IN THE COURT OF APPEAL OF BELIZE, A. D. 2014

Criminal Appeal No. 24 of 2012

**THE QUEEN** **Appellant**

**v**

**KRISMAR ESPINOSA** **Respondent**

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BEFORE:

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| The Hon. Mr. Justice Manuel Sosa | President |
| The Hon. Mr. Justice Samuel Awich | Justice of Appeal |
| The Hon. Madam Justice Minnet Hafiz-Bertram | Justice of Appeal |

C. Vidal, SC, Director of Public Prosecutions, along with P. Staine for the appellant
H. E. Elrington SC for the respondent

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9 June and 7 November 2014

**HAFIZ-BERTRAM JA**

**Introduction**

[1] Krismar Espinosa ("the respondent') was tried before Gonzalez J and a jury on an indictment charging him with the murder of Keon Swasey ("the deceased"). The trial commenced on the 26 November 2012 and on 5 December 2012, the learned trial judge ruled in favour of the respondent on a submission of no case to answer which resulted in a acquittal by the jury on a direction given by the learned trial judge.

[2] The Crown had applied for leave to appeal against the decision of the learned trial judge which had been granted by the court. The hearing of the application was treated as the hearing of the appeal which was allowed. The court set aside the ruling of the learned trial judge and the acquittal of the respondent. The court ordered a re-trial on the charge of murder before a judge other than Gonzalez J. The court promised to give reasons in writing and we do so now.

**The Prosecution's case**

[3] The case for the prosecution was that on 24 December 2009, the respondent, an inmate at the Belize Central Prison, stabbed the deceased, who was a fellow inmate, at a recreation area within the said prison. The deceased was first treated at the medical centre at the prison and thereafter he was taken to the Karl Heusner Memorial Hospital, where he underwent surgery. He died on the same day from the injuries sustained. One of the wounds he received penetrated the right apex of his heart.

[4] The case for the prosecution was dependent on circumstantial evidence. The main evidence was from Floyd Neal, a prison officer and Punciano Cowo, a former prison officer. A third witness, Abelino Briceno, who was an inmate at the Belize Central Prison ("prison"), did not come up to proof.

[5] Officer Neal and four other officers, including Officer Cowo were posted on 24 December 2009, at Tango 8 at the prison which had four wings. The A wing and the B wing were on recreation at the time. He was posted in the office within Tango 8 and the other officers were supervising the recreation. At about 9.35 am, he received a phone call from the main operator at the prison for inmate Swasey, the deceased. He said Swasey answered the phone call which lasted about three minutes. He testified that five minutes later, there was another phone call for the respondent and he informed Officer Cowo to retrieve

him from the D Wing which was not on recreation. The respondent was brought to the office for the phone call which lasted about three minutes. Officer Neal then informed Officer Cowo to escort the respondent back to his cell. Shortly thereafter, Officer Neal who was writing in a diary, received another phone call and when he picked up the phone and looked up, he saw that there was a fight. He testified that he saw the respondent running towards the deceased who was standing with his back turned near the recreation gate. He testified that, "I saw what seems to me like a punch." He said that the respondent's right hand went towards the deceased chest area. Thereafter, Officer Neal testified that there was a commotion within the building and he saw the respondent run towards Wing D where he was housed and the deceased ran out of the building towards the medical centre. Officer Neal testified that he went for the respondent and when he looked in the hall area he saw that Officer Cowo had him handcuffed. In court, during his examination in chief, he identified the respondent as the person he was referring to in his evidence as Espinosa, the respondent. In cross-examination, however, Neal retracted on the evidence in relation to whom he saw threw the "punch" towards the deceased chest area. He said, "With all fairness to both parties I would say that I cannot be sure if it is Mr. Espinosa." In re-examination, when Officer Neal was questioned by the judge about who threw the punch, he replied that, "..with all fairness I cannot be sure."

[6] Officer Cowo testified that he was a prison officer at the prison and his duties included taking out inmates for recreation. On 24 December 2009, at about 9:30 am, he took out about 40 to 50 inmates for recreation. He testified that around 9.00 to 10:00 am, Krismar Espinosa, the respondent, received a phone call and he took him for that call in the office where Officer Neal was in charge. He further testified that around that time, the deceased had also received a phone call and was heading back to the recreation hall. He testified that the respondent passed the deceased and he made a punching motion towards the deceased's head and lower body section. He then observed that the deceased ran towards the medical centre and the respondent went towards

D Wing. Officer Cowo further testified that he approached the respondent and escorted him to the office where Officer Neal was sitting, for questioning. He testified that he viewed the incident from a distance of 11 to 12 feet. Also, that he had not known the respondent prior to the incident. He was not requested by the prosecution to identify the respondent in court.

[7] The third witness, Abelino Briceno did not testify in accordance with the statement which he had given to the police on the day of the incident. An application by the prosecution to have him deemed adverse was summarily refused by the learned trial judge.

**No case submission at the trial**

[8] The above was the state of the evidence at the close of the case for the prosecution. Learned counsel for the respondent made a no case submission on the basis that the evidence of Officer Neal on the identification of the respondent cannot go to the jury because he said that he could not be sure that it was the respondent who made the punching motion towards the deceased. Further the evidence of Officer Cowo was that he did not know the respondent prior to the incident and he did not identify the respondent as the person who made the punching motion towards the deceased. Learned counsel further submitted that the evidence of Officer Neal and Officer Cowo who had contact with the respondent, went to the heart of the case, regarding whether the respondent attacked the deceased.

[9] Learned counsel for the prosecution in response submitted that the submission for the respondent was based primarily on identification of the accused person. She referred to the evidence of Officer Neal and submitted that although he was not sure who fired the punch, his testimony was that he went to look for the respondent and he saw him with Officer Cowo and thereafter both of them (Officer Cowo and the respondent) were in his office.

Learned Counsel then referred to the evidence of Officer Cowo whose evidence was that he retrieved the respondent from D Wing to get a phone call despite not knowing him prior to the stabbing incident. Learned counsel also referred to the submissions made to the learned trial judge that the connecting evidence was the phone call and the fact that Officer Neal had sent for Officer Cowo to retrieve the respondent from his cell to answer the phone. The learned judge was not satisfied with this submission as he said that, "*No, man, this is the problem it's not the same inmate because he came to court and he did not identify the person*….." He then adjourned for counsel to "prepare properly" and make further submissions. On resumption of court, learned counsel for the prosecution submitted that the combining evidence of the witnesses, Officer Neal and Officer Cowo were strong circumstantial evidence of the identification of the respondent as the person who stabbed the deceased.

**Ruling of the learned trial judge**

[10] The learned trial judge stated that learned counsel for the respondent made a no case submission consistent with the first limb of **Galbraith** (referring to **R v Galbraith [1981] 1 WLR 1039)** that there is no case to go to the jury. The learned trial judge said that he had carefully considered the evidence of both Officer Neal and Officer Cowo in respect of identification. He said that Officer Neal testified that he saw the respondent throwing a stabbing motion at the deceased in his evidence in-chief but, in cross-examination Officer Neal said that he was not sure, as the incident took place in split seconds. The learned trial judge said that, "*This evidence which came out in cross-examination totally destroyed the evidence which came out in evidence-in-chief. In effect this witness recanted his evidence-in-chief in respect to the crucial issue of identification. The effect of this denial that he could not say that it was the accused who he saw throwing a punch, the effect of that is that there is no evidence coming from him that he saw and he identified anyone as a person who*

*…he saw throwing the stabbing motion at Keon Swasey, from which the jury can then draw the inference that he must have been the one who stabbed Swasey*."

[11] In relation to the evidence of Officer Cowo, the learned trial judge stated that though he saw the respondent throwing a blow at the deceased, he did not know the deceased before the incident. He then went on to say that, "*it appears to me from the evidence since it did not come out at all, that there was no ID Parade in his ability to identify the accused, Krismar Espinosa. And as a consequence the prosecution or the crown counsel did not ask him quite properly to identify the accused in the dock. And as a consequence he was unable therefore to do any sort of identification in respect to the accused."*

[12] The learned trial judge further ruled that there was no other circumstantial evidence or otherwise which would lead a jury to conclude, when properly directed, to make the connection between the evidence of Officer Cowo and Officer Neal, that the respondent was the person who threw the stabbing motion. He said that in his view, the evidence was not of a kind and quality for which he can use his discretion and leave to the jury for their consideration. He said that:

> "The sum total of it amounts to no evidence against the accused and therefore, in my view, the submissions of defence counsel was consistent with the first limb of **Galbraith** against no evidence which I leave to the jury. And the further submission that I should therefore stop the case, in the circumstances, I rule that there is no case to go to the jury, and they will be so advised at 1:00 pm …"

[13] The learned trial judge so advised the jury that there was no case for the respondent to answer and directed them that their verdict in respect to the case would be "not guilty". The jury thereafter, returned a not guilty verdict and the respondent was discharged.

**Grounds of appeal by the Prosecution**

[14] There were two grounds of appeal by the prosecution. Initially there was one ground of appeal and leave was sought to add the second ground which was granted by the court. The grounds as amended were:

1. The learned trial judge erred in law in so far as he concluded that the circumstantial evidence led by the Crown in proof of the case was insufficient to establish a *prima facie* case against the respondent.

2. The learned trial judge improperly exercised his discretion when he refused leave to the Crown to deem witness Abelino Briceno adverse.

**Arguments by the Crown**

*First ground - Circumstantial evidence sufficient to establish prima facie case*

[15] The learned DPP submitted that notwithstanding the retraction of the evidence of Officer Neal and the failure of Officer Cowo to identify the respondent in the Court, the evidence of these two witnesses taken together, was sufficient for the Crown to prove that the offence had been committed and that it was committed by the respondent.

[16] The learned DPP referred to that aspect of the evidence of Officer Neal in which he testified that he sent Officer Cowo to get the respondent from his cell to take a phone call and he observed him for three minutes and later saw him in the custody of Officer Cowo. He called the respondent by his name and pointed him out in the dock as the person to whom he was referring. The learned DPP then connected that evidence to that of Officer Cowo where he testified that he was responsible for "letting inmates out for recreation, phone calls and visits." Further, Officer Cowo testified that on the day of the incident, an inmate by the name of Krismar Espinosa got a phone call and it was him who took Espinosa

to the office of Officer Neal to take the call. Also, that he took the deceased to take a phone call. The learned DPP also referred to the evidence where Officer Cowo said that he saw Krismar Espinosa make a punching motion to Keon Swasey. After the incident, he approached "the inmate Krismar Espinosa" and escorted him to the office and Officer Neal was in the office when he did so.

[17] The learned DPP further submitted that on this evidence, the jury could properly have come to the conclusion that the person Officer Neal pointed out in the Court, was the person to whom Officer Cowo was referring to in his evidence. Further, if the jury accepted that the witnesses were speaking of the respondent, then it would have been left to them to consider whether they accepted the evidence of Officer Cowo that he saw the person who they found to be the respondent, make a punching motion at the deceased which resulted in the stab wound that caused his death. The learned DPP relied on the case of **Phillip Tillett v The Queen** [2001] UKPC 21, which is similar to the case at hand to show that the identification of the accused was given by another witness who had not seen the altercation.

[18] It was further submitted by the learned DPP that the duty of a judge on a no case submission, particularly where there are circumstances that have to be put together to prove the elements of the offence, was to consider whether, on one view of the evidence, it is possible to conclude that a reasonable jury might return a verdict of guilty. See **The Queen v Melanie Coye and Others**, Criminal Appeal No 16 of 2010, at paragraphs 15 and 16, a case from this Court. The learned DPP submitted that in the instant case, on one view of the evidence, the jury could have returned a verdict of guilty. Further, that the learned trial judge erred in law when he found that there was no identification evidence which connected the respondent to the crime and when as a result, he upheld the submission of no case to answer and directed the jury to acquit the respondent.

**Arguments in response by Counsel for respondent on the circumstantial evidence**

[19] Learned senior counsel, Mr. Elrington submitted that the conclusion reached by the learned trial judge was right in law and cannot be impeached. He submitted that there is not sufficient nexus of the evidence of Officer Cowo and Officer Neal since Officer Cowo had not identified the respondent in the trial court. Learned senior counsel further submitted that it has always been the learning that a witness must identify the person whom he is talking about and since this was not done by Officer Cowo, there was a fatal flaw in the prosecution's case.

**Discussion**

[20] The issue for consideration is whether the learned trial judge erred when he found that there was no identification evidence which connected the respondent to the crime which resulted in the no case submission being upheld. The no case submission made by learned counsel for the respondent was premised on the fact that there was no "visual identification" of the respondent as the person who stabbed the deceased. The prosecution on the other hand, in response submitted to the learned trial judge that the case for the prosecution was not based on the identification of the person in relation to the punching motion but on the combined evidence of both Officer Neal and Officer Cowo which were strong circumstantial evidence of the identification of the respondent as the person who stabbed the deceased.

[21] The learned trial judge correctly assessed the evidence of Officer Neal in terms of him not identifying the respondent as the person who threw the stabbing motion, since he recanted his evidence in cross-examination on that aspect of the evidence ( he said that he was not sure as to who threw the stabbing motion). The learned trial judge was also correct when he said that Officer Cowo did not identify the respondent (in court) as the person who threw

the punching motion. The learned trial judge, however, failed to look at the combination of the evidence of Officer Neal and Officer Cowo. As can be seen in his ruling, the learned trial judge focused mainly on the evidence of Officer Neal of the "visual identification" of the person who threw the stabbing motion, which was withdrawn, and concluded that the evidence "*amounts to no evidence against the accused and therefore, in my view, the submissions of defence counsel was consistent with the first limb of* ***Galbraith*** *against no evidence which I leave to the jury*."

[22] The law in **Galbraith** is trite and has often been cited in judgments of this court. One such judgment is, **Enrique Montejo, Criminal Appeal No. 4 of 2011.** The court respectfully adopt the approach to be taken by a trial judge on a no case submission, as laid out by Morrison JA at paragraphs 39 to 40 of that judgment:

> "[39] **R v Galbraith** has been constantly cited in this jurisdiction and referred to in judgments of this court as prescribing the correct approach by a trial judge to a no case submission (see, for example, **Cardinal Smith**, at para. 36). We cannot avoid reproducing Lord Lane CJ's now famous statement in the case:
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> > "How then should the judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) 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. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown'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 a 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. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[40] It is always helpful to recall that the court was concerned in **Galbraith** to resolve a controversy in English judicial circles as to the proper response of the trial judge to a submission of no case to answer. In **Galbraith** itself, Lord Lane CJ identified the two school of thoughts (at page 1040) as - "(1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict". (A particularly lucid account of the development of this controversy may be found in the judgment of Lord Mustill in **Daley v R [1994] 1 AC 117, 123 – 126**)."

[23] The learned trial judge in the case at hand, stopped the prosecution's case because he came to the conclusion that the evidence for the Crown, taken at the highest, was such that the jury could not convict upon, even if they are properly directed. It was our opinion that the learned trial judge erred when he concluded that there was no other circumstantial evidence to make the connection between the evidence of Officer Cowo and Officer Neal, that the respondent was the person who threw the stabbing motion. It was our view that a combination of the evidence of Officer Neal and Officer Cowo could suffice to prove that the appellant was the assailant.

*The circumstantial evidence*

[24] The Crown's case did not depend on "visual identification" evidence of the respondent stabbing the deceased. It depended on circumstantial evidence of the respondent as the person who stabbed the deceased. Officer Neal recanted his evidence only in relation to the respondent as the person who threw the punching motion. Officer Neal however, gave crucial evidence which was not recanted and which, when combined with the evidence of Officer Cowo sufficed to prove that the respondent was the assailant. Officer Neal testified that he sent Officer Cowo to get the respondent from his cell to take a phone call in his office and he observed the respondent in his office about three minutes. He also testified that he later saw the respondent in Officer Cowo's custody after the stabbing incident. Officer Neal identified the person he was talking about in the court, that is, the respondent as the person who took the phone call in his office and who was later in the custody of Officer Cowo.

[25] Officer Cowo did not indentify the respondent in court but according to his evidence, both the deceased and the respondent received phone calls and later he saw when the respondent made a punching motion towards the deceased. Officer Cowo took the deceased in Officer Neal's office to receive a phone call shortly before the incident. Shortly, thereafter, it was Officer Cowo who took the respondent for the phone call in Neal's office and it was Officer Cowo who handcuffed the respondent after the incident.

[26] The court was in agreement with the learned Director that the evidence of Officer Neal and Officer Cowo taken together, could be sufficient proof by the prosecution that the offence had been committed by the respondent. In the view of the court, it was possible for a jury to accept that Officer Neal and Officer Cowo were speaking of the same person, the respondent. As such, it was for the jury to consider whether they accepted the evidence of Officer Cowo that he saw the respondent make a punching motion at the deceased which

resulted in the stab wound that caused his death. The court was of the view that the case should have been left to the jury to decide the weight of the evidence upon which the Crown based their case (second limb in Galbraith).

[27] The case of **Phillip Tillett v The Queen** [2001] UKPC 21 is similar to the instant case. It was the case for the Crown that the appellant who was an inmate at the Belize prison murdered a fellow inmate, Kirk Lee Gentle ("the deceased"). The case for the Crown was mostly circumstantial. Jacinto Pop, a prison officer who was a crucial prosecution witness at the trial was unable to provide identification evidence of the appellant at the trial. Pop was on guard duty on the roof of the medium security of the prison when he saw two inmates outside a cell on the lower floor. He saw one inmate push the other inmate up against a door and make a single punching movement towards his chest. That inmate who was subsequently identified as the deceased fell to floor. Pop could not identify the appellant who made the punching motion and he did not see a knife. However, he saw when the inmate who did the punching motion walk form one cell to another cell and then to a stairs where Officer Ernesto De Leon was standing. It was Officer De Leon who detained the appellant and he did not see the punching motion. Officer De Leon had received a radio message from Officer Pop whilst he was descending the stairs. Officer Leon testified that on reaching the bottom of the stairs, the appellant ran from the direction of cell 12 towards him. He requested him to stop and upon failure to do so, the officer pointed his gun at him whereupon he dropped the knife he was carrying. There was other evidence also by the Crown which proved that the person who was detained by Officer Leon was the appellant who was seen by Officer Pop throwing that punching motion.

[28] In the appeal before the Board, the central issue was the reliability of Officer Pop's evidence that the inmate he saw making the punching motion was the same inmate who dropped the knife when confronted by Officer De Leon. The Board found that the failure by Counsel at the time to challenge Pop's

evidence did not affect the safety of the conviction. Officer Pop had testified that he had seen when the inmate who punched the deceased walk towards Officer De Leon. The reliability issue was not argued on appeal to this Court. The Court was of the view that the appeal to this court was far more relevant to the issue of identification - **Phillip Tillett v The Queen,** Criminal Appeal No 5 of 2005. One of the grounds of appeal filed on behalf of the appellant was that:

> "(1) The learned trial judge erred in law when he failed to accept the no case submission put forward by defence counsel at the close of the prosecution's evidence as to the identity of the person who stabbed Kirk Lee Gentle."

[29] Learned Counsel for the appellant had submitted that Officer Pop did not identify the person who did the punching nor did Officer De Leon witness the punching motion. As such, learned counsel had submitted that the judge should have withdrawn the case from the jury. Carey JA, as he was then, stated that the learned counsel had taken "a singularly jejune approach to the evidence adduced by the prosecution in proof of its case." He then went on to say that, "In our review of the prosecution case, we noted that it consisted of a chain of circumstances which a jury could find, led inexorably to the appellant as implicated in the stabbing. … We are satisfied that there was a case to go to the jury".

[30] The case at hand is similar to **Tillett** as the case depended on circumstantial evidence identifying the appellant as the person who stabbed he deceased. Neal identified the appellant in the court as the person who was in the office taking the phone call and he later saw him in the custody of the deceased. Cowo who did not identify the appellant in court saw him make a punching motion towards the deceased. The evidence of Neal and Cowo when put together, circumstantially identified the appellant as the person who stabbed the deceased.

[31] The case of **Wayne Martinez,** Criminal Appeal No. 9 of 2007, though not a no case submission matter, was also helpful. It showed, on appeal, that a witness who could not identify the accused provided crucial evidence, in that when it was combined with evidence from other witnesses, was sufficient to prove the case against the appellant. In addition to the strong "identification evidence" there was circumstantial evidence to identify the appellant, as the assailant. He and his brother Norris Martinez went on trial on an indictment charging them both for the murder of Reno. The appellant was convicted for murder and his brother acquitted. The appellant appealed his conviction which was dismissed and his sentence affirmed. The case for the Crown was that the appellant stabbed the deceased four times with a knife not long after a struggle between Norris and the deceased. The deceased had sought to retrieve a cap and sunglasses that had been taken away from him by Norris. The deceased died a few hours later as a consequence of the stab wound.

[32] The Crown witnesses at trial included police officers who arrested the appellant and his brother, and three eyewitnesses, namely, Zoila Chacon, Rosa Reyes and Julia Young. Ms. Chacon and Ms. Reyes attended identification parades in which the appellant and Norris participated and pointed out the appellant as the person who stabbed the deceased. Ms. Young, who did not know the appellant and his brother, was not involved in the identification parade but, her evidence was crucial since it formed an evidential link to the appellant and his brother as the only two assailants. She saw the stabbing and she saw when the two persons were taken in custody by the police.

[33] The case for the appellant was that there were two to three other boys involved in the fight. He said that he wore a blue shirt and he did not have a knife. That one of the boys who wore a white shirt, brandished a knife and stabbed the deceased. The appellant's brother gave evidence to the same effect.

[34] There were two grounds of appeal, the first being the failure of the trial judge to give a dock identification warning. The second ground of appeal was that “the learned trial judge erred and was wrong in law in leaving the case to the jury when there was no admissible evidence that it was the appellant who had stabbed the deceased.”

[35] The court did not agree with learned counsel for the appellant that the trial judge so erred in leaving the case to the jury. Learned counsel had founded the second ground of appeal on a direction given by the learned trial judge in his summing up to the jury. That direction was that, "*So the identification parade you will not rely on it….. That's a matter for you to show that they were at the scene at the time."* The Court understood learned counsel’s submission as (i) the judge by his direction was “withdrawing” from the jury all evidence of identification of Ms. Chacon and Ms. Reyes of the appellant and (ii) it would have been proper if the “withdrawals” were done when the witnesses were in the witness box so that at the close of the prosecution’s case, the proper course would have been for the trial judge to rule that there was no case for the appellant to answer.

[36] The Court was of the view that it was wrong for the trial judge to tell the jury not to rely on the evidence of the identification parade. Nevertheless, Sosa JA, as he was then, discussed the scenario that even if there was an omission of the evidence of the two eyewitness who identified the appellant, namely Chacon and Reyes, that would not have affected the conclusion reached by the Court “that the white-shirted assailant seen by Ms. Young stabbing the deceased can, on the circumstantial evidence alone, only have been the appellant.” Ms. Young who was not involved in the identification parade testified that in the course of the fight between a “Hispanic” man and two men of “creole descent”, she “saw like a silver object in a male person hand and “saw the knife went down twice” in a stabbing motion. The person with the knife was wearing a white T-shirt and his hair was braided. She testified that the “Hispanic” man bled profusely from

around his nose. Sosa JA, as he was then, described what she said next as an important evidential link supplied by no other of the witnesses for the Crown. That is, when she was walking away from the scene, after seeing the Hispanic man placed in motor vehicle by a Police Officer, **she saw two male persons "sitting down in an arrested position with their hands on their heads, with an officer beside them". She testified that the two male persons were "the same ones that were in the fight".** This evidence from Ms. Young, combined with evidence from the police officers who arrested the appellant and his brother, but did not see the stabbing, was sufficient circumstantial evidence to prove that the appellant stabbed the deceased.

[37] Likewise, in the case at hand, Officer Cowo who did not identify the respondent, saw the stabbing motion and Officer Neal identified the respondent as the one who was in his office taking the phone call and was also the same person arrested by Officer Cowo. The learned trial judge focused his attention on the fact that Officer Neal retracted his evidence on the punching motion and did not look for the connection in the circumstantial evidence.

[38] The court was of the view that the **Tillett's case** and the **Martinez's case** are similar, as far as evidence of identification is concerned, to the case at hand. There was sufficient circumstantial evidence to identify the appellant as the person who stabbed the deceased.

[39] As for the approach to be taken by a judge in relation to circumstantial evidence, this had been laid out in the recent case of **Melanie Coye** cited by the learned DPP. As such, the court do not find it necessary to restate that approach

[40] It was for these reasons that the Court was of the opinion that the learned trial judge erred when he ruled that there was no evidence to leave the case to the jury.

**Second ground of appeal**

[41] The court granted leave to the Crown to argue a second ground of appeal as to whether the learned trial judge improperly exercised his discretion when he refused leave to the Crown to deem witness Abelino Briceno adverse. The court was of the view that ground one of the appeal sufficed to allow the appeal and as such, do not consider it necessary to express an opinion on this ground, especially since a re-trial has been ordered before a different trial judge.

**Conclusion**

[42] It was for these reasons, that the Court allowed the appeal and set aside the ruling of the learned trial judge and the acquittal of the respondent. We ordered a re-trial on the charge of murder before a judge other than Gonzalez J.

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**SOSA P**

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**AWICH JA**

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**HAFIZ-BERTRAM JA**