IN THE COURT OF APPEAL OF BELIZE AD 2014

CRIMINAL APPEAL NO 23 OF 2013

THE QUEEN Appellant

v

JACINTO ROCHES
RENEL GRANT
LAWRENCE HUMES
NELSON MIDDLETON
HAROLD USHER
VICTOR LOGAN Respondents

___

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Mr Justice Dennis Morrison	Justice of Appeal
The Hon Mr Justice Samuel Awich	Justice of Appeal

C Vidal SC, Director of Public Prosecutions for the appellant, the Crown.
B S Sampson SC for the respondent Jacinto Roches.
H Elrington SC for the respondent Victor Logan.
A Sylvestre for the respondents Renel Grant and Lawrence Humes.
Respondents Nelson Middleton and Harold Usher in person.

24, 26, 27 June 2014 and 14 October 2015

AWICH JA

[1] On 24 June, 2014, this Court heard two applications by the appellant, the Crown, for leave: (1) to appeal against acquittal of the 6 respondents on the direction of the trial judge at the close of the case for the prosecution, that the 6

accused/respondents had no case to answer, and (2) to add a ground of appeal to the original single ground.

[2] The Court allowed both applications and granted leave to appeal, and leave to add the ground of appeal outlined in the second application. We waived certain irregularities in the making of the application because there was very good prospect of the intended appeal succeeding

[3] The Court proceeded to hear the appeal on 26 and 27 June 2014. The two grounds of appeal presented to the Court were the following:

> "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 respondents"; and …
>
> … .
>
> "The learned trial judge conducted the trial in such a manner as to deprive the Crown of the opportunity of putting all the evidence in its possession before the jury."

[4] The Court allowed the appeal on both grounds and made the orders that: the appeal was allowed; the ruling by the learned trial judge, Hanomansingh J, that there was no *prima facie case* against the 6 accused/respondents to answer be quashed; the respondents be retried on the same indictment at the Supreme Court by a judge other than Hanomansingh J., and, the respondents be presented to a judge at the Supreme Court for consideration of bail pending their retrial. We promised to give reasons at a later date for the orders made. We now give the reasons.

[5] It is not usual that the Director of Public Prosecutions in Belize appeals against acquittal. That is changing. From what we have seen over a few years, of the criminal appeal cases that have been brought by the learned DPP, Mrs. Vidal SC, to this Court, the change may be justified. Justice in a criminal case is as much concerned with the conviction of the guilty as with the acquittal of the innocent. Where it is apparent that, in a trial a miscarriage of justice has occurred against the State, that is, the public including the complainant and those directly affected by the crime, the DPP is entitled to appeal on the ground set out in ***S. 49 of the Court of Appeal Act, Cap. 90, Laws of Belize***, without the usual restraint expected of the DPP.

[6] The overriding objective of a criminal case trial is to ensure that the accused is tried in a fair manner. ***Section 6(2) of the Constitution*** guarantees a fair trial to all. But it must be noted that a fair trial under ***s.6(2) of the Constitution*** does not mean that a court (a judge or magistrate) may conduct a trial in a way that is fair to the accused, regardless to whether it may be unfair to the Prosecution (the State), that is, the public, the complainant and those directly affected. A judge has a duty to conduct a criminal case trial in a balanced and impartial manner, subject to complying with specific laws that afford specific safe-guards consistent with the constitutional presumption of innocence of the accused. The principle is now so well established that I can state it in my own wording *ipsi dixit*.

[7] We are not unmindful of the constitutional presumption of innocence provided for in ***S. 6(3) of the Constitution***, in the words: "*every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty*." Learned counsel Mr. Elrington SC for respondent Victor Logan, in his submission stressed the importance of this constitutional provision in a criminal case trial. We accept the importance of ***s. 6(3)(a) of the Constitution***, but respectfully reject the submission that, the section justified the excesses of the trial judge in this trial.

The Facts.

[8] The brief facts relevant to this appeal, but which must exclude details that implicate the respondents, are the following. The 6 respondents were tried before a judge and jury, on an indictment which charged a single count of the offence of, abetment of importation of a controlled drug, under ***s. 20(1) of the Criminal Code, Cap. 101, Laws of Belize***. The particulars of the offence were that: "On 13 November 2010 between Miles 56 and 57 on the Southern Highway in the vicinity of Bladen Village, Toledo District in the Southern District of the Supreme Court, purposely facilitated the commission of the crime of importation of controlled drug, to wit, cocaine..., by assisting in the landing of Super King Air Beech Craft Type, Twin Engine Aircraft with markings N 786B, which was laden with the said cocaine." On the back of the indictment was a list of 35 prosecution witnesses intended to be called. It is a requirement of the law to list intended witnesses on the back of an indictment.

[9] The trial commenced on 12 November, 2012 and lasted until 5 December, 2012 when the judge made a ruling of no case for all the 6 respondents to answer, and directed the jury to return a verdict of not guilty in regard to all the respondents.

[10] But the proceedings were fraught with difficulties, especially leading to the close of the prosecutions' case. There were several interjections by the judge. The appellant complained that, the interjections were unfair interventions. Also several applications were made for: standing down witnesses; adjournment to afford time to the Prosecution to secure attendance of some witnesses; recall of witnesses; and for the Court to deem some witnesses adverse witnesses so that the Prosecution would cross-examine them. Some of the applications were granted, others were refused.

[11] By 28 November, 2012 the Prosecution had called 25 witnesses. It intended to call three more so, it applied for adjournment until the following day, 29

November, so that the witnesses would attend court on that day. The judge granted the application.

[12] On the adjourned day one witness, Ignacio Sho, testified. He said that, a certain "Chat Budd" he had known, went to a sawmill at Gomez Hill, in Bladen area, where the witness worked as a security guard, and borrowed a spade; a truck was stuck in soft ground on a feeder road nearby. The witness identified Chat Budd among the accused/respondents. He said in examination-in-chief that, it was on 13 November, 2010; but in cross-examination he accepted a suggestion that it could have been on another date, the 10th. The witness could not read or write. The Prosecution sought to ask him in re-examination about the two dates. The judge disallowed the question. The Prosecution then applied to the judge to deem the witness an adverse witness so that the Prosecution would cross-examine him. The judge refused the application.

[13] After the above refusal the Prosecution applied for permission that, the Court admit in evidence the deposition of "Dormis Wright" or "Doris Grant", who had left her address and could not be found at other addresses given to the Prosecution. The judge refused the application.

[14] The Prosecution then applied for permission that, the Court admit the deposition of Assistant Inspector of Police Bert Bodden, said to have died since his part in the investigation of the incident and the recording of the deposition. The Prosecution first asked for adjournment to allow it enough time to call a witness to prove the death of ASP Bodden. The judge granted the application for adjournment, but only to 10:30 a.m. the same morning. The Prosecution was unable to present the witness at 10:30 a.m. The judge noted the failure and stated: "Yes, next application."

[15] Next, the Prosecution applied for permission to recall prosecution witness, Eli Jacob; it informed the judge that, the Prosecution intended to ask the Court to deem

the witness an adverse witness so that the Prosecution would be allowed to cross-examine the witness. The judge refused the application.

[16] The Prosecution finally applied to be granted adjournment to some time later the same day, so that the Prosecution could bring an intended witness Michael Logan, to testify. The judge refused the application. He then asked: "Yes, Mr. Ramirez what you are doing?" Mr. Ramirez, learned Senior Counsel, replied, "in those circumstances, My Lord, we have no further witnesses to call." So, the prosecution's case closed. The judge then said: "Mr. Bradley what you are doing? Are you going to make submissions or you want to lead a defence?". Learned counsel Mr. Bradley answered that, he would make a submission for a court ruling of no case to answer. The two other counsel for the accused/respondents answered the same.

[17] Learned counsel for the accused/respondents then made submissions for no *prima facie case* to answer. The judge in his ruling accepted that, there was no case for all the 6 accused/respondents to answer, acquitted and discharged the respondents.

[18] Large portions of the record of the trial proceedings were missing. They were obtained and included in the record. The omissions were not part of the grounds of appeal.

Determination

[19] This Court has ordered a retrial of the respondents, it is not desirable or appropriate for the Court to examine in detail the evidence adduced, or that might have been adduced, but for the errors in law and the irregularities in the proceedings. Some mention of the evidence will be inevitable, provided we bear in mind that, we are enjoined not to mention anything that may be prejudicial in the retrial.

[20] The approach of the Court of Appeal in an appeal by the DPP under ***s. 49 of the Court of Appeal Act***, is to decide, the questions of law, of mixed law and facts, fair trial, and irregularity generally. If the Court decides that the trial judge erred in those questions, or that there has been serious irregularity, the Court shall proceed to determine whether as the result of the error or irregularity, there was, "a miscarriage of justice", in which event, the Court shall, "allow the appeal and order a retrial."

[21] Our view was that, the appeal succeeded on both grounds of appeal in that either ground succeeded, the appeal could be allowed on either ground alone. The judge erred about principles of law applicable to an application for adjournment, and to an application for the recall of a witness. Gross irregularities were also occasioned; and the trial was conducted in a manner that undermined the integrity of the trial, and it was not a fair trial.

The second ground of appeal generally.

[22] We note that, the success of the second ground of appeal that, the judge, "conducted the trial in such a manner as to deprive the Prosecution of the opportunity of putting all the evidence in its possession before the jury," that is, that on the facts the trial judge denied opportunity to the Prosecution to call or recall some of its witnesses, justified the complaint by the appellant against the ruling by the judge of no case to answer.

[23] The success of the second ground of appeal rendered the first ground of appeal pointless in that, any evidence said to have been lacking for the purpose of establishing a *prima facie case* could have been obtained from the testimonies of the witnesses erroneously excluded by the several erroneous rulings by the judge. In that way the success of the second ground of appeal was sufficient for us to decide the appeal without the need for support from the first ground of appeal.

[24] Relevant to the above point, and comparable to this appeal case, is the case of ***Clark [2007] EWCA Crim. 2532,*** in which the Court of Appeal (England and Wales) held that, the Prosecution could appeal against a ruling of no case to answer on the ground of the refusal of adjournment to allow the Prosecution time to secure the attendance of the principal witness, the complainant in the rape charge, without whose evidence the case was unsustainable. The witness had categorically said she did not wish to testify against the accused/appellant, her boyfriend, and she changed her address. The Prosecution had obtained a 24 hour adjournment. A further adjournment was refused. The case also demonstrates that, adjournment should not be refused simply because the judge considers that the intended witness will be a hostile witness.

[25] In a subsequent case, ***R [2008] EWCA Crim 370,*** it was accepted that, an appeal against a ruling of no case to answer could be based on the ground of an earlier ruling of the trial court that excluded evidence which may not necessarily be determinative of the Prosecution's case. So, generally an erroneous ruling that excludes an item of evidence may be a ground of appeal by the Crown against a ruling of no case to answer.

The second ground of appeal: the evidence excluded.

[26] The main items of evidence that we considered were erroneously excluded by denial of opportunity to the Prosecution to adduce, would have been presented in the deposition of ASP Bodden, deceased, and in the intended testimony of Michael Logan. There were other less significant intended testimonies that were also erroneously excluded.

Deposition of ASP Bodden, deceased.

[27] About the deposition of ASP Bodden, the record of the proceedings shows that, the judge had no intention at all of hearing the application by the Prosecution

for permission that the deposition be included in the evidence, under ***s. 123 of the Indictable Procedure Act*** which provides for admission of a deposition of a deceased person into evidence at trial.

[28] The Prosecution sought an adjournment long enough to enable it to bring evidence to prove the death of ASP Bodden. The judge, without hearing the Prosecution so that he would know the time required for the adjournment, and know whether it would otherwise be reasonable to grant adjournment, simply said: "Start the application ... " "The court grants the application. Mr. Ramirez at 10:40 a.m. states that he is unable to prove that Mr. Bert Bodden is deceased as he has no such witness or document to prove such. Yes, the next application."

[29] A decision to grant or refuse an application for adjournment is a discretionary decision, an appellate court should not interfere with it unless the discretion was not exercised judicially. Exercising the discretion judicially means that the trial judge must hear the applicant for adjournment, and hear the other party, and decide whether it is reasonable or not to grant the adjournment, based on the particular circumstances of the case – see ***Neath and Port Tabot Justices ex p. DPP [2000] IWLR 1376***.

[30] The usual important factors to consider in deciding an application for adjournment have been enumerated in: ***Kingston*** – ***upon Thames Justices ex p. Martin [1994] Imm AR 172***, and in ***Crown Prosecution Services v Picton (2006) 170 JP 567***. Some of them are: the importance of the case and the likely adverse consequence to the case of refusing adjournment; the risk of prejudice to the party making the application in the conduct of its case, if adjournment is refused; the risk of prejudice to the other party, if adjournment is granted; the extent to which the applicant for adjournment had been responsible for creating the difficulty which has led to the application for adjournment; and the interest of court in the efficient despatch of court business. The list is not exhaustive, much depends on the circumstances of the case and the facts about which the adjournment is sought.

[31] In ***R (DPP) North and East Hartfordshire Justices (2008) 172 JP***, it was stated that, adjournment should not be refused merely when a prosecution witness has not attended court, and that refusing adjournment was not a punishment to the Prosecution. I might add, or a punishment to the witness.

[32] In this appeal, the judge did not wait to hear counsel for the Prosecution, he simply granted adjournment up to 10:30 a.m. that morning. The short adjournment was completely unreasonable. It was in fact a refusal to grant the application for adjournment. The refusal by the judge to hear the application for adjournment resulted in excluding the deposition of ASP Bodden from the Prosecution's case. It had a prejudicial effect on the Prosecution's case.

[33] The discretionary decision of the trial judge was not exercised judicially. The judge did not consider the principle of law applicable to an application for adjournment. He did not wish to hear the application, did not consider how long the adjournment would be, and did not consider the effect on the Prosecution's case, of refusing to grant the adjournment, or on the defence, of granting the adjournment. The judge did not even ascertain whether the respondents opposed the application. In the circumstances of this case these were the factors that the judge should have considered in deciding whether to refuse the application for adjournment. It was unreasonable to refuse the application for adjournment for a realistic time to bring the witness to the courtroom.

[34] We concluded that, the judge erroneously denied to the Prosecution an opportunity to present an important part of its evidence to the jury. We were entitled to interfere with the discretionary decision of the trial judge.

[35] The deposition of ASP Bodden which was excluded from the proceedings, stated his part in the investigation of the case. We outline it without mentioning the parts that would implicate any of the respondents. The outline is intended to show that the Prosecution had a duty, and wished to present this important relevant

evidence to the court. The evidence would have counted in a ruling of a *prima facie case* or no *prima facie case* to answer – compare the ***Clark [2007] EWCA Crim. 2532 case*** and ***R [2008] EWECA 370*** *case*.

[36] On 13 November, 2010, ASP Bodden and his team, acting on the command of a more senior officer, travelled south on the Southern Highway. At 8:30 a.m. they arrived at Miles 56-57, a point where they saw an aircraft on the Highway. ASP Bodden inspected the aircraft and recorded his observations. The team proceeded in the direction of Punta Gorda. Their objective was, "to find the cocaine."

[37] At Miles 65 on an adjoining feeder road opposite a sawmill at Gomez Hill, they found "a ten-wheeler truck" reversing. ASP Bodden knew the driver, Mr. Eli Jacob (a prosecution witness). ASP Bodden asked the driver what his purpose there was. Jacob answered that, he went there on hire to collect and deliver "bush sticks". ASP Bodden allowed Jacob to go. Soon after, the team found a large number of "bales of cocaine" stashed in tall grass nearby. The team secured the load of cocaine until it was collected by the police. There was more in the deposition of ASP Bodden.

Intended witnesses: Michael Logan and Darell Coc.

[38] Similarly, we decided that, the refusal by the judge to grant the application for adjournment until later the same day, to afford time to the Prosecution to bring Michael Logan, an intended prosecution witness, to the courtroom was a discretionary decision not made judicially. The discretion was exercised without considering the principle of law applicable, and it had a prejudicial effect on the Prosecution's case. This Court was entitled to interfere with the discretionary decision refusing the application for adjournment until later in the day.

[39] Besides not exercising his discretion judicially when he refused to grant a short adjournment so that Michael Logan would be called as a witness, the judge

erred in several other ways. He erred regarding the evidence about Michael Logan. He erred in regard to intended witness Darell Coc about the rule of evidence regarding who may be called or not called as a witness, and at what point a judge may reject evidence as irrelevant to the proceedings. He erred about the role of a judge in regard to presentation of evidence to court in the common law adversarial system of proceedings.

[40] About the error regarding the evidence, the judge mistook the evidence about one Pedro Choc, who was arrested on the same evening of 13 November, 2010 as Michael Logan, for the evidence about Michael Logan. As the result of the mistake the judge refused to have Mr. Darell Coc (not Mr. Pedro Choc) testify because, the judge said, the intended evidence from Darell Coc's deposition about the release of Michael Logan from police custody would be irrelevant, Michael Logan was not connected to the case.

[41] The Prosecution had presented Darell Coc to court to testify and establish when and how Michael Logan first came into the picture as far as the police was concerned, and when he left the company of the police. The Prosecution intended to call Michael Logan as a witness later. The testimony of Michael Logan was expected to state his part in the transaction for which the respondents were charged, and that he was on a mission on the Highway when he was arrested on a motorcycle. Darell Coc's deposition was relevant in that connection. The relevant part of the record of proceedings is on pages 144-150.

[42] The evidence was this. On 13 November, 2010 the patrol unit of the Independence Village Police Station stopped Mr. Pedro Choc who was riding a bicycle on the Southern Highway and searched his body. They found "cannabis" on him. They arrested him and put him in the pan of the patrol pick-up. Subsequently that evening, the patrol unit stopped Michael Logan who was riding a motorcycle on the Highway. They arrested him for riding on a Highway a motorcycle which did not have a road lucence and a third party insurance policy. The police also put Michael

Logan in the pan of the pick-up. Both men were taken to the Police Station. They were released later. The judge's mistaken view was that, Michael Logan was innocently riding a motor bike when, "he was arrested for possession of marijuana". According to the evidence, Michael Logan was not arrested for possession of "marijuana" or "cannabis".

[43] It was this mistake about what Michael Logan was arrested for and released that caused the judge to refuse a short adjournment that the Prosecution needed to get Michael Logan to the courtroom. The judge's mistaken view was that, Michael Logan was innocently riding a motor bike when he was arrested for possession of marijuana, the intended testimony of Michael Logan would be irrelevant to the charge in court and so, Darell Coc's testimony about Michael Logan would also be irrelevant.

[44] The rejection of the intended evidence from Michael Logan is recorded on page 146 of the record. The judge was reported to have stated:

> "*Yes. I am saying ... the first thing before the evidence become admissible it must be relevant. Is it relevant to those 6 men...? Is it relevant to the airplane? Is it relevant to the finding of the cocaine, or any of the parts of the case? I don't think it is. It just happened that some police were out on duty, and some other policemen held up a man who had marijuana on him. They carried the man back to the station with his motorbike ... And that man, Michael Logan, he got nothing to do with the plane, he got nothing to do with the cocaine, all he had was some marijuana in his pocket*."

[45] The judge did not realise that there might have been more to the presence of Michael Logan on the Highway that evening than met the eye. If the judge was patient enough, Michael Logan would have testified, and the judge and the jury

might have heard all that was in the deposition of Michael Logan regarding his role and the role of other people in the transaction, the subject of the charge in court.

[46] The errors of law are the following. When the judge rejected out of hand, Darell Coc, the intended prosecution witness whose testimony would have linked Michael Logan's intended evidence with the rest of the evidence, the judge erred in the law of procedure. It is the responsibility of the Prosecution, and if he chooses, of the accused, to present witnesses to court. It is no part of the duty of a judge to select witnesses for the Prosecution or for the accused beforehand or at all. The error by the judge was about a fundamental feature of the common law adversarial system – see ***Mervyn Whitefield Cunning v R 98 Cr. App. R 303***, and the Privy Council Appeal case from Cayman Islands, ***Barry Victor Randall v The Queen [2002] UKPC 19***. The judge fell into this error on several occasions in this trial. That makes the trial a mistrial. We are entitled to order a retrial for that reason alone.

[47] In any case, whether a person may be called as a witness is governed by the rule of evidence about competence of a person to testify as a witness. It is only when an intended witness has sworn or affirmed and has become a witness, and begins to state a fact which has no bearing to the charge and the accused, that the judge will step in and reject it as an irrelevant statement. Hanomansingh J erred when he did not permit Darell Coc and Michel Logan as witnesses in court for no reason of incompetence as witnesses.

[48] The deposition of Michael Logan illustrated that his testimony would have added very important relevant evidence to the Prosecution's case. According to his deposition which we do not state in detail, Michael Logan was an equipment operator in Corozal District. He was invited by a named person to be at Independence Village on Friday 13 November, 2010.

[49] He went there arriving on 12th. He was told about an aircraft that would come on 13 November, 2010 bringing illicit drugs. On that day he went with the same named person to a place where he bought batteries. Michael Logan personally put the batteries in a van. His task in the operation that night was to operate light on the highway where the aircraft would land. At 7:30 p.m. he was given a motorcycle and rode to a junction on the Highway where a meeting was held and tasks were assigned to several people, some of them were some of the respondents.

[50] On his way to Bladen Village, Michael Logan was arrested by the police for riding a motorcycle without a licence and a third party insurance policy on a Highway. He was taken to the Police Station and later released. Later in their investigation into the subject of this case, the police interrogated, Michael Logan, and recorded a statement from him. We are unable to state more details out of the deposition without risking prejudice to the retrial.

[51] It was our view that, the judge should have considered the effect of Michael Logan's intended evidence on the Prosecution's case and on the defence, and should have indicated whether he considered the efficient despatch of proceedings by the court, before the judge refused the application for adjournment of the court proceedings to later in the day, so that intended witness Michael Logan could attend court.

Witness Eli Jacob

[52] We also considered that the decision by the judge to refuse the application for recalling witness Eli Jacob was a discretionary decision not exercised judicially. The judge did not give reason for his decision. There is no indication of what the judge considered in arriving at his decision to refuse the application to recall Jacob. In fact, the judge did not permit the Prosecution to make the application at all. After learned Senior Crown Counsel Ramirez said that he would like to make the

application, the judge simply stated: “Application refused. Yes?” The judge should have allowed the application to be made. A miscarriage of justice was occasioned.

[53] The Prosecution’s case had not closed. We note that it is permissible to make the application even at a later stage of proceedings. There was no apparent prejudice to the conduct of the defence. Mr. Jacob’s testimony in court seemed to be inconsistent with the deposition he had made prior. The testimony seemed to show the necessary *hostile animus* or *dishonest animus*. Mr. Jacob seemed to show hostility by intentionally testifying contrary to his deposition.

[54] Although the application to the court to deem Mr. Jacob an adverse witness was not made on the first occasion when the Prosecution may have realised that Jacob showed *dishonest animus*, as is the required practice, the record does not show that the judge permitted the application to be made at all. We were unable to inquire into the delay by the Prosecution in making the application.

Witness Ignacio Sho.

[55] About witness Ignacio Sho, we did not consider that, the refusal by the judge of the application by the Prosecution for leave to recall him was a discretionary decision made outside the principle of law applicable, or otherwise unreasonably. There were no exceptional circumstances that would cause us to interfere with the discretion of the judge. The witness accepted different dates, the 13th or 10th as the date on which he lent a spade to “Chat Budd”. The witness could not read or write. The Prosecution sought to ask a question in re-examination about the inconsistency. The judge disallowed the question. The Prosecution applied to the Court to deem Mr. Sho an adverse witness so that the Prosecution would cross-examine Mr. Sho. The judge refused the application.

[56] In our view, the application by the Prosecution for the judge to deem Mr. Sho an adverse witness was merely an attempt to get round the rejection by the judge of

the intended question in re-examination. The inconsistency about the dates was not sufficient to found an application for deeming the witness an adverse witness. Mr. Sho's answer in cross-examination about the dates seemed not to be a deliberate departure from his deposition or testimony. He did not seem to have the necessary *dishonest animus* of an adverse witness.

[57] May be another judge would have allowed the question in re-examination. It was a matter of discretion. In ***R v Manning (1968) Crim. L.R. 678***, the Court of Appeal (England and Wales) stated that: a witness who was genuinely forgetful might be unfavourable to the Prosecution, but could not be treated as hostile. See also an Australian case, ***McLellan v Bowyer (1961) CLR 95***.

[58] We saw no miscarriage of justice resulting from the denial by the judge of the particular question in re-examination. We considered that, the jury considering the entire evidence, would have been able to reach a decision of fact on the inconsistency and may be would have agreed on one of the dates, if they were given the proper direction.

[59] A proper direction to the jury would be something like this: "The evidence is that the spade was borrowed on one of two dates, the 10th or the 13th November, 2010. From all the evidence given in the trial, you may conclude that the spade was borrowed on the 10th or 13th, or even on some other date, or not borrowed at all." A similar direction was given in ***John Williams (1913) 8 Cr. App. Rep. 133***, where the witness, in a deposition, stated that the events took place on 9th but testified in court that the events took place on the 8th not the 9th.

The second ground of appeal: interventions by the judge and a fair trial.

[60] Under the second ground of appeal, the learned DPP also submitted that, the learned trial judge erred by: "improperly intervening and questioning witnesses himself and making comments about them; making ridiculing comments about the

Prosecution and the Prosecution's case; and, advising defence counsel as to strategy." In support of her contentions, the DPP referred to the record of proceedings at pages: 302, 321, 334, 631, 363 (13), 67, 72-74, 78, 13, 180-182, 188-190, 199, 302, 321-322, 334, 361, 363 (5) – 363(7), 363(13), 363 (9), 379, 389 and 395.

[61] We do not doubt that, the law permits a judge to intervene when it is proper in order to achieve the overriding requirement of a criminal case trial, which is *to ensure that the accused is tried in a fair manner*. The most frequently used and permitted intervention by a judge is when the judge exercises his common law and statutory powers of control of proceedings to ensure that the proceedings are conducted in an orderly, proper and fair manner – see the ***Barry Randall*** case.

[62] Two statutes, the ***Evidence Act, Cap. 95*** and the ***Indictable Procedure Act, Cap. 96*** are noteworthy on the point. Sections ***65 (7) and 70(2) of the Evidence Act*** provide as follows:

> **65** …
>
> **(7) The judge may, of his own motion at any stage of the examination of a witness, put any questions to the witness that he thinks fit in the interests of justice.**
>
> …
>
> **70** ...
>
> **(2) The judge shall forbid any question appearing to him as intended to insult or annoy, or to be needlessly offensive in form, or not relevant to any matter proper to be investigated in the cause or matter."**

[63] ***Section 109(1) of the Indictable Procedure Act*** provides as follows*:*

> **109 - (1) The court shall have full power and authority during any part of the trial, or after the case on both sides has been closed, to call and examine any witness, whether produced before the court in the course of the trial or not**.

In practice this section is seldom used. There are also preconditions.

[64] For the same reason of ensuring that proceedings are conducted in an orderly, proper and fair manner, the law does not permit improper intervention by the trial judge – see the ***Mervyn Cunning*** case where the judge asked the appellant 165 questions and defence counsel asked 172 questions.

[65] Our view about the complaint of the appellant about the questions and other utterances by the judge was that, several of the questions and utterances were unnecessary, some were uncalled for, and others were offensive and had no place in present day courtroom. For examples: the utterances at page 395 – "*oye oye, oye what kinda web are we in* … .," and at page 467 – "*I find Belizeans are like that, they just pile everything in a car. I tell my driver to clean out my vehicle. I said get all this rubbish outta here. Every 2 weeks, 3 weeks, he finding all this pieces of this and pieces of that, I keep finding in the car,*" had no relevance to the accused and the charge in court, and had no place in courtroom. They were probably distasteful to the jury.

[66] Some utterances by the judge could well have given the jury the impression that, the judge saw no merit in the Prosecution's case. For examples: at page 321, reacting to a question put by counsel for the Prosecution, the judge is reported to have said, "*you are not going to go through all that nonsense that's there*." At page 334 the judge said to learned counsel Bradley for accused/respondents, Roaches, Grant and Humes: "*Aren't you a little bit premature, I thought you would have gotten certain answers in your cross-examination and then you would have come down like a ton of bricks on this particular aspect of it*." At page 361, the judge is reported to

have said to learned counsel Arthurs for accused/respondent Victor Logan: "*I thought you would jump at the chance to capitalize on it … that gives you very good ground to cross-examine on*."

[67] Persistent interventions by a judge, particularly by putting too many questions to an accused or witnesses takes away the common law responsibility of the prosecuting counsel or defence counsel for laying his case before the jury in the way he had planned. It is contrary to the common law adversarial system and may render a trial unfair and a mistrial.

[68] In the ***Mervyn Cunning*** case, the appellant appealed against a conviction for theft, on the ground that: due to persistent interventions by the judge, "though not consciously hostile and unfair to the appellant, the examination-in-chief was taken right from the hand of counsel and was conducted by the judge," the trial ceased to be a trial in the common law adversarial system, and the effect was prejudicial to the appellant. During the testimony of the appellant the judge asked 165 questions, and defence counsel asked 172 questions.

[69] The facts of the case were not much in dispute. The appellant took from a wholesale establishment to his car a water pump and accessories without permission. Someone was watching. At exiting, the appellant's vehicle was searched and the goods were found. His defence was an explanation that, he had bought goods on credit from the establishment before. On this occasion he was merely remiss in formally obtaining permission which would have been given. He intended to take the goods to his home and examine them to see whether they were suitable for the heating system of his house, and thereafter he would return with the goods and pay for them. The jury convicted the appellant.

[70] The appeal was allowed for the reason that, the judge intervened in the proceedings far too much and rendered it a mistrial. Cumming – Bruce LJ stated at page 307 the following:

"***With some hesitation, this Court has decided that though this evidence given by the appellant was evidence that might well not have carried conviction to the jury if the trial had followed the usual course, the interventions of the judge during the attempts of Mr. Hopkins to lead his witness through the examination-in-chief were on such a scale and of such a character that though the judge had not got the slightest intention of being unfair, he did, if the matter is considered objectively, prevent the appellant from giving his evidence-in-chief in the way in which he should have been allowed to give it, because really Mr. Hopkins was not given a fair chance. The best example is the one to which we have already referred, where for a quarter of an hour the judge went on examining the appellant himself while Mr. Hopkins was standing there waiting to get a word in edgeways.***

This Court reluctantly has formed the view that the irregularity was so significant that the trial must be regarded as a mis-trial in that the appellant did not have the chance that the adversarial system is designed to afford him of developing his evidence under the lead and guidance of defending counsel. For those reasons the conviction is quashed."

[71] In the ***Barry Randall case*** (PC appeal from Cayman Islands), the primary ground of the appeal was that, the trial was conducted in a manner that was grossly and fundamentally unfair because the conduct of counsel for the Prosecution undermined the integrity of the trial process. The details were that, counsel was overbearing, made too many prejudicial statements, remarks and interjections during the testimony of the accused/appellant, and some of the statements were vilifying, intimidating and intended to bully. Further complaints were that, counsel so frequently intervened during re-examination to the extent that re-examination was precluded. Furthermore details were that, during all that, the judge failed to restrain

counsel for the prosecution, and instead the judge at times joined in the improper utterances by counsel. The Court of Appeal of Cayman Islands dismissed the appeal.

[72] However, the Privy Council reviewed some of the questions, remarks, interjections and other utterances and allowed the appeal. At paragraph 29 their Lordships stated:

> "***29. The crucial issue in the present appeal is whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial. The Board reluctantly concludes that there were. Prosecuting counsel conducted himself as no minister of justice should conduct himself. The trial judge failed to exert the authority vested in him to control the proceedings and enforce proper standards of behaviour. Regrettably, he allowed himself to be overborne and allowed his antipathy to both the appellant and his counsel to be only too manifest. While none of the appellant's complaints taken on its own would support a successful appeal, taken together they leave the Board with no choice but to quash the appellant's convictions. It cannot be sure that the matters of which complaint is made, taken together, did not inhibit the presentation of the defence case and distract the attention of the jury from the crucial issues they had to decide.***"

[73] The Board did not order a retrial because the appellant had already served the sentence passed by the trial judge.

[74] This Court adopts the observations and the statements of law made by the Privy Council in ***Barry Randall,*** and of the Court of Appeal (England and Wales) in ***Mervyn Cunning***; and we state that: where a prosecutor unnecessarily and

frequently interrupts the testimony of the accused or of his witnesses under the pretext of objections, or during cross-examination unnecessarily and frequently asks questions or makes prejudicial remarks, intimidates or otherwise bullies the accused, the trial may be rendered a mistrial. Likewise, where defence counsel unnecessarily and frequently interrupts the testimonies for the Prosecution, or unnecessarily and frequently asks prejudicial questions or makes prejudicial remarks in cross-examination of the witnesses, the trial may be rendered a mistrial. Further, too frequent interventions by a judge, during examination-in-chief or in cross-examination, which indicate that the judge has descended to the arena of the Prosecution and defence, may render the trial a mistrial.

[75] In this appeal case, Hanomansingh J misunderstood the law to allow a judge to: intervene and select beforehand witnesses for the Prosecution that the judge considered would testify to relevant facts; to exclude other intended witnesses from testifying as the judge wished; and to intervene without limit when prosecution witnesses testified. Further, the judge misunderstood the law to permit the trial judge to plan beforehand and present his own set of questions to prosecution witnesses in order to have the evidence set out in the manner desired by the trial judge. For example, on pages 301-302 the following is recorded:

"COURT:	Yes, who is this?
PROSECUTION:	Alton Alvarez, My Lord.
COURT:	You bring him now?
PROSECUTION:	Yes, My Lord, because Mariano is not here.
COURT:	There are lots of questions that I'd like to ask him and I didn't come prepared to ask him now. Well, you will have to bring him back later."

[76] We have in this judgment already pointed out that, in ***Barry Randall***, and in ***Mervyn Cunning,*** those views of the law, and that manner of conducting criminal proceedings have been held to render the trials mistrials. We respectfully hold in this appeal case that, Hanomansingh J erred in his views of the law and in the way he conducted the trial.

[77] We concluded that each of the interventions by the judge taken on its own might have not been prejudicial to the Prosecution's case, but all taken together persistently denied to the Prosecution the opportunity to carry out its legal duty to present to the trial court all the evidence that the Prosecution considered credible, or unlawfully restricted the Prosecution in presenting such evidence; and this grossly undermined the integrity of the trial. Collectively the interventions were grossly prejudicial to the Prosecution's case, and also gave the impression to the jury that, the judge regarded the Prosecution's case as not good enough. The interventions were serious irregularity which grossly departed from the common law adversarial system in Belize. It rendered the trial an unfair trial and a mistrial. This Court would order a retrial on the complaint of interventions and unfair trial alone.

The first ground of appeal.

[78] About the first ground of appeal, we concluded, having examined the evidence as a whole, that the evidence adduced established a *prima facie case* against all the 6 accused/respondents. The judge erred in ruling that, a *prima facie case* to answer had not been established. The case should have been proceeded with.

[79] A *prima facie case* (a case to answer) is a prosecution's case that has been supported by sufficient evidence for it to be taken as proved, should there be no adequate evidence to the contrary. It is a prosecution's case that is strong enough to require the accused to answer, although it is always the choice of an accused whether he will answer.

[80] So, what amounts to sufficient evidence; and what is a strong enough case? The law about whether a *prima facie case* has been established remains the statement of the law made by Lord Lane C.J. in ***Regina v Galbraith [1981] 1 WLR 1039*** that: Where there was no evidence at the close of the prosecution's case that the person charged had committed the crime alleged, the case was to be stopped; and it was also to be stopped if the evidence was tenuous and the judge concluded that the Prosecution's evidence taken at its highest, was such that a properly directed jury could not properly convict on it; but where the Prosecution's evidence was such that its strength or weakness depended on the view to be taken of the reliability of a witness or other matters which were within the province of the jury, and one possible view of the facts was that, there was evidence on which they could properly conclude that the person charged was guilty, the case was to be tried by them (that is, to proceed, as a case to answer); and that borderline cases were in the trial judge's discretion.

[81] In view of the retrial ordered, it is not appropriate for us to point out in detail the items of evidence that we considered established the *prima facie case*. It will suffice to state that, the evidence about the respondents participating and helping in the landing of the aircraft and transporting the large quantity of illicit drugs to where they were found by the police was sufficient albeit circumstantial, to establish a case against those who participated to answer.

[82] There were items of direct evidence that the jury could regard as having proved facts from which inference could be drawn that, the aircraft that landed on the Highway brought the large load of illicit drugs found concealed in tall grass nearby and on a small truck. Further inference could be drawn from the facts that could be regarded as proved that, those who made arrangements on false reasons to be absent from their distant work places on that day, the 13th November, 2010, and were instead found in the vicinity of the aircraft in the early morning of the 14th, in a van which did not display a number plate, and had on it some odd items, participated in the criminal transaction. Furthermore inference could also be drawn

from borrowing a spade to be used in getting the "ten-wheeler truck" out of soft ground at the place where large quantity of drugs were found concealed in tall grass. Moreover, evidence from ASP Bodden, deceased, and Michael Logan should not have been excluded.

[83] Circumstantial evidence is indirect evidence. It is evidence from which a judge or jury may infer the existence of a fact in issue, but which does not prove the existence of the fact directly – see ***DPP v Kilborune [1973] AC 729***. So, circumstantial evidence is evidence about a fact in issue. It is not necessarily weak evidence. Our view was that, there was sufficient circumstantial evidence to establish a *prima facie case* against the 6 respondents.

[84] Where the Prosecution relies on circumstantial evidence to prove a *prima facie case*, the case is not defeated by the fact that an inference that is consistent with innocence is also possible from the evidence that a jury properly directed may properly draw an inference of guilt from – see ***DPP v Selena Varlack [2008] UKPC 56***, an appeal from the British Virgin Islands to the Privy Council; and ***R v P [2008] 2 Crim. App. R. 6. (Court of Appeal England and Wales).***

[85] In his ruling of no case to answer, the judge correctly pointed out that the evidence that the Prosecution relied on was circumstantial. But he erred when he took the view that, the case was one where there was no evidence at all, that the offence of abetment was committed, and that the respondents committed it. He considered that, the evidence was not merely tenuous, it was not sufficient. On pages 476-477 of the record (without editing) he stated:

> *"The prosecution is relying upon evidence of various circumstances relating to the crime and the defendants which the Crown is saying when taken together will tend to the conclusion that the defendant committed the offence for which they are charged. At this stage the court must decide whether there is any or enough evidence on which a*

jury properly directed can return a verdict of guilty. We have heard from 30 witnesses, there is evidence which can be accepted by a properly directed Jury that there was an airplane at the southern highway. There was cocaine, in the vicinity and a van in which the five accused were travelling along the Southern Highway was stopped and certain articles which were tendered were found in the said van. There is no evidence of any of the accused even being on or near or having anything to do with that aircraft either when it was on the ground or prior to its landing. There is also no evidence of any of the accused having anything to do with the cocaine that was found. There is no evidence that there is any connection between the cocaine found, the six accused and the airplane. Further, this is not a case where the evidence is tenuous. This is a clear case of there being no evidence of the accused having any knowledge of the landing of the airplane, much less for them to facilitate the landing."

[86] First, the judge erred when he stated that, there was no evidence to show that the aircraft landed illegally. He overlooked the evidence that the several squads of police officers and a squad of police officers and soldiers together were instructed to go on the mission on the Southern Highway as the result of information that had been received.

[87] Secondly, although the judge had acknowledged that, the evidence relied on was circumstantial, he considered whether each item of evidence was proved or not proved, and from that concluded that, there was no proof of all the items of evidence that were required to prove the commission of the offence, that is, all the elements of the offence, and that it was the respondents who committed the offence. The judge did not consider the items of evidence together, and the inference that could be properly drawn from the whole evidence. He did not see the wood for the trees. He erred in his approach to circumstantial evidence, and

reached the wrong conclusion – see ***Question of Law Reserved on Acquittal (No. 2 of 1993) (1993) SASRI***.

The Orders repeated

[88] It is convenient to end our reasons by repeating the orders we made on 27 June, 2014. They were: (1) the appeal is allowed; (2) the ruling by the learned trial judge Hanomansingh J, that, there was no prima facie case against all the 6 accused/respondents to answer, be quashed; (3) the respondents be retried on the same indictment, at the Supreme Court by a judge other than Hanomansingh J; and (4) the respondents be presented to a judge at the Supreme Court for consideration of bail pending retrial.

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SIR MANUEL SOSA P

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MORRISON JA

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AWICH JA