IN THE COURT OF APPEAL OF BELIZE AD 2012

CRIMINAL APPEAL NO 7 OF 2010

ARTURO EK Appellant

v

THE QUEEN Respondent

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BEFORE

The Hon Mr Justice Sosa	President
The Hon Mr Justice Mendes	Justice of Appeal
The Hon Mr Justice Pollard	Justice of Appeal

B S Sampson SC for the appellant.
C Vidal, Director of Public Prosecutions, for the respondent.

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Hearing: 14 October 2011
Judgment (reasoned): 20 July 2012

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Introduction

[1] Shortly after daybreak on Sunday 18 November 2007, the lifeless and almost completely nude body of Eugenio Tzul ('the deceased'), aged 49, was found lying on the ground, a short distance away from the house of his brother, Gregorio, in the village of San Joaquín, Corozal District. The appellant, then aged 18, was charged with murdering the deceased between 17 and 18 November 2007, a charge to which he pleaded Not Guilty at arraignment on 13 May 2010. On 16 June 2010, however, at the end of his trial before Arana J and

a jury, he was found guilty of murder; and, on 14 July 2010, he was sentenced to life imprisonment. His appeal against conviction was heard by this Court on 14 October 2011.

Grounds of Appeal

[2] Mr Sampson SC, who did not appear for the appellant at trial, filed the following three grounds of appeal:

> '1. The trial judge erred by omitting adequately to direct the jury on the effect of the intoxication on 'intention to kill'.
>
> 2. The learned trial judge failed to give the jury the MUSHTAQ direction even though the appellant's dock statement described the ill-treatment he received at the hands of the police to obtain the statement.
>
> 3. Given the totality of inconsistencies identified in the appellant's caution statement (the sole foundation for the prosecution) the case should have been withdrawn from the jury. Instead, the Judge continued by misdirecting the jury on an important question of fact i.e MURDER WEAPON.'

At the hearing, Mr Sampson informed the Court that he would not be arguing grounds 1 and 2, and confined himself to arguing ground 3 alone; but the Court nevertheless heard the Director of Public Prosecutions on ground 2. Furthermore, following the hearing, the Court, with the consent of both sides, considered further submissions, in writing only, in regard to ground 2.

Factual background

[3] In setting out the factual background, the Court bears in mind the course which it has decided to take in this appeal, to which it shall come at para **[33]**, below, and therefore imposes on itself the usual restrictions. As relevant, the factual background falls into two parts concerning, respectively, i) the item allegedly found around the neck of the deceased's body ('the body') and ii) the alleged statement under caution of the appellant ('the statement').

i) <u>The item allegedly found around the neck of the body</u>

[4] The prosecution adduced at trial the *viva voce* evidence of five witnesses, all of whom claimed to have seen a piece of wire around the neck of the body at different times following its discovery. It further adduced in evidence the statement, written in the Spanish language and supposedly given under caution by the appellant, in which he spoke, in terms to be discussed below, first, of a *'cuerda'* and, later on, of a '*cuerda negro* (sic) *de cable'*.

[5] All relevant prosecution witnesses testified to having seen a piece of wire around the neck of the body during daylight hours. The first of these, Gregorio Tzul, said that the body 'had a wire around his neck'. He first saw the body shortly after rising at about 5 or 5.30 am on 18 November, at which time it was, from other evidence given by him, already clear. The second of these witnesses, Romeo Riverol, a Senior Crime Scene Technician, gave evidence that he saw, and photographed, the body with a piece of wire around the neck on more than one occasion, viz i) on visiting what, on the Crown case, was the crime scene at about 7 am on 18 November and ii) on witnessing the *post-mortem* examination carried out on the body at the Karl Heusner Memorial Hospital morgue in Belize City on 20 November 2010 (an examination which, in the testimony of the pathologist, Dr Estrada, started at about 2.40 pm). Mr Riverol described the item around the neck of the body not simply as 'wire' but as 'tying wire'. It was the evidence of the third of these witnesses, a Cpl Nicholas, that he visited the scene following a telephone call which he took at about 6 am on 18 November. Arriving there, he observed, amongst other things, a piece of 'tying wire' wrapped around the neck of the body. The fourth of the these witnesses was a Cpl Valladárez, whose pertinent testimony was that, whilst witnessing the *post-mortem* examination conducted on the body, he saw a piece of wire removed from around its neck. Dr Estrada, who conducted the examination in question and was the fifth of these witnesses, read the following from his report: 'There is a

wire around the neck with irregular ligatures and abrasions on the area which is settled below the hyoid bone.' In relevant further evidence which expanded upon the terse remarks made in his *post-mortem* report, he went on to opine that 'cause of death was strangulation asphyxia in a subject with head and chest trauma due to blunt force injuries'. [emphasis added]

[6] As to the evidence contained in the statement, the language of which the Court has already identified above, there is in the body of it the following detail of what the appellant allegedly did to the deceased:

> *'… lo amarré con una cuerda, alrededor de su pescuezo'* [accentuatation added and spelling corrections made],

the translation of which, by PC Ek (who also recorded the statement), was:

> '… I tied a piece of wire around his neck'.

Additionally, however, there is, immediately below the body of the statement, a series of questions by Cpl Ek and answers by the appellant which includes the following:

> [Q.] *'¿Qué color de cuerda amarraste en su pescuezo del señor?'*
>
> [A.] *'Lo amarré con una cuerda negra de cable.'* [emphasis and accentuation added and spelling and punctuation corrections made]

PC Ek's translation of this question and answer was as follows:

> '[Q.] What colour of wire or cable you tied around the man's neck?
>
> [A.] I tied the man with a piece of black cable wire.' [emphasis added]

In the body of the statement itself, the time of the beating of the deceased is said to be about 1 am and, what is more, there is no indication as to the quality of the lighting, if any, at the place of the beating.

[7] As to what became of the piece of wire on the day of the *post-mortem* examination, the evidence of both Cpl Valladárez and Mr Riverol is that it was removed from the body. The former's evidence is, so far as it goes, clear: it was removed during the examination and it was then held by the latter as an exhibit. He, in his own evidence, confirms that the piece of wire was removed at the morgue. Prosecuting counsel, very likely with the chain of custody uppermost in his mind, asked this witness (Mr Riverol) whether he knew what became of the wire but the answer of the latter was merely that he packaged it as an exhibit. Not long after, the following exchange occurred between the two:

> 'Q. These items that were given to you by [Dr Estrada] which you collected at the morgue, did you do anything with them or what became of them?
>
> A. These two items, I processed them.'

The two items mentioned in the portion of the evidence-in-chief immediately preceding this question and answer were the piece of wire and a 21-inch-long rod. Neither in his oral testimony nor in his *post-mortem* report did Dr Estrada say whether he handed the piece of wire, or the rod for that matter, to anyone during the *post-mortem* examination. On the other hand, in the case of certain strands of hair said to have been plucked from the head of the body in the morgue, Mr Riverol expressly said that it was Dr Estrada who handed them to him.

ii) <u>The statement</u>

[8] It was the Crown evidence that, on the morning of 18 November 2007, the appellant, by now in police custody, was being interviewed by Cpl Nicholas in the

recreation hall of the Corozal Town Police Station when he elected to give the statement which was recorded from him later that morning by PC Ek in the presence of a Justice of the Peace, a Ms Zetina. The statement was signed by the appellant. It is convenient to describe its contents before going on to explain how it came to form part of the evidence before the jury. As translated by PC Ek (the translation having been admitted in evidence), the statement tells of an incident which occurred in the San Joaquín Bar on the night before (ie the night of Saturday 17 November) when one known to the appellant as Gutman, as well as by his surname of Tzul, directed a volley of obscenities at the appellant and 'showed [him] his middle finger in the air', thus angering him. At this, Isair Martínez, a friend of the appellant who was with him in the bar, suggested they both 'beat him [ie Gutman] up' and the appellant agreed. Thereafter, upon Gutman leaving the bar, the appellant and Martínez followed him. Gutman was subsequently successively stoned by the appellant and physically attacked by both the appellant and Martínez. According to PC Ek's translation of the statement, the appellant during this attack elbowed, punched in the face and kneed Gutman before hoisting him in the air and heaving him on top of some nearby pieces of 'lumber'. (The statement itself uses the word '*leña*', which, according to The Williams Spanish and English Dictionary, Expanded International Edition, means 'firewood, kindling wood'.) When Gutman punched him back in the face, the appellant was again angered and punched Gutman once more, causing the latter to fall to the ground. The appellant and Martínez then proceeded to kick Gutman as he lay on the ground. The narrative contained in the translation in question indicates that the appellant was unable to recall what he next did to Gutman, who had remained on the ground, bleeding and moaning, apart from stripping him naked, tying a length of 'wire' around his neck and leaving him there. (At this point, the Court must pause to observe that the word translated by PC Ek as 'wire' is '*cuerda*', which, according to the dictionary mentioned above, means 'cord, rope, string …' but may also refer to wire, as in the term '*cuerda de piano*' which means 'piano wire'.)

[9] Prosecution and defence being both desirous of a ruling by the judge as to the admissibility of the statement, a *voir dire* was held. In it Cpl Nicholas gave evidence that, in the course of the interview already mentioned above, the appellant said to him that he had done some bad things and that he and 'Isair' had beaten Gutman. This admission led the corporal to caution the appellant as required and ask PC Ek to record his statement. Mr H E Elrington SC, counsel for the appellant at trial, was content to ascertain in his brief cross-examination of the corporal the time during which he had had the appellant under his own

supervision. Conspicuously absent from such cross-examination was any suggestion that that officer had been involved in any way in the use of force against the appellant. PC Ek, for his part, testified in the *voir dire* as to his recording of the statement. He said that he did so in the presence of Ms Zetina after having first informed the appellant, in the Spanish language, of the reason for his arrest and his pertinent constitutional rights and cautioned him. He recorded the statement in the Spanish language, affording the appellant two cigarette breaks as well as a snack break in the process, and thereafter asked him to sign it. It was the further evidence of PC Ek in the *voir dire* that he did not use force on the appellant nor promise or offer him anything before recording the statement, which was one given by the appellant of his own free will. He added that, being versed in both the Spanish and the English languages, he later translated the statement from the former language into the latter. Defence counsel suggested to PC Eck in cross-examination that the appellant was forced to give the statement but refrained from pointing the accusing finger at anyone in particular. Ms Zetina, who, as it turned out, was not cross-examined, testified to the following pertinent matters: that the appellant was both told of his rights and cautioned by PC Ek before agreeing to give his statement; that PC Ek recorded the statement as it was being given by the appellant; that the latter was afforded the cigarette and snack breaks already referred to above whilst giving the statement; that the statement was read over to him by PC Ek; and that he signed it after expressing satisfaction with it.

[10] The appellant neither testified nor called witnesses in the *voir dire*. Permitted to address the judge first, his counsel submitted, principally, that the prosecution had failed to discharge its burden under section 90 of the Evidence Act. Prosecuting counsel submitted in reply that the prosecution had in fact fully discharged such duty; and defence counsel was then afforded the advantage of a second bite at the cherry, so to speak.

[11] The ruling of Arana J was that the prosecution had affirmatively proven to her satisfaction that the statement was voluntarily made by the appellant and that it was therefore admissible. Neither this ruling nor the judge's subsequent admission in evidence of the statement (and the translation of it) is under challenge in the present appeal, which is concerned only with alleged misdirection and non-direction in the summing-up. Despite her remark to defence counsel at an early stage in the *voir dire* indicating an awareness of the

need to rule on the admissibility of the appellant's oral admission to Cpl Nicholas, the trial judge appears to have omitted so to rule.

[12] In the main trial, the corresponding parts of the evidence-in-chief of the three prosecution witnesses who had given evidence in the *voir dire* were essentially the same as the evidence they had given in the *voir dire*. The Record discloses nothing in the way of strong suggestions to Cpl Nicholas of oppressive conduct on the part of the police as regards the obtaining of the statement. Such questions on this topic as were in fact asked are confined to the tail-end of the prolonged cross-examination. Their perfunctory, almost apologetic tone is best conveyed by quotation from pages 155-156 of the Record:

> 'Q. ...Did you tell [the appellant] what had happened? Did you tell him what he did and get him to sign? You wouldn't do anything like that.
>
> A. No, Your Honour.
>
> Q. … I just mentioned this because I must mention it. My client expects me to mention some things. You didn't put him in a room and put a bag over his head? You didn't do that to him?
>
> A. No, Your Honour.
>
> Q. You didn't shot [shock?] his testicles with some kind of probe to help him to remember? I don't know what you all do.
>
> A. No, Your Honour.'

[13] PC Ek's testimony in the main trial did not omit anything of significance that he had included in his evidence in the *voir dire* except for the detail about the appellant having been informed of his relevant constitutional rights. Both the statement and the translation of it were tendered in evidence by PC Ek and, as already mentioned above, admitted by the trial judge. The parts of the cross-examination pertinent for purposes of the instant appeal (p 183, Record) are best reproduced in order to reveal the vague and unspecific nature of the questioning:

> 'Q. Have you got any idea how many hours he was in the police custody before you met him at the station?
>
> A. No.
>
> Q. You can't say?
>
> A. No …
>
> Q. Can you say if the JP had been sent for as soon as he was taken into custody?
>
> A. I called for the JP.
>
> Q. No. No. But when he was taken into custody, can you say if the JP was sent for?
>
> A. No, I can't say.'

[14] Other relevant parts of the cross-examination create an impression of scraping at the bottom of the proverbial barrel. An example is to be found at p 184, Record, where the following exchange appears:

> 'Q. So he was allowed to have food and drink after he started to give his statement, not before?
>
> A. Not before.
>
> Q. Would it have been better to find out if he wanted something? You asked him "How is the room?" Why didn't you ask him: "How is your belly?"'

This was the cross-examination of a witness who had earlier testified, not only in the *voir dire* but also in the main trial, of the cigarette and snack breaks afforded to the appellant during the recording of the statement. And defence counsel (for good reason, no doubt) was not denying that those breaks had been afforded, only complaining that the police did not ask the appellant from the outset whether he was hungry.

[15] Ms Zetina, testifying in the main trial, adhered to the account she had given in the *voir dire*, saying, primarily, that PC Ek told the appellant of his rights before the recording of the statement, but also, secondarily and in contradiction of PC Ek, that it was at the request of the appellant that food and drink had been given to him. Defence counsel did not, in the main trial, waive his right to cross-examine this witness, as he had done in the *voir dire*; but he made no discernible effort to challenge her evidence in any respect.

[16] After having himself said nothing in the *voire dire*, the appellant made an unsworn statement from the dock in the main trial. Prominently featured in this statement was a detailed accusation levelled against Cpl Nicholas and other unidentified persons to the general effect that they had resorted to the use of force against him when he told them that he did not wish to give a statement.

According to this unsworn statement, before subjecting him to torture, the corporal and these other persons placed a black plastic bag over his head, tied something around his mouth and handcuffed him with his hands behind his back. The torture which then ensued took the form of a beating which, having proven insufficient to break his will, was followed by the pulling down of his pants and the administration of an electric shock or shocks to an unnamed part of his anatomy. He continued refusing to give a statement and the corporal then told him the things he (the corporal) wanted him to say, including the detail that he had placed a piece of black cable around Gutman's neck. (It is recalled in this connection that, as already noted at para **[5]**, above, the selfsame Cpl Nicholas's evidence in the main trial was that, on his visit to the scene on the morning of 18 November 2007, he had seen the body with a piece of 'tying wire' - not of black cable - wrapped around its neck.) The appellant said further that, after yet another refusal by him to comply with the request that he give a statement, 'lone serious crime' entered his cell and, having first greeted him, as it were, with the rhetorical question, 'So you no wan sign this paper?', they promptly started beating him. It was at that point that he finally gave in and signed, a development which the 'serious crime' police officers apparently regarded with scant appreciation for, according to the appellant, they (in the fashion of authority figures in a Kafka novel) returned later, took him to an area 'back ah' the cemetery and there gave him another beating.

[17] The Court deals first with ground 3, which, as already indicated above, was the only one orally to be argued by Mr Sampson. Although counsel employed two separate sentences to frame this ground, the court will disregard the first of them since counsel did not, in fact, argue, either in writing or orally, that the case should have been withdrawn from the jury. Suffice it to say that the Court considers that approach on the part of counsel (which mirrored that of defence counsel at trial) eminently realistic. The Court concentrates, in the circumstances, on the issue whether the judge misdirected the jury on what Mr Sampson describes as a very important question of fact.

[18] Before further proceeding, the Court must express its strong disagreement with counsel's identification of "the murder weapon" as a question of fact, let alone a very important one, in the trial of the appellant. After all, as already demonstrated above, it was the evidence of every relevant Crown witness who went into the witness box that the item found around the neck of the body was a piece of wire. Two of them, viz Cpl Nicholas and Mr Riverol used the term "tying

wire" but the Court cannot ignore the known habits of speech of people on the streets in the cities, towns and villages of this country, where these two words are used synonymously. Admittedly, the Spanish description '*cuerda negro* (sic) *de cable*' is used in the statement, and it was the Crown which successfully tendered such statement in evidence, but that could not possibly make such description, *ipso facto*, a part of the Crown case. (The case is clearly comparable to that of a Crown witness whose evidence is patently unreliable as to the time of a killing but not as to the actions of the accused person, as to which see *R v Martin* [2012] NICA 7, at para [4]). And nothing else done by the Crown at trial can be construed as adopting that description of the item in question as part of its case. As for the defence, its position was unequivocal throughout: the appellant knew nothing about the killing of the deceased and the statement was a total fabrication. There was simply no place in its case for any assertion that the item in question was a black cable wire. Hence, the emphatic rejection by this Court of counsel's classification (and the judge's as well, as appears from the quotation in the paragraph next following below) of 'the murder weapon' as a question, plain and simple, in the appellant's trial, and more so as a very important question. (The judge's error in this regard would, of course, have worked only to the advantage of the appellant.)

[19] The Court will nonetheless, proceed to consider, *arguendo*, the remainder of counsel's argument in support of this ground. The judge's direction in question is to be found at page 294 of the Record where, in summing-up to the jury on inconsistencies, she said:

> 'And the final inconsistency which I will point out to you is that [the appellant] in [the statement] states that he tied a black cable wire around the neck of the deceased. You will have the wire. It's an exhibit in the case, which [Dr Estrada] removed from the neck of the deceased. It is a matter for you to decide if that is a black cable wire and how that result (*sic*) with what the appellant is saying in [the statement].'

Mr Sampson submits that the judge was there misdirecting the jury in that there was no evidence at trial to the effect that Dr Estrada at any time removed any piece of wire from the body. It is true, and unusual, that Dr Estrada himself did not testify as to what, if anything, he did with the foreign objects in question, viz the piece of wire and 'the piece of metal' or 'metal object', which he found

fastened to and protruding from, respectively, the body when he conducted his *post-mortem* examination. On the other hand, first, in a situation strongly reminiscent of another some years ago in the trial in the court below of another accused person, viz Aurelio Pop (for the details of which, see the judgment in *Aurelio Pop v The Queen* [2003] UKPC 40, at para 7), the inference that it was in fact Dr Estrada who removed and handed the foreign objects in question to Mr Riverol arises from the exchange between prosecuting counsel and the latter witness already highlighted at para **[7]**, above. In reply to prosecuting counsel's question whether he did anything with the items, viz the pieces of wire and metal 'given to you by [Dr Estrada]', a question to which defence counsel raised no objection, he (Mr Riverol) said that he processed them, thus acknowledging, by necessary implication, that they were indeed given to him by the pathologist. Secondly, as has also been pointed out above, Mr Riverol expressly stated in evidence that it was Dr Estrada, the sole pathologist conducting the *post-mortem* examination, who handed him the strands of hair plucked from the head of the body. In the absence of any indication to the contrary in the evidence, why should it not be inferred (even without taking into account the exchange between counsel and witness just referred to) that, by the same token, the foreign objects in question were handed to Mr Riverol by the same person? It is pertinent to recall that, as was noted above, both Mr Riverol and Cpl Valladárez gave evidence as to the removal *per se* of the piece of wire in question from the body during the course of the post-mortem examination albeit without saying, in the case of Cpl Valladárez, and expressly saying, in the case of Mr Riverol, who removed it. And there was, moreover, i) no suggestion in the course of cross-examination of either witness (and, more importantly, of Dr Estrada himself) that the good doctor left the piece of wire around the neck of the body on the completion of such examination and ii) no objection by experienced defence counsel to the admission in evidence of the piece of wire tendered to the judge by Mr Riverol. In these circumstances, the Court finds itself not only unable to accept Mr Sampson's twofold submission that there was (a) no evidence of the removal by Dr Estrada of the piece of wire from the body and (b) no evidence as to the identity of the person who effected such removal at the morgue but also at a loss to see how the direction in question could have unfairly prejudiced the appellant. It seems to the Court that it is of far greater importance that there was evidence of the removal of the wire from the body than that the remover was not identified other than inferentially.

[20] Continuing to examine Mr Sampson's submissions strictly *arguendo*, the Court comes to his invitation to attach importance to the omission of the Crown to

identify, through Dr Estrada, the piece of wire admitted in evidence at trial. The Court respectfully declines that invitation. It is true that Dr Estrada did not identify the piece of wire in question as the one he found on the neck of the body when he conducted his *post-mortem* examination. But it is also the case that Mr Riverol, a witness who, unlike Dr Estrada, could and did say in evidence that he had seen the same piece of tying wire around the neck of the body at the scene, then at the morgue in Corozal Town and then at the Karl Heusner Memorial Hospital morgue, testified that he witnessed the *post-mortem* examination and saw the very same piece of wire that was shown to him in court removed from the body in the latter morgue. In those circumstances, this Court regards as completely inconsequential the fact that Dr Estrada did not do likewise at trial.

[21] Mr Sampson further contended that, to quote from his skeleton argument without using block capitals, 'it is inconceivable that a scene of crime technician in this murder trial would describe a "black cable wire" repeatedly in evidence as just "tying wire"'. With respect, this Court considers that it is not open to counsel for the appellant to argue along lines such as those. The entire defence at trial hinged on the allegation that the statement was a complete fabrication by the police which the appellant only signed after being subjected to police violence. As has been pointed out above, the appellant claimed in his unsworn statement from the dock that, *inter alia*, he was told, in between beatings, to say that he had placed a black cable wire around the deceased's neck. An assertion to that effect was, in fact, contained in the statement. Central to his defence was the stout denial that he had made that particular admission. It is in those circumstances not open to his counsel to rely on the truth of that assertion. Even, however, were it open to the appellant to deploy this particular submission, the possibility that black cable wire was at any relevant time placed around the neck of the deceased is patently fanciful and, hence, in the respectful opinion of this Court, not one that any reasonable jury would be expected to accept. As has been demonstrated above, all Crown witnesses who testified to having seen the item in question allegedly saw it in daylight hours (though, of course, not all of them saw it outdoors) and all called it either simply 'wire' or 'tying wire'. If the appellant is right and the statement is a police fabrication, that leaves before the jury no assertion by him that the item in question was a piece of black cable wire. If, on the other hand, it is not such a fabrication, there is, of course, before the jury that assertion by him; but it is an assertion which must be kept in its proper context. So kept, it is an assertion based on an observation made by the appellant, as already noted above, at about 1 am in a place where lighting, if there was any, was of an unknown quality and, as if that were not enough, in the

course of a physically demanding activity. Furthermore, if it be correct that black cable wire (a weapon of convenience from all indications) was placed around the neck of the deceased at about 1am and that, by about 5 or 5.30 am, that same day, it was no longer there (and in its place was ordinary wire or tying wire), the explanation would have to be the entirely fanciful one that someone had, for some strange reason, in the interim period gone to the scene and not only removed the one but also replaced it with the other. The Court can find no reason to criticise the judge's coming to the common sense conclusion that that which was called black cable wire in the statement and wire (or tying wire) by the relevant Crown witnesses was, indeed, one and the same thing. To treat the 'black cable wire' and the 'wire' *simpliciter* (or 'tying wire') as two different items altogether would not only have betrayed an impermissible flight of fancy but also caused unnecessary confusion to the jury.

[22] This was a case like so many others, in which the prosecution evidence clearly linked the appellant to the crime charged, a fact unambiguously acknowledged by defence counsel when he refrained from submitting at trial that there was no case to answer. The judge is not, in the opinion of this Court, open to the animadversion that she unfairly reinforced such link in giving the jury the direction under challenge.

[23] In the circumstances, ground 3, however viewed, fails.

[24] The Court comes now to ground 2, the only other ground fully to be argued. As indicated above, this ground was abandoned at the hearing by counsel for the appellant but the Court invited the Director to elaborate on her relevant written submissions and she helpfully accepted such invitation, reiterating, in so doing, her heavy reliance on the decision of the Judicial Committee of the Privy Council in *Wizzard v The Queen* [2007] UKPC 21, an appeal from the Court of Appeal of Jamaica.

[25] Following the hearing and the reserving by the Court of its decision in the present appeal, however, the Privy Council delivered its judgment, on 13 March 2012, in *Benjamin v The State* [2012] UKPC 8, an appeal from the Court of Appeal of Trinidad and Tobago. Since their Lordships' Board refused, in

Benjamin, to follow its earlier decision in *Wizzard* insofar as the *Mushtaq* (*R v Mushtaq* [2005] UKHL 25) direction is concerned, this Court invited, and received, further submissions in writing on ground 2 from counsel on both sides.

[26] Having perused such further submissions, the Court considers that there is merit in ground 2, as the Director properly now concedes. In *Benjamin*, the Board did not alter what it had said in *Wizzard* concerning the principles which should guide a judge in deciding whether to give the jury a *Mushtaq* direction. What it did not agree with was the decision in *Wizzard* that the judge had been right not to give a direction along the lines of what is now the *Mushtaq* direction. It is useful, therefore, to set out here the guiding principles as stated by the Board in *Wizzard*, at para 35:

> 'A *Mushtaq* direction is required where there is a possibility that the jury may conclude (i) that a statement was made by the defendant, (ii) the statement was true but (iii) the statement was, or may have been, induced by oppression.'

In *Wizzard*, the relevant trial ended with the conviction of Mr Wizzard in January 2000, more than five years before the decision of the House of Lords in *Mushtaq*. The trial judge in *Wizzard*, not being a seer, could not foresee the now-famous decision of their Lordships in *Mushtaq*. Directing the jury in accordance with the then governing principles as stated by the Board in *Chan Wei Keung v The Queen* [1967] 2 AC 160, she told them:

> 'If, for whatever reason, you are not sure whether the statement was made or was true, then you must disregard it. If, on the other hand, you are sure both that it was made and that it was true, you may rely on it even if it was made or may have been made as a result of oppression or other improper circumstances.'

[27] On appeal to the Privy Council, it was held that since Mr Wizzard's position at trial was a denial that he had actually made the statement coupled with a claim that he had signed it, but only as a result of the use by the police of

force against him, the first of the stated prerequisites for the giving of a *Mushtaq* direction was not satisfied. Put a little differently, there was no real possibility that the jury could conclude that the statement was made by Mr Wizzard. In *Benjamin*, however, the Board has concluded that its logic in *Wizzard* was flawed. As Lord Kerr, delivering the judgment, said, at para 16:

> 'The Board in *Wizzard* considered that the fact that the appellant in that case had made an unsworn statement from the dock, denying that he had made the confession which the police claimed he did, meant that a *Mushtaq* direction was not required. It is, with respect, somewhat difficult to understand why this should be so. Simply because the appellant had denied making the statement, it does not follow that the jury could not find that he had done so.'

In those circumstances, the Director, in the instant case, no longer relies on the now-rejected part of the reasoning in *Wizzard* and accepts that the Board's reasoning in *Benjamin* is to be preferred.

[28] The Court has gone to the trouble of reproducing in this judgment the now-tangentially-discredited direction of the trial judge in *Wizzard* for the good reason that it contained all material elements of that given by Arana J at trial and assailed by Mr Sampson in the present appeal. That latter direction was as follows (p 194, Record):

> 'If you are not sure for whatever reason that [the statement] is true, you must disregard it. If on the other hand you feel sure that it is true, you may reply [rely?] upon it, even if it was or may have been made as a result of oppression or other improper circumstances.'

[29] In the opinion of the Court, Arana J should have given the jury a *Mushtaq* direction rather than that just quoted. The Director has at no stage in this appeal disputed that the second and third prerequisites for a *Mushtaq* direction were met at trial. Manifestly, there was a possibility that the jury might find both that the statement was true and that it was or might have been induced by oppression.

Her further written submissions leave no doubt that she no longer contends that the first of these prerequisites was not satisfied. There plainly was at trial a possibility that the jury might conclude that the statement was made by the appellant, a possibility amply borne out in the end by the jury's actual verdict. To borrow the language of the Privy Council in *Benjamin*, at para 15: 'All three conditions necessary to activate a *Mushtaq* direction were therefore present.'

[30] The jury were therefore misdirected as regards the ways in which they could treat the statement, upon which, as the judge rightly observed in her summing-up, the entire Crown case turned. It is clear from their verdict that the jury neither disregarded nor disbelieved the statement. But, had they been given a *Mushtaq* direction, would they have felt bound to disregard it on the ground of oppression or other such circumstances? Unable to rule out the possibility that they might have felt so bound, this Court is persuaded that this appeal should be allowed, there being, as the Director accepts, no room for the application of the proviso to section 31 of the Court of Appeal Act.

[31] The appeal is therefore allowed and the conviction quashed.

[32] The Court has considered whether the interests of justice require an order for a new trial, taking into account all that was said by the Privy Council in *Dennis Reid v The Queen* [1980] AC 343, an appeal from the Court of Appeal of Jamaica. Of particular importance, in the circumstances of the present case, is the fact that, in *Reid*, their Lordships' Board, having referred to those extreme cases in which the Crown evidence is insufficient and those in which it is overwhelming, said, at p 50:

> 'The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica … [I]t is not necessarily a condition precedent to the ordering of a new trial that the Court of

> Appeal should be satisfied of the probability that it will result in a conviction.'

This Court (comprised of Mottley P and Sosa and Barrow JJA) was particularly regardful of this part of the advice of the Privy Council in *Reid* when, on 12 October 2010, it ordered a retrial in *Romero Jiménez v The Queen*, Criminal Appeal No 13 of 2010, in which no written reasons for judgment were given. In the instant case, the Court, taking particular note of the same part of the Board's advice in *Reid*, has come to the conclusion that the interests of justice do require an order for a retrial. True it is that four years have passed since the slaying of the deceased; but this was a particularly grisly killing which must have deeply shocked not only the residents of San Joaquín but also those of the other populated areas of the Corozal District, one of the more peaceful districts of this country. Law-abiding members of all relevant communities of this district deserve no less than to see this Court pave the way for the appellant to go on trial again on the charge of murder. As already noted above, it is as clear as day that the jury which found him guilty, and against which no allegation of perversity is made, believed not only that he made the statement but also that it was a true statement. The Court has no reason to believe that the passage of time would prejudice the defence on a retrial, which, if it is to be proceeded with, should be proceeded with promptly.

[33] Accordingly, it is the further order of the Court that the Director be at liberty again to prosecute the appellant on the charge of murdering the deceased. And it is directed that the appellant should remain in custody pending retrial unless and until a judge of the court below shall otherwise order.

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SOSA P

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MENDES JA

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POLLARD JA