinidad and Tobago summarised the law into eight discrete principles, as follows:

> (1) There is no case to answer only if the evidence is not capable of supporting a conviction;
>
> (2) In a circumstantial case, that implies that even if all the evidence for the Prosecution were accepted and all inferences most favourable to the Prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, a reasonable mind could not exclude all hypotheses consistent with innocence as being unreasonable;
>
> (3) The correct test is whether a reasonable tribunal of fact properly directed would be entitled to draw an adverse inference;

(4) If there are no positive proved facts from which the inference can be made the method of inference fails and what is left is mere speculation and conjecture

(5) Even where the case against the Accused is thin, if there is evidence upon which a tribunal of fact is open to accept as truthful or reliable upon which it could be satisfied of guilt without irrationality, then the Judge is not only entitled but is required to allow the case to proceed;

(6) The proper approach of a Judge or a Magistrate sitting without a jury does not involve a different test from that in Galbraith, but the exercise the Judge must engage in is suitably adjusted to reflect that she is the tribunal of fact;

(7) In a judge alone trial on a no case submission, the question to be asked is not, "Do I have reasonable doubt?" Rather, it is whether I am convinced that there are no circumstances in which I can properly convict; and

(8) Even in judge alone trials, the close of the Prosecution's case does not mark the appropriate point for the weighing up of evidence and inferences to determine which deducement is the more or most reasonable.

In the CCJ case of ***Bennett*** **[2018] CCJ 29 (AJ)** (BZ), hearsay evidence in the nature of a previous inconsistent statement was admitted for the jury's consideration. At the close of the Prosecution's case, the defendant made

a submission of no case to answer which was dismissed. The defendant was convicted and appealed, challenging his conviction on the grounds that the trial judge had erred, first, in admitting M's previous inconsistent statement and second, in dismissing the no case submission. This case raised the issue as to the proper approach of the judge to evaluating and assessing hearsay evidence, whether it should be left to the jury, and whether the test to be applied should be the same at both the admission stage and the no case submission stage.

The CCJ in ***Bennett*** held that the proper approach was not to require the judge to make a finding on the reliability of the hearsay evidence, but to limit themselves to the question of whether the hearsay evidence could safely be held to be reliable. That test did not go to the reliability of the evidence as such, which would be for the jury to assess, but to the pre-condition of the quality of the evidence. The test was not the same at the admission stage and the no case submission stage. At the admission stage, the judge had to decide whether to admit it. At the no case submission stage, the judge had to decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, was clear in their mind that the hearsay evidence could not in reason safely ever be held to be reliable, they had to exclude it, and where the Prosecution's case wholly or substantially rested on that evidence, they should stop the trial and direct the jury to acquit the defendant. If, however, there was a reasonable possibility that, depending on how the trial unfolded, sufficient evidential material would emerge, given which the hearsay evidence could in the end safely be held to be reliable, the judge should, in principle, admit the evidence. That would be more so if at that stage, it was already clear that that test was or would be met. Where at the close of the Prosecution's case a no case submission was made, the final test was whether the evidence thus far produced could safely be held to be

reliable, as it was for the jury to decide whether in fact the evidence was reliable or not. If that test was met, the judge would leave the evidence for the jury, after having given them the necessary directions, to consider its ultimate reliability. If it was not met, the judge should conclude that the evidence was inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge would uphold the submission and direct the jury to acquit the defendant.

Further, the CCJ highlighted that the second limb of the ***Galbraith*** test allows the judge room to achieve procedural fairness. At [13] – [14], Wit JCCJ stated:

> So far as the power to stop the case upon a no case submission is concerned, the trial judge in Belize must rely on the *Galbraith* tests because a 'safety valve' similar to s 125 CJA has not been adopted by the Belize legislature. It appears to us, however, that the second limb of *Galbraith* allows the judge, to a great extent, room to achieve procedural fairness and to safeguard a sufficient level of verdict accuracy.
>
> We note in passing that these common law powers and discretions of the judge have an even stronger foundation in Belize because they directly flow from, and give further content to, the judge's constitutional duty to ensure a fair trial. We also note that the very fact that the right to a fair trial (including the judge's corresponding duty to ensure it) is a fundamental constitutional right in Belize not only means that the judge needs to conduct himself fairly in accordance with his common law duties, but also that if the common law would not sufficiently allow the judge to do what basically needs to be done from a

> perspective of fairness in the broader sense as set out in [4], above, the common law could, and depending on the circumstances should, be recalibrated or incrementally adapted in order to enable the judge to comply with his constitutional mandate

Even though the reasoning in ***Bennett*** dealt with jury trials, consider whether there is any logical reason why this principle ought not to extend to judge alone trials.

10. Legislative Framework

Barbados and Guyana currently do not have any legislative provisions implementing judge alone criminal trials.

Belize has implemented judge alone trials: s 65A of the **Indictable Procedure Act, CAP 96 as amended by Act No 5 of 2011** (BZ) ("IPA"). The amending Act came into force on the 1 August 2011, pursuant to **Statutory Instrument No 79 of 2011**. Section 65A of the IPA provides that the trial of persons indicted for murder, attempt to murder, abatement of murder, and conspiracy to commit murder, shall proceed before a judge of the Supreme Court sitting alone without a jury. The Government of Belize has, by the **Indictable Procedure (Amendment) Act No 3 of 2022** (BZ), amended the IPA to add offences that may be tried by a judge without a jury. The offences added are manslaughter, abduction of a child, sexual offences, offences under the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ) and offences under the **Commercial Sexual Exploitation of Children (Prohibition) Act, CAP 108:02** (BZ).

Section 65B of the IPA allows the Prosecution to apply to the judge for the trial of offences not specified above to be conducted without a jury, on any of the following grounds:

(a) that in view of the nature and circumstances of the case, there is a danger of jury tampering or the intimidation of jurors or witnesses;

(b) that a material witness is afraid or unwilling to give evidence before a jury;

(c) that the case involves a criminal gang element and would be properly tried without a jury; or

(d) that the complexity of the trial or the length of the trial (or both) is likely to make the trial so burdensome to the jury that the interests of justice require that the trial should be conducted without a jury.

Section 65B(3) of the IPA provides that any person may apply to the judge for a trial to be conducted without a jury, on the ground that in view of the pre-trial publicity attracted by the case, they are unlikely to have a fair trial with a jury. However, if a defendant is charged jointly with other persons, the judge shall not make an order for the trial to be conducted without a jury, unless all the defendant persons so jointly charged agree.

Applications shall be heard and determined by the judge in the absence of the jury and both the Prosecution and the defendant shall be given an opportunity to make representations (s 65B(4)). Where a judge is satisfied that the grounds are made out, they shall make an order that the trial shall be conducted without a jury, including the preliminary issue (if raised) of fitness to plead or to stand trial, but if they are not so satisfied, they shall refuse the application (s65B(5)).

11. Case Management and Judgment Writing Checklist Template

Chapter 24, Criminal Case Management, contains a model checklist intended to facilitate structure, organization of materials, accuracy of the record, clarity around facts and law, general efficiency and effectiveness in the management of judge alone proceedings and the writing of reasons/ judgments in a timely manner. The aspiration is to ensure compliance with constitutional, ethical, and institutional qualitative and quantitative performance standards in the conduct of judge alone trials. Fulfilment of these standards can eradicate delay, improve case disposition rates, increase respect, regard, and belief in the authority of courts, judicial officers, and the rule of law, and as well, enhance public trust and confidence in criminal justice systems

In this Chapter:

Chapter 26
Procedural Fairness

1. Introduction

Procedural fairness, also referred to as procedural justice, encompasses attitudinal, behavioural, and systemic/structural approaches by judicial officers, court officials and court offices, that have shown significant evidence of enhancing public trust and confidence in the administration of justice, as well as legitimizing legal authority, improving compliance with court orders and directions, and reducing recidivism. There has been a lot of international research establishing this, and regionally, at least one research project that confirms it (a list of these resources has been provided at the end of this chapter).

Simply put, people's responses to legal authorities, which include court systems and judicial officers, are directly linked to their experiences, assessments, and perceptions of the fairness of the processes by which these legal authorities both make decisions and, in the case of court systems and judicial officers, treat court users. Thus, people are more willing to accept court decisions and comply with court orders and directions if they regard and/or perceive them to be made fairly and if they are fairly treated in the process. This pragmatic reality places a responsibility on legal authorities, including judicial officers, as to the manner in which legal decision-making power is exercised, not only in relation to final decisions, but throughout the entire legal process. Indeed, it places an onus on legal authorities to ensure that the processes and systems and personnel that exist and the way in which these are operated and behave, are objectively fair and experienced as such.

All these insights have been confirmed regionally, through research done in Trinidad and Tobago in 2018, in relation to court systems (see P Jamadar and E Elahie, **Proceeding Fairly: Report on the Extent to which Elements of Procedural Fairness Exist in the Court Systems of the Judiciary of the Republic of Trinidad and Tobago** (2018, Judiciary of the Republic of Trinidad and Tobago)). This research discovered and articulated nine core elements of procedural fairness, building on internationally established elements, that constitute court users' experiences and perceptions of fairness. These nine elements are:

i. **Voice:** The ability to meaningfully participate in court proceedings throughout the entire process, by expressing concerns and opinions and by asking questions, and by having them valued and duly considered ('heard') before decisions are made.

ii. **Understanding:** The need to have explained clearly, carefully, and in plain language, court protocols, procedures, directions given, and

actions taken by decision makers and court personnel, ensuring that there is full understanding and comprehension.

iii. **Respectful Treatment:** The treatment of all persons with dignity and respect, with full protection for the plenitude of their rights, ensuring that they experience their concerns and problems as being considered seriously and sincerely, and having due regard for the value of their time and commitments.

iv. **Neutrality:** The independent, fair, and consistent application of procedural and substantive legal principles, administered by impartial and unbiased decision makers and judicial personnel, without discrimination.

v. **Trustworthy Authorities:** Decision makers, judicial personnel, and court systems that have earned legitimacy by demonstrating that they are competent and capable of duly fulfilling their functions, responsibilities and duties in an efficient, effective, timely, fair, and transparent manner; and by demonstrating to all court users, compassion, caring, and a willingness to sincerely attend to their justifiable needs and to assist them throughout the court process.

vi. **Accountability:** The need for decision makers and judicial personnel to fulfil their duties, to reasonably justify and explain their actions and inaction, decisions, and judgments and to be held responsible and accountable for them, particularly in relation to decisions, delays, and poor service.

vii. **Availability of Amenities:** The need for all court buildings to be equipped with the necessary infrastructure (both structural and systemic) to enable court users full and free access to court buildings, efficient information systems, relevant operational systems, and the enjoyment of functionally and culturally adequate amenities.

viii. **Access to Information:** The timely availability of all relevant and accurate information, adequately and effectively communicated in clear, coherent language, through open, receptive, courteous, and easily accessible decision makers, judicial personnel and systems, particularly in relation to each stage of court proceedings.

ix. **Inclusivity:** The need for court users to feel that they are, and experience themselves as, an important part of the entire court process, rather than outside of or peripheral to it; non-alienation, by being made to feel welcomed and included in court proceedings and to actively, easily, and effectively participate throughout the process.

The Trinidad and Tobago research report explains at 89:

> One of the interesting revelations …is the potential for the practise of Procedural Fairness to create a flow of mutual respect between court users (and the public at large) and court systems …(and Judicial Officers). This may be described as the flow of 'giving and receiving' respect. As litigants and court users are treated fairly and with dignity and respect, are given relevant and appropriate information in a timely manner, and feel included and valued; they give in return respect, legitimacy to and bestow moral authority upon the court systems and Judicial Officers. The result can be a spiralling and mutually reciprocating and fortifying trust and confidence in the administration of justice.

Improving procedural fairness in court processes and decision making is eminently possible. The need for doing so is also unavoidable. It is an imperative. Court systems will operate more effectively and efficiently with procedural fairness protocols and provisions built in, operationalised, and monitored.

Arising out of the research in Trinidad and Tobago, a procedural fairness manual was developed that was intended to function as a guide to the implementation of procedural fairness in court systems: P Jamadar, K J Braithwaite, T Dassrath, E Elahie, **Procedural Fairness A Manual** (2018, Judiciary of the Republic of Trinidad and Tobago). The guidelines that follow in this bench book draw on this research-based manual.

2. Caribbean Courts' Recognition of Procedural Fairness

The CCJ, in 2022, in ***Ramcharran v DPP*** **[2022] CCJ 4 (AJ) GY** at [80] – [81], and writing in the context of the desirability of separate sentencing hearings in criminal proceedings, opined:

> Judges must ensure procedural fairness in all aspects of the sentencing process. Procedural fairness, or procedural justice, is a necessity. In Caribbean judicial spheres facilitating the nine elements of procedural justice is apposite in a sentencing hearing. That is, facilitating: (i) voice, (ii) understanding, (iii) respectful treatment, (iv) neutrality, (v) trust, (vi) accountability, (vii) access to information, (viii) inclusivity, and (ix) access to necessary amenities.

> In Caribbean judicial spheres these elements can help mitigate against the still present and inherited colonial anti-therapeutic ethos that all too often prevails in the criminal justice systems. The research is clear that when court processes are imbued with procedural fairness throughout, there is an increase in overall public trust and confidence in the administration of justice, and increased compliance with court orders and directives. As well, the research indicates that there is reduced recidivism.

And earlier, in 2015, the Court of Appeal of Trinidad and Tobago in ***Her Worship Magistrate Ayers-Caesar v BS*** **(Trinidad and Tobago CA**, **Civ App No 252 of 2015)** (a judicial review appeal involving young persons), opined at [37]:

> It is important to also point out, that …consistent with the constitutional values of equality, fairness, respect and dignity, the new role of the judge …includes keen attention to procedural fairness. Thus, respect, equality of treatment and fairness must now colour all aspects of judicial behaviour both in court and throughout the management and hearing of all aspects of a matter. In concrete terms, there are four cardinal principles to be adhered to: (i) judges must be fair and experienced as such in all aspects of interaction with litigants and their attorneys; (ii) judges must treat all litigants and their witnesses (including attorneys and court staff) with utmost respect, having regard to their inviolable

human dignity; (iii) judges are obliged to take care to ensure that parties clearly understand both what is to be expected, as well as what is actually happening in court proceedings, and all orders, directions and decisions must be carefully explained so that parties fully understand them and appreciate their consequences; and (iv) judges must permit parties to have a voice, that is to say, a meaningful chance to actually participate in their matter at all stages of the proceedings.

3. Defining Procedural Fairness

Procedural fairness describes the kinds of behaviours and systems that inspire trust in, confer legitimacy on, and bestow authority upon court systems, and internal actors within these systems. It prescribes core, non-negotiable values and standards that are necessary for the legitimate and trustworthy exercise of legal authority within a community and society. Procedural fairness therefore demands integrity of actions, behaviours, and systems in relation to its constitutive elements; an integrity that must be consistently experienced and perceived by all stakeholders in the court systems, court users, potential court users and the general public. Integrity here, means consistency between behaviour/actions and declared values and regulatory frameworks—on personal and institutional levels—in all circumstances, in a way that is transparent and accountable: **Procedural Fairness A Manual** at 8.

4. The Principles of Equality and Non-Discrimination

Throughout the Commonwealth Caribbean, independence and post-independence constitutions establish as a core constitutional value, the inherent and inviolable dignity and worth of each human person. These constitutions also declare unequivocally, the right of every person to fundamental and substantive equality, and the right to non-discrimination. This is true for Barbados, Belize, and Guyana.

Equality and non-discrimination are linked, and are basic underpinnings of the protection, enjoyment and exercise of human rights. Generally speaking, equality requires equal treatment for equals, different treatment for those who are differently circumstanced, and special treatment for those who, though they may be considered equal from certain perspectives, from other perspectives deserve special treatment: ***Constitutional Court of Colombia*** **Case C-862/08**.

To achieve "substantive equality", there must be focus on the effect or impact of the law and actions, and not merely on whether they are applied equally to all who are similarly circumstanced. Non-discrimination prohibits unequal treatment of persons, based on inherent personal or group characteristics and attributes, and by reason of conditions that are inherent and integral to their identity and personhood: ***Sanatan Dharma Maha Sabha of Trinidad and Tobago Inc and Others v The Attorney General of Trinidad and Tobago*** **(HCA No S2065/2004)**.

UN Human Rights Committee, **CCPR General Comment No 18: Non-discrimination** (1989), states: '"Discrimination"... should be understood to imply any distinction, exclusion, restriction or preference...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons ... of all rights and freedoms.'

To discern whether there is discrimination and to achieve non-discrimination, the focus must also include the effect or impact of the law and of actions on the affected persons or groups. Therefore, the principles of equality and non-discrimination do not necessarily require identical treatment in all similar circumstances, and affirmative differential treatment may be both necessary and legitimate to achieve either, or both. While unequal or differential treatment may appear to be discriminatory to other parties, it may not in law be so, if the purposes (aims) of the differentiation are legitimate, and the means used to achieve them are proportionate and fair when judged in relation to the aims and are reasonably justifiable in a democratic society (see **Procedural Fairness A Manual** at 18).

These principles of equality and non-discrimination are integral to procedural fairness and inform the best practices associated with it. For the purposes of procedural fairness, equality and non-discrimination include the consistent application of these principles to all relevant procedures and practices, to fairly accommodate court users who have matters in the courts and/or who transact business within court systems. Focus must be placed on the effect or impact of laws, rules, decisions and actions on these individuals and groups, as well as on their legitimate needs.

5. Best Practices: General Guidelines

For the purposes of this bench book, best practices for the following five elements of procedural fairness will be considered – **voice, understanding, respectful treatment, neutrality, and trustworthy authorities**, as they align with the core internationally proven elements of procedural fairness. However, readers are encouraged to consider and implement the best practices for all nine elements described in the

publication **Procedural Fairness A Manual**. The content for these five elements is adapted from that publication.

Voice

Voice means that court users perceive that they have the opportunity to have input; actually have a meaningful opportunity to have input; have their input considered when decisions are being made and outcomes decided; and perceive and experience that their input has had an impact on decisions and outcomes.

Knowing that they have the Ability to Meaningfully Participate:

- ✓ Greet court users with courtesy and respect;
- ✓ Introduce yourself to court users before the start of any significant new interaction;
- ✓ Create and maintain spaces in which court users will feel comfortable asking questions and expressing concerns and views. This may be achieved by using attentive and engaging body language and a welcoming tone of voice. If you are unable to do so, explain why you are not engaging e.g. I am not making eye contact because I am taking notes;
- ✓ In the courtroom, court users should be placed so that they can comfortably and meaningfully participate in court processes;
- ✓ Where court users are self-represented, ensure that they have been given sufficient accommodation to facilitate active and meaningful participation;
- ✓ Practice active listening

The Ability to Express Concerns and Opinions and Ask Questions:

- ✓ Actively facilitate enquiries, expressions of concern and feedback from court users. Explain that they will be able to express their concerns and opinions, and to ask questions. This may be qualified by stating that they will be allowed to do so at specified intervals and, where an interaction is with a judicial officer, pursuant to the exercise of judicial discretion. If court users will not be permitted to do so, the reasons for this should be carefully explained;
- ✓ Give court users the permission, and the opportunity, to respectfully express if language or behaviour is offensive or disrespectful to them;
- ✓ Explain to court users what information is needed from them and why;
- ✓ When communicating directly with court users, allow them to finish speaking/ explaining themselves, allowing them reasonable time to express their views and thoughts about their matters. If they have to be interrupted, do so respectfully;
- ✓ Paraphrase and seek confirmation about what has been communicated to you by court users, to demonstrate your understanding of what has been conveyed;
- ✓ Answer court users' questions, and address their needs and concerns in clear, concise language. If you are unable to provide an answer, explain why and offer alternatives where appropriate;
- ✓ Instruct court users and attorneys about best practice protocols in relation to courtroom communication, and ensure that these protocols are upheld and fairly and equally applied;
- ✓ Specifically enquire of court users if they have understood court

processes, what is needed/required of them, and decisions and outcomes. Take the time and care to ensure full understanding;

- ✓ Where court users are represented by attorneys, give them enough space and time to communicate with each other, especially where a specific question has been asked that requires consultation.

Having Input Valued and Duly Considered in the Decision-making Process:

- ✓ Sincerely consider court users' input before decisions are made, and find ways to demonstrate that this has been done;
- ✓ Always acknowledge what has been said by court users. If you disagree, explain why (especially in judgments, reasons and rulings). As a general rule, where court users receive any outcome or decision that is not in their favour, take the time and care in all decision-making to address their position.

Understanding

Understanding means that court users always know what is happening and what is going to happen during court processes and why this is so, because the time has been taken to ensure that they are fully informed participants.

Clear, careful, and plain language explanations:

- ✓ Use simple, clear, and concise language that can be easily understood, when explaining procedures and decisions to court users;

- ✓ Be careful to speak slowly and clearly, making appropriate eye contact when communicating with court users, especially when delivering routine statements and decisions;
- ✓ Adopt a calm, respectful and polite tone when giving explanations to court users.

Ensuring Full Understanding and Comprehension:

- ✓ Do not presume that court users will understand proceedings, procedures, and decisions, or even your initial explanations of them. Be prepared to explain again, as necessary and practicable;
- ✓ Assure court users that they can feel free to ask questions;
- ✓ Do not depend entirely on attorneys to explain proceedings and decisions to court users;
- ✓ Explain the purpose of court processes to court users at the start of any significant new interaction with them, and at the start of each discrete stage of proceedings;
- ✓ Ensure that court users understand what is happening throughout court processes, and periodically enquire to ensure continued understanding, e.g., by asking them to explain in their own words what has been said/decided and what is to be done and/or expected of them, and what, if any areas they are uncertain about;
- ✓ Pay careful attention to court users' explanations for gaps in their understanding;
- ✓ Take the time at the beginning of proceedings and significant new interactions, to explain to court users what information is needed to effectively and efficiently conduct their matters/business e.g., the process for completing forms;

- ✓ Ensure that court users understand the meaning and consequences of the decisions that are made, i.e., the practical implications for them;
- ✓ Note recurring problem areas for court users. It may be that the existing processes or protocols need to be altered to meet court users' needs and concerns;
- ✓ If court users are uncertain or confused, be prepared to address this in a timely fashion to ensure full understanding

Respectful Treatment

Respectful Treatment means that court users are treated with due regard, as individuals deserving of serious consideration. This means that their concerns and problems are given due weight and that their time and other commitments are valued when they are engaged in court processes. All of their rights are to be honoured and upheld, enjoyed and protected.

Treating all persons with dignity and respect:

- ✓ Ensure that you interact with court users, attorneys and fellow Judiciary personnel in a dignified and respectful manner, in keeping with constitutional, international and institutional standards and mandates. Keep in mind that the treatment of others affects how court users perceive that they will be treated;
- ✓ Introduce yourself to court users at the start of significant new interactions, and be welcoming during all interactions;
- ✓ Clearly and briefly set out the expectations of behaviour and the procedures to be followed by court users, and check for understanding;

- ✓ Maintain a calm and fair disposition, polite tone of voice and neutral posture when interacting with court users. This is especially important where you have to be assertive, firm or decisive;
- ✓ Apologise for and explain any delays or defaults that are not the result of court users' actions/inaction;
- ✓ Ask court users if they require any assistance and provide it willingly and as appropriate (if possible and/or permissible);
- ✓ Constantly focus on the needs and concerns of court users;
- ✓ If you are unable to address individual court users' concerns or queries, it is important to explain why. If someone else is better equipped to assist court users, explain who the person is and why their input is necessary and how they can be accessed;
- ✓ Ensure that expectations are clearly set out and understood. Most court users have no, or very limited experience interacting with court systems;
- ✓ Court users, attorneys and Judiciary personnel should all be treated with respect. However, be prepared to give extra guidance on court procedure to court users as necessary;
- ✓ Judiciary personnel in the courtroom should maintain the same high standards of respectful treatment of court users.

Giving all court users full protection for the plenitude of their rights:

- ✓ Uphold and apply, generously and purposively, core constitutional values, including respect, equality of treatment, fairness and meaningful participation, to court users;

- ✓ Use non-offensive and culturally appropriate and sensitive language when communicating with court users (Trinidad and Tobago is a plural, diverse society);
- ✓ Actively identify and address any biases towards court users in interacting with them, or making decisions that affect them;
- ✓ Avoid being judgmental (and expressing these judgments) when your opinions are not relevant to the matter at hand. Where it is necessary for an issue to be raised with court users, do so in a manner that is respectful and fair;
- ✓ Be aware of differences in culture and the circumstances of individual court users before making statements, e.g., on what is appropriate behaviour, speech or attire;
- ✓ Give self-represented court users and attorneys an equal opportunity to speak and participate;
- ✓ Court buildings are public buildings in open court systems, and those with legitimate business (including the observation of court matters) should not be barred from entering without good reason and justification.

Ensuring that court users experience their concerns and problems as being considered seriously and sincerely:

- ✓ Ensure that individual court users' needs and concerns are treated with care and attention. Although you may have been involved in similar cases/situations before, for individual court users, their matters/ business involve/s important and significant events in their lives;
- ✓ Be open to, and assess court users' actual needs and concerns. Sometimes flexibility and creativity in thought and action brings about

the best solution, while rigid adherence to strict rules may defeat the ends being sought;

- ✓ Refrain from responding reactively. Engaging a delayed response, e.g., pausing for a few seconds and/or taking some deep breaths can permit an appropriately respectful and just response. Avoid reactions such as gasps, eye-opening, exasperated sighs, and scoffs when interacting with court users and attorneys;
- ✓ Actively listen to court users' queries and concerns and treat each with due regard and importance;
- ✓ Ensure that court users always enjoy the full benefits of a fair hearing and of being dealt with justly.

Due Regard for the value of time and commitments:

- ✓ As a general rule, begin your tasks at their scheduled start times;
- ✓ Ideally, court users should only be in court for as long as the process that impacts them should take;
- ✓ Implement a system of consultative scheduling that values court users' time and commitments, e.g., in the courtroom, schedule matters for fixed dates and times and adhere to these times as far as possible. This scheduling should keep in mind the different and particular needs of court users, the available amenities in the court building, the conditions in the courtroom, and the time needed to be spent on each matter;
- ✓ Where there are delays or postponements, notice should be given at the earliest opportunity, and genuine apologies should be made;
- ✓ Give ample notice and explanation if a matter has to be rescheduled. Ideally, rescheduling should be to a date convenient to court users.

Multiple postponements that do not advance the progress of the matter to resolution, should be avoided;

- ✓ Every court-scheduled event should advance the progress of a matter to a fair, just, and timely resolution;
- ✓ Utilise available amenities to maximise efficiency, e.g., by using video- and teleconferencing, e-mails and other effective forms of communication;
- ✓ Ensure that court users have a realistic expectation of how long court processes will take. Try to give court users accurate assessments of time.

Neutrality

Neutrality means that court users experience fairness and consistent treatment throughout court processes. If court users experience fairness and see that others are treated fairly, without bias and discrimination, this helps to ensure that there is trust in outcomes.

Independent, Fair and Consistent Application of Legal Principles:

- ✓ Discharge all responsibilities conscientiously and according to the law and the constitution, without fear or favour, affection or ill will;
- ✓ Arrive at decisions using only the relevant and admissible facts, determining the merits without regard to personal feelings or extraneous factors and characteristics;
- ✓ Make decisions only on the basis of the relevant law and applicable legal principles, without regard to personal feelings or extraneous factors and characteristics;

- ✓ Give sufficiently detailed explanations for decisions, so that court users are fully aware of the reasoning behind these decisions;
- ✓ Keep abreast of all current developments in the law.

Impartial and Unbiased Decision Makers:

- ✓ Identify unconscious biases that you have, and ensure that these biases do not impact upon – and are not perceived to impact upon – your decision-making and treatment of court users;
- ✓ Consistently apply relevant procedures and practices to fairly accommodate all individuals, keeping in mind that court users come from a variety of backgrounds and circumstances;
- ✓ Treat court users equally. This requires treatment relevant to court users' circumstances and needs, so that individual court users experience equal access to justice and a fair hearing;
- ✓ Make the necessary reasonable accommodations for court users who have different and particular needs, so that they all have equal access to justice and a fair hearing;
- ✓ Ensure that all court users have equal physical access to courtrooms and court buildings.

Non-Discriminatory Behaviour:

- ✓ Do not treat court users differently on the basis of personal or group characteristics and attributes, or by reason of conditions that are inherent and integral to identity and personhood, unless justifiable;
- ✓ Address all court users, attorneys and Judiciary personnel in an equally respectful manner;

- ✓ Continually monitor your body language, tone of voice and use of language at all times, so that court users are not made to feel discriminated against or disrespected;
- ✓ Ensure that fellow Judiciary personnel, including those under your supervision, do not discriminate against court users;
- ✓ Be mindful of your behaviour and use of language in all spaces of the workplace and at all times, and be mindful of and share responsibility for the behaviour and language of fellow judiciary personnel;
- ✓ Adopt neutral language and tones of voice when communicating with court users, Judiciary personnel and attorneys.

Trustworthy Authorities

Judiciaries become trustworthy authorities by earning trust when court users experience court processes as being conducted by all judiciary personnel with competence and compassion, in ways that attend to the legitimate needs of court users and are respectful of the significance and value of all matters and business.

Demonstrating Competency:

- ✓ Develop and apply the most effective and efficient case flow management, case management and time management practices and protocols;
- ✓ Develop and apply the most effective, efficient, respectful and fair interpersonal and communication skills;
- ✓ Keep abreast of and consistently apply all relevant developments in both procedural and substantive law;

- ✓ Give detailed reasons for all decisions and directions in clear, simple and effective language;
- ✓ Ensure that all court orders and directions are clear and effective;
- ✓ Genuinely and seriously consider all matters/concerns;
- ✓ Ensure that all court users' needs and concerns are dealt with in a reasonable timeframe, and in a way that ensures that they understand what is happening;
- ✓ Keep court users informed, in a timely manner, about all information that may concern or impact them;
- ✓ Where you cannot provide immediate responses to legitimate concerns, explain this to court users, and give them a reasonable timeframe in which to expect a response.

Demonstrating Capability in Fulfilling Functions:

- ✓ Make court users the focus of attention and service;
- ✓ Implement skills and techniques gained from engaging in continuous personal and professional education training, to ensure that the best practices are deployed, and the best service is provided to court users;
- ✓ Ensure that judiciary counters, desks, booths and units are adequately staffed to ensure that court users' needs and concerns can be met and addressed.

Efficient, Effective, Timely, Fair and Transparent Actions:

- ✓ Discharge all of your responsibilities in efficient, effective, timely, fair and transparent ways, and take responsibility for ensuring that all judiciary personnel do the same;

- ✓ Give reasonable timelines to court users, and if they cannot be met, explain why;
- ✓ Schedule all events in a matter for fixed dates and times, and adhere to these. Explain/Apologise if these timelines are not met;
- ✓ Consult court users if the rescheduling of matters or business has to take place, to agree to a time convenient to all;
- ✓ Periodically enquire of all court users if there is anything that they do not understand, and enquire as to what you can do to clarify any areas of uncertainty.

Compassion, Caring and a Willingness to Attend and Assist:

- ✓ At the beginning of each new interaction, explain to court users that you are willing to attend to their legitimate needs, and assist in fulfilling these needs within the parameters of the law and your responsibilities;
- ✓ Consistently welcome and engage court users and seriously consider their queries and concerns;
- ✓ Create a comfortable, safe and welcoming environment for court users, so that they are not intimidated or alienated by court processes or Judiciary personnel;
- ✓ Ensure that court users are not met with indifference, disrespect, hostility or discrimination when engaging with court processes and with Judiciary personnel;
- ✓ Understand that court users have different needs and come from different backgrounds and seriously consider these when dealing with them and their issues;

- ✓ Render assistance to court users whenever this is possible, and do so in a hospitable and caring manner.

6. Special Concerns

Self - and Under - Represented Litigants

Both self- and under-represented litigants must be treated no less than all other litigants, in that they must be the beneficiaries of an objective standard of fairness. They are equally entitled to have their matters dealt with justly and certain accommodations may be necessary in order to do so (see P Jamadar and K J Braithwaite, **Exploring the Role of the CPR Judge** (Judiciary of the Republic of Trinidad and Tobago, 2017)). The content of this section relies on the guidelines stated at 50 – 54.

Some challenges in dealing with self-represented litigants include the following: First, language. Self-represented litigants simply do not write or speak in 'legalese'. They may also not write or speak English (or standard English). The consequence is that their capacity to understand what is happening and to meaningfully participate in the process, as well as to feel included (and not alienated), are all severely compromised. Second, most are quite unaware of, or unpractised in relation to, both procedural and substantive law. The lack of knowledge of practice and procedure, as well as the rules of evidence, make for innumerable challenges for judges in both case management and at a substantive hearing and create a real disadvantage for these litigants. Third, there may be very real resource and power imbalances between self-represented litigants and the other parties.

Under-representation raises the issues of attorney competency and the adequacy of representation, and therefore of the limits of judicial reticence and intervention. Issues include:

i. How far can a judge go in pursuit of fairness, or in explaining procedure, law, and decisions, before they compromise the core value of Impartiality?

ii. Where does independence end and partiality begin?

iii. What are the limits of a judge's duty where there is under-representation? In general terms, fairness is the most important guideline. Tactfulness and care are required, as is attention to even-handed communication. If procedure or law is being explained, explanations ought to be directed to all parties. Explanations must also be communicated in clear, non-legal language, ensuring that there is understanding. Care must also be taken to give all parties equal voice.

General Guidelines

The following very general guidelines are offered as a starting point for managing cases involving self- and under-represented litigants (though the guidelines may also be of general use):

- ✓ Begin by introducing yourself, and explaining the court's protocols and expectations (be case specific);
- ✓ Be cordial and courteous at all times, even when being firm and decisive;
- ✓ Ensure equal treatment of all parties, even in the simplest things, such as the way parties, witnesses and attorneys are addressed. Equality

of treatment depends on the individuals involved and does not mean that everyone receives the same treatment;

- ✓ Pay attention to courtroom communication: written, verbal, and non-verbal. It should be clear, easily understood by all parties and unbiased;
- ✓ Confirm whether English is a first language or sufficiently understood. If not, find an effective means of communication;
- ✓ Quality focused and clear and decisive pre-trial management, will facilitate the adequacy of case management and pre-trial explanations;
- ✓ Information should be given in small amounts at a time. Too much information can result in information overload. Clarification about understanding should constantly be sought;
- ✓ Practice active listening. Avoid the excessive use of legalese, and explain all legal jargon. Check to confirm that there is understanding;
- ✓ Take the time to explain the procedure for each discrete event throughout the entire process;
- ✓ Take the time to explain the purpose of the process, doing so for each discrete event throughout the process;
- ✓ Be clear in explaining what the issues are, explaining what is required to prove and disprove each issue;
- ✓ Explain the necessity for proof and the types of proof that are permissible (e.g. oral testimony, documentary evidence, expert evidence), including what evidence is admissible and inadmissible. Also, explain the difference between facts and opinions and when the latter are of probative value. Do this before disclosure and witness statements/summaries are ordered;

- ✓ Explain before the trial begins, what are the relevant protocols and procedures, and the kinds of questions that can be asked (giving examples of what is and is not permissible);
- ✓ Explain the burden of proof and standard of proof in clear and understandable language. Check to confirm that there is understanding;
- ✓ Be astute to the possibility of a lack of or impaired mental capacity, for the purposes of conducting litigation (a general threshold being the ability to be able to understand what is happening and to meaningfully participate in the proceedings); and
- ✓ Give an assurance (and follow through on it) that throughout the proceedings, there will be explanations given and the permission that questions can be asked as and when the need arises.

Effective Communication

Effective communication is central to dealing with cases justly (see **Exploring the Role of the CPR Judge** at 56 – 58). Court users must, subjectively and reasonably, experience justice as being done. In this regard, communication is central, because all persons involved in legal proceedings must understand what is taking place. In addition, care must be taken to ensure that everyone involved in the process is properly understood. Understanding is critical to the legitimacy of the legal process, and a core responsibility of a judge. It is the judge's duty to ensure that attorneys, parties, witnesses (and even the public), understand the essential elements of court processes, events, and decisions. Care must therefore be taken to explain matters and check for understanding at all times. Inclusivity is also central to effective communication. Parties, witnesses, attorneys, and court staff who feel alienated, left out or excluded

from (or by) the process, experience it as unfair and discriminatory, and consequently as unjust. Therefore, every effort must be made to ensure that there is meaningful participation throughout the court process.

Active listening is a skill that can be learned and developed. In the context of procedural fairness, it has particular value in court proceedings. Practice it at all times during courtroom communication. Be flexible, helpful and considerate when interacting with court users. Although the court or a court department may not be able to deal with a particular issue or provide the relief sought, remember that court users have come for assistance with an issue that is of importance to them.

General Guidelines

Some useful guidelines to aid effective communication are as follows:

- ✓ At the beginning of and throughout proceedings, communicate so as to put participants in the process at ease, creating a safe and trustworthy environment. Use simple language and give clear and concise explanations;
- ✓ Always monitor and confirm understanding;
- ✓ Do not assume that silence indicates understanding;
- ✓ If in doubt, test for understanding by inquiring of the attorney, party or witness, or court staff, if they understand, or if they mean what they appear to have said;
- ✓ Be aware that cultural context shapes and informs communication. Words and phrases can mean entirely different things to different people;
- ✓ Be aware that a perception of partiality or unfairness can be the result of inappropriate language or conduct. Take care to be conscious of

both verbal and non-verbal 'messages' that tone, expression, posture and interaction can convey;

- ✓ Demonstrate fairness at all times and in everything that is said and done. Fairness does not require treating everyone in the identical way. Fairness is contextual. Treat like alike. It is fair to treat a self-represented litigant differently from an attorney; equality of treatment permits differential treatment for different situations;
- ✓ Be alive to situations of disadvantage. It is permissible to take steps to address such situations, provided no unnecessary prejudice is caused to another party; and
- ✓ Actively listen to attorneys, parties and witnesses. Effective communication is a two-way experience. Active listening requires that the listener hears what the speaker is saying with an open, receptive and non-judgmental attitude (i.e. without pre-judgment) and not merely to wait for a chance to speak/ respond. Active listening is premised on the willingness to discover truth, and the genuine desire to understand and appreciate other points of view.
- ✓ Always render whatever assistance is appropriate, in a respectful and courteous manner.

Securing Access to Justice for All

Justice, as underpinned across Caribbean constitutions, demands equality and fairness of treatment for all persons. The judge is thus duty-bound to ensure that matters are dealt with justly for people whose access to justice may be impeded because of, for example,:

i. disability (seen or unseen);

ii. mental illness;

iii. socio-economic status;

iv. communication or any other barrier.

Further, judiciaries and judges ought to ensure that the needs of these court users are meaningfully taken into account and met. The accommodation of the variety of needs is necessary as this is in keeping with the constitutional duty to ensure a fair trial.

The aim of fairness is to ensure that all parties and their witnesses and **all court users** are enabled to participate fully and meaningfully in the entire court process, from start to finish. Accommodating individual circumstances and the needs of persons is necessary for fairness and equality of treatment, and for a fair process, and to ensure that all matters are dealt with justly. Reasonable and proportionate steps can always be taken to balance competing interests and to accommodate parties, so that overall fairness is achieved and therefore justice served throughout the process. Such steps ought not to be considered prejudicial.

General Guidelines

The following general guidelines are suggested:

- ✓ Accommodating special needs permits a judge to be flexible in relation to all aspects of court proceedings, once the steps taken are fair and cause no unnecessary prejudice to other parties;
- ✓ Judges are required to be alert to the special needs of both parties and witnesses who are vulnerable and those who are disabled, including what is required for effective communication;
- ✓ Court procedures can be reasonably adapted to facilitate the effective and meaningful participation of all parties and witnesses. The steps

taken ought to be intended to ameliorate and compensate for any barriers which may impede a person's access to justice such as the lack of accommodations for persons with disabilities;

- ✓ Where there are vulnerable witnesses or parties, steps should be taken to safeguard these persons without creating unnecessary or disproportionate unfairness or prejudice;
- ✓ Sensitivity to the variety of needs of all persons, for example, those with disabilities or those who may experience barriers to communication, is important. A judge has a duty to discover and know what these needs are and how they can be addressed in order to deal with cases justly;
- ✓ This duty to know and understand the effects of vulnerabilities and being disabled and how they can create unfairness in the court process, includes the duty to know and understand: a. the impact of physical, psychological, cognitive and sensory impairment; b. the disadvantages and difficulties experienced as a consequence of unaccommodating systems and facilities; and c. the effects of decisions and procedures on court users.

7. Text Resources

Kevin Burke, ***Procedural Fairness: A Key Ingredient in Public Satisfaction*** (2008) Court Review, 44(1/2) 2008.

Tom Tyler, ***Procedural Fairness and Compliance with the Law*** 1997, Swiss Journal of Economics and Statistics.

Tom Tyler, ***Why People Obey the Law*** 2006, Princetown University Press.

Tom Tyler, ***Procedural Justice and the Courts*** 2008, Court Review, 44(1/2).

In this Chapter:

Chapter 27
Therapeutic Jurisprudence

1. Introduction

The last decade of the twentieth century saw the beginning of a shift towards a 'comprehensive, interactive, humanistic, interdisciplinary, restorative and often therapeutic approach to law and lawyering': Susan Daicoff, **Law as a Healing Profession: The "Comprehensive Law Movement** (2005) 6 Pepp Disp Resol LJ 1.

This movement resulted from the combination of several new or alternative methods of practicing law, particularly within the criminal justice system. These methods share two features:

i. A desire to maximize the emotional, psychological and relational well-being of the individuals and communities involved in each legal matter; and

ii. A focus on more than just strict legal rights, responsibilities, duties, obligations and entitlements – a focus on "rights plus".

This innovative approach views the law as a vehicle for positive change, such as 'healing, wholeness and harmony' in the resolution of legal matters; and it values "rights plus" factors, which include 'needs, resources, goals, morals, values, beliefs, psychological matters, personal wellbeing, human development and growth, interpersonal relations, and community wellbeing': **Law as a Healing Profession** at 4.

One significant discipline which propels this movement is therapeutic jurisprudence, which emanates through realms such as procedural fairness, restorative justice and problem-solving courts.

2. What Is Therapeutic Jurisprudence?

Therapeutic jurisprudence, through the insights of behavioural sciences such as psychiatry, psychology, criminology and social work, explores how the law impacts the mental health and well-being of those involved in legal processes. This is because therapeutic jurisprudence, with interdisciplinary lenses, views the law as a social force that can impact people's emotional lives, with positive or negative consequences.

Therapeutic jurisprudence is essentially a study of the "law in action", that is, how the law impacts law offices, clients and courtrooms around the world. Therapeutic jurisprudence approaches this study from a remedial

perspective. It focuses on how substantive law and legal procedures can be reshaped, in order to result in improvements to the psychological and emotional states of participating parties; in other words, how reform can result in an increase in therapeutic/healing effects and a decrease in anti-therapeutic effects, without the compromise of due process and other significant justice principles.

This perspective should apply across the entire legal spectrum, including health law, criminal law, juvenile law and family law. It also involves consideration of all participants in the judicial process. This particularly implies parties to litigation (as well as their families), victims, offenders, witnesses and jurors. It especially extends to lawyers and judges and how their application of therapeutic jurisprudence can effect progressive social change, which would not only benefit the judicial system, but ultimately the society at large. This is due to the fact that therapeutic jurisprudence 'prompts legal actors to "reach out to explore models of practice that are more relationally engaged, less adversarial, more psychologically beneficial and more capable of producing non-exploitative outcomes"': Penelope Weller, **Mainstreaming TJ in Australia: Challenges and Opportunities** (2018) International Journal of Therapeutic Jurisprudence 3(1).

The underlying philosophy and objectives of therapeutic jurisprudence have been embraced in the Caribbean, as reflected through ***Ramcharan v DPP* (2022) CCJ 4 (AJ) GY** at [88], [97], [98] and [171], where in the context of sentencing in criminal law it was stated:

> 88. ...sentencing is no longer to be viewed in a silo, as an adjudication limited to the interests of the State and the convicted person. Such a view is hopelessly myopic and divorced from lived realities. Arguably the persons most

directly affected by a crime are its victims-survivors. Then their families, friends, and communities. And as well the larger society of persons who live in various degrees of relationships with each other. Thus, while the traditional and inherited approach has been to place the convicted person at the centre of the sentencing process, and they are object of sentencing, they alone are not affected by the process and outcomes. A therapeutic approach to sentencing that is fully aligned with all five sentencing objectives requires a more encompassing approach to a sentencing hearing. An approach that includes all relevant evidence to enable the making of informed assessments and decisions, and that at the same time unlocks the law's capacity to be a source of healing and relevance for all persons, institutions, and communities that are affected by it. Indeed, for the entire society.

...

97. A therapeutic approach to sentencing would seek to meet all the objectives of sentencing in ways that promote the care and wellbeing of all persons and institutions that are affected, and to do so at every stage in proceedings. It therefore favours a broader more inclusive perspective in relation to how sentencing proceedings are conducted and who is involved. It also favours a multi-disciplinary approach that is open to drawing on all resources and sources of information

that are relevant and useful to the sentencing processes and outcomes. …

98. In sum, therapeutic approaches try to maximize the personal and societal wellbeing of individuals and communities, and so focuses on more than just strict legal rights, responsibilities, duties, obligations, and entitlements. It is what is referred to in the academic literature as a 'Rights Plus' approach to adjudication, that also consciously focuses on the law's potential to have a positive impact on people's lives and on society. In the context of sentencing, human wellbeing and interpersonal relationships also matter.

…

171. …Maybe it can be imagined as a sentencing hearing in which the traditional judge led decision-making process (hierarchical and pyramidical) is combined or intersects with multiple overlapping circles (interdisciplinary vectors of information and insight), that serve to inform the decision-making process without supplanting or usurping either the process of decision making or the established objectives of sentencing. However, undertaken with a clear intention of minimizing anti-therapeutic effects and maximizing therapeutic and procedurally fair effects in the sentencing process and outcomes. In this way one achieves truly fair and just outcomes for all parties, including victims-survivors, and the society at large.

3. Therapeutic Jurisprudence and Procedural Justice

Behavioural sciences studies have directed therapeutic jurisprudence proponents to the tenet that, in the context of a court or other legal setting, people are more likely to accept and comply with the legal authority's decision, if they are treated with respect when they present their case, and where they feel that the authority's processes are fair, and its motives are legitimate. Such procedural justice can only impact positively on psychological and emotional well-being, hence the inclusion of procedural fairness research in the field of therapeutic jurisprudence. This natural connection was emphasized by Dylan Kerrigan in **Therapeutic Jurisprudence in Trinidad and Tobago: Legitimacy, inclusion, and the neo-colonialism of procedural justice** in *The Routledge International Handbook of Global Therapeutic Cultures* (Routledge 2020), when he stated '…the major selling point of procedural justice as therapeutic jurisprudence is its desire to enhance the perceived legitimacy of the court process in the eyes of its users.'

"Enhanced perceived legitimacy" of the overall court process – which is the impact of procedural justice – results in the court user's increased trust and confidence in the procedures, their willingness to comply with decisions and ultimately, their general positive assessment and experience. Kerrigan further states at 453:

> According to Justice Peter Jamadar, Judge of the Caribbean Court of Justice, such public trust and confidence 'survives and flourishes' in the context of the judiciary's legitimacy, when inter alia, the public is satisfied with the quality of decision-making and interpersonal treatment, and it can predict that the judiciary will do the things they are tasked to do.

The reshaping of the perception of the legal process afforded by procedural justice, together with the resulting positive court experience and increased psychological satisfaction, rest on four essential factors:

i. Voice: the court participant has the chance to tell their story and explain their concerns;
ii. Validation: the feeling of being paid attention to, of being taken seriously and of having arguments being taken into account, even if eventually rejected;
iii. Respect: the experience of being listened to attentively, with dignity, respect and courtesy; of being provided with a process administered in good faith, which in turn leads to increased trustworthiness;
iv. Voluntariness: being able to choose whether to participate in legal processes.

Voice, validation and respect, which are all clearly consistent with therapeutic jurisprudence philosophy, apply to the criminal justice system; criminal defendants, however, are not "volunteers" – they can only make limited choices with respect to their case.

Studies conducted by the Australian Human Rights Commission in 2014 (see **Mainstreaming TJ in Australia**) illustrate that persons who become involved with the criminal justice system usually have a history of poverty, low levels of education, unemployment, high drug or alcohol use, homelessness, domestic violence and poor mental/physical health. This type of court population would have complex, multi-layered needs. If, however, in the context of the criminal justice process, they are afforded voice, validation and respect by judicial officers and the prosecutors – treated with fairness and allowed to participate at all stages - their emotional and psychological needs would be catered to, and they would

feel valued; they would certainly be more satisfied with the process and thus more willing and able to accept an outcome which may not be in their favour. Procedural justice can therefore improve the "plight' of the participant in the criminal justice system, which could result in healing and the ability to move forward – the focus and spirit of therapeutic jurisprudence.

4. Therapeutic Jurisprudence and Restorative Justice

Restorative justice is a movement in the criminal justice realm which has been growing since the 1980's. The root of this movement may be traced to Canada in 1974, when a probation officer and prison worker brought two young men who had vandalized property, in contact with the victims of the offence and through victim-offender mediation, arrived at an agreement for restitution to the victims. There was an obvious shift here from the retributive model of justice which prioritized punishment and blame as the way to address crime, to a focus on responsibility and reparation. This 'restorative' course of action paved the way for a restorative justice approach within the criminal law arena, which advanced proportionately to the vision and acceptance of the law as a possible therapeutic/healing agent.

Restorative justice perceives a criminal offence as an attack on the harmony of interpersonal relationships and community wellbeing. It seeks to bring all those harmed by the crime or conflict, those responsible for the harm, and the community affected, into communication with each other, so that everyone impacted by these victim/offender, offender/community relationship breaches, would 'resolve collectively' how to mend the effects of the harm and advance positively into the future. The main par-

ticipants in this encounter process would be the victims, the offenders and the community.

The victims: Victims of crime had generally remained 'invisible' - uninformed and uninvolved - throughout the criminal justice process, as the state basically assumed the role of the injured party, undertaking the investigation and prosecution of crimes. This, even though victims of crime may experience varying degrees of harm, based on the gravity of the offence, its duration and their own reaction to it. The harm suffered by victims could involve property damage, financial loss, physical injury, emotional pain and suffering, ongoing treatment, anger, fear, diminished self-esteem or reduced quality of life. Furthermore, a victim's experience of insensitivity by the justice system to their subjective harm, could result in secondary victimization.

Increased awareness of this marginalization of the victims - that they deserve more than what the criminal justice system has traditionally offered - led to reforms in criminal justice systems around the world from the 1980's, which included the creation of victim support services and the use of victim impact statements. This focus on victim restoration in the criminal law arena, which involves attending to victims' needs, is now seen as an important process that includes 'reassurance and support, reparation, vindication, meaning, safety and empowerment': Howard Zehr, **Changing Lenses: A New Focus for Crime and Justice**, (3rd ed, Herald Press, 2005). Their voice needs to be included not only for the process of justice, but for their recovery and survival, and for the possibility of future victimization to be erased.

It is important to note that therapeutic jurisprudence is advocating the increased use of restorative justice with child victims in particular, to facilitate as much healing as possible before a trial, as the courtroom

experience would involve trauma for the child in addition to the pain of the crime itself. The victims of domestic violence would also benefit from a restorative justice process, where the Prosecution can interact with them pretrial to emotionally and psychologically empower them, can limit negative victim character evidence, can introduce evidence of the offender's prior abuse, and can allow the victims to contextualize the violence in their testimony.

The offenders: Offender restoration requires that it be made clear to the offenders what their actual degree of responsibility is for the criminal event which occurred, in order to avoid complications which may arise from their misconceptions about their culpability. Offenders may also need 'social support, assistance to deal with guilt, education and training, interpersonal skills, emotion management skills and a positive self-image': **Changing Lenses: A New Focus for Crime and Justice** at 200. This could lead to an enhanced capacity on their part to face the victim, accept the consequences of their action on the life of the victim and be accountable and empathetic. The ultimate effect of such restorative justice would be the opportunity for the offender to heal and re-enter society as a trusted member.

The community: A community where crime has occurred is also a victim in a broad sense and it needs to be restored to a place of stability, where the breaches of relationships are healed, and citizens feel safe and can live without fear. Processes which 'denounce offending behaviour, hold offenders accountable for their actions and promote the healing of victims and offenders can help address the community's need for restoration' to a place where there is peace and quality of life: Michael King, **Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice** (2009) Melbourne University Law Review

Vol 32 at 1103. The community is best positioned to address the causes of crime, as these are often rooted in its social or economic framework.

5. Aim of Restorative Justice

The aim of a restorative justice program is to:

i. resolve conflict

ii. facilitate healing for victims – give them a voice

iii. facilitate rehabilitation for offenders – let them accept responsibility for wrongdoing; apologize to victims

iv. strengthen communities – restore trust between parties by putting right the harm caused: reparation/restitution e.g. financial or other compensations

v. prevent future damage – no recidivism, through remediation of offenders

Restorative justice seeks to enable a shift from the adversarial model of litigation, where the focus is on legal rights, entitlements, blame and punishment, to a justice system which balances the victims' needs for healing and rights for protection; the need for offender responsibility, rehabilitation and remediation, and the duty to protect the public/ community.

6. Process of Restorative Justice

A restorative justice process should promote active participation and discussion, where each party may voice their subjective feelings and

exchange information on the impact of the offence, in a supportive and collaborative environment. The offender can explain why the offence occurred, take responsibility, express remorse and convey an apology; and the victim can share the effects of the offence on them and express their hurt feelings. Such an environment would also be conducive to a decision-making process, where the parties can offer suggestions and agree on how the situation may be addressed and resolved, in order to bring about healing, restitution and no future reoffending, which would also be beneficial to the wider community. The overall positive outcomes of this process can include shame management for both the victim and the offender; victim satisfaction, through the removal of negative mental images associated with the offence, as well as empowerment in choosing whether to forgive; and for the offenders, a sense of closure for the offence committed.

One specific restorative justice process is the victim – offender mediation (VOM), where the victim and the offender interact with the aid of a neutral mediator. The meetings can be face to face, through recordings or letters, or with the mediator acting as a go-between. The offender's progress is monitored by support groups, community committees, probation officers and by the court. Conferencing is another practice and is widely and most influentially used in Australia. It includes family group conferencing, police-mediated conferencing, community group conferencing and circle methods.

Research conducted by the Correctional Services of Canada in 1998 indicates that the system of restorative justice reduces recidivism and increases the probability that the offenders will accept responsibility and make restitution. It also shows that participating victims and offenders prefer and are more satisfied with the restorative justice approaches, than the traditional criminal justice system; that restorative justice reduces

post traumatic stress and has a positive effect on their health, physically and psychologically.

The focus of the restorative justice process aligns with the insight of therapeutic jurisprudence, that legal processes impact the psychological well-being of participants and need to be reviewed to minimize anti-therapeutic consequences and maximize healing. Therapeutic jurisprudence advocates that victims should not be revictimized through their encounters with the criminal justice system; rather, legal procedures should be reshaped so that the victim can re-establish equilibrium and gain control over their life. In order to achieve this, all participants within the criminal justice system process should be highly trained in restorative justice in order to be sensitive to what a victim needs at every stage of healing.

This would include training for participants such as judges, lawyers, police officers and court personnel in social and psychological services, so they can attain increased sensitivity to each victim's subjective needs. In addition, court proceedings should support victim empowerment and discourage their sense of loss of control and feelings of responsibility for what happened. One route is to encourage the victims to write or speak about their feelings in relation to the crime, as this validation would help in healing post-traumatic stress disorder, which is crucial to the victim's restoration.

Restorative justice involves the victim, the offender and the community with the aim of 'restoring' circumstances to their status prior to the offence. Its processes of reparation, reconciliation and remediation can lead to holistic healing, which is the hallmark of therapeutic jurisprudence. It should be noted that restorative justice processes have been added to the criminal justice system as an enhancement and not as a substitute;

constitutional rights and procedural due processes are preserved. The therapeutic, restorative approach to criminal justice, however, is resulting in doors being opened through which both the victim and offender can pursue and experience healing, and the wider community can be satisfied and move forward, restored.

7. Therapeutic Jurisprudence and Problem-Solving Courts Approach

Lawyers and judges in their roles as upholders of the law, interacting with legal rules and legal procedures, create social forces which may produce therapeutic or anti-therapeutic results. A significant question which naturally arises, is what approach taken by a judge in the courtroom, promotes the potential therapeutic effects of the law, without compromising due process and procedure?

Therapeutic jurisprudence reaches into the criminal courts through lenses which view the offender's behaviour as capable of rehabilitation, and the ultimate justice process outcome as possibly transformative – they will never again appear in court as an offender. This therapeutic jurisprudence perspective lends the court a solution focused or problem-solving characteristic, and the criminal judge will obviously play an important role in motivating and helping the offender to be rehabilitated. This revolutionary change in the way courts function can be seen as therapeutic jurisprudence at the judicial level.

It is important to note that this approach cannot be adopted in every court, as there are often instances where the judge has to perform the traditional adjudicatory role of neutrally deciding historically disputed issues. There are cases, however, where the court can provide help to

prevent a reoccurrence of the problems before it, such as substance abuse, juvenile delinquency, domestic violence, child abuse and neglect, and untreated mental illness. In these types of matters, courts can function as psycho-social channels and judges as social workers.

Judges' Problem-Solving Skills

In Canada, the National Judicial Institute published, in 2011, **Problem-Solving In Canada's Courtrooms – A Guide To Therapeutic Justice** which specifically outlines problem-solving skills for judges. These include communicating effectively; clarity in the courtroom; and adopting a team approach. These are explored further, below, and salient areas of the Guide highlighted.

Communicating Effectively

It is advocated that problem-solving judging requires direct interaction between a judge and court participants – direct speaking and listening. The Guide notes at 29 that through this process, judges would 'inspire trust, motivate change, give participants a sense of voice and dignity, enhance progress and healing, and make court procedures more relevant to participants' lives'. Such effective communication incorporates:

i. Empathy – the ability to understand and relate to another's feelings and views. To establish empathy, judges can:

   a. show an interest in the court participant's perspective. For example, Justice Stanley Sherr of the North Toronto Family Court has stated that a father may be afraid of not having a relationship with his child, so he makes a custody claim, when all he wants is to develop access. If you say to the father, 'It looks to me what

you really want is a relationship with the child. You're not trying to take the child away from the mother," and the father says 'No, I'm not,' this addresses the fear of both father and mother in a meaningful way, which allows all parties to work things through together.

b. relate events to court participants' lives. In a domestic violence context, a judge can ask an offender if they have children and tell them that their children will model their behaviour, which they would not want to see happen.

c. acknowledge not only the facts of the case, but people's emotional responses to the case or court events. For example, a judge can say, "I can see that this situation upsets you/makes you angry/is frustrating".

d. convey a sense of caring, compassion and respect for all court participants. According to Justice Sherr, this starts with being kind. At 32, Justice Sherr notes, 'You want to project that you're fair and that you care about people and that you want to make sure that everybody is heard …Validation is extremely important.'

e. act in a trustworthy, credible manner. Treat all court participants fairly and consistently, respect due process, be prepared.

f. be aware of their own biases and predetermined ideas. This may be most clearly illustrated through youth offenders, who can appear in court in what they believe is their most special outfit, but which clothes would 'drive their parents insane'. Judges would have to realize that young people have a different outlook from what might be expected of adults (Judge Janice leMaistre, Provincial Court of Manitoba).

g. Respect – A judge must respect the dignity of all people in the courtroom. A judge's respect for an offender can result in the offender respecting the judge and the courtroom, and this mutual respect can have a positive effect on the progressive and ultimate outcome for the offender. There are various techniques which a judge can use to promote mutual respect in their courtroom:

- Speak slowly, clearly and loud enough to be heard by everyone;
- Ask the offender their name and/or how they would like to be addressed;
- Pronounce names correctly and ask for guidance when in doubt;
- Use words and tones which convey concern, not pity or condescension;
- Refrain from sarcasm, or from rushing/interrupting court participants;
- Encourage dialogue, rather than making speeches;
- Treat all participants equally;
- Make and maintain eye contact with participants, especially the offenders, as they speak and while speaking to them, rather than looking down at papers or only at lawyers. Be aware of the cultural practice of refraining from making eye contact as a sign of respect.

ii. Active Listening – Therapeutic judging requires judges to give court participants a voice and a chance to tell their stories. This active

listening provides opportunities for judges to listen for what's not said, to inquire about gaps and inconsistencies and to ask questions. This would convey to the participant that they are being heard and would promote the court's credibility. It is now accepted that process counts more than results and a judge's active listening would satisfy the participants that a fair procedure is involved, which would lead to respect for the court's decisions and orders. Active listening requires that judges:

a. give participants the opportunity to speak, listen attentively, do not rush speakers and seldom interrupt them.
b. ask questions and make comments which illustrate that they want to know about and understand a person's position.
c. refer to that position in their judgment.
d. invite the victim to speak and acknowledge and validate the victim's experience when referring to it in court.
e. read verbal and non-verbal cues which could reflect a participant's discomfort, confusion or emotional state.
f. ask court participants if they have any questions.
g. maintain active and attentive body language, such as upright posture, eye contact and focusing on the speaker.

iii. Positive Focus – A judge can create opportunities for therapeutic outcomes when interacting with offenders, by:

a. refraining from condemnation of the offender and directing disapproval at the anti-social and criminal behaviour.
b. highlighting the offender's good qualities and contrasting them with the specific criminal acts.

c. expressing hope and faith in the person's ability to become a law-abiding citizen.

d. focusing on the offender's future and the possibilities for pro-social, law-abiding, healthy behaviour.

iv. Non-coercion – Participants in the court process tend to be more satisfied, if they feel that their responses to choices open to them are not forced. Judges can reduce feelings of perceived coercion, by:

a. using positive pressures such as persuasion and inducement, rather than negative pressures such as threats and force.

b. seeking input from offenders on such issues as parole, sentences, treatment and risk management plans, and other terms and obligations imposed by the court. This can lend to feelings of autonomy and responsibility on the part of the offenders.

c. emphasizing discrepancies between the offender's current behaviour and their expressed long-term goals.

d. avoiding arguments and confrontation, which can result in defensiveness; rather allow the offender to create solutions to their problems and remain in control.

v. Non-paternalism – A paternalistic attitude of telling the offender what the problem is and how to fix it, 'can be offensive, reinforce denial, foster resentment, and cause a judge's efforts to backfire': at 41 of the Guide. In contrast, problem-solving judges recognize that therapeutic justice requires offenders to acknowledge their problems and take responsibility for solving them. These judges can, with the support of treatment staff, help offenders to identify

their beneficial qualities which they can use constructively in the joint effort to solve the problem.

Clarity in the Courtroom

The majority of persons who appear before judges in the criminal courts, may not be able to properly understand the legal documents and language involved in the management of their case. This may be due to limited literacy skills, as well as the highly specialized legal language used and the particular way of formulating legal documents. The result is that people are intimidated by the legal system and do not see it as a place where they can defend their rights.

If, however, judges facilitate greater understanding in their courtroom, the offenders would more clearly appreciate such matters as the reasons for and the terms of their sentences, restraining orders and why they have to report back to the court on a certain date, and they would more likely comply as required. Techniques which the judge can use to achieve this clarity:

i. Look for signs of limited literacy, e.g., participants saying they forgot to bring glasses, hesitating when asked to read a document or reading at a very slow speed, mood change when faced with a document – upset, quiet, uncommunicative, forms which are incomplete or incorrectly completed or grammatically incorrect, their coping with the fear and embarrassment of inability by being flippant, dishonest, defensive, frustrated, angry

ii. Be proactive by breaking silence and directly asking if the participant has difficulties reading or writing,

iii. Speak slowly and clearly, using short sentences and repeating important information

iv. Read documents aloud in the courtroom

v. Use plain language instead of "legalese", and translate specific legal terms when they arise

vi. Use the active voice (we understand) rather than the passive voice (it is understood)

vii. Use the first and second person (I/You) rather than the third person (One)

viii. Ask the court participant if they understand and ask them to repeat in their own words what was just said

ix. Ask often if the court participants have any questions, waiting a sufficient amount of time for a reply and using body language such as eye contact, leaning forward, a nonthreatening vocal tone and open hands to show willingness to receive

x. Watch the listeners' body language to determine if they have questions but are hesitant to ask

xi. Answer reasonably expected questions even if not asked

Team Approach

Judges vested in a problem-solving approach can achieve great progress, through the cooperation and input of an experienced team which includes lawyers for all parties, police officers, social workers, mental health professionals, mediation professionals, victims' services professionals, addiction treatment centres and community outreach representatives. The court staff can also be included, guided by the judge to create a therapeutic courtroom tone and environment, by treating offenders with

respect and facilitating court participants' understanding of the process. Finally, the offenders themselves and other court participants can be included to provide input from their respective perspectives. This muti-disciplinary, team-based approach can only enhance the potential for problem-solving.

Judges who succeed in honing the courtroom problem-solving skills of communicating effectively, clarity and a team approach, would clearly aid in the realization of procedural fairness, and facilitate the aims and process of restorative justice. The ultimate result would be doors opening for the psychological and emotional healing of court participants and consequently, the positive experience of therapeutic justice in the management of their matters before the courts.

As explored in **Problem-Solving In Canada's Courtrooms**, an international group of approximately 50 judges who took a problem-solving approach to judging were asked to complete the statement: 'One way that I practise therapeutic jurisprudence in my courtroom is …'. The following statements summarize their responses.

- ✓ Speaking directly to the defendant in language and a tone of voice I think he or she will understand.
- ✓ Finding something positive to say about the defendant; praising positive steps toward recovery; identifying and building on any indications or demonstrations of willingness to try to effect positive change.
- ✓ Learning as much as I can about each defendant; trying to understand where a defendant is coming from – educationally, socially, psychologically – so they feel that I know and care about them.
- ✓ Taking into account the impact of police and court processes to date.
- ✓ Viewing the case as a primarily emotional, not legal, event.

- ✓ Not allowing therapeutic/anti-therapeutic considerations to trump legal considerations.
- ✓ Communicating to the parties that I understand their plight and the emotions involved.
- ✓ Considering any cultural/linguistic factors that have an effect on a defendant's understanding of communication in the courtroom.
- ✓ Using research-based decision making.
- ✓ Working in a collaborative fashion with lawyers, health care professionals, and community organizations to provide a comprehensive treatment plan
- ✓ Looking at each defendant's support system and utilizing that system in the treatment plan.
- ✓ Listening carefully to each person who comes before me.
- ✓ Being mindful of the impact of my words and actions on all participants.
- ✓ Explaining my decisions to all parties.
- ✓ Trying to schedule all of my contested cases for a case management conference so everyone appears informally and expresses their position. By doing so, often the problem can be resolved.
- ✓ Using any influence I might have to encourage the client to get services they need to be well.
- ✓ Always asking an offender, when they say that they will not offend again, what they are going to do to ensure that they do not offend and what supports they have in place.
- ✓ Getting a defendant to explain what they have agreed to do and to explain how they are going to do it.
- ✓ Asking defendants to explain why they think they offended: "What made you do it?"

- ✓ Insisting on participation by all family members who are present at the disposition stage for an offender.
- ✓ Being absolutely open about discussing underlying problems.
- ✓ Constructively incorporating psychological or psychiatric assessments with the parties and their lawyers as a step toward problem-solving.
- ✓ Treating clients/defendants with respect.
- ✓ Letting clients ask questions and report positive progress.
- ✓ Requiring treatment and medication compliance as conditions of release.
- ✓ Setting status hearings to monitor court orders.
- ✓ Using incentives (e.g., applause, positive affirmations/reinforcement, encouragement) to reward compliance, and sanctions (e.g., increasing release restrictions) for non-compliance.
- ✓ Educating myself and parties about mental-health and substance-abuse disorders, treatment, and available community resources.
- ✓ Believing that people can change.
- ✓ Recognizing that you can't punish people to make them get better.
- ✓ Viewing the person as a whole instead of seeing only the parts of them that committed a crime.
- ✓ Determining what would be in the best interest of the community

8. Specialized Problem-Solving Approaches

In the criminal law context, therapeutic jurisprudence was initially applied in specialized problem-solving courts, as these courts were "therapeutic jurisprudence friendly" designed. They facilitated the judges not only being able to resolve the case, but also the underlying issue or issues

which gave rise to the matter. These solution-focused or problem-solving courtrooms are where therapeutic jurisprudence flourished. Their embrace of therapeutic jurisprudence included a focus on procedural fairness, as well as their use of the principles of restorative justice.

In Canada, specialized problem-solving courts can be found in almost every province and territory. They started in 1998, when a drug treatment court and a mental health court were initiated in Toronto, Ontario. Today, specialized problem-solving courts have expanded to include domestic violence courts, community courts, aboriginal courts and youth courts.

In the United States, problem-solving courts were formalized in 2000, by the adoption of a joint resolution of the Conferences of Chief Justices and Chief Court Administrators which explicitly supported the development of problem-solving courts. These include drug treatment courts, mental health courts, domestic violence courts and other specialized courts.

The relational, interdisciplinary and healing focuses of these courts, facilitate the aim to identify and resolve the psychological issues underlying the legal problems, rather than on administering punishment or assigning blame.

For instance, in drug treatment courts, awareness of the fact that repeat offending occurs due to addiction, leads to a team approach being used to focus on mandatory programs for addiction, judicial supervision and life-skills training, over incarceration. In mental health courts, there is sensitivity to the fact that crimes by the mentally ill are health issues rather than criminal law matters, as well as awareness of the impact of the court process on them. A non-adversarial, relaxed atmosphere, as well as expedited assessments of mental illness and where appropriate, treatment of mental health conditions, are opted for over punishment. In domestic violence courts, there is recognition of the unique and complex

characteristics of violence between family members and the approach adopted includes early and effective intervention and processing of these cases to increase victim safety; a team approach with social services to support the victims throughout the matter; and requiring the offenders to take responsibility for their actions not only through legal sanctions, but also through monitoring their compliance with court orders for treatment and for terms of contact with the survivors.

In Australia, a problem-solving courtroom approach has actually led to research being conducted into the benefits of legal representation in the courtroom, for the victims of serious sexual violence. It was examined and found that such representation would significantly support victims during the criminal justice process, especially during aggressive cross-examination; it would reduce secondary victimization and trauma; secure and maintain the victim's confidence in their own testimony, which would lead to the probity and efficacy of the evidence that goes before the jury; ensure the veracity of the criminal proceedings themselves; and may improve low conviction rates. If such representation is granted, the therapeutic jurisprudence outcomes can only be enhanced. However, fairness to the defendant remains vital and the defendant's rights to ask questions and test the Prosecution's case cannot be compromised. Victim legal representation may therefore have to be limited to the specific role of protecting the victim's confidence and their capacity to testify with integrity.

Specialised Courts in the region where Therapeutic Jurisprudence may be facilitated:

i. **Bermuda**: Drug Treatment Court, DUI Treatment Court, Mental Health Treatment Court, Juvenile Court; (In progress: establishment of a Family Treatment Court - parents with drug, alcohol, and mental health issues - and a Domestic Violence Court);

ii. **Cayman Islands**: Drug Treatment Court; (Informal Domestic Violence and Mental Health Treatment Courts);

iii. **Guyana**: Juvenile Court, Adult Drug Treatment Court, Juvenile Drug Treatment Court, Sexual Offences Court

iv. **Saint Lucia**: Juvenile Court.

9. Mainstreaming Therapeutic Jurisprudence and The Problem-Solving Courtroom Approach

An issue which has arisen, is whether therapeutic jurisprudence problem-solving techniques should be limited to the specialized problem-solving courts. The underlying principles of therapeutic jurisprudence however, combined with the significant roles judges often play in the resolution of wide-ranging disputes, has led to the phenomenon of mainstreaming.

Mainstreaming is the process of 'applying the principles and practices of therapeutic jurisprudence to any and all aspects of the legal system where a therapeutic jurisprudence focus may "make a difference"': E Richardson, P Spencer, and D Wexler, **The International Framework for Court Excellence and Therapeutic Jurisprudence: Creating Excellent Courts and Enhancing Well-Being** (2016) 25 Journal of Judicial Administration 148. That is, therefore, employing therapeutic jurisprudence in regular criminal courts and other general courts, beyond the specialized, problem-solving ones. The rationale for this expansion is that the law would be able to broadly impact the social wellbeing of society.

D Wexler and M Jones in **Employing the 'Last Best Offer' Approach in Criminal Settlement Conferences: The Therapeutic Application of an Arbitration Technique in Judicial Mediation** (2013) 6 Phoenix L Rev, illustrate this development, through the analogy of the landscape of

legal rules and procedures as 'bottles' and the therapeutic jurisprudence practices of legal actors like judges, as "liquid". To achieve mainstreaming, certain legal landscapes (rules and provisions) or "bottles" must be explored, to determine the extent to which the various practices and techniques of therapeutic jurisprudence, the "liquid", can be poured into them.

Judges in the states of New York and California in the United States, who had sat in both dedicated problem-solving courtrooms and courts of general jurisdiction, in conjunction with the New York-based Center for Court Innovation, actually conducted such an exploration, and identified some no or low-cost therapeutic jurisprudence approaches which judges can transfer from problem-solving to regular courtrooms; that is, therapeutic jurisprudence approaches which they can mainstream:

i. **A proactive, problem-solving orientation of the judge**: This orientation leads judges to seek creative solutions to problems and to treat court participants as individuals worthy of respect and attention.

ii. **Direct engagement with participants**: Courts can engage in clear communication with litigants, enhancing their understanding and confidence in court proceedings. For example, judges and other court staff can ask litigants whether they have questions. They can make direct eye contact, address litigants directly, and speak courteously. Direct engagement is a prerequisite for effective behaviour modification, and enables judges to motivate and influence defendants to make progress in treatment, while identifying parties' crucial needs and laying the groundwork for positive solutions. Courts can also solicit litigant feedback (in comment boxes or via a website).

iii. **Individualized screening and problem assessment**: The court screens or assesses potential litigants for key circumstances, including drug and alcohol use, mental illness, literacy and language difficulties, and prior or concurrent court involvement (e.g., criminal court and Family Court).

iv. **Sentencing therapeutically**: Judges can involve offenders in crafting sentences to include risk- management strategies, relapse-prevention plans, and goals, and that incorporate specific rewards and sanctions for compliance and meeting those goals. Combined with ongoing judicial supervision (see point below), problem-solving sentencing can dramatically increase compliance and the likelihood of addressing or ameliorating some of the underlying causes of criminal activity.

v. **Ongoing judicial supervision**: Ongoing supervision – such as having defendants report back to court for treatment updates and judicial interaction – keeps judges informed and offenders accountable, and allows judges to tailor sentencing provisions according to an offender's progress or relapse. Such reviews demonstrate to defendants and litigants that the court watches and cares about their behaviour, while providing ongoing opportunities for the court to communicate with litigants and defendants, and respond to their concerns and circumstances.

vi. **Establishing links and partnerships with social services agencies, and integrating social services into sentencing and courtroom procedures**: By establishing direct links and relationships with such agencies, judges and counsel can more effectively and efficiently refer offenders to appropriate and available services, increasing the likelihood of compliance. Such partnerships and referrals are

especially useful when dealing with defendants having addiction, mental illness, or vocational/educational needs.

vii. **Tracking service mandate compliance**: Courts can track the number of litigants assigned or recommended to social services – including drug treatment, mental health treatment, domestic violence programs, education initiatives, parenting classes, etc. – each year and monitor the compliance rate.

viii. **Prompt information sharing**: Courts can provide up-to-date information, forms, and instructions to litigants and family members in order to ensure that they understand the process and to help them prepare and file necessary paperwork. Courts can routinely collect and update relevant case information.

ix. **A team-based, non-adversarial approach** with lawyers, social service agencies, and other court actors.

x. **Courthouse training and education**: Courts can educate staff about the context of offending, problem-solving strategies, and socioeconomic contexts that can underlie criminal behaviour and conflict through informal and formal trainings. Such training sessions can take the form of brown-bag talks, lectures from outside experts, or participation in out-of-court judicial education programs.

xi. **Community outreach**: A court's presence in the community can be bolstered by hosting site visits from community groups, expanding court information available online and in libraries, schools and other public centres, and encouraging transparency in how courts operate.

Outlined below is a comparison of traditional and transformed court process, adapted from Roger Warren, '**Reengineering the Court Process**' (1998) Presentation to Great Lakes Court Summit:

Traditional Court Process	Transformed Court Process
• Dispute resolution	• Problem-solving dispute avoidance
• Legal outcome	• Therapeutic outcomes
• Adversarial process	• Collaborative process
• Claim or case oriented	• People-oriented
• Rights-based	• Interest- or needs-based
• Emphasis placed on adjudication	• Emphasis placed on post adjudication and alternative dispute resolution
• Interpretation and application of law	• Interpretation and application of social science
• Judge as arbiter	• Judge as coach
• Backward looking	• Forward looking
• Precedent-based	• Planning-based
• Few participants and stakeholders	• Wide range of participants and stakeholders
• Individualistic	• Interdependent
• Legalistic	• Common-sensical
• Formal	• Informal
• Efficient	• Effective

One positive feature of mainstreaming is the involvement of legal personnel other than judges; this includes professional and administrative staff involved with the court who also contribute to the participant's experience of the justice system.

The advancement of mainstreaming was endorsed by the Canadian Council of Chief Judges in 2011, when it released a Therapeutic Justice Resolution which expressly stated, inter alia, that judges are not only expected to deal with disputed issues of facts and law, but are also asked to resolve 'human and social problems that contribute to offending behaviour'; and that it is desirable that judges apply the principles of therapeutic jurisprudence, not only within the context of problem-solving courts, but whenever appropriate to do so. It was moved by the Resolution, inter alia, that the Canadian Council of Chief Judges endorses the principles and purposes of therapeutic jurisprudence and encourages their application in the courts whenever it is appropriate and feasible; and it 'supports the development of evidence-based best practices' in therapeutic jurisprudence and 'the dissemination of that information to all judges'.

Evidence regarding the development and practice of therapeutic jurisprudence within the Caribbean jurisdiction of Trinidad and Tobago, was acquired through a two-year research project on procedural fairness conducted by the Judicial Education Institute of Trinidad and Tobago. According to Kerrigan, consultant to the research project, the data reveals a therapeutic jurisprudence 'culture of progressive members of the judiciary in T&T, which is promising and working for liberation and the building of new communities and humane ways for dealing with disputes'. That the mainstreaming of therapeutic jurisprudence has also been accepted as essential, emanates from the work done by several judges of the T&T judiciary, including Kokaram and Jamadar, who 'actively through training seminars, workshop papers, judgments and changes in their processes helped to push the idea of therapeutic jurisprudence beyond a niche concern': at 42 in D Kerrigan, P Jamadar, E Elahie and T Sinanan, **Securing Equality for All in the Administration of Justice: The**

Evidence and Recommendations in *Caribbean Judicial Dialogue: Equality for All in the Administration of Justice* (Faculty of Law The University of the West Indies (UWI), Mona 2017).

The difficulties which may be encountered with mainstreaming therapeutic jurisprudence, include a regular court calendar which cannot effectively accommodate a therapeutic jurisprudence approach to everyday judging; traditionalist judges who resist change; as well as attorneys who view a "team approach" as an infringement of their traditional role as pure advocate, or a waste of time. It is proposed, however, that if therapeutic jurisprudence practices are extended into the "ordinary" system, a more humanistic approach to law would evolve and expand into everyday life, which would maximize the therapeutic potential of the law on those it affects. The benefits of mainstreaming therapeutic jurisprudence outweigh its challenges.

10. Text Resources

Australian Human Rights Commission (AHRC), **Equal before the law: towards disability justice strategies** (2014).

Bruce Winick, **'Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime'** (2009) Nova Law Review, Vol 33, Issue 3.

Carolyn Copps Hartley, **'A Therapeutic Approach to the Trial Process in Domestic Violence Felony Trials'** (2003) Violence Against Women 9(4).

David Wexler, **'Therapeutic jurisprudence in a comparative law context'** (1997) Behavioral Sciences & the Law 15(3).

Douglas Johnson, **'Mainstreaming Therapeutic Jurisprudence in Criminal Courts with a Focus on Behavioural Contracting, Prevention Planning, & Reinforcing Law-Abiding Behaviour'** (2016) International Journal of Therapeutic Jurisprudence 313.

Elizabeth Gresson, **'Restorative Justice in Criminal Offending: Models, Approaches and Evaluation'** (2018) Special Edition International Journal of Therapeutic Jurisprudence.

Lori Caroll, **'Sentencing and Restoration Through TJ'** (2016) International Journal of Therapeutic Jurisprudence 119.

Michael Perlin, **'"Have You Seen Dignity?": The Story of the Development of Therapeutic Jurisprudence'** (2017) Available at SSRN: https://ssrn.com/abstract=2932149 or http://dx.doi.org/10.2139/ssrn.2932149

N Bakht and P Bentley, '**Problem Solving Courts as Agents of Change'** (2004) Commonwealth Judicial Journal 16(3):7.

Tyrone Kirchengast, **'Victim legal representation and the adversarial criminal trial: A critical analysis of proposals for third-party counsel for complainants of serious sexual violence'** (2021) International Journal of Evidence and Proof, Vol 25, Issue 1.

In this Chapter:

Chapter 28

Human Trafficking, Forced Labour, and Modern Slavery

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1. Introduction

The islands of the Caribbean and its mainland jurisdictions arc from the northern coast of Venezuela, sweeping north first, curving eastwards and then veering westwards to the southern tip of the United States of America. Comprising in total some 700 islands, islets, reefs, and cays, not all of which are inhabited by humans, these island arcs delineate the eastern and northern boundaries of the Caribbean Sea and simultaneously, the

western boundaries of the Atlantic Ocean. To their west across the Caribbean Sea are the countries of Central America. Like stepping-stones across a great expanse of water, the Caribbean islands are a natural pontoon-like bridge between South America and North America, and a seafaring link between North, South, and Central America. Humans from the earliest times have traversed these islands, moving between continents over and across these island-chains. The peoples, cultures, flora, and fauna in the Caribbean bear testament to these historical movements. Today these movements continue and include nefarious activities, from drug and arms smuggling to human trafficking and modern slavery: Jason Haynes, **Caribbean Anti-Trafficking Law and Practice** (Hart Publishing, 2019) at 5.

In Caribbean spaces, historical practices of slavery, overt 'chattel' slavery, Indian indentureship, human trafficking and forced labour, are woven into the fabric, cultures, and psyches of regional peoples. The trauma, injustice, and inhumanity of these experiences, and their consequences, persist. Forced sexual exploitation, commercial sexual exploitation of children, and the exploitation of migrant and undocumented workers, remain major concerns in the American region, including Commonwealth countries. The Caribbean, with open unsecured borders and economies heavily reliant on tourism, provides opportunities for undocumented migrants seeking employment, as well as a destination for sex tourism, including the commercial sexual exploitation of children. Indeed, child sex tourism in the Caribbean results in the exploitation of numerous children each year: Commonwealth Human Rights Initiative and Walk Free, **Eradicating Modern Slavery. An assessment of Commonwealth governments' progress on achieving SDG Target 8.7** (2020); P Jamadar and L Pena, **Human Trafficking, Forced Labour, and Modern Forms of Slavery: Commonwealth Caribbean Perspectives** (March 2022).

In fact, these practices are globally rampant, and increasingly so. As of 2020, 1 in 150 persons in the Commonwealth is living in contemporary forms of slavery, such as forced labour, trafficking, or other exploitative conditions; an estimated 40% of the 40.3 million people living in modern slavery reside in Commonwealth countries. This represents about 15.7 million men, women, and children in forced labour, forced marriage, and human trafficking; and 1 in every 130 women and girls globally is currently trapped in modern slavery. An estimated 29 million women and girls are victims of modern slavery: **Eradicating Modern Slavery**.

This evidence describes a global phenomenon of enormity, tragedy, and criminality. It is unavoidably an issue for judicial systems, and all who are interested in human rights and justice. The exposure and eradication of human exploitation and cruelty, that is manifesting in our times as modern-day slavery, must be made a high priority – it is both urgent and imperative.

Statistics show that women and girls are the most vulnerable. According to **Global Report on Human Trafficking in Persons** (United Nations Office on Drugs and Crime, 2020) at 4, 9:

> Migrants account for a significant share of the detected victims in most regions. Traffickers prey upon the marginalized and impoverished. Cases examined by UNODC found that at least half of the victims were targeted because of economic need.
>
> ....
>
> ...In 2018 for every 10 victims detected globally, about five were adult women and two were girls. About one

> third of the overall detected victims were children, both girls (19 per cent) and boys (15 per cent), while 20 per cent were adult men.
>
> Traffickers target victims who are marginalized or in difficult circumstances. Undocumented migrants and people who are in desperate need of employment are also vulnerable, particularly to trafficking for forced labour.

Children living in extremely poor households are especially vulnerable. Countries in West Africa, South Asia, Central America, and the Caribbean, report much higher shares of detected child victims. Globally, one in every three victims detected is a child, but in low-income countries, children account for half of the victims detected, most of them trafficked for forced labour.

Finally, considering the percentages of detected trafficking victims, classified according to the categories of exploitation, what is striking is that 50% of victims are trafficked for the purpose of sexual exploitation, and 38% are trafficked for the purpose of forced labour. The research data also shows that where forced labour revolves around domestic servitude, women and girls predominate. **Human Trafficking, Forced Labour, and Modern Forms of Slavery**.

2. Human Trafficking in The Caribbean

The **Global Report on Human Trafficking in Persons** highlights the key features of human trafficking in the Caribbean and the Americas, as follows:

i. In the Caribbean, most of the detected victims in 2018 are girls and women, equalling 79 per cent of the total detected trafficking victims in this region. The percentage of girls as a proportion of the total detected victims, was 40 per cent in 2018, and is among the largest percentage of girl victims of trafficking recorded worldwide.

ii. In North America, Central America and the Caribbean, sexual exploitation is the most commonly detected form of trafficking (over 70 per cent), which is among the highest recorded globally. As far as victims of trafficking for sexual exploitation are concerned, most victims in North America are adult women, while a higher share of girls is reported in Central America and the Caribbean.

iii. The share of detected victims trafficked for forced labour ranges between 13 and 22 per cent in the two subregions. In North America, detected victims who are trafficked for forced labour are mainly adults, with men and women detected in similar shares. The victims detected in Central America and the Caribbean who are exploited in forced labour are girls and boys.

iv. In Central America and the Caribbean, children are also trafficked for the purpose of exploitative begging, for forced criminal activity and for some forms of illegal adoption.

In terms of trafficking flows, the Report research data shows that victims detected in Central America and the Caribbean are primarily citizens of the country of detection. The other significant flows are from South America and other countries in the subregion. These flows mainly move from south to north, from relatively poorer countries towards relatively richer countries across borders. Overall, the trafficking flows affecting Central America and the Caribbean continue to be confined to the Americas, both in terms of their origin and destination.

From this research data, the picture that emerges is of hemispheric trafficking, generally flowing from south to north, but with significant internal local trafficking, all influenced by both wealth differentials and economic factors. In the Caribbean subregion, poverty is a significant factor, and women and girls are the most highly trafficked victims, with sexual exploitation, forced labour and domestic servitude being the most prevalent drivers: **Human Trafficking, Forced Labour, and Modern Forms of Slavery**.

3. Territorial Situational Overviews

Dr Jason Haynes, in **Caribbean Anti-Trafficking Law and Practice**, undertakes a sort of non-exhaustive overview of incidences and occurrence rates of human trafficking in Caribbean states – one that is much broader in scope Caribbean-wise than the **Global Report on Human Trafficking in Persons**. The following highlights a few of his observations, to give a sense of what obtains in Barbados, Belize, and Guyana.

Barbados

In Barbados, the first case of human trafficking was formally investigated in 2004; it involved two adult Guyanese women being trafficked for sexual exploitation. Subsequently, several Indian nationals were found to have been trafficked for forced labour, having been discovered to be working for a Barbados construction company for wages of about US$ 1 per week. Then in 2013, five Guyanese girls had been forced into prostitution by their traffickers, who coerced them to provide sexual services for BBD$ 10, which was immediately taken from them by their handler (a 76-year-old woman). Dr Haynes reports that in Barbados, 'traffickers in that country have a particular preference for young, vulnerable Guyanese girls', girls who come from impoverished conditions and have low levels of education.

Belize

Belize, located where it is in Central America, has proven to be particularly conducive to human trafficking. Vulnerable women and girls are trafficked and forced to engage in prostitution. The UN Special Rapporteur on Trafficking in Persons Mission to Belize, 2014 Report, documents a typically tragic case, in which a 13-year-old Guatemalan girl was transported to Belize with a promise of a babysitting job. On her arrival, she was taken to a small village in Belize, where she was made to provide sexual services. She was never paid, and was deprived of her freedom for one year, and threatened that she would be detained by the police for

her illegal entry into the country if she tried to escape. She was also sexually molested by a police officer, who was complicit in her exploitation. Dr Haynes notes that 'young and impressionable (Belizeans) with poor education and job prospects, are widely acknowledged to be at the highest risk of being trafficked.' He also recounts a report by the UN Special Rapporteur on Trafficking in Persons, which documents a case in which 60 Nepali nationals were subjected to forced labour exploitation.

Guyana

Guyana is described as consistently having 'the highest rates of human trafficking' of all English-speaking Caribbean states. Research shows that in the five-year period from 2013-18, over 200 victims of human trafficking were recorded, of whom 89 percent were women and girls, the majority being Guyanese nationals. In 2016 alone, 103 children were reportedly trafficked. Of the Guyanese women and girls trafficked, the vast majority were used for sexual exploitation, and to a lesser degree, domestic servitude.

Dr Haynes, in **Caribbean Anti-Trafficking Law and Practice** at 9**,** describes the situation as follows:

> The stories are harrowing as they are endless. Most of these women are reportedly recruited through the promise of jobs or better living conditions overseas only to find themselves, once in the country, in physical and psychological bondage, often being forced to provide their sexual services to traffickers, their associates and clients, and threatened with the prospect of being

> detained and immediately sent back home when they try to escape.

4. Defining Modern-Day Slavery

Slavery is defined in contemporary terms as the status or condition of a person over whom any or all the powers attaching to the right of ownership or control are exercised. Modern day slavery therefore encapsulates human trafficking, forced labour, debt bondage, descent-based slavery, slavery of children, forced marriage and child marriage: League of Nations, ***Slavery Convention*** (60 LNTS 253, 25September 1926).

The International Criminal Tribunal for former Yugoslavia Appeals Chambers, in the case of ***Prosecutor v Kunarac*** **(IT-96-23 &-IT-96-23/1-A)**, sheds further light on modern slavery. The traditional concept of "slavery", the court notes at [117], 'evolved to include various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership.'

The court made it clear that slavery is not limited to the 'right of ownership over a person', but extends to where the 'powers attaching' to such a right are exercised. The court also identified, at [119], a non-exhaustive list of factors which may be indicators of slavery:

> control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.

The Appeals Chamber further explained: (i) lack of consent of a victim, (ii) duration of enslavement, and (iii) the nature of the relationship to a victim, are relevant considerations. These are not necessary elements, though they may be evidential considerations: see [120] – [121].

The intention required is simply 'an intentional exercise of power attaching to the right of ownership': see [122].

A good working definition that encapsulates the essence of modern-day slavery is **forced or involuntary servitude** (see ***Prosecutor v Kunarac*** at [123], citing with approval ***United States v Oswald Pohl and Others,*** **Judgement of 3 November 1947, reprinted in Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council No. 10, Vol 5, (1997**), 958 at 970).

5. Treaties and Legislative Frameworks

The majority of the Commonwealth Caribbean are signatories to the Palermo Protocol, which at the time of writing has been ratified or acceded. Barbados, Belize, and Guyana have all done so. **The Palermo Protocol, supplement to the UN Convention against Transnational Organized Crime** (2000), is the most significant international instrument to combat and prevent human trafficking. There are several other salient international protocols: **Human Trafficking, Forced Labour, and Modern Forms of Slavery**.

Of special relevance is **The UN Trafficking Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children** (2000), which is another important international treaty, that creates the internationally accepted definition of human trafficking. Human Trafficking is defined, at Article 3(a), as:

> Trafficking in persons shall mean 'the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, or practices similar to slavery, servitude or the removal of organs.

These treaties are becoming more important, as Caribbean courts, when interpreting and applying the law, strive as far as is reasonable to ensure that their approaches are aligned with State international treaty obligations. A hallmark decision that emphasizes this, is the decision of the CCJ in ***Attorney General v Joseph and Boyce* [2006] CCJ 1 (AJ)**.

Many Caribbean territories have either amended/ modified their existing laws, or enacted new laws, to address the issue of human trafficking. Barbados, Belize, and Guyana have all enacted new laws, as follows:

i. **Trafficking in Persons Prevention Act, 2016** (BB)
ii. **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ)
iii. **Combating of Trafficking in Persons Act 2005**(GY)

6. The Role of Judicial Officers

Judicial officers have pivotal roles to play in the mitigation, amelioration, and eradication of these modern forms of slavery, forced labour, and human trafficking. They are, after all, amongst the primary powers when it comes to trial procedures, determinations of guilt, and sentencing, all of which are deeply intertwined in good practices for protecting victims of contemporary forms of slavery.

Article 1 of the **Slavery Convention** (1926), defined slavery as 'the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

Its terms were shaped by context, and thus by prevailing historical circumstances. The language is contractual - 'right of ownership' – informed by the dominant form of chattel slavery, and shaped by existing ideologies.

7. Constitutional Lenses

Viewed through modern constitutional lenses and in post-colonial contexts, a critical interrogation of this almost 100-year-old colonial era treaty, may reveal the true potential of the roles and capacities of judicial officers in relation to contemporary forms of slavery; a potential unshackled by both history and 'tabulated legalisms': ***Marin*** **[2021] CCJ 6 (AJ)** at [31] – [33]; ***McEwan and others v The Attorney General of Guyana*** **[2018] CCJ 30 (AJ)**.

The jurisprudential implications for contemporary forms of slavery should be self-evident; the inherent dignity and worth, the freedom, and the unequivocal equality of all persons, are constitutionally presumed

inviolable (subject of course to lawful exceptions). Courts and judicial officers are obliged to orient themselves around these values – both procedurally and substantively. This is what a rights-centric, rule of law approach to judicial work requires. In the context of this issue, it is an approach where the primary focus is on the rights and interests of victims/survivors. Judicial officers are the guardians of constitutional values. In the context of contemporary forms of slavery, when viewed through the principles of constitutional supremacy and human rights paramountcy, judicial officers are under a constitutional imperative to act to protect victims/survivors.

The Constitutions of Barbados and Belize expressly prohibit slavery, servitude and forced labour: s 14 of the **Constitution of Barbados 1966**, s 8 of the **Belize Constitution Act 1981**. Caribbean constitutions that do not expressly prohibit slavery, do so by implication.

Barbados

The Constitution of Barbados, like many Caribbean constitutions, recognizes that every person is entitled to fundamental rights and freedoms, whatever their race, place of origin, political opinion, colour, creed, or sex, including the right to life, liberty, and security of the person. Besides declaring these rights, the Constitution of Barbados goes on to specifically prohibit torture, inhuman or degrading punishment or other treatment. It also expressly provides that persons shall not be deprived of their personal liberty.

Belize

Likewise, the Constitution of Belize also impliedly prohibits human trafficking, as it recognizes a person's fundamental rights to life, liberty, security of the person, and the protection of the law, as well as the protection for their family life, personal privacy, privacy of their home and other property. The Constitution of Belize also prohibits inhuman or degrading punishment or other treatment, and protects the right to freedom of movement.

Guyana

The Constitution of Guyana also contains clauses protecting the right to freedom of movement and the right to liberty, and prohibiting cruel and inhuman treatment; it thus impliedly prohibits all forms of human trafficking and modern-day slavery.

8. Practical Implications

In a very practical sense, the following are some general approaches that should be embraced by all court systems and judicial officers. In this context, it is worth remembering that human trafficking, forced labour, and all modern forms of slavery, are events of violence perpetrated against unwilling and most often vulnerable victims.

Some important matters that courts and judicial officers should therefore always be concerned about and address from the earliest opportunities, are:

i. the safety and security of victims/survivors
ii. the physical, mental, emotional, and psychological wellbeing of victims/survivors, including access to services that can aid recovery and healing
iii. the active and meaningful participation of victims/survivors throughout court proceedings, ensuring convenient access to necessary information, amenities, and legal and other social services
iv. considerations (where appropriate) of regularization of immigration status, safe repatriation, and community and filial reintegration
v. the avoidance of revictimization
vi. the provision of relevant compensation tailored to the circumstances of each case.

Care, however, needs to be taken to avoid adverse effects on victims' rights, including rights to privacy, freedom of movement, and choices about the exercise and enjoyment of freedom (agency).

Dr Haynes itemizes some general human rights obligations, as follows, at 106 of **Caribbean Anti-Trafficking Law and Practice**:

i. Give primacy to the rights of victims/survivors
ii. Provide basic supplies to victims/survivors
iii. Provide medical and psychological assistance to victims/survivors
iv. Afford children specialized care and treatment
v. Provide safe and secure accommodation

vi. Protect privacy of victims and ensure confidentiality

vii. Provide information, documentation, and interpretation/translation

viii. Regularize victims' immigration status

ix. Ensure the safe repatriation of victims/survivors

x. Assist in the reintegration of victims

9. Three Key Legal Principles

One of the major pillars of international anti-trafficking law, is the protection of victim's rights. The Commonwealth constitutions, like international law, have adopted a rights centric approach, focusing on the rights of the victim and putting safeguards in place to prevent revictimization of the person. To some extent, these principles have been incorporated into the domestic law through the enactment of Trafficking in Persons legislation.

Non-punishment Principle

The principle is best explained in the case of ***L*** **[2014] 1 All ER 113**. This case consolidated several separate appeals, as the appellants were all victims of human trafficking. The appellants were all Vietnamese nationals who had been brought to the United Kingdom as children and forced to cultivate cannabis plants. The appellants were charged and convicted of cultivating cannabis and being in possession of fake passports.

At [13], the court held:

> What, however, is clearly established, and numerous different papers, reports and decided cases have

> demonstrated, is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation, and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity. The reasoning is not always spelled out, and perhaps we should do so now. **The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals**.

At [16], the court further stated:

> The court reviews the decision to prosecute through the exercise of the jurisdiction to stay. **The court protects the rights of a victim of trafficking by overseeing the decision of the prosecutor and refusing to countenance any prosecution which fails to acknowledge and address the victim's subservient situation, and the international obligations** to which the United Kingdom is a party. The role of the court replicates its role in relation to agents provocateurs. It stands between the prosecution and the victim of trafficking where the crimes are committed as an aspect of the victim's exploitation.

The legal principle in operation is that where the crime committed (the offence) has a *sufficient nexus* to the fact that the person was trafficked and there was evidence of *compulsion* (to commit the offence), to a degree that the victims' culpability can be considered to be effectively extinguished, then a judicial officer should exercise their discretion to grant a stay of the proceedings. The jurisprudential basis for the stay is that the proceedings or their continuation amounts to an abuse of process.

The case of ***Sermanfure Joseph*** **[2017] EWCA Crim 36**, is one involving a Saint Lucian national who was a victim of human trafficking in the UK and had smuggled cocaine into the UK. The court affirmed the sufficient nexus and compulsion test, but noted that the seriousness of the offence must also be considered when determining whether a stay was appropriate in the instance. In the case of a child, however, it was determined that it is not necessary to consider the element of compulsion in deciding whether to stay a matter.

Barbados, Belize, and Guyana have all statutorily incorporated the non-punishment principle, as follows:

i. Section 14 of the **Trafficking in Persons Prevention Act, 2016** (BB);
ii. Section 27 of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ);
iii. Section 11of the **Combating of Trafficking in Persons Act 2005** (GY).

All of these jurisdictions give the broadest coverage, i.e., the protection is broadest where the provisions state: 'A victim is not criminally liable for any immigration-related offence, or any other criminal offence that is a direct result of being trafficked.'

Duress

In the Commonwealth Caribbean, the defence of duress is a recognized defence, and it has applicability in the area of human trafficking and victim/survivor criminality. However, this will usually mean that the victim/survivor must go through a full trial to prove duress, as opposed to a court ordering a stay of the prosecution.

According to the Jamaican case of ***Clement Reid*** **[2013] JMCA Crim 41**, a defence of duress will be successful where:

i. the victim was forced against their will to act as they did by threats which they genuinely believed would cause serious harm to them or their family;
ii. a reasonable person of the victim's age and circumstance would have been forced or compelled to act as they did in the commission of the offence;
iii. the victim could not reasonably have avoided acting as they did without either being harmed or having their family harmed as a result.

Avoidance of Revictimization

Building upon the above, particularly on procedural fairness requirements that include understanding, respectful treatment, availability of amenities, and access to information, **Proceeding Fairly** notes that judicial officers must be careful to avoid secondary victimization caused by court proceedings, in relation to victims/survivors of modern-day slavery.

According to the International Centre for Migration Policy Development's **Anti-Trafficking Training Material for Judges and Prosecutors Handbook**, judges should put all measures in place to eliminate security risks

to the victim and manage the victim's psychological trauma and stress. Judges should treat the victim with compassion, fairness, respect, and dignity, and encourage and arrange special support for the victim. These measures, according to the Handbook and **Caribbean Anti-Trafficking Law and Practice**, include:

i. Explaining the nature of the proceedings to victims in understandable terms;

ii. Arranging for victims to be under the care of an established NGO;

iii. Allowing victims to be accompanied to Court by a person they trust;

iv. Ensuring access to translation services;

v. Monitoring the types of questions put to the victim;

vi. Providing Witness Protection;

vii. Ensuring the basic needs of Trafficked Victims are met (see s 6(1)(c) **Trafficking in Persons Prevention Act, 2016** (BB), s 9(1) **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ));

viii. Providing medical and psychological assistance (see s 26(1) **Trafficking in Persons Prevention Act, 2016** (BB));

ix. Providing accommodation (see s 10(1)(f) **Combating of Trafficking in Persons Act 2005**(GY)).

x. Dr Haynes explains in **Caribbean Anti-Trafficking Law and Practice** at 31:

> The importance of protection …lies in the fact that trafficked victims are, by virtue of the exploitation which they have had to endure, vulnerable individuals whose mental and physical wellbeing could easily be compromised by the recalcitrant practices of traffickers and their associates who wish to regain their "property"

> or dissuade victims from cooperating with prosecuting authorities in the institution of criminal proceedings.

The safety of these persons can easily be compromised by their vulnerable positions.

Many Commonwealth Caribbean countries now have legislation to ensure that the victims/survivors are safe from threats and intimidation from their traffickers. In Barbados, Belize, and Guyana, the following sections are apposite: s 29(b) of the **Trafficking in Persons Prevention Act, 2016** (BB), s 8(2) of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ), s 9(2) of the **Combating of Trafficking in Persons Act 2005** (GY).

The legislation in these jurisdictions even goes further to provide reasonable protection to the family members of the victims/survivors: s 29(c) of the **Trafficking in Persons Prevention Act, 2016** (BB), s 13 of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ), ss 16(1) and 105(c) of the **Combating of Trafficking in Persons Act 2005** (GY).

10. The Special Case of Child Victims

Children have always been recognized by the law as being especially vulnerable. Article 3 (1) of the **Convention on the Rights of the Child**, provides that '[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.'

Many Commonwealth Caribbean countries have enacted legislation that recognize this vulnerability and the best interests of the child: s 21 of the **Trafficking in Persons Prevention Act, 2016** (BB), s 36 of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ), s 25 of the **Combating of Trafficking in Persons Act 2005** (GY).

The respective Acts also require housing care and support, and that the victims are reunited with their families as soon as practicable. In some instances, there is a requirement that criminal proceedings involving child victims be held in camera, to prevent secondary victimization: s 16(2) of the **Trafficking in Persons Prevention Act, 2016** (BB), s 30(a) of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ), s 15(2) of the **Combating of Trafficking in Persons Act 2005** (GY).

Some of these countries provide that child victims are not to be housed in prison or other detention facilities: s 18(3) of the **Trafficking in Persons Prevention Act, 2016** (BB), s 18(6) of the **Combating of Trafficking in Persons Act 2005** (GY).

Some of these jurisdictions also provide that child victims are to be assigned trained social or case management workers to support them in court proceedings: s 30(e) of the **Trafficking in Persons (Prohibition) Act, CAP 108:01** (BZ), s 25(b) of the **Combating of Trafficking in Persons Act 2005** (GY).

11. Practical Considerations

The considerations offered in this section are reflected in Office of Trafficking in Persons, **Identifying Victims of Human Trafficking, Anti-Trafficking Training Material for Judges and Prosecutors Handbook,** Ministry of Justice Office to Combat Trafficking in Persons, **Information Sheet: Red Flags – Indicators of Human Trafficking.**

Red flags and Indicators that a Person may be a Victim of Human Trafficking

In order to afford the victim/survivors their rights and prevent secondary victimization and revictimization in society, it is crucial that the victim is identified. Sometimes victims themselves are unaware of their possible victim status; lived experiences of mistreatment and abuse are "common" to some migrants. Victims may have a negative perception of authority and may be afraid of being deported (see **Identifying Victims of Human Trafficking**).

Human Trafficking Can Occur In The Following Situations:

i. Prostitution and escort services
ii. Pornography, stripping, or exotic dancing
iii. Massage parlours
iv. Sexual services publicized on the Internet or in newspapers
v. Agricultural or ranch work
vi. Factory work or sweatshops
vii. Businesses like hotels, nail salons, or home-cleaning services

viii. Domestic labour (cleaning, childcare, eldercare, etc. within a home)

ix. Restaurants, bars, or cantinas

x. Begging, street peddling, or door-to-door sales

General Physical Indicators of Human Trafficking

i. Bruises, broken bones, burns, and scarring

ii. Chronic back, visual, or hearing problems

iii. Skin or respiratory problems

iv. Infectious diseases, such as tuberculosis and hepatitis, which are spread in overcrowded, unsanitary environments with limited ventilation

v. Untreated chronic illnesses, such as diabetes or cardiovascular disease

vi. Reproductive health problems, including sexually transmitted diseases, urinary tract infections, pelvic pain and injuries associated with sexual assault, or forced abortions.

12. Special Indicators

The considerations offered in this section are reflected in Office of Trafficking in Persons, **Identifying Victims of Human Trafficking, Anti-Trafficking Training Material for Judges and Prosecutors Handbook,** Ministry of Justice Office to Combat Trafficking in Persons, **Information Sheet: Red Flags – Indicators of Human Trafficking**.

Forced Labour

i. Evidence of a failure to pay a worker the minimum wage
ii. Work is extracted from workers by physical or sexual violence
iii. Confinement to the workplace
iv. Retention of identification documents
v. Threats of deportation or harm to family
vi. The person feels linked to the employer by debt bondage
vii. Working hours are disproportionate

Domestic Servitude

i. Cohabitation
ii. Disproportionate working hours and lack of time off
iii. Perpetration of offensive acts or manifestation of racist attitudes against the domestic worker
iv. Exposure to physical or sexual abuse/violence
v. They are prevented from leaving the place of residence/work freely
vi. No negotiation of work conditions is allowed
vii. Inadequate remuneration such as to maintain dependent relationships
viii. The person feels linked to the employer by debt bondage - for instance to pay back travel expenses often for an undefined amount

Sexual Exploitation

i. Women without passports or identification documents or visas and whose personal data cannot be verified
ii. Women speak only their native language
iii. Women seem to be very anxious or in a helpless situation
iv. Women are not able to explain how they entered the country
v. Women do not have their earnings at their free disposal
vi. The price of sexual services is considerably lower than market prices
vii. Women have to earn a minimum amount of money per day
viii. Women are limited in their freedom of movement
ix. Women have a relatively high debt

13. Judicial Attitudes for Increasing Awareness - Ascertaining Red Flags

Situational Awareness and Intersectionality

This speaks to the recognition, understanding, and awareness that a matter may present itself as a straightforward case, when in reality it involves intersecting and other influencing considerations. The nature of human trafficking, how and why humans are trafficked and who is trafficked (currently there is an overwhelming and disproportionate number of women and children), is constantly changing; contemporary forms of slavery are shifting, changing forms, yet fundamentally the same. Judicial officers who operate in a closed-minded way, within the four-corners of a case, can miss the existence and impact of contemporary forms of slavery in those cases.

Mindful Judging

Mindful judging requires judicial officers to adopt a 360-degree internal and external view of court proceedings and court relationships. This approach places an enhanced and specific focus on not only the substance of a case, but also on behaviours, the environment, and communications in the court room (and courthouse). Mindful judging offers judicial officers an opportunity to understand how victims/survivors may be impacted by judicial proceedings.

In Caribbean spaces, for example, judicial officers are required to become aware of whether there are factors which may influence 'rites of domination' and more generally, whether there are incidences of power and control and of manipulation at play, that operate to intimidate, silence, and re-victimise (see Mindie Lazarus-Black, **The Rites of Domination: Practice, Process, and Structure in Lower Courts** (1997) American Ethnologist, Vol 24, No 3 at 628-651).

For victims/survivors who have notably endured trauma (which can be both immediate and long-term), the judicial environment can reinforce unequal power relations that negatively impact on the victim/survivor's safety and comfort, impact their levels of trust, and their capacity to meaningfully participate in proceedings. Mindful judging thus gives rise to enhanced degrees of courtroom consciousness, that may otherwise be overlooked on account of familiarity.

Judicial Humility, Compassion, and Concern

Victims/survivors of human trafficking have already suffered trauma, exploitation, dehumanization. They enter court systems disadvantaged. Their core human rights to dignity, respect, and equality have already

been compromised. Achieving substantive equality for them may necessitate appropriate differential treatment.

Judicial humility begins when judicial officers give up their need to be right, be in control and have power over, and their predisposition to be pre-judgmental. Judicial humility leads to genuine attitudes of openness and receptivity and consequently, to judicial compassion and concern. Indeed, these three judicial attitudes may be exactly what victims/survivors of contemporary forms of slavery are both entitled to and need.

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