IN THE COURT OF APPEAL OF BELIZE AD 2015

CRIMINAL APPEAL NO 16 OF 2012

KENRICK WILLIAMS Appellant

v

THE QUEEN Respondent

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BEFORE

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

P Palacio for the appellant.
C Vidal SC, Director of Public Prosecutions, and L Banner, Crown Counsel, for the respondent.

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11 June 2014 and 24 September 2015.

SIR MANUEL SOSA P

I - Introduction

[1] In the early afternoon of Wednesday 24 March 2004, the dead body of Elia Mercedes Gonzáles, a 17-year-old student of the village of Libertad, Corozal District ('the deceased') who had gone missing on the day before, was discovered lying *en déshabillé* in the bushes just off the feeder road which forms a short cut between Libertad and the village of Concepción and which is popularly known variously as 'the

Concepción-Libertad white road', 'the Libertad back road' and 'the back street'. The body was clad in the white school uniform of the Corozal Community College; round its left ankle was a pair of shorts and a pair of panties; and near it lay, *inter alia*, a peaked cap marked with the abbreviation 'PUP' ('the PUP cap'). Kenrick Williams, a resident of Libertad also known variously by the sobriquets 'Mendigo' and 'Bendigo' ('the appellant'), then aged 27, was detained by the police later on that same date and charged, on 26 March 2004, with the murder of the deceased. Following the preferment against him in August 2006 of an indictment containing a single count of murder, the appellant went on trial in 2009 but, for reasons unknown to this Court, his trial proved abortive. In June 2012, the appellant was put on trial again, this time before Hanomansingh J ('the judge'), sitting with a jury. At the conclusion of this trial ('the trial') on 4 July 2012, he was convicted of murder; and, on 18 July 2012, he was sentenced to imprisonment for life. After having evinced, by his notice of appeal and application for leave to appeal, a desire to appeal to this Court against both conviction and sentence, the appellant ended up advancing at the hearing an appeal against conviction only. On 11 June 2014, the Court heard and dismissed the appeal, affirmed the appellant's conviction and sentence and undertook to deliver at a later date the reasons for judgment which it shall now set out below.

II - The grounds of appeal argued (seen as a trinity)

[2] In the order in which they were argued by Mr Palacio, who represented the appellant at the trial as well as on his appeal, the grounds of appeal complained that the judge failed:

- '… to give to the jury a Mushtaq direction' (ground 1);
- '… to make a proper exercise of his discretion to admit the questions and answers contained in the [statement under caution] notwithstanding the breach of the Judges' Rules' (ground 4, added at such hearing); and
- '… to give adequate directions on the defence of accident in that he failed to assist the jury with resolving issues of fact' (ground 2).

Ground 3, to the effect that the verdict of the jury was unreasonable having regard to the evidence, was expressly abandoned at the hearing, a casualty, from all indications, of the early meltdown of ground 1 at such hearing.

[3] The paramount reality in this appeal is, as the Court sees it, that grounds 1, 3 and 4 formed an interlocking trinity resting on a common foundation, viz the proposition that the statement under caution (treated by the appellant as including the questions and answers which followed its recording by the police on 25 March 2004) was crucial to the success of the Crown case. The President made no effort at the hearing to conceal his skepticism as to the soundness of that core proposition. Such soundness, or the lack thereof, must be the central concern of the present judgment. It is convenient to lay the ground work for the necessary examination by describing the other evidence, essentially circumstantial in nature, deployed by the Crown at the trial.

III - The other evidence deployed at the trial

[4] The Court will first note that the evidence heard by both judge and jury at trial was adduced by the Crown, the appellant not having testified under oath or called any witnesses. This so-called other evidence falls under six distinct headings.

(a) Evidence of the ring and the wrist-watch

[5] It was the evidence of Elia Elena Gonzáles, the mother of the deceased, that the latter left home for school on the morning of 23 March 2004 wearing, *inter alia*, a gold ring and a wrist-watch. As described by Mrs Gonzáles, the former item was 'a thin ring, with little flowers and a brown stone'. While in the witness-box, she was shown a ring, which she identified as the ring in question. Evidence of the visit of a party of police officers and a crime scene technician to the spot where the body of the deceased was found ('the scene') was given by the investigating officer, Julius Cantun, a police corporal at the time of the pertinent investigation but a police inspector by the time of the trial, and also by Romeo Riverol, the crime scene technician in question. Neither of these two witnesses testified to having observed either a ring or a watch on the body of the deceased at the scene.

[6] Inspector Cantun, for his part, touched on the subject of the hands of the deceased in the part of his evidence-in-chief in which he dealt with his taking of photographs. He said he took, at the scene, a close-up photograph of the hands of the deceased, which were tied behind her back. He was at pains to point out in his testimony that that photograph revealed 'a white marking around the left wrist, where it appeared that she had worn a wrist watch (*sic*)'. The photograph was admitted in evidence as exhibit 'JC 9'.

[7] Later in his examination-in-chief, Inspector Cantun gave evidence of his observation of the hands of the deceased during the course of a *post-mortem* examination conducted on the morning of 25 March 2004. It was his testimony that he observed 'a clear spot around the right index finger of the deceased' (emphasis added) which led him to believe that she had been wearing a ring on that finger.

[8] It is to be noted that, in his testimony, Dr Estrada, who conducted the *post-mortem* examination already referred to above, said that his examination revealed, *inter alia*, 'a ring impression on the right middle finger' (emphasis added) of the deceased. There is, however, no indication in the Record that the doctor found on either of the deceased's wrists any mark which might be identified with that claimed to have been observed by Inspector Cantun on the left wrist of the deceased.

[9] Amalia Chi, who testified before Mrs Gonzáles, Mr Riverol and Inspector Cantun at the trial, told the jury that she lived in Concepción but was a trader who sold her wares in Belize City. At about 4.00-4.30 pm on 23 March 2004, the appellant, whom she knew, appeared at her house offering to sell her a ring. At one point in the ensuing conversation, he offered to let her have it in exchange for no more than a cigarette and a loaf of bread. In the end, Ms Chi paid him $5.00 for it. On the following day, however, the police visited her house looking for the ring and she turned it over to them. The ring, which (as has already been seen above) was shown to Mrs Gonzáles during her testimony, was also shown to Ms Chi and identified by her as the ring in question while she was in the witness-box. Her material evidence, including her estimate (admittedly the result of leading by the prosecuting counsel) as to the time of the appellant's arrival at her house, was not at all questioned by defence counsel in cross-examination.

(Indeed, the Crown's very leading of the witness could have been objected to by the defence.)

[10] Maricruz Yamili Botes, a housewife of Libertad, stated in her evidence-in-chief that, at about 6.00 pm on 23 March 2004, the appellant, whom she had known for some 24 years, arrived at her house looking frightened and worried. He offered to sell her a wrist-watch at a price of $5.00 only but she declined the offer. She was not cross-examined by defence counsel.

(b) Evidence of the presence of the appellant and the deceased in the vicinity of the scene at the material time

[11] Eric Eure Cantun gave testimony at the trial that he was, in 2004, in the employ of Ucan (recorded by the stenographer as Oakland) Bus Service as a conductor and, as such, came to know the deceased as a student at the Corozal Community College who commuted on school days. He said in evidence-in-chief that the deceased, wearing her white school uniform, was a passenger on the bus on which he worked on the afternoon of 23 March 2004. She boarded it near the cinema on 7th Avenue in Corozal Town and travelled in it as far as the short cut between Libertad and Concepción, which he described as a 'white dust road', where she alighted.

[12] Testifying earlier at the trial, Prisma Moh, a shop employee of Libertad, had recalled that, at about 3.30 pm on 23 March 2004, she was on her way from Libertad to Concepción, riding a bicycle on what she called 'the back street' and described as a 'straight road' with mostly bushes on either side. Along the way, she met the appellant, also riding a bicycle, and they orally acknowledged each other's presence. They had known each other for years, in her words, 'From small. Like 7 years.' He was headed in the direction of Concepción. Having left him behind, she met, further up the short cut, the deceased, whom she knew 'from school days', wearing her white school uniform. She was headed in the direction of Libertad. They exchanged hails. Ms Moh having pointed out the distance between the point where she met the appellant and that where she met the deceased, the jury estimated such distance to be one of some 30 yards only. Nowhere in the short cross-examination of Ms Moh that followed was it suggested

to her that she was with two companions on the back street on that afternoon and that all three of them, and the appellant, had reached Concepción together.

[13] A taxi-driver of Concepción called Julio Nolasco Carias gave evidence of having seen the appellant at about 3.30 pm on 23 March 2004 standing on the left hand side of what he (Mr Carias) called a street in Libertad. Pointing out thereafter that 'the street was a straight road', Mr Carias said that, because the appellant looked suspicious to him, he 'focused on him for about 3 to 5 minutes' (undoubtedly an exaggeration, since Mr Carias claimed to have been driving at the time) and noticed that he (the appellant) was looking in the direction of Concepción. He was not then familiar with the appellant, having seen him for only the first time on the morning of that same day. But he was able to point him out at an identification parade held at the Corozal Town Police Station on the afternoon of 25 March. Under cross-examination by Mr Palacio, Mr Carias readily agreed, unsurprisingly, that he was a Justice of the Peace at the time of the trial.

(c) Evidence of the green ¾ pants

[14] Ms Moh, the shop employee of Libertad, testified that, when she met him on the afternoon of 23 March, the appellant was wearing a green ¾ pants. Ms. Botes, the Libertad housewife, said that, when he called at her house on the evening of 23 March, he was wearing a pair of green 'pants'. These discrete claims of Ms Moh and Ms Botes went unchallenged in cross-examination.

[15] Inspector Cantun, the investigating officer, gave evidence of a search conducted at the home of the appellant in Libertad commencing late in the morning on 25 March. He said that, in the middle of such search, carried out in the presence of the appellant, a faded green ¾ pants was found on the roof of the house; and photographs of the pants on the roof were tendered in evidence by him and admitted as exhibits 'JC 24' and 'JC 25'. Inspector Cantun was not challenged in cross-examination as to this part of his evidence. (Indeed, the appellant was to declare in an unsworn statement from the dock later in the trial, not only that the pair of pants he had worn on 23 March 2004 was found on the roof of his house (with, as he claimed, his assistance), but also that it was photographed, while still on the roof, by the police.)

[16] Mr Riverol said in evidence-in-chief (in 2012, as already noted above) that he was then a Senior Crime Scene Technician and that, on 25 March 2004, he found a pair of faded green 'short pants' on the roof of the appellant's house. It was his further testimony that he observed on this pair of pants what appeared to him to be blood stains. He took possession of the pair of pants and later on, on 29 March 2004, he delivered it, together with other items, to the National Forensic Science Service ('the laboratory') for analysis. It appears from the Record, at p 379, that the pair of 'short pants' was shown to Mr Riverol at the trial and identified by him as the 'short pants' he found on the roof of the appellant's house on 25 March 2004 and later took to the laboratory for analysis. (The package containing the pants had previously been opened at the appellant's first trial and had, it seems, remained unsealed since then; but the defence did not object to the pants being shown to Mr Riverol for identification at the trial.) Mr Riverol's evidence as to the finding of the pants in question and as to the presence on it of the stains which he described was not the subject of cross-examination.

(d) Evidence of the boxer shorts with designs

[17] Mr Riverol gave further evidence concerning two pairs of boxer shorts, viz one consistently described as grey and another said to have had designs but otherwise variously described. Both pairs of boxer shorts were supposedly being worn by the appellant on 25 March 2004; but, for reasons which shall appear later on this judgment, it is only the latter pair which is of importance for present purposes. According to the testimony of Mr Riverol, these two shorts were obtained by him from the appellant during the previously mentioned visit of 25 March to the home of the latter upon requesting of him the underwear that he was wearing 'at the time'. It is reasonable, in the Court's view, to infer from Mr Riverol's evidence that what he thus requested was the underwear the appellant was wearing on the afternoon of 23 March and that the appellant, by taking off and handing to him not one but two pairs of boxer shorts he was wearing at the time of Mr Riverol's request (on 25 March, as already indicated above), was representing to the latter that he had been wearing both of them on 23 March as well. The two pairs of boxer shorts were among the items delivered on 29 March at the

laboratory for analysis. It appears from the Record, at p 379, that two pairs of boxer shorts were shown to Mr Riverol at the trial and identified by him as those which he obtained from the appellant on 25 March 2004 and later took to the laboratory for analysis. (While, however, before being shown the pair of shorts with designs in court, Mr Riverol described it as blue, with red, blue and grey 'box designs', upon it being shown to him, he described its design as a 'blue gray boxer design', adding that 'it had black on the waist.')

[18] Mr Riverol's testimony as to his obtaining of the two pairs of boxer shorts in question was not challenged during cross-examination. (Indeed, the appellant, was to confirm, in the course of making his unsworn statement from the dock already referred to above, Mr Riverol's account of his obtaining of possession of the two pairs of shorts except as regards the date and place, which, according to him (the appellant), were 24 March and the Libertad Police Station, respectively.)

(e) Evidence of blood

[19] Mr Riverol delivered several other items to the laboratory for examination and/or analysis. Included among them were the school uniform in which the body of the deceased was clad when found; the PUP cap; two tubes containing, respectively, a specimen of the blood of the appellant and one of the blood of the deceased (both such specimens having been taken by Dr Estrada); the white shoe lace found tied around the neck of the body of the deceased (removed from it – the body – by Dr Estrada in the course of the *post-mortem* examination); and fingernail clippings from the body of the deceased (taken by Dr Estrada during the *post-mortem* examination).

[20] Diana Bol Noble was called by the Crown, and accepted by the judge, as an expert witness. Mrs Bol Noble said she was a Forensic Analyst employed by the National Forensic Science Service and experienced in the analysis of body fluids, such as blood and semen, and in the examination of hair and fibres.

[21] She testified that, based on her tests of the identified samples in question, the blood group of the deceased was O and that of the appellant A. Significantly, group O blood was found by her on the appellant's green ¾ pants and on his grey boxer shorts,

with red and blue designs; and, equally significantly, group A blood was found by her on the fingernail clippings taken from the right hand of the deceased's body. Less significantly, group O blood was found by her on the right side of the collar of the school uniform (at the 'hem'), on the PUP cap, on the shoe lace removed from the neck of the body of the deceased and on the fingernail clippings taken from the left hand of such body.

(f) Evidence of abrasions on the face and right hand of the appellant

[22] Dr Estrada, who described himself as a 'forensic doctor' gave testimony under examination-in-chief of a medical examination of the appellant conducted by him at about 1.07 pm on 25 March 2004 at the Corozal Town Police Station. According to such testimony, as material for present purposes, he discovered, as a result of his examination, two recent abrasions on the face and right hand, respectively, of the appellant. The former abrasion was 5 mm long and situated on the left cheek of the appellant while the latter was 1 cm long and situated on the dorsal part of his right hand. Dr Estrada estimated that these abrasions had been sustained some 40 to 52 hours prior to the time of his examination, ie between approximately 9 am and 9 pm on 23 March 2004; and he opined that they were consistent with fingernail scratches. Dr Estrada did, it is true, label these abrasions as defensive wounds; but it seems obvious that this was the result of some momentary loss of concentration.

[23] Dr Estrada admitted in the course of cross-examination that there was no mention in his notes of the medical examination of the appellant that the abrasions in question were consistent with fingernail scratches. And defence counsel, for some unclear reason, saw fit to elicit from him a repetition of his estimate as to the time of the infliction of those abrasions. However, such estimate having been repeated, its accuracy, though hardly favourable to the appellant, was not even indirectly questioned in the cross-examination that followed.

IV - The appellant's unsworn statement from the dock

[24] The appellant, by the previously mentioned unsworn statement from the dock which he made at the close of the Crown evidence, raised a defence of denial.

[25] He admitted having sold the ring in question to Ms Chi but said he had found it. He had found it, he said, as a result of having gone, on the day of the murder, to a farm, either in or near to Concepción, in search of papayas. On the way to Concepción, he had met Ms Moh, the shop employee of Libertad, and two female companions of hers; and they had all reached Concepción together. At that point, he had taken 'the first lane to the left' and proceeded on his own to the papaya farm, finding the ring on the way there.

[26] The police had visited his house on 24 March, arrested him for the murder of 'a young girl' and taken him thence to the Libertad Police Station. While at the station, Corporal Cantun had brandished a pistol and directed a feint at him. Thereafter, while still at the station, he had, on the demand of the corporal, taken off and surrendered to Mr Riverol the two boxer shorts he was then wearing.

[27] The police had, in his presence, conducted a search at his house on 25 March and, thanks to his assistance, had found, on the roof of the house, the pants he had worn on 23 March.

[28] A doctor had subsequently, with his consent and cooperation, taken blood from him at the Corozal Town Police Station.

[29] He had been led, later on, to the CIB office, in that same station, where he had been confronted by four police officers and Mr Riverol. A statement had been demanded of him and he had been physically and mentally mistreated. The details given by him of such alleged mistreatment need not be reproduced here, given the concession of the Director in relation to ground 1, a concession to which the Court shall return later on this judgment. Suffice to say that it was the claim of the appellant that such mistreatment caused him first to decide to give, and later to give, a statement based on details provided to him by the police, although he knew nothing of the murder in question.

*V - The grounds (*taken *seriatim*)

(a) Ground 1 – The *Mushtaq* direction

[30] The first hurdle standing in the path of this ground was effortlessly cleared by the appellant: the Director correctly conceded that a *Mushtaq* direction (*R v Mushtaq* [2005] 1 WLR 1513) ought properly to have been given by the judge. It is in the light of this concession that, as pointed out above, there is no point in reciting the details of the appellant's alleged mistreatment at the hands of the police.

[31] What occasioned the meltdown of this ground at the hearing was the need to tie the judge's undoubted non-direction to a substantial miscarriage of justice. That is a need arising by virtue of the provisions of what has come to be known commonly as 'the proviso', viz the proviso to section 30 of the Court of Appeal Act, whose operative language is as follows:

> '… the Court may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.'

No substantial miscarriage of justice, nay no miscarriage of justice at all, could have occurred if there was in the Crown case, independently of the contents of the statement under caution (as broadly defined – rightly in the view of the Court – by the appellant), sufficient evidence to render it inevitable that a properly directed jury would nevertheless have convicted the appellant of murder. It is the opinion of this Court that the Crown case contained such additional evidence in the form of the various pieces of circumstantial evidence which have already been described above under the label of 'the other evidence' and whose synergism is nothing short of overwhelming.

[32] Taken together, those pieces of evidence showed that the appellant and the deceased were, so to speak, on a collision course at mid-afternoon on that fateful day in March 2004. And it is clear that the collision was to be of no more than two persons, the appellant being alone. On this web of circumstantial evidence, the collision was not

avoided. The ring was, figuratively, living and, literally, palpable proof of that; but the watch, though never produced in court, was not without its own potential significance in this connection. The failure to cross-examine Ms Botes may well have proved far more telling to the minds of the jurors than the failure to challenge Ms Chi for the simple reason that, in retrospect, the appellant is seen to have saved for his unsworn statement from the dock, an explanation, however weak, for his possession of the ring he sold to Ms Chi but to have, in effect, chosen to turn a deaf ear to Ms Botes' parallel allegation. The jury's obvious rejection of the appellant's explanation that he had found the ring seems a clear indication of their opinion as to its quality.

[33] The Court, for its part, regards that explanation as decidedly weak for two main reasons. First, it would be a very striking coincidence, indeed, if the ring had been separated from its owner, the deceased, in some incident occurring earlier in the day and having nothing to do with her murder. But the explanation given by the appellant presupposed the occurrence of just such an incident: the ring was said by him to have been found, not on, or adjacent to, the back street itself, but at some ill-defined location arrived at by the appellant sometime after reaching Concepción but before reaching the papaya farm he claimed to have visited. And any interpretation of his explanation as one consistent with the finding of the ring on or near the back street was nipped in the bud by his claim that it occurred after he, Ms Moh and her supposed companions arrived, simultaneously, at Concepción. The back street is, as already noted above, a short cut between Libertad and Concepción and, as such, does not extend into or beyond the latter village.

[34] Secondly, if, as seems certain, the ring was taken from the person or dead body of the deceased during the incident which involved her killing, than, since the appellant, Ms Moh and her supposed companions all arrived (on his version of events) at Concepción at one and the same time, he would most certainly have met the deceased, still in possession of her ring, at some point along the back street (a certainty as to which, coincidentally, he was stoically silent in his dock statement). Thereafter, the third party, who, on his (the appellant's) account, must have been her killer, would not only have attacked and killed her but also, somehow, with supernatural capabilities,

immediately taken the ring from the place of the attack and killing to the discrete location where the appellant claims to have found it – before the appellant himself could reach there. It must be borne in mind, in this regard, that Ms Moh's undisputed testimony was that both she and the appellant were travelling by bicycle, rather than on foot, on that undoubtedly memorable afternoon.

[35] But the jury would not have found themselves obliged incorrectly to reach their verdict of Guilty on the weakness of the defence case. There was additional circumstantial evidence to lend immeasurably more strength to the Crown case. The blood on the green ¾ pants worn by the appellant on the day of the murder (and found on, of all places, the roof of the appellant's house) was determined by the Forensic Analyst to belong to blood group O, the deceased's blood group. The same was true of the blood found on the appellant's boxer shorts with red and blue designs. On top of that, blood of the blood group A, the appellant's blood group, was found on the fingernail clippings taken from the body of the deceased. A reasonable jury would not have failed to juxtapose, and connect, such evidence with the forensic doctor's testimony of the scratches he found on the face and right hand of the appellant, scratches described by him (the doctor) not only as 'recent' but also as consistent with fingernail scratches. The jury would no doubt have also given careful attention to the doctor's elaboration on the word 'recent', which was to the effect, as already pointed out above, that the scratches would have been sustained by the appellant some 40 to 52 hours before the time of his (the doctor's) examination.

[36] One is thus left to echo, by way of conclusion, the words of Lord Brown of Eaton-under-Heywood in *Simmons and Anor v R* [2006] UKPC 19 (judgment delivered on 3 April 2006), at para 36:

> '… even had the *Mushtaq* direction been given and the jury disregarded the statement [under caution], they must inevitably still have convicted him.'

(b) Ground 4 – The Judges' Rules

[37] Before entering into this ground, the Court must further comment briefly on the abandonment of ground 3. As was rightly intimated to Mr Palacio by the President, once oral argument reached a point where the fate of ground 1 was sealed, failure of that ground would inevitably have serious implications for the viability of ground 3. If the evidence was such that, even leaving aside the statement under caution, the jury would inevitably have convicted the appellant of murder, how, then could it be argued that the verdict was unreasonable having regard to the evidence? The Court is convinced that this intimation, a hint that the untenable should not be argued, was not made in vain.

[38] The truth is, however, that if, as this Court has opined, there is, for the reasons already given, no merit in ground 1, then neither can there be any in ground 4. After all, the questions and answers said by Mr Palacio to have been admitted in breach of the Judges' Rules are, as he rightly implied in his very formulation of the ground, and as the Court has already implicitly recognised above (para [31]), part and parcel, in fact, of the statement under caution. The *voir dire* itself was conducted on the understanding (clear and correct in the view of this Court) of Crown, defence and judge, that what was at issue was the admission, first, of everything recorded by Cpl Wright as having been said by the appellant to him on 24 March 2004, whether or not in response to questions posed by him (the corporal) and, secondly, of course, of those questions themselves. The various pieces of the other evidence which have been described, and whose combined effect has been considered, above, certainly do not include any part of the questions and answers of whose consideration by the jury the appellant effectively complained under ground 4. The Court, in short, sees nothing whatever in ground 4. Indeed, in retrospect, from its present vantage point amidst the *disjecta membra* of ground 1, it considers that leave to add ground 4 ought properly to have been refused.

(c) Ground 3 - accident

[39] The early meltdown of ground 1 at the hearing thus effectively left ground 3 alone on centre stage. This is a ground whose success would require a conclusion by the Court that the statement under caution, in which it was raised, was, after all, evidence to

be accepted by the jury, not, as the appellant contended, or may be deemed to have contended, in the context of all his other grounds, evidence to be disregarded by the jury. The Court finds such a conclusion wholly unattractive.

[40] In any event, the Court is unable to agree with Mr Palacio that the defence of accident had any proper part to play in the summing up in the instant case.

[41] In *Marroquin Barillas (Miguel Angel) and Anor v R*, Criminal Appeals Nos 3 and 4 of 1990 (judgment delivered on 8 February 1991), this Court found no merit in a ground of appeal to the effect the trial judge had failed to give the jury a proper direction on the defence of accident. The appellant M in that case had admitted in a statement under caution that he and the appellant G, who was armed with a shotgun, had gone to a gas station to commit a robbery. Upon their entering the building, G pointed the gun at a young man who was inside it and a shot was fired. Blood then poured out of the young man's eye. The appellant G, in a statement under caution of his own, said that, he and M having entered the building, a struggle ensued between the young man and M who told him (G) to shoot, after which the gun was discharged and the shot hit the young man. In statements from the dock made at the trial, each appellant said he had gone to 'steal' rather than to kill. G further said that the shot in question was fired when, while he was holding it, 'the shotgun was knocked against the wall'. The Court allowed the appeal on a ground relating to an error made by the trial judge in the course of exercising his discretion as to the admission of the statements under caution in evidence. But, admittedly by way of *obiter dicta*, the Court rejected the argument that the defence of accident arose in the case. It was emphatic that the killing of the young man –

> '… could not … be regarded as an "accidental" killing justifying [G's) acquittal in circumstances in which [G] had taken a loaded shotgun with him with the intention of stealing.'

(See the 10th of the unnumbered paragraphs of the judgment.)

[42] The eminently sound reasoning there was that what might otherwise be called an accident could not give rise to the legal defence of accident where it arose in the course

of the commission of a criminal act. Applying that reasoning to the instant case, the supposed accident, viz the holding of the neck of the deceased 'with strength' in such a way that it brought about her death by asphyxiation, cannot give rise to the legal defence of accident arising, as it did on the statement under caution of the appellant, in the course of an act of sexual intercourse which, on the appellant's own telling, had started as consensual sex but soon turned to rape. The appellant claimed in that statement that 'Liz' (who could only be the deceased) had submitted to his advances on condition that he 'not push all my … penis inside her'. In disregard of this, and over the protestations of the deceased, he proceeded fully to penetrate her and to hold her by the neck 'with strength' (ie firmly), an act which prevents the person to which it is subjected from screaming out or even talking. If there is merit in this ground, the Court has failed to see it.

VI - Concluding remark

[43] The Court is firm in its conclusion that neither singly nor collectively do the appellant's grounds of appeal pass muster.

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SIR MANUEL SOSA P

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AWICH JA

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HAFIZ BERTRAM JA